

## Ethics for Environmental and Sustainability Reporting

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### Trends in Environmental and Sustainability Reporting

More and more organizations are engaging in environmental and sustainability reporting.

Some do so because of either legal or stakeholder-imposed requirements.<sup>1</sup> Others do so voluntarily. The number of companies publishing sustainability reports has increased substantially since 1996 – from a few hundred to several thousand. A study completed in 2012 found that over half of the companies on the S&P 500 published a sustainability report.<sup>2</sup> An even greater number of companies include environmentally-related information on their websites, in financial disclosure documents or in their marketing materials. Another recently-completed study of sustainability reporting in the United States found that 499 of the 500 companies in the S&P 500 made at least one sustainability-related disclosure in their financial filings.<sup>3</sup>

A sustainability report is commonly understood to be a report that provides information to the public about the economic, environmental, social performance of an organization. For purposes of this presentation, **environmental sustainability reports** are considered to include any publications of an organization which contain information about the environmental performance of that organization or its products that are intended to be read and used by the public and other external stakeholders. These reports may be published as stand-alone documents or they may be part of other documents such as annual reports, sustainability reports, white papers or marketing brochures. They would also include the publication of environmental assertions and claims on company websites, such as claims of third party certification to ISO standards such as ISO 14001.<sup>4</sup>

Although the majority of the formal sustainability reports are prepared by large global organizations, environmental sustainability reporting is not just a “big company” issue. Small companies are increasingly including environmental statements and claims on their websites and in their marketing and promotional materials. Many small companies are legally required to submit a variety of reports to federal, state and local agencies that include environmental information. In addition, individuals who may not be familiar with the issues involved in environmental sustainability reporting are increasingly relying on environmental claims and assertions in their decision-making. These include institutional investors, corporate purchasing agents, commercial building managers, construction contractors and marketing specialists.

There are several different sustainability reporting frameworks and/or standards that are currently being used by organizations in preparing their sustainability reports. These include –

- Global Reporting Initiative (GRI)<sup>5</sup>
- ISO 26000<sup>6</sup>
- ISO 14064<sup>7</sup>
- Carbon Disclosure Project Climate Disclosure Standards<sup>8</sup>
- AccountAbility AA1000<sup>9</sup>
- International Integrated Reporting Council International Framework<sup>10</sup>
- UN Global Compact<sup>11</sup>
- World Resources Institute (WRI) Greenhouse Gas Protocol<sup>12</sup>

Of these, the most commonly used is the Global Reporting Initiative. According to the results of the 2013 Ernst & Young and Boston College survey, more than two-thirds of the survey respondents indicated that their organizations use GRI guidelines or a GRI-referenced framework in the preparation of their sustainability

reports. The latest version of the GRI Sustainability Reporting Guidelines, the G4 Framework, was released in May 2013. The G4 Guidelines contain 34 specific standard disclosures in the environmental category covering topics from material and energy usage to compliance and supplier environmental assessment.<sup>13</sup>

Environmental sustainability reports are increasing being used by external parties in making financial decisions. This includes decisions such as whether to invest in a company or enter into a supplier relationship. Obtaining environmental certifications is a common requirement for becoming a supplier or for qualifying for green tax incentives. In the case of electronics recycling, certification may be a legally-imposed requirement and, therefore, necessary to stay in business. In 2009, Bloomberg added sustainability indices to its data terminals. Investors can see environmental indices relating to topics such as greenhouse gas emissions, water usage and employee fatalities right along with the financial data Bloomberg has traditionally reported.<sup>14</sup>

Given the increased reliance being placed on the claims and assertions made in environmental sustainability reports, there will be increasing pressure placed on organizations to ensure that the information reported is truthful and not misleading.

