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# Corporate Sustainability Strategies

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*The New York Times* published a special business section entitled “Green is the New Black,” on May 17, 2006, describing business strategies to capitalize on environmentalism, environmental technologies, and environmental issues.<sup>1</sup> Many of the corporations named in that section described these strategies as attempts to improve “sustainability.”<sup>2</sup> This topic gained increasing popularity, and since May 2006, the *New York Times* published hundreds of articles and columns addressing the issue of “sustainability.”<sup>3</sup> As I revised this article, *The Economist* featured a cover story entitled “The Greening of America.”<sup>4</sup>

Beginning in 1999, Dow Jones, in partnership with European co-venturers, published various “sustainability indexes.”<sup>5</sup> In these indexes, Dow Jones used a “Corporate Sustainability Assessment,” prepared by SAM Indexes GmbH, to rate the sustainability of corporations.<sup>6</sup> Dow Jones defined “corporate sustainability” as “a business approach that creates long-term shareholder value by embracing opportunities and managing risks deriving from economic, environmental and social developments.”<sup>7</sup> Fund managers licensed by Dow Jones then used these indexes to prepare “sustainable” investment vehicles.<sup>8</sup> The top performers -- the top 20 percent in North America, for example -- on the Corporate Sustainability Assessment were

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<sup>1</sup> See N.Y. TIMES, May 17, 2006, at Section G (publishing a special newspaper section devoted to the intersection of business and environmentalism).

<sup>2</sup> See *id.*

<sup>3</sup> A search conducted on “sustainability” on The New York Times Online yielded 552 returns, *available at* www.nytimes.com (last searched Jan. 28, 2007).

<sup>4</sup> THE ECONOMIST, Jan. 27, 2007, at 1.

<sup>5</sup> See Dow Jones Sustainability Indexes, www.sustainability-index.com (last visited Mar. 1, 2007) (listing various measures of the financial performance of leading sustainability-driven companies worldwide).

<sup>6</sup> Dow Jones Sustainability Indexes, *Corporate Sustainability Assessment*, [http://www.sustainability-index.com/06\\_html/assessment/overview.html](http://www.sustainability-index.com/06_html/assessment/overview.html) (last visited Mar. 1, 2007).

<sup>7</sup> Dow Jones Sustainability Indexes, *Corporate Sustainability*, [http://www.sustainability-index.com/06\\_html/sustainability/corpsustainability.html](http://www.sustainability-index.com/06_html/sustainability/corpsustainability.html) (last visited Mar. 1, 2007).

<sup>8</sup> Dow Jones Sustainability Indexes, *Overview*, [http://www.sustainability-index.com/06\\_html/indexes/overview.html](http://www.sustainability-index.com/06_html/indexes/overview.html) (last visited Mar. 1, 2007).

included in the index.<sup>9</sup> A list of the top 50 companies, by weightings in the index for Dow Jones' United States Sustainability Index, can be found on the website.<sup>10</sup> These corporations reflected a subset of industrial and financial America. As of September 30, 2006, the top five companies were General Electric Co., Citigroup, Inc., Bank of America Corp., Microsoft Corp., and Pfizer, Inc.<sup>11</sup>

CERES, a coalition of investors and environmentalists, launched the Global Reporting Initiative ("GRI") in 1997.<sup>12</sup> Two years later, in 1999, the United Nations Environment Programme ("UNEP") joined the GRI, which was separately incorporated in the Netherlands in 2002.<sup>13</sup> GRI was an effort to establish standards for reporting on sustainability and other corporate social responsibility efforts and outcomes in a way that parallels financial reporting.<sup>14</sup> As of this writing, the GRI database included 201 reports from 106 entities using some or all of the GRI Guidelines.<sup>15</sup> The list included such entities as Ben & Jerry's, General Electric, General Motors, Cinergy, Sunoco, and DuPont.<sup>16</sup>

Throughout the GRI's Corporate Register, major corporations identified "greenness" as an important attribute of products. For example, General Electric's "Ecomagination" program sought not only to run GE's operations more sustainably, but also to develop and to profitably market lines of products which allow GE's customers to create lower environmental impacts when using these products.<sup>17</sup> Similarly, BP television advertisements over the past few years memorably asked viewers to know their "carbon footprint."<sup>18</sup> BP described "carbon footprint" as a measure of an individual's contribution to emissions of greenhouse gases over the course of a year.<sup>19</sup> Similarly General Motors' "Live Green Go Yellow" advertising

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<sup>9</sup> *Id.*

<sup>10</sup> Dow Jones, *Sustainability North America Index, Factsheet 2* (Sep. 30, 2006), [http://www.sustainability-index.com/djsi\\_pdf/publications/Factsheets/DJSI\\_NA.pdf](http://www.sustainability-index.com/djsi_pdf/publications/Factsheets/DJSI_NA.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> Ceres: Investors and Environmentalists for Sustainable Prosperity, *Sustainability Reporting*, <http://www.ceres.org/sustreporting/> (last visited Mar. 1, 2007) (organization homepage giving an overview of sustainability concepts and issues).

<sup>13</sup> See Global Reporting Initiative, *What we Do*, <http://www.globalreporting.org/AboutGRI/WhatWeDo> (last visited Mar. 16, 2007) (stating that the Global Reporting Initiative is a collaborative centre of the United Nations Environment Programme).

<sup>14</sup> Global Reporting Initiative, *About GRI*, <http://www.globalreporting.org/AboutGRI/> (last visited Mar. 1, 2007).

<sup>15</sup> Global Reporting Initiative, Corporate Register, <http://www.corporateregister.com/gri/about.html> (last visited Mar. 16, 2007) (note that the reporting company must issue an affirmative response in order to be posted on this database).

<sup>16</sup> Global Reporting Initiative, *Search the Corporate Register, Display All*, <http://www.corporateregister.com/gri/search.cgi?d=&n=0&com=0&sec=All&cou=All&r=a&nr=30> (last visited Mar. 16, 2007).

<sup>17</sup> See General Electric, *GE Ecomagination*, <http://ge.ecomagination.com> (last visited Mar. 1, 2007) (providing visitors with information about the Ecomagination program).

<sup>18</sup> See BP, Marketing & Innovation: Measure Your Carbon Footprint, <http://visionarymarketing.wordpress.com/2006/03/15/measure-your-carbon-footprint/> (last visited Mar. 1, 2007) (marketing/blog website to promote BP's program pushing for the measurement of carbon footprints); see also BP, Environment and Society: Carbon Footprint Calculator, <http://www.bp.com/extendedsectiongenericarticle.do?categoryId=9008204&contentId=7015209> (last visited Mar. 1, 2007) (interactive website allowing an individual or company to enter inputs and receive an output quantifying carbon footprint).

