

**Environmental Disclosure Requirements in the Securities
Regulations and Financial Accounting Standards of Canada,
Mexico and the United States**

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and Environmental Reporting

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Executive Summary

Disclosure of financially material information is essential for the protection of investors against fraud and for the efficient functioning of financial markets. It is widely accepted as a fundamental principle of capital market governance that investors must have access to all relevant information in order to make rational decisions about buying, selling, or holding securities. Incomplete or asymmetric access to material information can easily lead to the mispricing of securities in financial markets. Moreover, lack of disclosure can conceal financial manipulation and misconduct.

The idea that capital markets accurately incorporate all relevant publicly available information has become enshrined as the “efficient markets” theory, with wide and influential support (Fama 1970). Its basic justification lies in the demonstrated difficulty investors have in consistently achieving abnormally high returns through any trading strategy. The opposite position, that capital markets will *not* accurately incorporate information that is *not* publicly available, is central to the disclosure requirements embedded in securities laws in the United States, Canada, and Mexico. Information disclosure is central to the smooth operation of the capital markets.

In the United States, for example, disclosure is the dominant regulatory mechanism underlying the Securities Act to promote capital market efficiency. “At its core, the primary policy of the federal securities laws today involves the remediation of information asymmetries” (Seligman 1995; p. 604). “The past two decades have witnessed a significant expansion of what must be disclosed by all registrants ... This expansion can be termed the ‘soft information revolution’ in the mandatory disclosure system” (ibid, p. 610). These requirements include not only information about current conditions affecting the firm that investors would consider relevant, but also any known risks and uncertainties that might have future material financial effects.

The case for greater information disclosure is becoming stronger over time because domestic and international capital markets are exerting more and more influence over the decisions of corporate managers. In the United States, half of all listed shares are held by institutional investors who compete on performance and whose portfolios are subject to rapid turnover (Conference Board 1998). Companies that fall out of favor with investment professionals because of adverse news can suffer rapid losses in market value. Large institutional investors are increasingly also exerting influence over corporate governance and policy through direct dialogue with corporate management (Carleton, Nelson and Weibach 1998; Smith 1996; Karpoff 1998).

At the most fundamental level, the disclosure requirements of Canada, Mexico and the United States are similar in requiring that all material information regarding securities offered for sale to the public must be promptly revealed. Material information is commonly defined as information that investors would regard as significant in their decisions to buy or sell a security. Materiality is broadly defined and not subject to numerical thresholds. In the United States, it is explicit that information bearing on the competence or integrity of management, including noncompliance with extant laws and regulations, can be material even if financially insignificant. There is common recognition in the three countries that environmental information may be material in this broad sense and, if so, must be disclosed.

The securities regulations of the United States and Canada share a mandate to promote the public interest that is not found in Mexican law, which is directed solely to the protection of investors. In Canada, this public interest mandate is limited to actions promoting the purposes the basic securities act: protecting investors and promoting fair and efficient capital markets. Only in the United States, through the National Environmental Policy Act, is the public interest defined to include environmental protection and the responsibility of the Securities and Exchange Commission extended to take environmental objectives into account when formulating rules and regulations. However, this distinction may be largely theoretical. There is little evidence from its actions that the SEC has accepted a responsibility broader than that in Canada to protect investors and to promote efficient capital markets.

With respect to explicit and specific requirements for the disclosure of environmental information, the three countries clearly lie along a spectrum, with Mexican regulations having the fewest prescriptions and US regulations having the most. In Mexican federal securities law there are no specific provisions establishing explicit requirements for disclosure of environmental liabilities, costs or other related matters. At the other extreme, US securities regulations explicitly require registered firms to disclose:

- the material costs of complying with environmental regulations in future years;
- the costs of remediating contaminated sites if a liability is likely to have been incurred and its magnitude can be approximately estimated;
- other contingent liabilities arising from environmental exposures;
- involvement as a party to a legal proceeding about an environmental issue, especially with an agency of government; and
- any known trend or uncertainty involving environmental issues, including pending regulation, that would have a material effect on the company's business.

Most of these requirements can be found in Canadian securities regulations and accompanying accounting standards, though the provisions differ in detail. Registered Canadian companies must also disclose the financial impacts of compliance with environmental protection requirements and environmental risk factors that significantly affect their businesses. Management discussion and analysis is required of unusual environmental expenditures and material environmental uncertainties. Moreover, Canadian Generally Accepted Accounting Practices require disclosure and accrual for liabilities arising from the necessity for remediation of contaminated sites.

There are two obvious opportunities for harmonization in these disclosure requirements of the three NAFTA Parties. The first is an elaboration of specific environmental disclosure requirements in Mexican securities regulation to bring it closer to the regulatory provisions already in place in Canada and the United States. Since the general provisions requiring disclosure of all material information are essentially the same in all three countries, harmonization of specific requirements would seem to represent more of a clarification than a change in regulatory policy.

The second opportunity for harmonization lies in the area of application and enforcement. Since there are no cases in the Mexican public record of enforcement of environmental disclosure requirements and only one case in the Canadian record, it would seem that there is probably scope for more intensive application of current requirements in those countries. Moreover, since the enforcement record in the United States, though fuller, is also relatively limited, there is probably scope for more intensive application of current requirements in that country as well. Upward harmonization of enforcement activities would be consistent with NAFTA's investment and sustainable development objectives.

I. Introduction

A. The Increasing Importance of Financial Disclosure

Disclosure of financially material information is essential for the protection of investors against fraud and for the efficient functioning of financial markets. It is widely accepted as a fundamental principle of capital market governance that investors must have access to all relevant information in order to make rational decisions about buying, selling, or holding securities. Incomplete or asymmetric access to material information can easily lead to the mispricing of securities in financial markets. Moreover, lack of disclosure can conceal financial manipulation and misconduct.

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The case for greater information disclosure is becoming stronger over time because domestic and international capital markets are exerting more and more influence over the decisions of corporate managers. In the United States, half of all listed shares are held by institutional investors who compete on performance and whose portfolios are subject to rapid turnover (Conference Board 1998). Companies that fall out of favor with investment professionals because of adverse news can suffer rapid losses in market value. Large institutional investors are increasingly also exerting influence over corporate governance and policy through direct dialogue with corporate management (Carleton, Nelson and Weibach 1998; Smith 1996; Karpoff 1998).

The influence of the financial markets on management decisions is reinforced by the increasing use of stock options and ownership rewards in executive compensation. Ownership by managers has actually increased among US publicly listed companies from 13 percent in 1935 to 21 percent in 1995 (Holderness, Kroszner, and Sheehan 1999), reversing a trend decried by Berle and Means in the early 1930s (Berle and Means 1932). Stock options and related forms of compensation are the fastest growing components of executive compensation. While total CEO compensation has risen rapidly during the 1990s, stock options have grown from 36 percent of

the average compensation package among S&P500 corporations in the late 1980s to 46 percent in 1997 (Murphy 1997). These ownership stakes give managers direct incentives to be concerned with financial market judgements, because CEO compensation has become much more sensitive to their companies' stock market performance (Hall and Liebman 1997). Even where pay is not tied explicitly to stock price, a company's market value is increasingly seen as a report card of management's efforts.

In addition to these important trends, the liberalization of capital markets over the past 25 years has rapidly increased the flow of capital across national borders. The annual value of international capital flows now exceeds the value of international trade by a margin of approximately ten to one. Moreover, in the aftermath of the debt crisis of the 1980s, direct international investment and portfolio investment in tradable securities have increased relative to international bank lending. This increasing role of direct purchases and sales of tradable securities in international financial markets, replacing the banker-client relationship, has raised the importance of transparency and disclosure in the pricing of risks.

One of the lessons drawn from the financial crises in Mexico and in Southeast Asia in the 1990s was that lack of transparency contributed to financial instability. In hindsight, it appeared that many international investors were not fully informed about the risks inherent in the securities that they held, partly due to inadequate accounting standards and disclosure. Moreover, lack of transparency contributed to the contagion that was a feature of these financial crises, as investors were unable to differentiate accurately between the riskiness of investments in different countries and currencies. The ease with which portfolio investments can move in and out of countries in response to "surprises" puts a premium on the disclosure of material information. Consequently, recommendations for strengthening the international financial system's "architecture" have all featured improvements in accounting standards and greater transparency.

One of the main objectives of the North American Free Trade Agreement is to "increase substantially investment opportunities in the territories of the parties." To this end NAFTA includes numerous provisions for national treatment, removal of restrictions on cross-border investments, and other measures to encourage cross-border investment. Though not specifically addressed in the agreement, harmonization of accounting and reporting standards can act as a powerful stimulus to investment. Harmonization can ensure that a potential cross-border investor is not disadvantaged with respect to the availability of material information relative to the information available in the investor's domestic market. The pronounced "home-country bias" of most investors is largely attributable to a perceived informational advantage in the domestic market. Harmonization of disclosure rules and practices in the direction of greater transparency can reduce these informational disparities, promoting international investment. Moreover, harmonization of accounting rules and standards can help assure investors that the meaning of information in financial reports is comparable across the three countries.

B. The Increasing Importance of Environmental Disclosure

The NAFTA is also intended to promote sustainable development and to strengthen the development and enforcement of environmental laws and regulations. Increased transparency to investors of the financial risks and opportunities to which companies are exposed by virtue of their environmental management decisions can be a powerful market incentive for sustainable

development and for compliance with environmental regulations. Financial disclosure of material environmental information removes a potential rift between the interests of managers, owners and creditors. It also introduces a powerful market-based, non-regulatory incentive for prudent environmental management.