## Role of Environmental Attorneys and Consultants in Sustainability Reporting

Attorneys and consultants may be asked to assist their clients with environmental sustainability reports by:

- Advising a company about preparing a sustainability report or obtaining environmental certification
- Providing data that is used in preparing a sustainability report or for obtaining certification
- Reviewing a sustainability report for verification or assurance purposes
- Defending a company that has been accused of making deceptive or misleading environmental claims

### Service # 1 – Providing Advice on Sustainability Reporting

Because environmental sustainability reporting is a specialized and rapidly evolving field with several questionable certification schemes, it is important to have the knowledge and skills necessary to provide appropriate advice to your clients. Sustainability reporting is a rapidly expanding and evolving field with a number of potential risks, including:

1. **Meaningless Certifications.** There is a lack of consensus on the sustainability reporting requirements, and there is a lack of mandatory qualifications for those selling such services. There are a host of different environmental certifications being promoted and offered for sale. Organizations need to exercise due diligence when pursuing third-party certification. One sustainability certification scheme was found to be operated by a college student from his dorm room. The company had a very professional looking website. All you needed to do was send him a deposit check for \$5,000.00, and you were on your way to certification.
2. **Damaging Negative Publicity.** Because sustainability reports are made available to the public, they will be subject to public scrutiny. This creates the potential for negative publicity that can go viral through the use of social media. Examples of this include the Green My Apple campaign<sup>15</sup> launched against Apple by Greenpeace and the Campaign for Justice in Ecuador<sup>16</sup> targeting Chevron. There is even a website where individuals can rate the sustainability claims made by companies in their advertisements – [www.greenwashingindex.com](http://www.greenwashingindex.com).

- 3. Legal Liability.** There is potential legal liability for making false claims—including false environmental claims. Such claims may be considered fraudulent and may subject a company to governmental enforcement actions or civil lawsuits. “Greenwashing” may have been tolerated in this past but it is unlikely to be accepted in the future. The Federal Trade Committee (FTC) has issued *Green Guides* to help companies avoid making misleading environmental claims.<sup>17</sup>

## **Service #2 – Providing Data Used in a Sustainability Report**

The availability, accuracy and completeness of data have been identified as major challenges for organizations in preparing their sustainability reports.<sup>18</sup> Because of lack of expertise or lack of staffing resources, many companies turn to outside experts to help them collect and process the data used for sustainability reporting. There are two issues related to the collection and dissemination of information in environmental sustainability reports: too little data and too much data.

Since sustainability reports are disseminated to the public, they need to be truthful and not misleading. There may be no legal obligation to publicly report environmental metrics – such as air emissions, water usage and injury statistics – but, if such information is reported, it needs to be accurate. Unless an organization has validated the information management systems in place to collect and verify the data being used in preparing its sustainability report, it runs the risk of making inaccurate statements. For a large organization, this may mean collecting and analyzing a massive amount of data from multiple functional groups and numerous databases. In a May 2013 article published on GreenBiz.com, the director of one Greenhouse Gas Verification firm stated, “We find misstatements or non-conformances in 99 percent of the GHG Inventories that we verify.”<sup>19</sup>

The flip side of making environmental information public is concerns about confidentiality, privacy and security. The information included in environmental reports can be used for purposes other than simply assessing an organization’s commitment to environmental stewardship. Chemical storage and usage information could be used for planning terrorist attacks. Information in permit applications can be used for reverse engineering proprietary processes (i.e. industrial espionage). Information in sustainability reports can be “mashed up” with other publicly available data to provide increased scrutiny by regulators and other public interest groups.

## **Service #3 – Verification of Sustainability Reports**

As more companies begin publishing sustainability reports and as more external stakeholders use information from these reports in their decision-making, the demand for external verification of sustainability claims will increase. According to information in 2013 Ernst & Young and Boston College report, 77% of investors and financial analysts rated assurance of sustainability reports as either “important” or “very important.”

Some organizations are already having their entire sustainability report externally verified; others are only verifying certain sections of the report. Of those doing partial verification, the most common area that is externally verified is Greenhouse Gas (GHS) reporting. This is understandable since there are internationally - recognized standards for GHG verification. Although there are efforts underway to develop standards in other areas, such as water usage and worker injury reporting, standardization in these areas is still some way off.

There are a number of firms providing verification, or assurance, of sustainability reports. The majority of this work is currently being done by accounting firms; however, verification services are also being provided by consulting firms, engineering firms and certification bodies (i.e. registrars).