<sup>19</sup> See *id.*

campaign touted the virtues of flexible fuel vehicles, which burn E85, an eighty-five percent (85%) ethanol, more “sustainable,” fuel blend.<sup>20</sup>

One might assume that only manufacturers and energy companies focused on “sustainability” over the past few years; however, retailer Wal-Mart Corporation also featured “sustainability” on its website.<sup>21</sup> In fact, in its 2006 Annual Report, Wal-Mart devoted an entire section to the concept of sustainability.<sup>22</sup>

Global climate change led each of these corporations’ discussions of sustainability. The day before President Bush’s State of the Union Address on January 23, 2007, a coalition of leading United States corporations and environmental groups --formed as the U.S. Climate Action Partnership-- called for mandatory greenhouse gas emission regulation in the United States.<sup>23</sup> The next day President Bush, traditionally not known for an aggressive approach to greenhouse gas emission control,<sup>24</sup> advocated steps toward developing alternative energy resources. In his Address, Bush characterized global climate change as a “serious challenge.”<sup>25</sup>

Closer to home, a working group of the Section of Environment, Energy, and Resources of the American Bar Association, entitled the Sustainable Development, Ecosystems, and Climate Change Committee, developed a draft policy on “Sustainability Practices for Law Organizations” to discuss at the Section’s 2007 annual meeting in Pittsburgh.<sup>26</sup>

You may now be asking: What is all this about? What does it mean for corporations that are not in the Fortune 100? What sorts of legal work does it generate? In the next few pages, I will try to offer some practical thoughts on these issues.<sup>27</sup>

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<sup>20</sup> See GM, Automotive, Only GM: Energy & Environment, <http://www.gm.com/company/onlygm/energy/index.html> (last visited Mar. 1, 2007) (marketing website to promote GM’s “live green, go yellow” program pushing for the use of ethanol via E85).

<sup>21</sup> See Wal-MartFacts.com, Featured Topics: Sustainability, <http://www.walmartfacts.com/default.aspx> (last visited Mar. 1, 2007) (marketing website describing Wal-Mart’s sustainability initiatives); see also Wal-MartStores.com, Environment, <http://walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=217&alias=http://www.walmartstores.com/environment/&origref> (last visited Mar. 1, 2007) (marketing website describing Wal-Mart’s position on the environment and the ways in which Wal-Mart stores are adjusting to decrease their environmental footprints).

<sup>22</sup> In October 2005, Wal-Mart CEO, Lee Scott, committed to associates and to the public that the Company will take a leadership position in sustainability. We are convinced that this endeavor is consistent with our business model, that we can make the earth a better place for all of us and that we can be an efficient, profitable enterprise. *Id.*

<sup>23</sup> U.S. CLIMATE ACTION PARTNERSHIP, A CALL FOR ACTION (2007), available at <http://www.uscap.org/ClimateReport.pdf> (members of U.S. Climate Action Partnership (USCAP) include Alcoa, BP America Inc., Caterpillar, Inc., Duke Energy, DuPont, Environmental Defense, PPL Group, General Electric, Natural Resources Defense Council, Pew Center on Global Climate Change, PG&E Corporation, PNM Resources, and World Resources Institute).

<sup>24</sup> See, e.g., David G. Mandelbaum, *Thoughts on the Bush Clean Air “Strategy” So Far, and a Suggestion for What Might Work*, 21 TEMPLE ENVTL. L. & TECH. J. 1 (2002).

<sup>25</sup> President George W. Bush, State of the Union Address (Jan. 23, 2007), available at <http://www.whitehouse.gov/news/releases/2007/01/20070123-2.html> ¶ 27.

<sup>26</sup> Proposal Memorandum from J. Martel and W. Blackburn to P. Wright (Jan. 16, 2007) (on file with author) (proposing to endorse such things as attention to choice and design of space, encouragement of public transportation use by employees, and office recycling).

<sup>27</sup> For a more comprehensive treatment of sustainability; see, e.g., WILLIAM R. BLACKBURN, THE SUSTAINABILITY HANDBOOK (Envtl. L. Inst. 2007); JOHN C. DERNBACH, STUMBLING TOWARD

## 1. WHAT IS THIS ALL ABOUT?

Much of the twentieth century's economic activity utilizes resources in a way that cannot be sustained indefinitely.<sup>28</sup> These underlying resources will run out. Mined mineral resources represent an obvious instance of this sort of practice. For example, once all gold is extracted, or all oil pumped out, there will be no more of this resource, at least not in that location, at that cost, at that time.

Many practices do not need to be unsustainable, but nevertheless proceed unsustainably. As Jared Diamond documents in his popular book, *Collapse*, for example, many human societies, including ours, frequently over-harvest timber.<sup>29</sup> Humans cut down trees faster than forests regenerate.<sup>30</sup> In the United States today, many timber operators now practice "sustainable forestry," which treats trees as a standing crop that must be replenished over the crop cycle.<sup>31</sup> Similarly, without management controls, human societies over-fish many wild fisheries to the point that supermarkets now widely sell farmed, not wild, fish.<sup>32</sup>

Thomas Malthus observes, in his 1798 *Essay on the Principle of Population*, that human populations increase geometrically, while the resources on which they depend (e.g., agricultural production) increase at best arithmetically.<sup>33</sup> Accordingly, the population is limited by the resource at some point, and consequentially, lower class existence always descends into misery (or worse) over time.<sup>34</sup> When resources become limited, their price goes up, and the search for new technologies or alternatives becomes more intense. Those who invent, adopt, or adapt the new technologies have the potential for relatively great economic success.<sup>35</sup>

Many individuals now believe that the global economy faces a period when a more "sustainable" delivery of the same goods and services will become increasingly valued. Whatever one believes about American habits, and the way that the American economy uses resources, the fact remains that there are only 300 million Americans.<sup>36</sup> Both China and India each host more than one billion inhabitants.<sup>37</sup>

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SUSTAINABILITY (Envtl. L. Inst. 2002).

<sup>28</sup> See Institute for Economic Analysis, *Towards the Integration of Economic Science*, <http://www.iea-macro-economics.org/int-ec-sci-pol.html> (last visited Mar. 17, 2007) (noting that "It has become obvious that continued depletion of economic resources at the present rate cannot be sustained indefinitely, particularly if the rest of the world attempts to achieve the present U.S. standard of waste").

<sup>29</sup> JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 487 (Viking 2005).

<sup>30</sup> See *id.*

<sup>31</sup> Yale School of Forestry & Environmental Studies, The Global Institute of Sustainable Forestry, <http://research.yale.edu/gisf/> (last visited Mar. 17, 2007) (promulgating its mission "to integrate, strengthen and direct the School's forestry research, education and outreach to address the challenges of sustaining forests in the 21st century and a globalized world").

<sup>32</sup> See MARK KURLANSKY, *COD: A BIOGRAPHY OF THE FISH THAT CHANGED THE WORLD* (Penguin Group 1998) (1997).

<sup>33</sup> THOMAS MALTHUS, *AN ESSAY ON THE PRINCIPLE OF POPULATION* 4 (1798), available at <http://www.esp.org/books/malthus/population/malthus.pdf>.