In all three countries that are parties to NAFTA, though their specific disclosure requirements differ, the shared basic principle is that companies should disclose whatever information is necessary for investors to make rational, informed investment decisions. This general standard of "materiality" covers not only recent and current financial conditions and results of operations, details of management and ownership, and purposes for which capital is to be employed but also a wide variety of business, legal, and regulatory risks and exposures. It is generally accepted that a company's environmental performance and requirements could constitute material information under this broad standard of materiality. According to a law review article written by the newly appointed Chairman of the US Securities and Exchange Commission, "... while standards of what is material may vary with the context in which disclosures are to be made, in any context certain disclosure of an ecological nature will always be material and are, therefore, mandatory under existing regulations" (Sonde and Pitt 1971). Adequate disclosure of material information, whether ecological or not, is necessary not only for the efficient functioning of capital markets but also to prevent a critical incentive failure in the management of industrial companies. Without adequate disclosure, a key link between the owners and managers of corporations will be broken. Unless financial market valuations of risk and return accurately reflect the financial risks that companies incur through their environmental management decisions, an important market incentive for prudent environmental management will be lacking. Rational investments to reduce future environmental costs, liabilities, or risks may be undervalued in the capital markets and thus discouraged. Asymmetric information about companies' environmental exposures creates principal-agent problems. If external investors cannot accurately value companies' investments in pollution control, managers may have an incentive to inflate earnings for short-run gain by neglecting such investments (Milgrom and Roberts 1992). Similarly, managers that position their companies to gain competitive advantage by virtue of their superior ability to cope with impending environmental challenges might not be rewarded by investors, so such strategies might be discouraged. Aligning the interests of management with that of owners is a critical function of capital markets. It is impossible to achieve unless investors are adequately informed about the financial implications of managerial decisions. The stronger the influence of external investors over management decisions, including decisions about environmental risk, the more important is it that external investors be fully informed about the financial implications of those risks.

There is considerable evidence that the materiality of environmental information has increased substantially in the past 25 years. For example:

- (i) Increasing outlays are required for compliance with environmental regulations. Between 1972 and 1994, expenditures by US businesses on pollution abatement and control more than doubled in real terms (Vogan 1996). Similar trends are found in Canada and Mexico.
- (ii) Twenty-five years ago, only a trivial fraction of institutionally managed assets were in socially screened funds or portfolios that explicitly considered environmental performance as an investment criterion. Today, it is estimated that more than \$1.5 trillion resides in

socially and environmentally screened portfolios, while the number of screened mutual funds has risen to 175, from just 55 five years ago (Social Investment Forum 1999). Socially responsible investing can no longer be considered a negligible phenomenon.

- (iii) It has been demonstrated repeatedly that disclosure of information regarding a company's emissions, even if legal, or its failure to comply with environmental regulations or its potential liability to environmental remediation requirements has influenced the company's stock price. So-called "event studies" have identified definite market reactions to such environmental news confirming that stock market investors consider such environmental information relevant (Barth and McNicholls 1994; Hamilton 1995; Campbell, Sefcik, and Soderstrom 1998).
- (iv) Several financial research services have emerged in the US and Canada that sell environmental performance information to investors. These include Kinder, Lydenburg, and Domini, the Investors' Responsibility Research Service, and Innovest, among others. Most large investment houses also employ environmental managers and undertake in-house research on environmental issues affecting companies. The fact that the generation and sale of environmental information has emerged in the investment community as an economic activity indicates that professional investors consider such information relevant to their decisions and thus financially material.

However, the availability of information on environmental issues has not kept pace with this growing materiality. According to the research firms that sell information to screened fund managers, environmental information is among the hardest to obtain. Even in the United States, where public access to official information is perhaps most advanced, many EPA and state government databases, including those that are theoretically in the public domain, are hard to access, often inaccurate, inconsistent or out of date, and not formatted in ways that are useful for financial or company-specific analysis. Moreover, environmental reports issued by companies themselves are typically selective, unstandardized, and unrelated to financial statements (Williams 1999; Birchard 1996). Therefore, the information available through stand-alone environmental reports, from government agencies or from environmental research services does not substitute effectively for adequate disclosure of financially material environmental information in company disclosures.

Information disclosure has been proven to be a fundamental regulatory tool not only in financial markets but also in the control of environmental pollution. It has been demonstrated that providing information to the public regarding companies' environmentally damaging behavior has caused the companies sufficient reputational losses that their behavior has been affected. The public release of the US EPA's Toxics Release Inventory induced many of the largest emitters to make public commitments and take action to reduce their releases of toxic chemicals (Konar and Cohen 1994; Khanna, Quimio, and Bojilova 1998). Experience in other countries has also shown that public disclosure of pollution is effective in inducing improvements in environmental performance (Teitenberg and Wheeler 1998; World Bank 1999). The falling costs of information dissemination through the Internet make information disclosure an increasingly powerful policy tool.

Both the self-reported information in annual and quarterly financial disclosures and information from outside sources have impacts on capital markets. However, as might be expected, firms that

practice fuller financial disclosure themselves suffer fewer adverse market impacts when outside information becomes available (Blacconiere and Northcutt 1997; Blacconiere and Patten 1994; Patten and Nance 1998).

Therefore, increased disclosure can be in a company's best interest because it may reduce market uncertainty and volatility. Consequently, more and more companies are issuing stand-alone environmental reports, though these are rarely, if ever, integrated with financial reporting (KPMG 2000). Research in Canada, where firms have more discretion in adopting environmental disclosure standards, has found that large capitalization firms with greater reliance on external capital markets and whose securities are more actively traded are more likely to disclose environmental information. Closely held firms and firms in poor financial condition are less likely to do so (Cormier and Magnan 1999; Li and McConomoy 1999).

C. Purposes and Structure of this Report

In order to pursue the twin objectives of widening investment opportunities and promoting sustainable development, the Commission on Environmental Cooperation has initiated a comparative review of the disclosure rules applicable to environmental information contained in the securities laws and regulations of Mexico, Canada, and the United States. The main purpose of this review is to identify similarities and differences in the disclosure requirements in the three countries. This comparison can then provide a factual basis for consideration of the areas for possible harmonization, should such harmonization ultimately be judged to be desirable.

The review covers general disclosure rules that can apply to environmental information, such as general requirements that all material information must be revealed. To the extent that environmental facts are financially material in particular cases, these facts would then be covered by such general disclosure requirements. The review also covers specific disclosure requirements that refer directly to environmental information, such as the costs of compliance with environmental regulations or the costs of remediating contaminated work sites. In addition, the review examines the extent to which securities regulators in the three countries are empowered, authorized, or instructed to require disclosures "in the public interest" of information that might not be financially material, such as information on a publicly traded corporation's environmental performance. Finally, the review investigates the application of disclosure rules to environmental issues through an examination of enforcement activities, administrative actions, and relevant judicial cases in the three countries.

Given its underlying purposes, the review is restricted to environmental disclosure that is required in financial reporting to the investing public. It does not examine companies' obligations to report environmental information to agencies of government for purposes of environmental regulation. Nor does it examine the public reporting requirements incorporated into environmental laws and regulations, such as "community-right-to-know" obligations. The sole focus of this report is on the environmental disclosure requirements contained in the securities laws and regulations of the three NAFTA countries.

II. Environmental Disclosure Requirements in Mexican Securities Law and Regulation

This section reviews the general disclosure provisions applicable to environmental matters that are embodied in extant legislation, including:

- Market Securities Law,
- Interpretative guidelines issued by the National Banking and Securities Commission,
- General Accepted Accounting Principles in Mexico.

It also provides information on how such laws, regulations, and standards have been enforced.

A. General Disclosure Provisions that may be Applicable to Environmental Matters

1. Market Securities Law

The federal regime of mandatory disclosure applies only to companies whose securities are traded on Mexico's one stock market. These companies become subject to a wide range of regulation, but only 60 to 70 Mexican corporations are registered in the stock market. Currently one company, Telmex, has a capitalization that constitutes as much as thirty per cent of the entire stock market value.

1.1. Laws and Rules Applicable to Issuers

Issuers are publicly held corporations or government agencies that issue securities with the sole purpose of obtaining financing. If an issuer wants to make a public offering, such security must be registered in the National Securities Register of the National Banking and Securities Commission (hereafter, NBSC).¹

According to the Mexican Securities Law (hereafter, MSL), if an issuer wants to register and maintain a security in the National Securities Register, certain information must be disclosed to the NBSC, the Mexican Stock Exchange, and the public in general. All information submitted to the NBSC has to be delivered by the issuer to the brokerage house in charge of the securities' offering. The information that must be disclosed is specified in several circulars and other general rules issued by the NBSC.² Financial disclosure is intended to protect the investing public by providing information needed by investors to judge the potential risks and rewards offered by the registered securities. In Mexican securities law there is no mandate for broader information disclosure solely to promote the public interest, aside from the protection of investors.

In June 2001, the MSL and the NBSC law were amended. Prior to this amendment, all the information on securities made public had to have the previous authorization of the National

¹ Article 11 of the Mexican Securities Law

² Article 14, fraction IV of the Mexican Securities Law

Banking and Securities Commission Law, including the initial prospectus and annual financial reports. Today, only information addressed to promote and publicize securities will require prior NBSC authorization. However, all information regarding securities to be issued to the public must be contained in the prospectus.