Since assurance and verification of environmental sustainability reports is a relatively new service, it is not yet clear what legal and ethical issues will arise. It is likely that the issues will be similar to those that are already associated with assurance of financial statements and the issuance of management system certifications such as those provided for ISO 9001 and ISO 14001.

#### **Service #4 - Litigation Related to Sustainability Reporting**

Litigation related to sustainability reporting is in its infancy but is likely to grow in importance as sustainability reporting increases. Cases have already been brought alleging fraud, misrepresentation, defamation and antitrust. The kinds of cases that have been brought can be broadly characterized as two types – cases involved a green certification scheme and cases involving claims of “greenwashing” – the making of unsupported or false environmental claims. Below are some examples of this budding area of the law.

### **Cases Involving Environmental Certifications**

#### **Fake “Tested Green” Certification<sup>20</sup>**

In its 2011 complaint, the Federal Trade Commission (FTC) alleged that Tested Green, and its owner Jeremy Ryan Claeys, engaged in deceptive business practices by selling over 45,000 worthless environmental certifications. According to the FTC, Tested Green did not actually test anything and would “certify” anyone willing to pay its fee. One of the means used to deceive customers was to claim that Tested Green was endorsed by two official-sounding associations. These organizations were not independent organizations, as Tested Green implied, but were instead organizations owned and operated by Claeys. The case was resolved with a consent order that prohibited the company and Claeys from engaging in fraudulent environmental certification.

#### **Lost Green Building Tax Incentives<sup>21</sup>**

In this 2011 case, a general contractor agreed to construct a condominium project that had been designed to obtain LEED Silver certification. The owner applied for a state income tax credit equal to 8 percent of the project cost. When the contractor failed to complete the work needed to obtain LEED Silver certification within the time required under Maryland’s green building tax credit program, the owner was unable to collect more than \$600,000 in tax credits. The owner then sued the general contractor.

#### **Defamation Case against a Certification Body<sup>22</sup>**

In 2009, the Basel Action network (BAN), an environmental non-governmental organization, established an environmental certification program for electronics recyclers called the e-Stewards program. Several governmental entities passed legislation requiring electronics waste to be processed by certified recyclers. Intercon Solutions applied for e-Stewards certification. In 2011, just before it was to obtain its certification, BAN issued a press release that stated it was denying certification to Intercon and alleged that waste from the Intercon facility in Chicago was being illegally exported to China. Intercon sued BAN and its director for making false and defamatory statements.

#### **Certification Program Called an Industry Front Group<sup>23</sup>**

In May 2013, ForestEthics, a forest protection non-governmental organization, filed a complaint with the Federal Trade Commission (FTC) alleging that the certification program developed and managed by the Sustainable Forestry Initiative (SFI) is deceptive and misleading. According to the complaint, the SFI program is not

independent but is, instead, funded almost entirely by the companies who are being certified – large timber and paper companies.

## Cases Dealing with Greenwashing Claims

### Investor Lawsuit over Sustainability Claims<sup>24</sup>

BP was one of the early adopters of green marketing and sustainability reporting, including being listed on the Dow Jones Sustainability Index (DJSI). Following the Deepwater Horizon explosion, BP was removed from the DJSI. In addition, a number of investor lawsuits were filed against it and its partners alleging fraud associated with misrepresentations there were alleged to have been made in various sustainability statements and other public statements. These cases have been consolidated into one action in the Southern District of Texas. Although many of the plaintiff investor's claims were dismissed in a February 2012 order, not all of them were. Of note, allegations of misrepresentations related to implementation of the recommendations in the Baker Report were allowed to remain. The Baker Report is the report of an internal safety investigation commissioned by BP following the explosions at BP's Texas City refinery.

### FTC Suits over Bamboo Textiles<sup>25</sup>

The Federal Trade Commission (FTC) has brought a number of cases alleging misleading "green" advertising and product claims. Several of these have involved clothing and other textile products labeled as bamboo and advertised as green, antimicrobial, biodegradable or made in an environmentally friendly manner. These claims were based on the properties of natural bamboo. In actuality, the products were made of rayon. Although bamboo fiber may have been one of the source materials for the rayon, rayon does not have the same properties as natural bamboo. Also, according to the FTC, there is nothing environmentally friendly about rayon production. The FTC has a publication on its website to assist businesses selling textiles labeled as bamboo entitled – *Avoid Bamboo-zling Your Customers*.