<sup>34</sup> *Id.* at 44.

<sup>35</sup> See e.g. National Energy Technology Laboratory, <http://www.netl.doe.gov/technologies/oil-gas/index.html>, (last visited Mar. 25, 2007) (describing new ways that company is adapting its technology to more efficiently procure rapidly-dwindling supplies of fossil fuels).

<sup>36</sup> United States Census Bureau, *Population Finder*, [http://factfinder.census.gov/servlet/SAFFPopulation?\\_submenuId=population\\_0&\\_sse=on](http://factfinder.census.gov/servlet/SAFFPopulation?_submenuId=population_0&_sse=on) (last visited Mar. 16, 2007) (estimating the current U.S. population just below 300 million).

<sup>37</sup> See China Population Development and Research Center, *China Population*,

The Chinese and Indian populations live in well-organized countries with the expressed goal of achieving first-world living standards.<sup>38</sup> With respect to current technology, first-world living standards are simply not achievable for the current first-world countries plus an additional two to three billion people.<sup>39</sup> There is not enough capacity in the world's environment to generate electricity, to power automobiles, to produce food, to construct buildings, or to do virtually anything else at the same per capita rate as the United States currently does.<sup>40</sup>

The demand by the poor and disadvantaged for improved material lives will not go away, nor should it. Therefore, one might bet that enterprises that invent, adopt, or adapt more "sustainable" technologies will prevail economically. These enterprises will be able to deliver goods and services to an increasing market when older technologies face cost or supply constraints.

Other trends reinforce that conclusion. Some environmental constraints limit economic development and affect (or are perceived to affect) the whole planet. To take an obvious example, a broad consensus likely exists among scientists that addition of carbon dioxide and other greenhouse gasses to the atmosphere did cause, and will continue to cause, global climate change.<sup>41</sup>

Pressure to address such a global issue comes in two forms. First, one can anticipate conventional regulatory requirements to be imposed upon emissions of greenhouse gases. The United States and many other nations entered into the United Nations Framework Convention Climate Change ("UNFCCC").<sup>42</sup> The United States *did not* ratify the 1997 Kyoto Protocol to the UNFCCC, but the Protocol is in effect in most other countries (including Europe, Canada, and Latin America), and imposes legally binding requirements.<sup>43</sup> Regulatory pressure to reduce emissions of greenhouse gases currently exists with many U.S. trading partners.<sup>44</sup> The same

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<http://www.cpirc.org.cn/en/eindex.htm> (last visited Mar. 16, 2007) (totaling the current Chinese population at over 1.3 billion); United States Central Intelligence Agency, *The World Factbook: India*, <https://www.cia.gov/cia/publications/factbook/print/in.html> (last visited Mar. 16 2007) (recording the population in India at just over 1 billion as of July 2006).

<sup>38</sup> *In Conversation with Robyn Williams*, (Radio National Broadcast Feb. 23, 2006) (transcript available at <http://www.abc.net.au/rn/science/incon/stories/s1569542.htm>) (interview in which Professor Jared Diamond extrapolates that if China, and other countries, meet its goals of first class living standards "which means first-world consumption rates and first-world sewage output rates...").

<sup>39</sup> *See id.* (Diamond noting that "if India as well as China and the rest of the developing world catches up to Australia that increases world consumption by a factor of eleven... the world [cannot] support nine times eleven, or ninety ninety billion people in the future").

<sup>40</sup> *See id.*

<sup>41</sup> *See* Committee on the Science of Climate Change, Division on Earth and Life Sciences, National Research Council, *Climate Change Science: An Analysis of Some Key Questions* (National Academy Press 2001), available at [http://www.nap.edu/catalog/10139.html?onpi\\_webextra6](http://www.nap.edu/catalog/10139.html?onpi_webextra6); *see also* Massachusetts v. U.S. Environmental Protection Agency, 127 S. Ct. 1438, U.S. LEXIS 3785 \*80 (2007) (petitioners arguing that domestic motor vehicles emit carbon dioxide and other greenhouse gases which in turn contribute to global warming); Intergovernmental Panel on Climate Change, *Climate Change 2001: The Scientific Basis*, available at [http://www.grida.no/climate/ipcc\\_tar/wg1/pdf/WG1\\_TAR-FRONT.PDFv](http://www.grida.no/climate/ipcc_tar/wg1/pdf/WG1_TAR-FRONT.PDFv).

<sup>42</sup> UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, 1771 U.N.T.S. 107 (May 9, 1992), available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

<sup>43</sup> KYOTO PROTOCOL TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, (1997) available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

<sup>44</sup> Martin Smith & Gord Lambert, *Two Companies on Leading Edge in Emissions Trade*, 3 USIA Elec. J. (1998) (describing the "use of private market mechanisms, such as emissions trading, has been viewed by many economists and policy makers as a means for achieving difficult environmental goals in an

regulatory pressure also exists in eleven states (with two additional observers) in the northeastern United States (who in turn formed the Regional Greenhouse Gas Initiative (“RGGI”)),<sup>45</sup> as well as in California and four other western states.<sup>46</sup> Thus, any entity doing business outside the country will encounter a regulatory scheme designed to reduce carbon and other emissions in New England, the Middle Atlantic, New York, or the far West. The rules forming those regulatory structures primarily affect electricity generation,<sup>47</sup> but they may also affect a number of other businesses that can sell “credits,” so pressures and opportunities exist. One may also expect that the federal government would impose similar pressures and opportunities.<sup>48</sup>

Second, even without regulatory pressure, market pressure exists to reduce emissions of greenhouse gasses. Recall the BP and GM advertising campaigns. These company targets these campaigns at consumers and, possibly to potential investors in BP and GM stock.<sup>49</sup> These corporations believe that associating themselves and their products with sensitivity to greenhouse gas emissions will induce consumers to buy more of their products or more of their stock. The companies assume that consumers have a desire to be “greener” and to “do their part.”<sup>50</sup> This desire is real, and is fed by government inaction. As a result, the market meets this demand.

For these reasons, many now believe that enterprises which: (a) practice their own business in a more sustainable manner or (b) provide products or services that allow others to behave more sustainably, will have lower costs and higher profits.<sup>51</sup> These companies will prosper economically; therefore, their products and stock are relatively better investments for consumers. The demand for a capital share of more sustainable enterprises (in both senses) should increase. Accordingly, enterprises seeking to increase shareholder value should wish to be perceived as “sustainable.”

At this particular historical juncture, these environmental pressures coincide with

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efficient manner”).