The new provisions also require that in order to keep their securities registered in the National Securities Register, the issuers must disclose information continually to the authorities and to the public by filing periodic financial, administrative, economic and legal reports. Both annual and quarterly reports are required. Also, issuers must disclose in a timely way any new material information that can have an effect on the price of the securities; that is, relevant events must be disclosed to the investors as they occur.

The general rules contained in NBSC circulars 11-28, 11-33, and 11-18 establish the contents, procedures and terms of the information that issuers must disclose to the NBSC, to brokerage firms and to the public in general. Among these are general disclosure requirements applicable to material environmental information. In addition to such basic facts as the articles of incorporation, the by-laws, the minutes of shareholders' meetings, a list of the shareholders with the respective number of shares owned by each of them, any increase or decrease of the capital stock, and audited balance sheets, issuers must make public a prospectus describing the business and the risk factors that could affect its development and profitability. Among these risk factors are the impact on the business of government regulations, including environmental regulations, and a list of the judicial and administrative proceedings and arbitration to which the corporation is a party. This list would include environmental litigation.

Circular 11-28 establishes the basic principle common to the three NAFTA parties that all material information must be disclosed. It obliges the issuers to disclose to the NBSC, brokerage houses, and the public in general any relevant fact or information that can affect or influence the price of the securities. Thus, to the extent that environmental information is financially material, it should be disclosed under Mexican securities law.

Circular 11-33 imposes the legal duty of filing annually before the NBSC an extensive disclosure document that consists mostly of updated financial statements, including the balance sheet of the year, and, on every June 30, the operating results of the fiscal year. The annual report should include other information regarding the corporation, such as decisions taken at the shareholders' meeting.

Circular 11-18 prescribes the financial information to be provided by the corporation, including a specific procedure by which to value the assets. The corporation is obliged to give to the valuator, among other information, documentation regarding the prevention and control of pollution in air, water and soil, as well as impacts caused by industrial waste. Such information includes providing information on licenses, permits and authorizations issued by the environmental authorities.

Aside from these general disclosure provisions that apply to any environmental information that investors need to understand the nature, condition, and risks of the publicly-traded securities, there are no specific provisions in the Federal securities establishing explicit requirements for disclosure of environmental liabilities, costs or other related matters.

In order to protect the general investing public against selective disclosure, MSL establishes that privileged material information, defined as the knowledge of any fact that can influence the price of the securities in the stock market, may not be disclosed when such information has not been made public.³ Insider trading is prohibited. Any individual who has access to privileged information cannot use such information for their own or another's benefit until that information is made public.⁴ The June 2001 amendments state a more general prohibition against disclosure of privileged information whether or not a benefit or a profit could be gained from the disclosure.

2. Financial Accounting Standards

2.1. General Accounting Standards under Mexican Law

The Mexican Institute of Public Accountants⁵ issues the Generally Accepted Accounting Practices for Mexico (hereafter, GAAPM). A corporation that participates in the Mexican stock market must follow the GAAPM. Otherwise it may be severely sanctioned and even delisted by the NBSC.

Since NAFTA was signed, a considerable harmonization of accounting standards with the other parties has already taken place. The intent has been to amend and adapt the GAAPM in order to make them compatible with the accounting standards internationally recognized, rather than just to substitute international standards for the existing GAAPM. In this process, GAAPM has been made similar to those of the US Financial Accounting Standards Board. The rules of the International Accounting Standards Commission have also influenced the development of GAAPM, just as they have influenced the evolution of generally accepted accounting practices in the US and Canada. In fact, when the GAAPM are silent, the International Accounting Standards Commission principles are applicable. If the latter are also silent, any other highly recognized accounting principles of other countries, such as the General Accounting Principles in the United States, are applicable.

2.2. Compliance and Enforcement with Disclosure Requirements

The general disclosure provisions embodied in the Mexican Securities Laws, the interpretative guidelines by the Mexican Securities Commission; as well as in the financial accounting standards are commonly complied with. However, it should be noted that in some cases the information provided to the authority is distorted, so that even when the disclosure requirements are technically fulfilled the information provided may not be completely reliable. There are no cases on record of the NBSC or other securities regulatory bodies in Mexico bringing enforcement actions against companies for inadequate disclosure of material environmental information.

³ Article 16-bis of the Mexican Securities Law

⁴ Articles 16 and 16 bis of the Mexican Securities Law

⁵ The MIPA is a private, non-profit, organization of certified public accountants. In Mexico there are a lot of certified public accountants associations, all of which are part of a federation, the MIPA. The MIPA has the task of issuing rules that are binding for all of its members. Though, the NBSC is the authority empowered to issue the rules about the accounting, in the practice the NBSC follows the MIPA rules.

III. Environmental Disclosure in Canada’s Major Securities Jurisdictions

Abbreviations

AIF - Annual Information Form
ASB - Accounting Standards Board
ASE - Alberta Securities Commission
BCSE - British Columbia Securities Commission
CGA - Certified General Accountants
CSA - Canadian Securities Administrators
CICA - Canadian Institute of Chartered Accountants
FASB - Financial Accounting Standards Board
FCA - Full Cost Accounting
GAAP - Generally Accepted Accounting Principles
GAEAS - Generally Accepted Environmental Auditing Standards
MD&A - Management Discussion & Analysis
MOE - Minister of Environment (Ontario)
OSA - *Securities Act* (Ontario)
OSC - Ontario Securities Commission
OWRA - *Ontario Water Resources Act*
SEC - Securities and Exchange Commission (United States)
TSE - Toronto Stock Exchange

This section of the report describes securities regulation in Ontario, Alberta and British Columbia that require the disclosure of environmental information by publicly listed companies in these provinces. It covers the law and administration of securities in Canada, environmental accounting principles developed by the Canadian Institute of Chartered Accountants, basic company disclosure regimes in Ontario, Alberta and British Columbia and disclosure requirements applicable to environmental information.

A. Securities Law and Administration in Canada

1. Jurisdiction over Securities in Canada

Apart from applicable criminal provisions, securities in Canada are regulated by the provinces under their broad jurisdiction over “property and civil rights” granted by s. 92(13) of the *Constitution Act, 1867*.⁶ Even the trade in securities of companies incorporated by federal statute is within provincial competence, provided that provincial actions don't completely preclude such companies from issuing securities.⁷

⁶ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

⁷ See *A.-G. Man. v. A.-G. Can. (Manitoba Securities)* [1929] A.C. 260 (capacity to raise capital through securities issuance an essential feature of corporate status of federal companies); *Multiple Access v. McCutcheon* [1982] 2 S.C.R. 161 (even insider trading, which is also a matter dealt with by *Criminal Code* provisions on insider trading, could also be the subject of concurrent provincial legislation); *Lymburn v. Mayland* [1932] A.C. 318 (while

Provincial governments delegate much of their authority to securities commissions. In addition, self-regulatory organizations such as stock exchanges and a range of professional bodies play a significant role in governance and rulemaking. Substantial co-ordination between provincial securities commissions has been achieved by the Canadian Securities Administrators (hereafter, CSA), made up of members of provincial securities commissions. As a result, national instruments have been developed that are generally adopted in the provinces and proposals for a more significant federal role in securities trading have been pre-empted.

The Ontario Securities Commission (OSC) is responsible for the largest volume of securities traded in Canada. The Toronto Stock Exchange (TSE) now trades all senior Canadian equities. As a result, while there are differences among the securities laws of each province and territory, if a public issuer satisfies the disclosure standards applicable in Ontario, the rules of the other provinces will in most cases also be satisfied.⁸ Nonetheless, Canada's securities markets have grown considerably outside of Ontario, particularly in Alberta and British Columbia. Both of these provinces have disclosure requirements particular to natural resource-based industries.

2. *Sources of Securities Law in Canada's Provinces*

In addition to the statutes, regulations and orders-in-council of provincial governments, provincial securities commissions play a strong role in securities law and governance. Securities commissions issue binding decisions and rulings on disputes brought before the commission (which are attributed considerable deference by superior courts, if leave is granted to appeal⁹). Where permitted by statute or regulation, they also issue orders and blanket orders that apply to a number of similar cases brought before the commission. Most importantly, they make policy statements, which provide guidelines on the manner in which administrators will exercise their discretion, including national policy statements coordinated by the CSA. In practice, policy statements and notices are critical and can be adopted as rules with legal force, where allowed by statute. Provincial securities legislation allows provincial securities commissions broad discretion and scope to develop binding instruments.

In addition, self-regulating bodies, such as the Investment Dealers Association (IDA), or the Canadian Institute of Chartered Accountants (CICA) set by-laws, rules, standards and norms that shape the practice of securities regulation. Further, where not otherwise dealt with by other binding instruments, rules found in the *CICA Handbook* and other sources of accounting principles are authoritative wherever a legal instrument incorporates the generally accepted

provinces could not deny federal companies the right to raise capital, they could insist that securities only be issued through provincially-licensed brokers).

⁸ Joan C. Smart, Vice-Chair Ontario Securities Commission, Patricia L. Olasker, Partner McMillan Bull Casgrain, "Disclosure Standards in Canada" (prepared for the International Bar Association, International Litigation and Securities Law committees of the Section on Business Law, September, 1995), online: QL (OSC).