### Dole's Banana Lawsuit<sup>26</sup>

In 2012, Dole was sued for claiming it used sustainable agricultural practices that it did not, in fact, follow when it purchased bananas from growers in Guatemala. According to a press release on the website of the law firm that filed this lawsuit, the case was settled in January of 2013. As part of the settlement, Dole will participate in a water filtration project to assist local communities in Guatemala.

### Chevron Ethics Complaint<sup>27</sup>

In November 2012, Chevron filed an ethics complaint with the New York State Joint Commission on Public Ethics that accused Thomas DiNapoli, the New York State Comptroller, of accepting \$60,000 in campaign contributions from lawyers and other supporters of groups that are suing Chevron in Ecuador over alleged environmental damages. The Complaint alleges that the donations were made to influence DiNapoli to pressure Chevron, in his role of providing oversight of the state's pension fund which happens to include Chevron stock, to settle the lawsuit in Ecuador.

## Ethical Issues for Attorneys and Consultants in Sustainability Reporting

The table below sets out examples of the types of ethical canons for environmental consultants and ethical rules for Florida attorneys that may apply to sustainability reporting:

Ethical Concern	Consultants' Code of Ethics Provisions <sup>28</sup>	Attorneys' Rules of Conduct Provisions <sup>29</sup>
<b>Competence</b>	<p><b>CHMM</b> – "...shall function only within his or her area and level of competence."</p> <p><b>NSPE</b> – "Perform services only in areas of their competence."</p> <p><b>AICP</b> – "...shall not accept work beyond our professional competence...."</p>	<p>Rule 4-1.1—"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."</p>
<b>Truthfulness</b>	<p><b>CHMM</b> – "...shall demonstrate integrity, honesty and fairness in all activities"</p> <p><b>NSPE</b> – "Engineers shall be objective and truthful in professional reports, statements or testimony."</p> <p><b>AICP</b> – "We shall not deliberately or with reckless indifference fail to provide adequate, timely, clear and accurate information on planning issues."</p>	<p>Rule 4-4.1—"In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6."</p>
<b>Confidentiality</b>	<p><b>CHMM</b> – "...maintain the security and confidentiality of an employer's or client's confidential information."</p> <p><b>NSPE</b> – "Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes any present or former client or employer..."</p> <p><b>AICP</b> – "Nor shall we disclose such confidential information...."</p>	<p>Rule 4-1.6—"A lawyer shall not reveal information relating to representation of a client ... unless the client gives informed consent."</p>
<b>Protection of Public Interest</b>	<p><b>CHMM</b> – "The interests of individual clients and employers must be secondary to protecting public health and safety, national security and the environment."</p> <p><b>NSPE</b> – "Hold paramount the safety, health and welfare of the public." and "Engineers shall at all times strive to serve the public interest."</p> <p><b>AICP</b> – "Our primary obligation is to serve the public interest...."</p>	<p>Preamble—"As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession."</p>

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<sup>1</sup> In July 2010, France put in place a law that will require certain companies to include information on the social and environmental consequences of their activities into their annual reports (Grenelle II, Article 225). In the United States, there are a number of laws and regulations that require the submittal of publicly-available environmental reports. The most notable of these are the Emergency Planning and Community Right-to-Know (EPCRA) requirements for annual reporting on chemical storage and use.

<sup>2</sup> Ctr. for Corp. Citizenship and Ernst & Young, *Value of Sustainability Reporting*, at 5-6 (June 2013) (“Between 2007 and 2011, the GRI Sustainability Disclosure Database, which tracks sustainability reports submitted by companies grew, on average, more than 30% each year.”) accessed at [http://www.ey.com/Publication/vwLUAssets/ACM\\_BC/\\$FILE/1304-1061668\\_ACM\\_BC\\_Corporate\\_Center.pdf](http://www.ey.com/Publication/vwLUAssets/ACM_BC/$FILE/1304-1061668_ACM_BC_Corporate_Center.pdf)

<sup>3</sup> IRRC Institute and the Sustainable Investments Institute, *Integrated Financial and Sustainability Reporting in the United States*, (April 2013), accessed at <http://irrcinstitute.org/projects.php?project=63>.