<sup>45</sup> Regional Greenhouse Gas Initiative, (RGGI), <http://www.rggi.org> (last visited on Apr. 13, 2007) The participating states are Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Maryland. Observers include Massachusetts, Pennsylvania. *See id.*

<sup>46</sup> California Global Warming Solutions Act, CAL. HEALTH & SAFETY CODE §§ 38500-599 (West Supp. 2007); *See* OR. REV. STAT. § 469.503 (SUPP 1998); WASH. REV. CODE ANN. § 80.70.020 (WEST SUPP 2007); HAW. REV. STAT. ANN. § 226-18 (LEXISNEXIS 2005); WYO. STAT. ANN. § 35-11-202 (2005).

<sup>47</sup> *See e.g.*, Regional Greenhouse Gas Initiative, <http://www.rggi.org/about.htm> (last visited Mar. 25, 2007) (describing goals, mission, history and structure of RGGI, stating that RGGI was designed initially to cover carbon-dioxide emissions by power plants in the region, but that it may be extended to include other sources of greenhouse gas emissions in addition to greenhouse gases other than carbon dioxide).

<sup>48</sup> *See generally*, AN INCONVENIENT TRUTH (Paramount Classics 2006) (exploring the effects of global warming and chronicling former U.S. vice-president Al Gore’s commitment to reducing the effects of global climate change).

<sup>49</sup> *See* Marketing and Innovation Blog, *Measure Your (Carbon) Footprint*, <http://visionarymarketing.wordpress.com/2006/03/15/measure-your-carbon-footprint/> (last visited Mar. 15, 2007) (describing the new BP campaign as “social and ethical marketing”); *see also* BP, *Carbon Footprint Calculator*, <http://www.bp.com/extendedsectiongenericarticle.do?categoryId=9008204&contentId=7015209> (last visited Mar. 15, 2007).

<sup>50</sup> *See id.*

<sup>51</sup> *See e.g.* The GRI Register, BP, *Making Energy More – The Sustainability Report 2005* at 1 (2005), available at <http://www.corporateregister.com/search/report.cgi?num=15081&com=0> (asserting, in the BP Sustainability Report, that taking steps to improve sustainability directly enable businesses to prosper economically).

geopolitical pressures. Many of the world's oil reserves are controlled by regimes that are not friends of the United States.<sup>52</sup> Accordingly, for some kinds of "sustainability" strategies, environmental stewardship and national defense coincide.

Many other factors support attention to environmental issues within a business enterprise. Good corporate stewardship may decrease materials costs, decrease accidents and illnesses, increase morale, and generally allow those in charge of the business to feel better about what they do.<sup>53</sup> These factors reinforce the underlying economic bet on which businesses hope to capitalize.<sup>54</sup>

## 2. WHAT DOES THIS MEAN FOR CORPORATIONS THAT ARE NOT IN THE FORTUNE 100?

A quick review of the reports posted on the GRI website demonstrates that elaborate sustainability reporting costs a good amount.<sup>55</sup> Unless the enterprise already has other systems on which sustainability or corporate social responsibility accounting easily graft, trying to emulate the largest organizations may not make sense.

This presumption does not mean that the benefits of "greenness" cannot accrue to a much smaller organization. Indeed, the "greenest" enterprises in the economy are very small.<sup>56</sup> In order for a smaller company to benefit from "greenness," the enterprise should determine where it can accrue the largest desired effect from investment in a sustainability program.

First, the company should decide who it wishes to impress. Is the enterprise looking to improve its standing with customers, investors, regulators, foreign partners, employees, or someone else? Different audiences respond to different information. For example, regulators may require formal programs, investors may require formal accounting, and customers may require a "green" certification.<sup>57</sup> On the other hand, if investors care only about decreased costs, reporting on sustainability may yield no benefit, and the only thing an enterprise should measure is the cost savings, if any, from reduced resource use.

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<sup>52</sup> Energy Information Administrative, Country Analysis Briefs, <http://www.eia.doe.gov/emeu/cabs/contents.html> (last visited Mar. 30, 2007) (offering an interactive website detailing the world's oil production by country; noticeably many countries with the largest productions of oil are currently not friends with the U.S.).

<sup>53</sup> See Claudia H. Deutsch, *Companies and Critics Try Collaboration*, N.Y. TIMES, May 17, 2006, at G1 (finding that "global warming, endangered forests, dwindling water supplies and scary new technologies" have motivated corporations to work with environmentalists to protect the future).

<sup>54</sup> One director for a large brokerage firm succinctly remarked that "[i]f you can channel greed, for lack of [a] better term, you are going to clean up the environment a whole lot faster than a government saying thou shalt reduce pollution." Vikas Bajaj, *Are Storm Clouds Massing? These Traders Need to Know*, N.Y. TIMES, May 17, 2006, at G2.

<sup>55</sup> See, e.g. The GRI Register, BP, *Making Energy More – The Sustainability Report 2005* at 1 (2005), at <http://www.corporateregister.com/search/report.cgi?num=15081&com=0> (stating that the need for a sustainable environment must be satisfied to "fuel human progress and economic growth".)

<sup>56</sup> Although smaller companies have less financial resources with which to develop technology that will reduce pollution, they also give off a much smaller volume of pollution than large, multi-national firms. See JOHN C. DERNBACH, *STUMBLING TOWARDS SUSTAINABILITY* 549-554 (Env'tl. L. Inst. ed., 2002) (describing the methods used to increase compliance with environmental laws).

<sup>57</sup> Nat'l Research Council, *Global Environmental Health in the 21<sup>st</sup> Century: From Governmental Regulation to Corporate Social Responsibility: Workshop Summary* 26 (National Academies Press 2007), available at <http://books.nap.edu/openbook.php?isbn=0309103800>.

Second, the enterprise should decide where its opportunities lie. Does it have an inherently “green” business? For instance, a wind farm appears “sustainable” even if its construction is exactly the same as any other building project.<sup>58</sup> Does it have a “greener” way of doing what has already been done? Does it know *why* this method is “greener?” Many individuals and businesses criticize excessive packaging of consumer products.<sup>59</sup> A manufacturer, distributor, or retailer may find that the “greenness,” and, indeed, the cost savings, associated with reduced packaging comes not from saving paper or plastic (which, after all, are relatively cheap), but instead in saving space in a shipping container, on a truck, or in the store. Reducing truck trips may be more important economically and environmentally.<sup>60</sup> Similarly, a more durable product may use less energy amortized over its lifetime than a more energy efficient product, if the energy cost of production is high relative to the energy cost of use.<sup>61</sup>

Third, the business should craft a sustainability strategy to make apparent the enterprise’s “green” characteristics to the desired audience.

### 3. ELEMENTS OF A SUSTAINABILITY STRATEGY AND THE LEGAL ISSUES THEY ENTAIL.

#### a. Energy

Many sustainability programs focus heavily on energy used or produced within an enterprise.<sup>62</sup> For this purpose, one may usefully focus separately on: (i) electricity; (ii) vehicle fuel; and (iii) other fuel used in the process. Ultimately, a higher degree of energy efficiency tends to be “greener.”<sup>63</sup> The source of the energy also attracts a lot of attention. Burning fossil fuels is inherently unsustainable, because the fuels do not renew.<sup>64</sup> Moreover, while burning anything tends to

<sup>58</sup> See Heartland Institute, Louisiana Wind Farm Economically Unviable, <http://www.heartland.org/Article.cfm?artId=16202> (last visited Mar. 13, 2007) (discussing the costs of generating wind power, which can cost more than power produced by conventional methods).