⁹ See esp. *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58 at para. 71ff, online: QL (SCJ) [hereinafter *Pezim*].

accounting principles (GAAP) by reference, or in some cases, where the legal instrument is silent.^{10, 11}

3. *Essential Features of the Law and Administration of Securities in Canada*

Provincial securities regimes generally include: (1) registering persons involved in the trade of securities and periodic renewal, subject to good conduct, (2) filing preliminary and final prospectuses disclosing the financial and operational aspects of a business issuing securities, (3) continuous and timely disclosure of financial and other information relevant to the market price of the security, as well as regular reporting after the distribution of securities, and (4) mechanisms to avoid fraud. The closed system of trading mandated under the provincial laws of Ontario, Alberta, British Columbia, Newfoundland, Nova Scotia, Saskatchewan and (to some extent) Manitoba ensures that securities that have not been supported by a properly filed prospectus or have not otherwise been made subject to adequate public disclosure cannot be freely traded on public capital markets

B. General Disclosure Requirements in Ontario, Alberta and British Columbia

1. *Material Facts*

The securities disclosure regime begins with the requirement that a preliminary and final prospectus be filed.¹² The prospectus must contain “full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed.”¹³ ‘Material fact’ is defined by s. 1 of the Ontario *Securities Act* (OSA):

where used in relation to securities issued or proposed to be issued means a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities.¹⁴

The determination of whether or not a fact is material depends upon the particular circumstances of a company. In *Agbi v. Geosimm Integrated Technologies Corp.*,¹⁵ the Alberta Court of Appeal again cited with approval the definition of a material fact given by Marshall J. for the US Supreme Court in *T.S.C. Industries Inc. v. Northway Inc.*:

¹⁰ Canadian Institute of Chartered Accountants, *CICA Handbook*, on-line: <http://www.cica.ca> (accessed May 2001). In many areas of the law, the GAAP will be relied where it is relevant to financial, commercial or actuarial matters and the applicable legislation is silent, such as for example in treating income and expenses in federal income tax law. See e.g. *Daley v. M.N.R.*, [1950] C.T.C. 254 at 260, or *Dom. Tax Cab Assn. v. M.N.R.*, [1954] C.T.C. 34 at 37.

¹¹ Vern Krishna, *The Fundamentals of Canadian Income Tax*, 6th ed. (Scarborough, ON: Carswell, 2000) at 128.

¹² *Securities Act*, R.S.O. 1990, c. S. 5., s. 53(1) [hereinafter *OSA*]; *Securities Act*, S.A. 1981, c. S-6.1, s. 81(1) [hereinafter *ASA*]; *Securities Act*, R.S.B.C. 1996, c. 418, s. 61(1) [hereinafter *BCSA*].

¹³ *OSA*, s. 56; *ASA*, 84(1); *BCSA*, s. 61(2), 63(1).

¹⁴ *OSA*, s. 1.

¹⁵ [1998] A.J. No. 1290 at para. 53 (C.A.), online: QL (AJ).

... an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.¹⁶

2. *Material Changes*

A material change is distinct from a material fact. The OSA defines a material change at s. 1:

“material change,” where used in relation to the affairs of an issuer, means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement such a change made by the board of directors of the issuer or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable.¹⁷

Companies must report adverse material changes arising between obtaining the receipt for a preliminary prospectus and the obtaining of a receipt for a final prospectus, as well as after a receipt for a final prospectus is obtained, but prior to the completion of a distribution of securities.¹⁸

3. *Timely and Continuous Disclosure*

Section 75 of the OSA sets out the company’s continuous disclosure obligations subsequent to the initial prospectus process. Any material change in the affairs of a reporting issuer must be disclosed to securities regulators and to the public through a press release by a senior officer of the company, describing the nature and substance of the development.¹⁹ When management is contemplating a securities transaction, management has a duty to inquire whether any material changes have occurred and must make disclosure prior to entering into any transaction.²⁰

4. *Material Information*

The legislation appears to set up separate disclosure requirements for material facts and changes. However, instruments developed by provincial securities commissions and stock exchanges have largely eliminated this distinction: instead, there is an obligation to make continuous and timely disclosure of all material *information* that arises in the affairs of a reporting issuer, a category including both material facts and changes. This requirement is set out in *National Policy* (“NP”) *Statement 40, Timely Disclosure*, developed by the CSA.²¹ “Material information” is defined as:

...any information relating to the business and affairs of an issuer that results in or would reasonably be expected to result in a significant change in the market price or value of any of the issuer’s securities.

¹⁶ (1976), 96 S. Ct. 2126, motion den’d 97 S. Ct. Co., 48 L. Ed. (2d) 757, C.C.H. Federal Securities Law Reports 90, 069.

¹⁷ OSA, s. 1.

¹⁸ OSA, s. 57; ASA, s. 85(1), 89(1); BCSA, s. 66(1), 67(1), 67(3).

¹⁹ OSA, s. 75(1); ASA, s. 118(1)(a); BCSA, s. 85(1)(a).

²⁰ *Pezim* at para. 90.

²¹ First published (1987), 10 O.S.C.B. 6295; restated (1993), 16 O.S.C.B. 2722.

Material information does not require that a “change” has occurred per se and is therefore broader. NP 40 requires immediate disclosure by way of press release of “material information,” and notification to the relevant securities regulator in advance of issuing the press release so that a determination as to whether to halt trading in the issuer’s securities can be made.

5. *Financial Documents*

In addition to timely and continuous disclosure of material information, disclosure of a range of financial documents is also required. Issuers are required to file annual audited financial statements that conform to GAAP.²² These documents must be distributed to securities holders and regulators, consisting of comparative figures for the previous year, an income statement, a statement of retained earnings, a statement of changes in financial position and a balance sheet. Reporting issuers are also required to file interim financial statements every three months.²³

OSC Policy Statement 5.10 Annual Information Form and Management’s Discussion and Analysis of Financial Condition and Results of Operations expands the statutory regime of continuous disclosure.²⁴ Part III of this policy requires that the financial statements be accompanied by management discussion and analysis of the issuer’s financial condition, results of operations, and future prospects.

C. Disclosure Requirements for Environmental Information

1. Disclosure Requirements of Broad Application

To the extent that environmental information could reasonably be expected to influence investors' decisions or securities prices, it must be disclosed under existing regulations.

In addition, there are specific disclosure requirements pertaining to environmental information. Item 6.1, (1), 4 (h) of the *OSC Form 41-501F1, Information Required in a Prospectus* [short-form] requires a narrative description of the business of the issuer, including:

...the financial and operational effects of environmental protection requirements on the capital expenditures, earnings and competitive position of the issuer in the current financial year and the expected effect, on future years.²⁵

Item 20.1 also requires the issuer, however, to list “risk factors material to the issuer that a reasonable investor would consider relevant to an investment in the securities being distributed,” such as “environmental and health risks.”

²² *OSA*, s. 78(1), (2); *ASA*, s. 121(1), (2); *BCSA*, s. 14, 15.

²³ *OSA*, s. 77; *ASA*, s. 120(1); British Columbia provides for interim financial statements in the Regulations.

²⁴ First published in (1989) O.S.C.B. 4275, as am. by (1990) 13 O.S.C.B. 943.

²⁵ Published in (2000) 23 O.S.C.B. (Supp.) 685. The same criteria is found in *Ontario Securities Commission Supplement General Prospectus Requirements* (2000), 23 OSCB (Supp.) 795, with the costs of environmental compliance dealt with also at 6.1 (1), 4. (h), and risk factors at item 20.1(1)(h).

OSC Policy Statement 5.10 Annual Information Form and Management's Discussion and Analysis of Financial Condition and Results of Operations requires the reporting issuer to set out in its AIF the impact of the following environmental criteria on its business generally and to list the affected industry segments:

(c) The financial or operational effect of environmental protection requirements on the capital expenditures, earnings and competitive position of the Issuer for the current fiscal year and any expected impact on future years.²⁶

According to CICA, the following general provisions of *OSC Policy Statement 5.10* would also apply:²⁷

Under Part III, MD&A, Item 1(4)(a), para. 124, environmental expenses that are unusual or infrequent events or transactions or otherwise represent any significant economic change materially affecting income from operations must be disclosed, along with the extent to which the income from operations are affected. If an environmental risk or uncertainty is necessary for an understanding of the Issuer's financial condition, changes therein, or results of operations, it should be disclosed under Part III, MD&A, Item 1(1)(3), para. 108, with particular emphasis on risks in the next two years.

2. *Disclosure Requirements for the Oil and Gas Industry*

The Alberta Securities Commission *Notice 43-701 Oil and Gas Estimates and Reports* does not include specific requirements for environmental disclosure.²⁸ Nor does *ASC Staff Notice 44-701 - Oil and Gas Reserves Disclosure in NI 44-101 AIFs*.²⁹ Both regulate claims and representations, however, as to the supply of oil and gas. General disclosure requirements for material information apply however.

3. *Disclosure Requirements for Natural Resource Companies in British Columbia*

Form 14A *Information Required in Prospectus of a Natural Resource Issuer* requires substantial disclosure of the financial impact of environmental regulations.³⁰ Item 6.4, (c), 5., concerning proposed exploration and development programs, sets out a requirement of disclosure where environmental restrictions are likely to have an effect on operations. Item 9, 1 also requires environmental regulations to be listed again under the heading of "risk factors," where such regulation could be a material financial risk to an investor.

4. *Disclosure Requirements for the Mining Industry*

Item 5 of the Technical Report requires an appropriate disclaimer on the environmental expertise of the authors of the report. Item 6 of the Technical Report requires the following disclosure:

²⁶ First published in (1989) O.S.C.B. 4275, as am. by (1990) 13 O.S.C.B. 943.

²⁷ Moore, David J. ed., *Accounting for Environmental Costs and Liabilities* (Toronto: CICA, 1993).

²⁸ Published in (2000), 9 A.S.C.S. 4848.

²⁹ Published in (2001), 10 A.S.C.S. 474.

