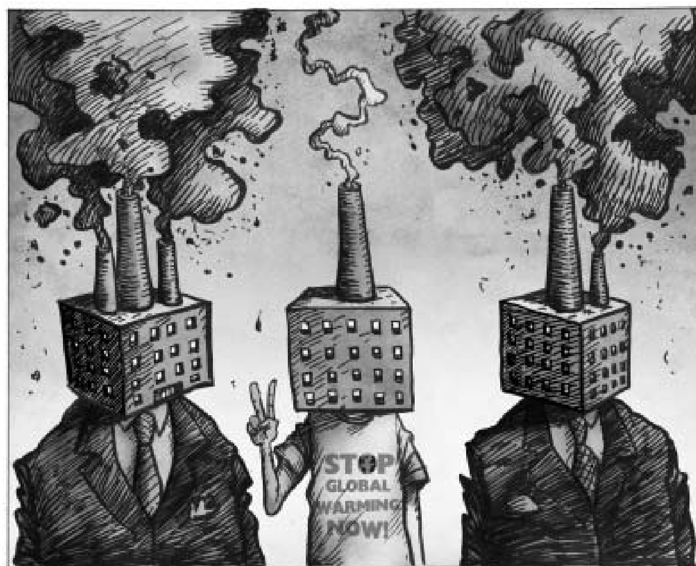
THE GREEN EVOLUTION

Sustainability's Corporate Challenge



By Ann Marie Mortimer

Kermit the frog seemed to have gotten it right when he warbled his catchy tune lamenting the perils of being green, although he might soon be singing a new ditty: It isn't easy being sustainable — the reigning byword of environmental, social and economic responsibility. What "eco-friendly" was to the '80s and "green" to the '90s, "sustainability" is to the current decade. Although sustainability includes as one of its core components environmental responsibility and stewardship, it encompasses a much broader concept that extends to social and economic longevity and parity.

The concept of sustainability was popularized in the 1987 report of the World Commission on Environment and Development. There, "sustainable development" was defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

Embedded in this definition are both qualitative and quantitative implications, without any direction about operationalization, and there's the rub: How do you translate the aspirational qualities of sustainability into a practical action? What metrics do you use to measure compliance? Success? What happens when your stated goals fall short of executed action?

With more and more corporations establishing sustainability committees, there can be little doubt that these questions are keeping business executives across the globe up nights. That sustainability has moved well beyond the ivory tower of academia or the niche territory of environmental extremism is beyond question. Interest in corporate responsibility and sustainability has accelerated to a point where every segment of the corporate world, from energy to media, manufacturing to pharmaceuticals, has thrown its hat into the sustainability arena. For example, attendance at a 2006 Environmental Forum on Sustainability sponsored by ConEd read like a Who's Who of corporate megagiants, from Disney to Duke Energy, Merck to Honeywell. Of those in attendance, a strong majority (about 86 percent) had a formal sustainability policy, often directed by an officer responsible for corporate sustainability, with an identified reporting chain, some directly to the CEO of the company.

Many companies have already published corporate responsibility and sustainability reports in which they commit to important and quantifiable climate change and water stewardship goals, including, for example, reducing absolute carbon dioxide manufacturing emissions by 2015 and becoming water neutral. In most cases, these pledges are backed by real money, with promised and actual investments into the billions of dollars.

Who is watching the companies that have publicly pledged a more sustainable business or those that have failed to properly quantify and disclose sustainability-related risks? The

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answer, it seems, is everyone. In a recent 100-plus page petition filed with the Securities and Exchange Commission, a powerful coalition of public and private persons, including state officials, state pension fund managers and environmental organizations, requested the SEC "issue an interpretive release clarifying that material climate-related information be included in corporate disclosures under existing law" citing investor interest with more than $41 trillion at stake.

The petition cites the Supreme Court's ruling in *Massachusetts v. EPA*, 127 S.Ct. 1438 (2007), that the EPA has authority to take regulatory action addressing global warming under the existing terms of the Clean Air Act, the proliferation of state law initiatives aimed at greenhouse gas emission reductions, including California's proposed Global Warming Solutions Act (Assembly Bill 32, establishing mandatory greenhouse gas emissions cap for the state based on 1990 emissions; Assembly Bill 143, limiting greenhouse emissions from new motor vehicles) and proposed greenhouse gas procurement standards for certain electricity providers. It urges the SEC to bare the teeth of existing disclosure requirements by insisting on disclosure of facts that are material to the company's operation or financial condition, which might include physical risks associated with climate change; financial risks and opportunities associated with present or probable greenhouse gas regulation; and legal proceedings relating to climate change.

That the petition requests that the SEC opine on existing obligations is the most obvious tip-off to the potential legal quagmire ahead. And the pumps are primed for claims relating to failure to disclose. Already, investment firms and others have issued reports highly critical of corporate disclosures of the climate-related sustainability issues and the financial and operational impact of these. Meanwhile, investor groups are rattling their collective sabers about shareholder actions alleging that corporations are either spending too much on global climate change initiatives (and therefore diluting corporate profitability without a thorough cost/benefit analysis) or spending too little to meet their sustainability pledges. A real Catch-22.

In addition to the obvious threat of SEC and shareholder related actions, the time appears ripe for public and private "greenwashing" suits alleging, in effect, that corporations have overstated or misstated their sustainability track record. Already there is precedent in California that precisely this type of conduct can be deemed false and misleading within the meaning of Business and Professions Code Section 17200 et seq. See *Kasky v. Nike*, 27 Cal.4th 939, (2002), in which a manufacturer's statements about manufacturing labor practices and conditions qualified as "commercial speech" and was therefore subject to false advertising and unfair competition law.

And who bears the risk of all this litigation? Well, on that score the insurance companies are out in front, having long been on record about the enormous potential business and financial risk of global climate related claims. Not surprisingly, litigation is already ongoing as to who bears the risk (and associated cost) of climate-related claims. See, e.g., *Steadfast Ins. v. AES*, (Cir.Ct. Va., July 2008).

There is no perfect plan for eliminating these types of risks, but to avoid becoming a cautionary tale in the no-good-deed-goes-unpunished annals, corporations should, at minimum: comprehensively review all public statements related to sustainability and global climate change for accuracy, balance and fairness; conduct a thorough audit and risk assessment of the accuracy of what is said and what is not said in these statements; review all hard metrics and promised goals for achievability and don't over-promise what they cannot deliver; centralize sustainability communications; and publicize their sustainability commitments, without ceding policy control to the public relations department.

Besides the obvious reputational consequences of being a hero or failure in the sustainability sweepstakes, the operational difficulties of translating intention into action are more than the stuff of insomnia and existential musings. On the real world side of the ledger, the adoption and implementation of a sustainability policy increasingly appears both a business imperative for corporate America and a potential legal minefield that should rattle the nerves of both the most steel-eyed market opportunist who views "greening" as just another form of consumer advertising and the most idealistic of environmental reformer. Whichever side you are looking from, the view is the same: There is a big storm on the horizon.

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