<sup>59</sup> See Earth 911, Save Money and the Environment, <http://www.earth911.org/master.asp?s=lib&a=shopsmat/shop.inc> (last visited Mar. 13, 2007) (educating the public on how to decrease costs and help the environment by buying products in large sizes to avoid excess packaging).

<sup>60</sup> See e.g., ENVIRONMENTAL PROTECTION AGENCY, WASTEWISE, 12 (May 1995), available at <http://www.epa.gov/wastewise/pubs/wwupda2.pdf> (explaining that the restaurant McDonalds saved money by “[r]educing the raised designs on napkins, which allowed 23 percent more napkins to fit into a shipping container, and eliminated 294,000 pounds of corrugated packing boxes and 150 truckload shipments”).

<sup>61</sup> See Canadian Office of Greening, Environmental Product Terminology, <http://www.pwgsc.gc.ca/greening/text/proc/enviro5-e.html> (last visited Mar. 28, 2007) (providing that “[d]urable products are environmentally preferred, in principle, because they can be reused or upgraded, they keep resources from landfill, and reduce the need for the consumption of raw materials”).

<sup>62</sup> See e.g., Wal-Mart Stores – Environment, <http://www.walmartstores.com/GlobalWMStoresWeb/navigate.do?catg=217> (last visited Mar. 28, 2007) (discussing Wal-Mart’s sustainability program).

<sup>63</sup> See e.g., Robin Pogrebin, *Putting Environmentalism on the Urban Map*, N.Y. TIMES, May 17, 2006, at G7 (explaining the stringent Battery Park City Authority’s “green guidelines” – green buildings must be 30 percent more energy efficient than New York State building code demands).

<sup>64</sup> See Matthew L. Wald, *What’s Kind to Nature Can Be Kind to Profits*, N.Y. TIMES, May 17, 2006, at G1 (discussing companies such as BP and Walmart’s efforts to replace carbon dioxide producing energy sources with renewable energy).

increase emissions of greenhouse gases, the carbon in fossil fuels was removed from the atmosphere hundreds of millions of years ago.<sup>65</sup> This *newly* emitted carbon adds to the total amount of carbon circulating among the atmosphere, the oceans, and the biomass.<sup>66</sup> On the other hand, burning fuel derived from crops could be considered a release of carbon into the atmosphere that was previously taken out in the last growing season.<sup>67</sup> The standing crop would remove roughly the same amount in the current period.<sup>68</sup> Therefore, the lower the contribution of fossil fuels to an enterprise's energy use, the more "sustainable" that enterprise may appear.

In many jurisdictions, including Pennsylvania, state law mandates inclusion of "renewable" or "alternative" energy in the mix of sources of *electricity* sold to consumers in the jurisdiction.<sup>69</sup> An entity (typically a utility) that markets electricity to consumers in Pennsylvania must meet the "portfolio standard" established by the Alternative Energy Portfolio Standards Act ("Act 213" or "AEPSA").<sup>70</sup> The portfolio standard is the required minimum proportion of electricity generated from (a) solar photovoltaic technology, (b) "Tier I" sources including solar photovoltaic technology, and (c) "Tier II" sources.<sup>71</sup> These percentages increase over time until 2020. By that time, Pennsylvania electricity will have to be 0.5% solar photovoltaic, 8.0% Tier I (including solar photovoltaic), and 10.0% Tier II.<sup>72</sup>

An electricity retailer that does not meet the portfolio standard may purchase "credits" from a retailer (or a power producer that does not retail) to satisfy the standard.<sup>73</sup> These "green tags" transfer "greenness" from one electron to another.<sup>74</sup> A wind farm generates one-hundred percent (100%) alternative energy -- wind is a "Tier I" alternative energy.<sup>75</sup> The wind farm will then sell that electricity to the grid. Even if the owner of the wind farm is directly regulated by AEPSA, unless that owner has *other* generation assets, it will be generating more "green tags" than it needs to satisfy the portfolio standard.<sup>76</sup> The farm can convert some of its wind energy into non-"green" electricity by selling its credits to an electricity retailer selling conventionally generated power. These sorts of programs, with significant local variation, exist in 21 states and the District of Columbia according to the Union

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<sup>65</sup> See Gordon McBean, et al, *The Science of Climate Change What Do We Know*, 2 ISUMA 4, Winter 2001, available at [http://isuma.net/v02n04/mcbean/mcbean\\_e.shtml](http://isuma.net/v02n04/mcbean/mcbean_e.shtml) (noting that carbon was stored in rocks hundreds of millions of years ago).

<sup>66</sup> See *id.* (stating that the combusted geologic carbon is added to the components of the carbon cycle).

<sup>67</sup> See US Environmental Protection Agency, SmartWay Grow & Go, <http://www.epa.gov/SmartwayLogistics/growandgo/documents/factsheet-biodiesel.htm> (last visited Mar. 15, 2007) (discussing the benefits of using biofuels, which includes reducing emission of greenhouse gas).

<sup>68</sup> See *id.*

<sup>69</sup> 73 PA. CONS. STAT. §§1648.1-1648.8 (2006).

<sup>70</sup> *Id.*

<sup>71</sup> §1648.3(a)(1).

<sup>72</sup> §§1648.3(b)(1), (b)(2)(e), (c)(4).

<sup>73</sup> §§1648.3(e)(4).

<sup>74</sup> *Id.*

<sup>75</sup> 73 PA. CONS. STAT. §1648.2.

<sup>76</sup> See 73 PA. CONS. STAT. §1648.3 (e)(2)(ii) (2006) (setting up a commission to regulate credit transfer, tracking, and reporting); (e)(4)(ii) (defining credit as one megawatt hour self-generated, bought with other energy, or bought through a separate instrument).

of Concerned Scientists.<sup>77</sup>

An entity that wishes to become more “sustainable” has two sorts of opportunities created by portfolio standards. First, it can seek to *consume* predominantly “alternative” or “renewable” electricity. That does not necessarily mean that it has to vet the generation of each electron it acquires from its local utility. Instead, it can purchase and retire credits that, for all practical purposes, convert its conventional energy use into alternative energy use.<sup>78</sup>

Second, an entity can actually produce electricity for its own use or for sale back to the grid using alternative energy sources. In this way, it creates a “green” asset – the credit – which not only has value, but whose creation adds to the “sustainability” of the enterprise.