³⁰ British Columbia Securities Commission, Chapter 1 - Notices Weekly Summary, Edition 95:15, p. 10 April 21, 1995 *Form 14A Information Required in Prospectus of a Natural Resource Issuer*.

(h) to the extent known, all environmental liabilities to which the property is subject.

In addition, Item 25 calls on the issuer to include a discussion in the Technical Report of environmental bond posting, remediation and reclamation obligations, if applicable.

IV. Canadian Accounting Standards

A. The *CICA Handbook* and CICA Research on the Environmental Aspects of Accounting

In Canada, companies must present their financial statements according to GAAP. The *CICA Handbook* is an authoritative source of GAAP wherever the GAAP is incorporated by reference in a legal instrument or where a binding provision requires a certain type of financial or operational disclosure without specifying the manner in which that obligation is to be provided or fulfilled. However, the need for such disclosure would have to arise as a logical requirement or necessity of a legal obligation. The GAAP does not create legal rules by default simply because it has not been precluded or because a legal instrument is silent.

B. Treatment of Environmental Liabilities in Canadian GAAP

In section 3060 (“Capital Assets”) of the *CICA Handbook*, paragraphs 3060.39, 3060.40, 3060.41 and 3060.63, are the only ones that make specific reference to environmental liabilities disclosure (see appendix B). Section 3060 of the *CICA Handbook* “requires that an accrual for the future removal and site restoration costs be made through charges to income.” However, according to Section 3060, the disclosure of these costs need only be a provision and not a full amount. Furthermore, the company need only disclose restoration costs concerning the company’s “established policy to restore a site.” Section 3060 also states that these future environmental liabilities are to be reported only “when the likelihood of their incidence is established as a result of environmental law, contract, or because the enterprise has established a policy to restore a site” (Paragraph 3060.41, see Appendix B). Finally, Section 3060, is limited to capital assets.

With respect to liabilities in general, the *CICA Handbook*, paragraphs 1000.32 and 1000.33 state:

Liabilities are obligations of an entity arising from past transactions or events, the settlement of which may result in the transfer or use of assets, provision of services or other yielding of economic benefits in the future. Liabilities have three essential characteristics:

- a) they embody a duty or responsibility to others that entails settlement by future transfer or use of assets, provision of services or other yielding of economic benefits, at a specified or determinable date, on occurrence of a specified event, or on demand;
- b) the duty or responsibility obligates the entity leaving it little or no discretion to avoid it and
- c) the transaction or event obligating the entity has already occurred.

Future expenditures are recognized in financial statements if the transaction or event has already occurred. In response to the question whether environmental damage caused by a company can

be considered a past transaction or event requiring a future expenditure, the Study Group held that the environmental damage constitutes the past event that will lead to an eventual future expenditure, especially if existing legislation requires remediation. The Study Group's position on past environmental damage is definite when there is environmental legislation that requires a company to undertake remediation but, according to paragraph 1000.34 of the *CICA Handbook*, there need not be any legal obligation in order for a liability to exist:

Liabilities do not have to be legally enforceable provided that they otherwise meet the definition of liabilities; they can be based on equitable or constructive obligations. An equitable obligation is a duty based on ethical or moral considerations. A constructive obligation is one that can be inferred from the facts in a particular situation as opposed to a contractually based obligation.

However, most of the *CICA Handbook* principles allow for a wide variety of positions and interpretations on disclosing environmental liabilities. First, depending on the interpretation given to paragraphs 1000.32 and 1000.33 of the *CICA Handbook*, a company can hold that an environmental expenditure is not a liability because the transfer of assets for the company has not yet occurred. Second, the company has a measure of discretion with respect to whether a liability can be reasonably estimated. Third, a company can still choose not to disclose a liability if it has a plausible belief that it is not probable that this liability will occur. Fourth, when specific environmental disclosure is required by the *CICA Handbook*, as is the case for future removal and site restoration costs (see 3060.39, 3060.40, 3060.41, 3060.63), the full costs are not reflected in current financial statements because accounting techniques attribute future costs to future accounting periods.

V. Jurisprudence on Environmental Disclosure Issues

The leading and only case in Ontario, Alberta and British Columbia directly relevant to environmental disclosure requirements concerned whether the initiation of environmental proceedings represented a material change. The (*Re Sheridan*) decision of the Ontario Securities Commission³¹ determined whether an application under s. 128 of the OSA to withdraw a number of exemptions from the disclosure requirements of the Act, previously granted to Sheridan's mining company, Madeleine, in the exercise of the Commission's discretion, was in the public interest.

It was alleged by the Securities Commission staff that Mr. Sheridan, president, director and major shareholder, caused his mining company Madeleine, traded on the TSE, to fail to make timely public disclosure concerning an action by the Ministry of the Environment (MOE), which claimed an injunction in the Ontario Court to prohibit all mining and milling operations at one of Madeleine's mines.³² This claim was served on him during July of 1991 along with related charges. The action, based on the *Ontario Water Resources Act*, s. 24, was resolved by consent between the MOE and Madeleine in October of 1991. Management for Madeleine issued a press release on the action at the end of September, and filed a material change report concerning the settlement in October 1991, by which time there was a change in management.

³¹ (1993), 16 O.S.C.B. 6345.

³² The application was based on the *Ontario Water Resources Act*, R.S.O. 1980, c. 361, as amended, s. 24.

There were two issues relating to the materiality of the proceedings. The first was whether publication and filing of a material change report about the injunction claim should have occurred in July 1991. The second issue was the argument that disclosure should have been made of the injunction and related proceedings in the company's notes to its interim financial statements for the period ending 30 June 1991, in conformity with GAAP.

The case was resolved on the basis of its particular facts but the court did clarify underlying disclosure rules. In fact, MOE officials had not at any time sent a qualified inspector to Madeleine's mining facilities to verify a concern, based on a cursory visual inspection, that certain impounding walls containing mining by-products might collapse, leading to the contamination of nearby waterways. The Ministry discontinued correspondence, despite documentary responses from Sheridan. Sheridan produced uncontested evidence during the injunction hearing that the walls were stable and went down to the bedrock. No inspector of the MOE had ever expressed concern with Madeleine's mining operations prior to certain acrimonious telephone conversations between Sheridan and MOE officials. Based on these facts, Sheridan concluded that the MOE action was merely harassment and not likely to succeed in court. He therefore concluded that the injunction application in July was not a material change requiring disclosure.

The Commission noted the absence of anything comparable in Ontario to the specific environmental disclosure rule existing in the United States, contained in Item 103 of Regulation S-K.³³ The Commission outlined the factors that must be weighed by a reporting issuer in determining whether a contingent or speculative event, such as the possibility of a successful court application for an injunction, is a material change. The Commission noted that any contingency which threatened to interrupt the business operations of a mining company would prima facie represent a material change.³⁴ Further, given the public sensitivity to environmental prosecutions, any action undertaken by the MOE could have an impact on public perception of the company, regardless of its legal merits, and therefore be material.³⁵

The Commission also stated that it would be appropriate for the issuer to weigh the likelihood of success of such a court application in assessing its materiality, however, particularly by seeking expert evidence (which was not done in Sheridan's case).³⁶ The Commission gave the following example:

...if the application had, say, a 1% chance of success and/or that, if successful, would have postponed the full operation of the mine and mill complex for, say, two weeks and occasioned

³³ (1993), 16 O.S.C.B. 6345 at 25. "Instruction 5 to Item 103 indicates that disclosure should be made of, inter alia, legal proceedings where the government is a party and the proceeding involves potential monetary sanctions, unless the issuer reasonably believes the proceeding will result in no monetary sanctions or in monetary sanctions of less than \$100,000; any legal proceeding involving potential capital expenditures in excess of 10% of the current assets of the issuer; and any legal proceeding which is material to the business or financial condition of the issuer."

³⁴ (1993), 16 O.S.C.B. 6345 at 24.

³⁵ (1993), 16 O.S.C.B. 6345 at 24.

³⁶ (1993), 16 O.S.C.B. 6345 at 25.

costs of \$10,000 to lift, in the circumstances of Madeleine, disclosure may not have been required.³⁷

The Commission quoted with approval from the American 2nd Circuit decision *SEC v. Texas Gulf Sulfur Co.* In that case, the court stated that materiality should be determined by weighing two factors:

...[1] the probability that the event will occur and [2] the anticipated magnitude of the event in light of the totality of the company activity.³⁸

The Commission chastised Sheridan for his cavalier attitude towards disclosure and his failure to consult legal advice on the materiality of the environmental proceedings against Madeleine.³⁹ However, on the facts of the case, the MOE had not adduced sufficient evidence in the original proceedings to support a determination as to the likelihood of success of the injunction application in July 1991 when Sheridan was served by the statement of claim. Therefore, the materiality of the proceedings and the Commission staff's allegation of a failure to make timely disclosure of a material change could not be resolved. Since the burden of proof is upon the staff, the hearing was resolved in Sheridan's favor.

The same lack of evidence furnished by the crown in the injunction application and related proceedings determined the result of the hearing with respect to the allegations that there was a failure to make disclosure in accordance with the GAAP in the interim financial statements. However, the court made a number of observations respecting the disclosure of environmental proceedings required by s. 77 of the OSA, which incorporates the GAAP and therefore the *CICA Handbook* rules.⁴⁰

The Commission noted that while the service of the statement of claim for the injunction application was subsequent to the completion of the figures for the interim financial statement in June 1991, the *CICA Handbook*, Section 1750.06, states that interim financial statements should include notes on matters "such as changes... in contingencies." They then considered s. 1750.14 which states that "the preparation of financial data should be based on accounting principles and practices consistent with those used in the preparation of annual financial statements." The Commission then referred to s. 3290.02 of the *Handbook*, which defines a contingency as "an existing condition or situation involving uncertainty as to possible gain or loss to an enterprise that will ultimately be resolved when one or more future events occur or fail to occur."

The Commission noted that s. 3290.03 indicates that a contingency would include pending litigation. It was further noted that under s. 3290.18 of the *Handbook*, the "existence of a contingent loss should be disclosed in notes to the financial statements when...the occurrence of the confirming future event is likely...or...not determinable."

With respect to subsequent events, s. 3820.10 of the *CICA Handbook* states that, "Financial statements should not be adjusted for, but disclosure should be made of those events occurring

³⁷ (1993), 16 O.S.C.B. 6345 at 25.

³⁸ 401 F.2d 833 (2d Cir. 1968) (en banc) at 849, qtd. by the Commission at 26.

³⁹ (1993), 16 O.S.C.B. 6345 at 46-47.

⁴⁰ (1993), 16 O.S.C.B. 6345 at 34ff.

between the date of the financial statements and the date of their completion that do not relate to conditions that existed at the date of the financial statements, but...will or may have a significant effect on the future operations of the enterprise.” Section 3820.09 lists as an example of such a subsequent event the commencement of litigation where the cause of action arose subsequent to the date of the financial statements.

The Commission characterized the injunction application as a subsequent event under the *CICA Handbook*. The Commission then cited s. 1000.17 of the *CICA Handbook*, which states “An item of information, or an aggregate of items, is material if it is probable that its omission or misstatement would influence or change a decision.” While the Commission also chastised Sheridan for not including notes in his interim financial statement, it again determined that there was not sufficient evidence for a determination of whether or not the injunction application would or might have had “a significant effect on the future operations of the enterprise,” based on s. 3820.10 of the *CICA Handbook* concerning subsequent events. The question of the materiality of the subsequent event of the injunction application, and a possible violation of s. 77 of the OSA, could therefore not be resolved.

The case of (*Re*) *Sheridan* thus establishes that proceedings by a regulatory authority such as the MOE may be a material change depending on the following considerations: (1) the threat to the company’s continued business operations and the possibility of negative publicity, (2) the likelihood of the litigation’s success, and (3) the extent of the impact on the company’s business activities if the proceedings were to be successful. It also suggests that the narrower scope of disclosure found in the text for subsequent, rather than contingent, events found in the *CICA Handbook*, will apply in such cases.

VI. The Public Interest Mandate in Canadian Securities Law

Section 127 of the OSA affords the Commission a broad discretion to issue orders where it deems them to be in the public interest. These orders include (1) the suspension or restriction of registration, with terms and conditions, (2) an order to cease trading in a particular security, (3) an order that exemptions no longer apply, (4) orders that a market participant submit to a review of its practices, (5) the disclosure of particular documents, (6) an order that a person or company be reprimanded, (7) an order that a person resign one or more positions that the person holds as a director or officer of an issuer, (8) an order prohibiting a person from becoming director a particular company. The Ontario Securities Act states that the Director “shall” receipt a prospectus unless it “appears to the Director that it is not in the *public interest* to do so,” a term of limited application that is discussed below.⁴¹

The Commission and superior courts of Ontario, Alberta and British Columbia have forged a broad discretionary basis for the Commission’s public interest orders. In *Re Cablecasting Ltd.*,⁴² the OSC determined that even where there was no breach of legislation, regulation or policy, it could act in the “public interest” to deter schemes that were technically legal but detracted in spirit from the credibility of the capital markets. This decision was affirmed in *Re Canadian Tire*

⁴¹ OSA, s. 55; ASA, s. 83; BCSA, s. 65(1).

⁴² (1978), O.S.C.B. 37.

Corporation,⁴³ where in affirming *Cablecasting*, it was decided that a cease trade order could issue despite the absence of any breach of regulation, statute or policy, provided that an aspect of the transaction was not merely unfair, but abusive of capital markets, the investing public, or a class of investors.⁴⁴ In its later decision *Re H.E.R.O. Industries Ltd.*, the Commission again affirmed that it would exercise its public interest jurisdiction in connection with transactions violating the spirit of the take-over bid rules, though not violating the rules themselves:

By this stage, there should be no doubt in anyone's mind that the Commission will intervene to protect the public interest in cases in which the rules in Part XIX are complied with, but the spirit underlying those rules is not....⁴⁵

The OSC's public interest jurisdiction was also defined broadly in *Gordon Capital Corp. v. Ontario (Securities Commission)*, where Craig J., of the Ontario Divisional Court (as it then was) delivering the judgement of the court, said the following:

There is no definition of the phrase "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion....⁴⁶

Nonetheless, in *Pezim v. British Columbia (Superintendent of Brokers)*, the Supreme Court of Canada expressed the view that Commission policies could not be treated as law, except where policies were pursuant to specific rulemaking powers existing in the statute (even if framed broadly). As Iacobucci, J. stated:

...It is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.⁴⁷

Perhaps the most significant pronouncement on these limitations came in the Ontario Court General Division (as it then was) decision *Ainsley Financial Corp. v. Ontario (Securities Commission)*, affirmed by the Ontario Court of Appeal, where Blair J. of the General Division agreed with the following comment by McIntosh:

While it is clear that the ability to act remedially "in the public interest" cedes some residual discretionary authority to the regulators, *it was obviously the intention of the legislature not to delegate to the Ontario Securities Commission the power to make substantive law of a legislative or regulatory character*. It is... impossible to escape the conclusion that *policy statements must not*

⁴³ (1987), 35 B.L.R. 56.

⁴⁴ At 97-108. Recently, in (1995), 18 OSCB 475 #05/95 *Canfor Corp. (Re)*. it was said at page 62-3 *It seems to us that the "abusive" test enunciated in Canadian Tire is still the applicable one, and that, absent a breach of the Act or the Regulation, we should not normally exercise our cease trade power in a case of this sort unless we first find that there has been something abusive of investors or the capital markets in the transaction. And, as stated in Canadian Tire, "abuse" is something more than "unfairness"*.

⁴⁵ (1990), 49 B.L.R. 182 at 190-1.

⁴⁶ (1991), 1 Admin. L.R. (2d) 199 at p. 211.

⁴⁷ [1994] 2 S.C.R. 557 at 596.

*be used [to] create substantive legal requirements of a legislative or regulatory character. Any other conclusion would be inconsistent with the Rule of Law [emphasis added].*⁴⁸

Blair, J. concluded, contrasting the powers of the OSC and SCE in the United States that “There is nothing in the Act or the regulations which delegates to the Commission a general jurisdiction to regulate the securities industries in the public interest. [emphasis added]”⁴⁹

Even seen in the broadest possible terms, this discretion could not be exercised outside the basic statement of purposes of the OSA at s. 1.1:

Sec. 1.1. Purposes. -- The purposes of this Act are,

(a) to provide protection to investors from unfair, improper or fraudulent practices; and

(b) to foster fair and efficient capital markets and confidence in capital markets.

This is suggested in the second part of Craig J.’s above statement for the Ontario Divisional Court (as it then was) in *Gordon Capital Corp. v. Ontario (Securities Commission)*:

The scope of the OSC's discretion in defining “the public interest” standard... is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public.⁵⁰

The Ontario Court of Appeal in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*⁵¹ indeed held that the Commission’s public interest discretion was guided by these two purposes, as well as the six guiding principles at s. 2.1 of the Act, which do not expand the scope of its application substantially. Therefore, despite the wide discretion that the Commission has to make orders where it is in the public interest, this authority does not go beyond capital market objectives to promote environmental or social purposes. In the absence of explicit legislation from the Lieutenant Governor-in-council, the Commission cannot use its otherwise broad public interest discretion to issue mandatory orders on matters such as environmental disclosure or to develop such requirements for environmental disclosure. The exclusively market-based criteria for the exercise of the Commission’s authority is reflected consistently in the jurisprudence.⁵²

⁴⁸ [1993] O.J. No. 1830 (aff’d Ontario Court of Appeal [1994] O.J. No. 2966), at 49.

⁴⁹ [1993] O.J. No. 1830, at 33.

⁵⁰ (1991), 1 Admin. L.R. (2d) 199 at 211.

⁵¹ *Committee for Equal Treatment of Asbestos [Minority Shareholders v. Ontario Securities Commission]* [1999] O.J. No. 388 at 6.

⁵² See e.g., *Wilkinson v. Toronto Stock Exchange* (1993), 16 O.S.C.B. 3545 at 356, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, *Re Security Trading Inc.* (1994), 6 C.C.L.S. 145 at 148-176, *Gordon Capital Corp. v. Ontario Securities Commission* (1991), 1 Admin. L.R. (2d) 199 at 211, 50 O.A.C. 258.

VII. Environmental Disclosure Requirements in US Securities Regulations

Disclosure is central to US securities regulation. The premise underlying the Securities Act of 1933 and the Securities Exchange Act of 1934 is that full disclosure of all material information is the best way to protect investors from fraud and manipulation and the best way to promote efficient and fair pricing of securities. The House Report on the Securities Exchange Act states:

“ The idea of a free and open public market is built upon the theory that competing judgements of buyers and sellers as to the fair price of a security brings about a situation where the market price of a security reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value” [H.R. Report No. 73-1383 (1934), as quoted in Williams 1999, p. 1210].