Section 211(o) of the Clean Air Act,<sup>79</sup> added by the Energy Policy Act of 2005, requires the Environmental Protection Agency (“EPA”) to establish a similar portfolio standard for the proportion of renewable fuels, like ethanol, within the mix of liquid fuels for vehicles sold in the United States.<sup>80</sup> EPA recently proposed a program for establishing that standard on an annual basis.<sup>81</sup> For 2007, the standard would be 3.71 percent,<sup>82</sup> but certain sorts of biofuels receive special credit, so the actual proportion sold in any given year may not exactly equal that amount. If adopted, this program will create the same sorts of incentives for operators of cars and trucks as the state programs do for users of electricity.<sup>83</sup>

The principal legal issues under these programs arise from the transactions by which entities buy and sell credits and electricity.<sup>84</sup> Presumably, similar issues will arise under the Renewable Fuels Program.

Initially, as with many other issues in this area, in order for a market to exist, there must be some mechanism for knowing that “green” electrons are “green,” and that their “greenness” has not already been transferred. In each state with a portfolio standard, the legislation authorizes creation of a registry that issues and retires credits. In Pennsylvania, the task of setting up those implementation procedures has fallen to the Public Utilities Commission,<sup>85</sup> which opened an administrative docket to issue the necessary orders and rules to implement AEPSCA.<sup>86</sup>

“Greenness” of electrons is not necessarily obvious. For example, in

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<sup>77</sup> See Union of Concerned Scientists, State Clean Energy Maps and Graphs: Renewable Energy Standards, [http://www.ucsusa.org/clean\\_energy/clean\\_energy\\_policies/state-clean-energy-maps-and-graphs.html](http://www.ucsusa.org/clean_energy/clean_energy_policies/state-clean-energy-maps-and-graphs.html) (last visited Mar. 13, 2007) (depicting the states with renewable energy standards and giving the standards and goals for each of those states).

<sup>78</sup> See, e.g., 73 PA. CONS. STAT. § 1648(e)(4)(ii).

<sup>79</sup> Clean Air Act, 42 U.S.C. § 7545(o) (2005).

<sup>80</sup> *Id.*

<sup>81</sup> Regulation of Fuels and Fuel Additives: Renewable Fuel Standards Program, 71 Fed. Reg. 55,552 (Sept. 22, 2006) (to be codified at 40 C.F.R. pt. 80).

<sup>82</sup> Regulation of Fuels and Fuel Additives, 71 Fed. Reg. at 55, 561.

<sup>83</sup> See discussion *supra* page 13.

<sup>84</sup> See, e.g., Cal. ex rel. Lockyer v. Powerex Corp., 2006 U.S. Dist. LEXIS 19634, 2-3 (9th Cir. 2006) (holding that federal law governs the field of wholesale energy sales).

<sup>85</sup> See 66 PA. CONS. STAT. ANN. § 1501 (2007) (providing that public utilities “shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities”).

<sup>86</sup> See 37 Pa. Bull. 29 (Jan. 6, 2007); see also 52 PA. CODE § 69.1 (2007) (stating that a public utility “shall use every means reasonably available to monitor and enforce vendor adherence to all aspects of fuel procurement agreements”).

Pennsylvania, “Tier I” energy sources include: solar photovoltaic, wind, low-impact hydroelectric, geothermal, biologically derived methane gas, fuel cells, biomass energy, and coal mine methane power production. Thus, it is not difficult to conceive of projects that might be controversial. Controversy breeds legal disputes over the content of the implementing rules and guidance, and their application. Moreover, that controversy creates issues in contracting for either energy or credits, as well as for construction of projects at a facility. For example, if someone approaches a business proposing to generate energy by digesting used paperboard packaging containers, would that qualify as “Tier I” electricity? Who takes the risk? What if the classification is challenged?

Tier II in Pennsylvania raises even more questions. The types of projects that qualify include waste coal derived energy, high-impact hydroelectric dams, and other similar projects. Pennsylvania already meets its Tier II portfolio standard for 2020,<sup>87</sup> but companies may still want to take credit for the “greenness” of those projects.

Considerable controversy – and therefore legal issues – can arise over “double credit” for the same alternative energy. Suppose that a client chooses to put solar photovoltaic cells on the roof of its store. If the client does not retail electricity, it has no use for the “credits” generated along with the electrical power. Accordingly, it may wish to sell them. At that point, it will wish to take credit for “green” energy production *as will its credit buyer*. Only one, the buyer, can take credit under the portfolio standard for the green energy. It is unclear whether the credit seller would violate rules of the Securities and Exchange Commission (SEC), on financial reporting, or rules of the Federal Trade Commission, on truth in advertising, if it reports the same energy production to its investors<sup>88</sup> or, possibly, if it advertises that its store is “powered by solar energy.” Presumably the buyer of the credits can do these same things.

Notice that these incentives to consider energy use and distributed energy production in an enterprise’s business strategy coincide with the incentives to participate in the energy market generally during a time of high prices. A store with the roof suitable for solar power production (or for a wind turbine or something similar) has an incentive to consider that sideline without the incentives created by portfolio standards legislation.<sup>89</sup> Those who participated in cogeneration transactions will recognize the similarities here, although many of those transactions have been driven by tax incentives.<sup>90</sup> Thus, a sustainability strategy that incorporates energy use or energy production decisions coincides with the incentives imposed by energy costs.

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<sup>87</sup> See John Hanger, *E<sup>3</sup>- Timely Issues About Pennsylvania’s Environment, Energy, & Economy*, 6 PENN FUTURE<sup>3</sup> 23, Dec. 2, 2004, available at [http://www.pennfuture.org/docs/vol6no23\\_120904.pdf](http://www.pennfuture.org/docs/vol6no23_120904.pdf) (discussing Pennsylvania’s passage of the AEPS act and its effect on Tier II energy sources).

<sup>88</sup> That the seller of credit is regulated by the SEC assumes that the seller runs a publicly-traded corporation.

<sup>89</sup> See discussion *supra* page 35.

<sup>90</sup> Database of State Incentives for Renewables & Efficiency, Pennsylvania Incentives for Renewable Energy, <http://www.dsireusa.org/library/includes/map2.cfm?CurrentPageID=1&State=PA> (last visited Mar. 30, 2007).

b. Real estate and building design

My firm's Philadelphia offices looked over the construction of what is touted as the world's largest "green building" at 17<sup>th</sup> and Kennedy Boulevard in Philadelphia.<sup>91</sup> Comcast Corporation will occupy that building.<sup>92</sup> Comcast, or the building's developer, Liberty Property Trust, must perceive advantages to being in, or to owning, a "green" building.<sup>93</sup> Similarly, PPL Corporation features its "green" headquarters, which is the Plaza at PPL Center developed by Liberty Property Trust.<sup>94</sup> The Pennsylvania Department of Environmental Protection induces the entire Commonwealth government to participate in the Governor's Green Government Center that promotes location of state offices in green buildings.<sup>95</sup>

Many features of building design can improve the sustainability of the building's use.<sup>96</sup> Many of the features involve energy use, but other features of the design, such as reduction of water use, may prove equally significant.<sup>97</sup> For example, readers may recall the controversy surrounding the installation of waterless urinals in the Comcast Center.<sup>98</sup>

Similar kinds of principles may be applied to land development, not just to the buildings themselves.<sup>99</sup> Location of trees, buffering around water bodies, means of wastewater treatment, and the like can dramatically affect the environmental "footprint" of a project.<sup>100</sup>

A client who wishes to locate in a "green building" faces the problem of determining whether a building is, in fact, "green." A private organization, the United States Green Building Council, establishes a trademarked building rating

<sup>91</sup> Mr. Mandelbaum's firm, Ballard Spahr Andrews & Ingersoll, LLP, is located at 1735 Market Street in Philadelphia. Ballard Spahr Andrews & Ingersoll, [http://www.ballardspahr.com/offices/office\\_detail.asp?ID=11](http://www.ballardspahr.com/offices/office_detail.asp?ID=11) (last visited Mar. 14, 2007). The new Comcast Center will occupy 17<sup>th</sup> and Kennedy Boulevard. Emporis Buildings, <http://www.emporis.com/en/wm/bu/?id=102154> (last visited Mar. 14, 2007).

<sup>92</sup> Emporis, *supra* note 97.

<sup>93</sup> "In the January 3, 2005 press release announcing the lease, Comcast does not mention that the building will be "green." Comcast Press Releases, <http://www.cmcsk.com/phoenix.zhtml?c=147565&p=irol-newsArticle&ID=658162&highlight=comcast%20center> (last visited Mar. 14, 2007). However, Liberty features its intention to make the building "green" in the building fact sheet. *See Comcast Center Fact Sheet*, [http://media.corporate-ir.net/media\\_files/irol/14/147565/FactSheetCC.pdf](http://media.corporate-ir.net/media_files/irol/14/147565/FactSheetCC.pdf) (last visited Mar. 14, 2007) (stating that the building will feature a sustainable building design with a goal of achieving certification from the U.S. Green Building Council).

<sup>94</sup> PPL Environment & Community, <http://www.pplweb.com/community+partners/our+environment/plaza.htm> (last visited Mar. 14, 2007).

<sup>95</sup> Governor's Green Government Council, <http://www.gggc.state.pa.us/gggc/site/default.asp> (last visited Mar. 14, 2007).

<sup>96</sup> *Id.*

<sup>97</sup> UNITED STATES GREEN BUILDING COUNCIL, LEED GREEN BUILDING RATING SYSTEM FOR CORE & SHELL DEVELOPMENT VERSION 2.0 29-33 (July 2006), <http://www.usgbc.org/ShowFile.aspx?DocumentID=1728> (last visited Apr. 13, 2007) [hereinafter "USGBC Report"].

<sup>98</sup> Inga Saffron, *Phila. No-Flush Standoff Unclogged, With a Catch*, PHILA. INQUIRER, Apr. 5, 2006, at A1.

<sup>99</sup> *See generally*, John Randolph, ENVIRONMENTAL LAND USE PLANNING AND MANAGEMENT (Island Press 2004) available at <http://books.google.com/books?id=U1gLoLxFswC&dq=environmental+footprint+of+land+design> (last viewed March 28, 2007) (discussing the concept of Environmental Land Use Management which promotes approaches that mitigate the impact of land use practices).

<sup>100</sup> *See USGC Report, supra* note 104.

system, Leadership in Energy and Environmental Design (“LEED”)®.<sup>101</sup> LEED provides the most commonly used way of determining whether a building is more or less “green” or “sustainable.”

If greenness matters to the person leasing or purchasing the building, the contract must allocate responsibility for achieving green certification and consequences for failing to achieve greenness. Failures of the certification process can, in principle, lead to litigation. On the other hand, green design standards may run afoul of local building codes or land use ordinances. The most obvious local example involves evolving notions of appropriate storm water management. Older codes may treat storm water as the “common enemy” and may promote diversion of runoff into streams rapidly. That design, of course, contributed to recent flooding in this area and is now discouraged.<sup>102</sup>

c. Risk

All public companies must consider risks to the corporation internally, and must report on those risks to their shareholders.<sup>103</sup> Among the risks faced by a company are exposure to new environmental regulation or to market conditions specific to some raw material or fuel. Thus, a company that burns natural gas for process steam may face different market risks than one that burns coal or landfill gas. Some believe that these risks should be considered by the appropriate committees of the board of directors and disclosed as part of financial reporting.<sup>104</sup> Whether or not that stance is appropriate, some companies believe that by reporting on their own performance, they can cast themselves in a better light than their competitors.

Of course, any evaluation of “sustainability” or “greenness” reported under this framework will touch on issues also reported under securities law. Lawyers will want to assure that nothing said in one context is inconsistent with something said in another context, and that the combination of reporting does not mislead regulators.

d. Regulators and enforcement

Appearing “green” may have significant benefits to an enterprise that requires regulatory approvals or might find itself facing such enforcement. A sustainability

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<sup>101</sup> See United States Green Building Council, [www.usgbc.org/DisplayPage.aspx?CategoryID=19](http://www.usgbc.org/DisplayPage.aspx?CategoryID=19) (last visited Apr. 14, 2007) (answering frequently asked questions about what LEED is, how LEED is developed, and the steps for attaining LEED certification).

<sup>102</sup> See, e.g., PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA STORMWATER BEST MANAGEMENT PRACTICES MANUAL (Dec. 2006), available at <http://www.dep.state.pa.us/dep/deputate/watermgmt/wc/subjects/stormwatermanagement/default.htm> (follow hyperlink for Manual name; then follow “Login as our guest” hyperlink below “Visitors” tab) (last visited Mar. 14, 2007). DEP motivates the BMP manual as much by concerns over water quality as flooding. Storm water can cause a separate issue when it flows through combined sewers, and its management can affect the municipality’s ability to comply with the wastewater discharge permit governing its sanitary sewage system. So, in Philadelphia, the Water Department has promulgated storm water management regulations that have little to do with flooding, and a great deal to do with permit compliance.

<sup>103</sup> These obligations have many sources. See, e.g., 15 U.S.C. § 7241 (2007).

<sup>104</sup> See, e.g. The Global Reporting Initiative home page, [www.globalreporting.org](http://www.globalreporting.org) (last visited March 22, 2007)(stating that, “The Global Reporting Initiative’s (GRI) vision is that reporting on economic, environmental, and social performance by all organizations becomes as routine and comparable as financial reporting.”).

policy may also increase enforcement risks.