A. The Public Interest Mandate in US Securities Law

The basic US securities laws authorize the Securities and Exchange Commission to require the disclosure of information “necessary or appropriate in the public interest or for the protection of investors.” This mandate applies to information disclosed in conjunction with the registration and public offering of securities, solicitation of proxy votes, and periodic public reporting. Disclosure requirements, then, serve a dual purpose, protecting investors from fraud and inefficiency in the pricing of securities and promoting responsible corporate management. This public interest mandate pervades US securities law.

The Securities Act specifies objectives that the SEC must consider in devising disclosure requirements in the public interest.

“Whenever, pursuant to this title, the Commission is engaged in rulemaking and is required to determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation” [Securities Act, Section 2b].

Promotion of efficiency in capital markets and in the broader economy is the specific public interest objective of securities legislation.

However, subsequent Congresses have broadened the public interest mandate of the Securities and Exchange Commission. The National Environmental Policy Act of 1969, [Public Law 91-90, 83Stat.852, 42USC§4321 et seq.1970] states that the protection of the environment is a national policy. NEPA states:

“It is the continuing responsibility of the Federal Government to use all practicable means, consistent with other considerations of national policy, to...fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; to assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences...” [42USC;§4331(b)]. NEPA also “...directs that, to the fullest extent possible (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this act ...” [Section 102(1)].

Congress thereby authorized and directed the Securities and Exchange Commission, as a federal agency, to include environmental protection in its mandate to issue regulations in the public interest. The Conference Report to NEPA states that while NEPA does not repeal existing legislation and is supplemental to the authorization of federal agencies,

“this section does not, however, obviate the requirement that the federal agencies conduct their activities in accordance with the provisions of this bill unless to do so would clearly violate their existing statutory authorizations” [Conference Report 91-765, 91st Congress, 2 US Code and Administrative News, 2767,2771-2 (1969).

By this enactment the SEC was directed to take environmental protection into account in enacting disclosure requirements and other securities regulations unless clearly incompatible with the protection of investors and the promotion of efficiency, competition and capital formation. In settling a case arising from a rule-making petition brought to the SEC by the Natural Resources Defense Council, which asked the SEC to require broad disclosure of environmental information, a US District Court decided that NEPA did not impose any specific mandate on SEC to require environmental disclosure but did compel the SEC to take environmental considerations into account.

B. The Basic Requirement that All Material Facts Must be Disclosed

In addition to extensive specific disclosure requirements set forth largely in Regulation S-K, the Securities and Exchange Acts lay on companies a far more general obligation to disclose all material information needed to make required statements not misleading. This requirement applies to securities registrations, prospectuses, proxy statements, and periodic reports. Making false or misleading facts or omitting to disclose a material fact that is needed to make other statements not misleading opens a company and its officers to severe penalties, including criminal prosecution, civil penalties, withdrawal of registration, and private lawsuits by investors who have suffered damages. Like the securities regulations of Canada and Mexico, the general requirement is to disclose all material information.

A materiality filter has been applied to much information that is specifically required to be disclosed, including environmental information. Thus, for example, Item 101 of Regulation S-K requires companies to disclose any material effects that compliance with environmental regulations that have been enacted or adopted will have on capital expenditures, earnings and competitive position for the current and next year and any future years for which the impacts might be material. Item 303 of Regulation S-K requires a management discussion and analysis of material trends and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or future financial conditions. In these and other provisions, securities regulations elaborate on the general requirement that all material information be revealed to investors.

Moreover, in response to the NRDC rulemaking petition, the SEC clarified its position that insofar as environmental information is material, it disclosure is required under securities law and that requirement would be enforced [SEC, Securities Act Release No. 5627; 14 Oct. 1975; also, Williams, p. 1251].

The concept of materiality has been clarified in litigation and interpretive releases. Material information is information that a reasonable investor would find significant, in the total mix of available information. In SEC Staff Accounting Bulletin No.99, devoted to materiality, the Commission reminded companies that no numerical benchmark could be relied upon as a threshold of materiality. Rather, “a matter is material if there is a substantial likelihood that a reasonable person would consider it important” [17CFR§211, 12 August 1999]. The Bulletin quotes a judgement by the US Supreme Court to the effect that a fact is material if there is a substantial likelihood that the fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available [TSC Industries v. Northway, Inc, 426US 438, 449 (1976)]. The bulletin cites examples of misstatements or omissions that might be material although quantitatively small in financial terms. Among these are misstatements bearing on the integrity or competence of management, such as a company’s compliance with environmental regulatory requirements.

C. The SEC’s Disclosure System

In order to fulfill this broad mandate to take action necessary or appropriate in the public interest or for the protection of investors, the SEC has issued regulations, instructions, interpretative and explanatory releases that have created an extensive and highly integrated disclosure system. The kinds of information that must be disclosed are specified in detail in Regulation S-K [CFR§§229.10 – 229.702(1998)]. These disclosure requirements consist of a basic information package that must be disclosed to all investors plus additional in-depth information that is presumed to be of interest primarily to securities analysts, institutional investors, and sophisticated individual investors. These information requirements have been standardized to a large extent across several important disclosure stages specified in the Securities and Exchange Acts:

- 1) information contained in a prospectus or similar document when securities are offered for sale to the public or otherwise distributed;
- 2) information contained in a statement accompanying the registration of securities with the Securities and Exchange Commission;
- 3) information contained in proxy solicitations in conjunction with the election of officers and votes in annual meetings; and
- 4) information contained in required annual, quarterly, and special ongoing reports filed with the SEC and made available to the public.

Some disclosure requirements apply specifically to information of an environmental nature. However, the SEC has stated that compliance with such specific disclosure requirements does not obviate the firm’s obligation to comply with more general requirement that all material information must be revealed [SEC Release No. 33-6130; 44FR56925]. For example, if a company makes public disclosure of its environmental policies, it must ensure that statements made are accurate and sufficient to make the information not misleading.

Section 101 c) xii) of Regulation S-K specifies:

“Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local 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. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material.”

In an interpretive release, the SEC made it clear that companies may have to make and disclose estimates of environmental compliance costs in future years if they expect such costs to be material and significantly higher than current costs [SEC Release No. 33-6130; 44FR56924, 3 Oct. 1979]. For example, most environmental regulations are enacted with a compliance deadline set in the future, so that future year capital expenditures might substantially exceed those expected in the current year.

The distinction between provisions that have been enacted or adopted is significant in the United States system, because many environmental regulations that are enacted are not adopted for months or years thereafter. Often, one or another interested party challenges regulations that have been issued in final form in the courts. The contested issues are litigated and a judicial decision is made, sometimes supporting the EPA and sometimes requiring the EPA to revise the regulation. The regulations are not adopted until court challenges have been settled so regulations that have been enacted but not yet adopted are commonplace. Section 101(c)(xii) requires disclosure of the material effects of such regulations.

In addition, though not targeted exclusively at litigation arising out of environmental matters, Section 103 of Regulation S-K requires disclosure of pending material legal proceedings:

“Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.”

The instructions to Item 103 stipulate, *inter alia*, that

...No information need be given with respect to any proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same legal and factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage....

“...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 or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary for the purpose of protecting the environment shall not be deemed "ordinary routine litigation incidental to the business" and shall be described if:

A. Such proceeding is material to the business or financial condition of the registrant;

B. 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

C. 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.”

Another disclosure requirement imposed by Regulation S-K with great potential significance for environmental information is Item 303, which specifies the requirements for the Management Discussion and Analysis, a narrative explanation that accompanies the financial reports. Item 303 requires a disclosure and discussion of any known trends, commitments, events or uncertainties that will have a material effect on the firm’s financial condition or results of operation. Item 303 stipulates:

Liquidity. “Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant’s liquidity increasing or decreasing in any material way. ...”

Results of operations: “...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. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed....”

The instructions to Item 303 state *inter alia*:

“...The discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This would include descriptions and amounts of (A) matters that would have an impact on future operations and have not had an impact in the past, and (B) matters that have had an impact on reported operations and are not expected to have an impact upon future operations....”

“...Registrants are encouraged, but not required, to supply forward-looking information. This is to be distinguished from presently known data which will impact upon future operating results, such as known future increases in costs of labor or materials. This latter data may be required to be disclosed. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See Rule 175 under the Securities Act , Rule 3b-6 under the Exchange Act and Securities Act Release No. 6084 (25 June 1979) .”

The scope of this requirement was further explained in an interpretive release, which states that

“A disclosure duty exists where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant’s financial condition or results of operation.”

This release shifts the burden of proof onto management, in that known uncertainties must be disclosed unless management can determine that a material effect “is not reasonably likely to occur” [SEC Release No. 33-6835; 54FR22430, 24 May 1989].

In its explanation of this requirement, the SEC used a hypothetical, proposed government safety regulation affecting a company’s operations as an example. In deciding whether this proposed regulation must be disclosed, the SEC stated:

“... management must make two assessments:

- 1) Is the known trend, demand, commitment, trend or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
- 2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event, or uncertainty on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant’s condition or results of operations is not reasonably likely to occur” [54FR22430].

In this release, the SEC pointed out that events that have already occurred or are anticipated may give rise to material known uncertainties. It warns registrants that

“where a material change in the company’s financial condition or results of operations appears in a reporting period and the likelihood of such change was not discussed in prior reports, the Commission staff, as part of its review of the current filing, will inquire as to the circumstances existing at the time of the earlier filings to determine whether the registrant failed to discuss a known trend, demand, commitment, event or uncertainty as required by Item 303” [SEC Release No. 33-6835; 54FR22431, n28, 24 May 1989].

In its interpretive discussion of required disclosure in the management discussion and analysis, SEC staff specifically referred to a company’s obligations when identified as a Potentially Responsible Party (PRP) to a site contamination under CERCLA, the “Superfund” law. After a company is so notified, it may be subsequently subject to the law’s joint and several liability provisions for environmental remediation costs. The interpretive release states that a PRP notification does not automatically require disclosure of an anticipated government proceeding under Item 103 of Regulation S-K. However, under Item 303 a PRP notification does require a MD&A discussion unless management is able to determine, based on the known facts and circumstances, that a material financial effect is not likely to occur. Such circumstances might include the company’s contribution to the contamination, its insurance coverage, and the likely contribution from other responsible parties.

D. Generally Accepted Accounting Standards

As in Canada and Mexico, US companies are required to use generally accepted accounting practices in constructing financial accounts and reports. Section 4-01a of Regulation S-X rules that statements that do not comply with GAAP are considered to be misleading. GAAP is defined through authoritative pronouncements by accounting standards bodies, such as the Financial Accounting Standards Board (FASB). These accounting standards have an important bearing on the way companies disclose and treat environmental information.

Because the Superfund Law's enactment of strict, joint and several liability for cleanup of badly contaminated sites created such potentially large financial liabilities for many companies, it stimulated considerable attention from the accounting profession to contingent liabilities arising from environmental contamination. The basic accounting framework for dealing with such contingencies is set forth in the FASB Financial Accounting Standard No. 5 ("Accounting for Contingencies") and Financial Interpretation No. 14 ("Reasonable Estimation of the Amount of a Loss").

Potential liability for costs of environmental cleanup is classified as a contingent liability unless the possibility is remote or the costs insignificant.

FAS5 sets forth two criteria determining whether a contingent liability must be accrued. It must be reasonably probable a loss has occurred, the value of an asset has been impaired, or a liability has been incurred. Further, the amount of a loss must be reasonably estimated. However, even if no accrual is necessary, the contingency must be disclosed if there is a reasonable possibility that a loss has been incurred. In order to prevent companies from taking refuge in uncertainties surrounding their share in cleanup costs, FIN14 prescribes that if a probable range of loss can be determined, then the most likely amount within that range should be accrued. If no amount is more likely than any other, however, the low end of the range should be recorded. FASB's Financial Interpretation No. 93 (FIN93) further prescribed that contingent liabilities such as those for environmental remediation should be recorded without netting out possible financial recoveries from insurance companies or other responsible parties, except under very narrowly defined circumstances. Moreover, FASB's Emerging Issues Task Force, in release EITF 93-5, "Accounting for Environmental Liabilities", prescribed that such liabilities should not be discounted to their present value unless the amount and timing of the outlays can be reliably determined.

The SEC issued Staff Accounting Bulletin 92 to elaborate on these issues of generally accepted accounting practices for contingent liabilities [SEC Release No. 92, 58FR32843 (8 June 1993)]. SAB92 instructs registrants that disclosure or accrual should not be delayed because of uncertainty until only a single amount can be reasonably estimated. Estimates should be based on available information and updated in later filings as more information becomes available. SAB92 confirms that potential recoveries from third parties should not be netted against potential liabilities. Rather, the gross amount and the potential recovery should be recorded separately in the balance sheet. Further, disclosure should be made of the amounts of potential recovery that are contested by third parties. If a company does discount an environmental liability, SAB92 prescribes that it disclose its discounting method and rate, which must not exceed the rate for US treasury bills. SAB92 also articulates the disclosure required in notes to the financial statement to make them not misleading, if no amount is accrued. The company should disclose the circumstances surrounding the contingency, the range of possible outcomes and the company's judgements and assumptions regarding those outcomes. In general, consistent with Regulation S-K, Item 303, the SEC requires that disclosure should be sufficient to enable investors to understand the range of outcomes that could have a material effect on the company's liquidity, financial condition and results of operation.

E. Enforcement of Environmental Disclosure Requirements

The SEC has several enforcement tools at its disposal, ranging from letters of enquiry and deficiency notices to administrative proceedings and civil suits. However, these tools have been used infrequently [Caputo 1992-93]. There have been few administrative proceedings about lack of disclosure of environmental information. These include:

- *SEC v. Allied Chemical Corp.* [No. 77-0373, 4 March 1977] in which the company consented to liability from failure to disclose potential liability from discharge of toxic chemicals.
- *In re U.S Steel Corp.* [Exchange Act Release No. 16223, 27 Sept. 1979] involving the company's failure to disclose future costs of environmental compliance and involvement in legal proceedings with the federal government.
- *In re Occidental Petroleum Corporation* [Exchange Act Release No. 34-16950, (2 July 1980)] regarding the company's failure to disclose environmental legal proceedings and costs of environmental remediation.
- *In re Lee Pharmaceuticals* [Admin. Proc. File No. 3-9573, 9 April 1998] involving failure to disclose potential remediation liabilities.

The few SEC proceedings involving alleged environmental disclosure violations that have gone to court include

- *Levine v. NL Industries* [20 Env. Law Rep. 20197, S. D. NY, 31 July 1989] involving failure to disclose liabilities and legal actions involving noncompliance with environmental regulations and remediation costs.
- *Grossman v. Waste Management, Inc.* [589 F. Suppl. 395, N.D. Ill. 1984]
- *Steiner v. Baxter* [No. 89-M-809, D. Col., 9 May 1989]

In 1990 the SEC and the US Environmental Protection Agency entered into an informal agreement to cooperate by sharing information. The SEC was to use information supplied by the EPA to check up on the adequacy of companies' disclosures of financial liabilities, especially for remediation of contaminated sites identified under Superfund legislation. In addition, from time to time public interest groups in the United States have sought to bring other instances of nondisclosure by major U.S companies to the attention of the SEC [Lewis 1998; Friends of the Earth 1997; Repetto and Austin, 2000]. Quite recently, the EPA has begun notifying companies subject to EPA enforcement actions for non-compliance with environmental regulations of their SEC disclosure obligations (US EPA 2001). Thus, the available record of enforcement of environmental disclosure requirements in the United States, though scanty, is more extensive than that in the other two NAFTA parties.

V. Summary and Conclusions

The foregoing comparative review of the disclosure requirements related to environmental information in the securities regulation of Mexico, the United States, and Canada reveals essential similarities and particular differences.

At the most fundamental level, the disclosure requirements of the three countries are similar in requiring that all material information regarding securities offered for sale to the public must be promptly revealed. Material information is commonly defined as information that investors would regard as significant in their decisions to buy or sell a security. Materiality is broadly defined and not subject to numerical thresholds. In the United States, it is explicit that information bearing on the competence or integrity of management, including noncompliance with extant laws and regulations, can be material even if financially insignificant. There is common recognition in the three countries that environmental information may be material in this broad sense, and, if so, must be disclosed.

The securities regulations of the United States and Canada share a mandate to promote the public interest that is not found in Mexican law, which is directly solely to the protection of investors. In Canada, this public interest mandate is limited to actions promoting the purposes the basic securities act: protecting investors and promoting fair and efficient capital markets. Only in the United States, through the National Environmental Policy Act, is the public interest defined to include environmental protection and the responsibility of the Securities and Exchange Commission extended to take environmental objectives into account when formulating rules and regulations. However, this distinction may be largely theoretical. There is little evidence in its actions that the SEC has accepted a responsibility broader than that in Canada to protect investors and to promote efficient capital markets.

With respect to explicit and specific requirements for the disclosure of environmental information, the three countries clearly lie along a spectrum, with Mexican regulations having the fewest prescriptions and US regulations having the most. In Mexican Federal securities law there are no specific provisions establishing explicit requirements for disclosure of environmental liabilities, costs or other related matters. At the other extreme, US securities regulations explicitly require registered firms to disclose:

- The material costs of complying with environmental regulations in future years;
- The costs of remediating contaminated sites if a liability is likely to have been incurred and its magnitude can be approximately estimated;
- Other contingent liabilities arising from environmental exposures;
- Involvement as a party to a legal proceeding about an environmental issue, especially with an agency of government
- Any known trend or uncertainty involving environmental issues, including pending regulation, that would have a material effect on the company's business.

Most of these requirements can be found in Canadian securities regulations and accompanying accounting standards, though the provisions differ in detail. Registered Canadian companies

must also disclose the financial impacts of compliance with environmental protection requirements and environmental risk factors that significantly affect their businesses. Management discussion and analysis is required of unusual environmental expenditures and material environmental uncertainties. Moreover, Canadian GAAP requires disclosure and accrual for liabilities arising from the necessity for remediation of contaminated sites.

There are two obvious opportunities for harmonization in these disclosure requirements of the three NAFTA parties. The first is an elaboration of specific environmental disclosure requirements in Mexican securities regulation to bring it closer to the regulatory provisions already in place in Canada and Mexico. Since the general provisions requiring disclosure of all material information are essentially the same in all three countries, harmonization of specific requirements would seem to represent more of a clarification than a change in regulatory policy.

The second opportunity for harmonization lies in the area of application and enforcement. Since there are no cases in the Mexican public record of enforcement of environmental disclosure requirements and only one case in the Canadian record, it would seem that there is probably scope for more intensive application of current requirements in those countries. Moreover, since the enforcement record in the United States, though fuller, is also relatively limited, there is probably scope for more intensive application of current requirements in that country as well. Upward harmonization of enforcement activities would be consistent with NAFTA's investment and sustainable development objectives.

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