Sustainability strategies or programs are, at some level, elaborations of, or related to, environmental management systems. The International Organization for Standardization publishes a standard for environmental management systems.<sup>105</sup> ISO 14001 calls for enterprises to set up internal systems to measure environmental performance and to seek “continual improvement.”<sup>106</sup> Regulators urge businesses to adopt environmental management systems.<sup>107</sup> The federal regulators offer mitigation of penalties for businesses that adopt systems like ISO 14001.<sup>108</sup>

One expects that an enterprise that appears more “sustainable” should have better success obtaining approvals for new projects and avoiding draconian enforcement. Certainly, the experience in Pennsylvania over the past few years suggests that projects which appear to advance an environmental goal will obtain permits (even over environmental groups’ opposition to the project). For example, in *Groce v. Department of Environmental Protection*, a waste coal-fired power plant received air permits from the Department of Environmental Protection despite sustained objection from several national advocates.<sup>109</sup> The company then prevailed on appeal, in part because of the environmental benefits of burning large waste coal piles, which could serve as a fuel source.<sup>110</sup> Similarly, the Department of Environmental Protection generally explores the net carbon emissions of new energy projects, even though Pennsylvania is neither a participating member of RGGI, or otherwise subject to any greenhouse gas regulatory structure. Enterprises looking to capitalize on this environmental “good will” will see an advantage in sustainability programs.

Of course, as with any corporate policy, failure to comply can make any accident, violation, or other problem worse. It is one thing to fail; it is another to claim success while failing. Therefore, in deciding how to craft sustainability programs, lawyers must assess the extent to which their clients’ claim of “greenness” actually increases exposure.

The issue becomes particularly acute for businesses operating in multiple jurisdictions with different environmental standards, or for enterprises involving multiple lines of business. Many companies will measure environmental performance by the number of times their operations exceed the standards in their permits. However, the standards that comply with regulations in one jurisdiction may not comply with the regulations of a different jurisdiction. The company needs a good explanation for differing performance in different locations. In addition,

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<sup>105</sup> International Organization for Standardization [ISO], ENVIRONMENTAL MANAGEMENT SYSTEMS -- REQUIREMENTS WITH GUIDANCE FOR USE, ISO 14001 (1996 and revised ed. 2004).

<sup>106</sup> *Id.*

<sup>107</sup> See ENVIRONMENTAL PROTECTION AGENCY, EPA POSITION STATEMENT ON ENVIRONMENTAL MANAGEMENT SYSTEMS (Dec. 13, 2005), available at <http://www.epa.gov/ems/docs/positionstatement-20051215.pdf> (noting that the EPA will promote the widespread use of Environmental management Systems).

<sup>108</sup> Guidance on the Use of Environmental Management Systems in Enforcement Settlements (June 12, 2003), available at [www.epa.gov/compliance/resources/policies/incentives/ems/emssettlementguidance.pdf](http://www.epa.gov/compliance/resources/policies/incentives/ems/emssettlementguidance.pdf).

<sup>109</sup> *Groce v. Department of Environmental Protection*, EHB No. 2005-246-R (Pa. Env'tl. Hrg. Bd. Nov. 22, 2006), aff'd, No. 2355 CD 2006 (Pa. Commw. Ct. Apr. 11, 2007).

<sup>110</sup> *Id.*

business units within a company may perform differently. The company needs a good explanation for variations in environmental performance across the company. Explanations typically exist, but lawyers often must assess the risk posed by highlighting “greenness,” or sustainability, in light of the company’s differences.

f. Is all this legal?

Publicly held corporations are supposed to make money for their shareholders. All of this interest in “sustainability” and corporate social responsibility generally may be said to violate management’s fiduciary duty to maximize shareholder value.<sup>111</sup>

In 2005, shareholders of Wendy’s International, Inc, sought to include on the proxy statement a proposal to require a “sustainability report to its shareholders.”<sup>112</sup> The Board of Directors sought to exclude the proposal under Rule 14a-8(i)(3) and (10) because it called for reporting what Wendy’s already made and was a vague and indefinite proposal.<sup>113</sup> By letter dated February 21, 2006, the SEC staff stated its inability to concur with the Wendy’s Board on these points.<sup>114</sup> Similarly, General Electric shareholders voted against a proposal calling for abandonment of Ecomagination.<sup>115</sup>

From these events, one can conclude that at least some form of corporate sustainability strategy passes muster under the United States securities laws. That is, a public company in this country can at least consider reporting on its sustainability performance and can highlight “greenness” as a corporate strategy. These examples do not suggest that *any* program passes muster, but some green programs seem to be compatible with the law.

#### 4. IS THIS “FLAVOR OF THE MONTH,” AND SO WHAT?

Those individuals encountering sustainability for the first time may believe that sustainability is no more than a corporate fad. In 2009, people may comment that “sustainability” was “*so* 2007.” Only time will tell if “sustainability” is merely the flavor of the month.

On the other hand, the issues addressed in a corporate sustainability strategy clearly have staying power. The demand for energy and for resources will surely put pressure on raw material prices for a long time. If a billion Chinese and a billion Indian citizens aspire to first-world living standards, something has to happen for them to be accommodated. As long as this country depends upon importing

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<sup>111</sup> *Id.*

<sup>112</sup> See TERENCE JEYARETNAM, SUSTAINABILITY FOR WHOM – SHAREHOLDERS OR STAKEHOLDERS?, available at [http://www.ap.urscorp.com/\\_pdf/Pub\\_Sustainability\\_for\\_stakeholder\\_and\\_shareholders.pdf](http://www.ap.urscorp.com/_pdf/Pub_Sustainability_for_stakeholder_and_shareholders.pdf), (2007) (noting that the extreme view of corporate fiduciary duty to shareholders is solely to make profits and not become concerned with interests of parties other than the corporate investors).

<sup>113</sup> Tiffany Kary, *Shareholder’s Favor More Disclosure*, Wall St. J., Oct. 4, 2006 available at <http://www.politicalaccountability.net/files/WSJ-10-04-06.pdf>.

<sup>114</sup> See Interfaith Center on Corporate Responsibility, *Wal-Mart 2006 Proxy Item #6: Sustainability Report*, at 1, available at [http://www.iccr.org/news/press\\_releases/pdf%20files/resolution6Sustain.PDF](http://www.iccr.org/news/press_releases/pdf%20files/resolution6Sustain.PDF).

<sup>115</sup> See GENERAL ELECTRIC, NOTICE OF 2007 ANNUAL MEETING AND PROXY STATEMENT 49-50, available at [http://www.ge.com/ar2006/pdf/ge\\_proxy2007.pdf](http://www.ge.com/ar2006/pdf/ge_proxy2007.pdf) (outlining the shareholder proposal to abandon Ecomagination and the Board of Directors recommendation to vote against this proposal, which the majority of shareholders eventually did).

petroleum from unstable and unfriendly parts of the world, geopolitical pressure against using oil will persist. Thus, while the lexicon may change, and the ways to alleviate problem may shift, I am reasonably convinced that these are issues with staying power. Enterprises that think about how to capitalize on “sustainability” (or any other term it may come to be called) will do relatively better than those companies that insist on doing business as if oil were only \$20/barrel, or as if only ten percent of the Chinese population used electricity.