<sup>4</sup> ISO 14001:2004, *Environmental management systems – Requirements with guidance for use*, is the most commonly-used standard for certification of an organization’s environmental management system. Many organizations refer to their ISO 14001 certifications on their websites, in their marketing materials and in their sustainability reports.

<sup>5</sup> [www.globalreporting.org](http://www.globalreporting.org)

<sup>6</sup> [www.iso.org](http://www.iso.org) ISO 26000:2010, *Guidelines on Social Responsibility*.

<sup>7</sup> [www.iso.org](http://www.iso.org) There are actually three ISO 14064 standards. Part 1, ISO 14064-1:2006 specifies the requirements for quantification and reporting of greenhouse gas (GHG) emissions at the organization level.

<sup>8</sup> [www.cdproject.net](http://www.cdproject.net)

<sup>9</sup> [www.accountability.org](http://www.accountability.org)

<sup>10</sup> [www.theiirc.org](http://www.theiirc.org)

<sup>11</sup> [www.unglobalcompact.org](http://www.unglobalcompact.org)

<sup>12</sup> [www.ghgprotocol.org](http://www.ghgprotocol.org)

<sup>13</sup> The G4 Guidelines can be downloaded from the GRI website. See <https://www.globalreporting.org/reporting/g4/g4-developments/Pages/default.aspx>

<sup>14</sup> <http://www.bsr.org/en/our-insights/bsr-insight-article/bloomberg-launches-esg-data-service>

<sup>15</sup> <http://members.greenpeace.org/sites/greenmyapple/about.php>

<sup>16</sup> <http://chevrontoxico.com/>

<sup>17</sup> <http://www.ftc.gov/opa/2012/10/greenguides.shtm>

<sup>18</sup> Ctr. for Corp. Citizenship and Ernst & Young, *Value of Sustainability Reporting* (June 2013)

<sup>19</sup> <http://www.greenbiz.com/blog/2013/05/30/sustainability-reporting-and-ghg-reductions-verification-gap>

<sup>20</sup> *In re Nonprofit Mgmt. LLC* (FTC File No. 1023064), available at <http://www.ftc.gov/opa/2011/01/testedgreen.shtm>.

<sup>21</sup> *S. Builders v. Shaw Development*, No.: 19-C-07-011405 (Md. Cir. Ct. 2008), as discussed in <http://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/62D131A5D4F5D767852576D50074D702>.

<sup>22</sup> *Intercon Sol’ns, Inc. v. Basel Action Network*, Case 1:12-cv-6814 (N.D. Ill. 2009), as discussed in <http://www.ban.org/2012/09/04/ban-denies-defamation-allegations-launches-countersuit-against-intercon-solutions/>.

<sup>23</sup> ForestEthics FTC Complaint about the Sustainable Forestry Initiative, available at <http://forestethics.org/news/forestethics-files-complaint-federal-trade-commission-charging-sustainable-forestry-initiative>.

<sup>24</sup> *In Re: BP p.l.c. Securities Litigation*, Case 4:10-md-02185 (S.D. Tex. 2012), available at <http://www.dandodiary.com/2012/02/articles/securities-litigation/bp-deepwater-horizon-securities-suit-though-narrowed-survives-dismissal-motion/print.html>.

<sup>25</sup> *In re Sami Designs, LLC* (FTC File No. 082 3194), and other cases, available at <http://ftc.gov/opa/2009/08/bamboo.shtm>.

<sup>26</sup> *Clayton Laderer v. Dole Food Co.*, Case 2:12-cv-09715 (C.D. Cali. 2012), as discussed at <http://www.hbsslaw.com/resources/newsroom/Class-action-Lawsuit-Alleging-Dole-Misrepresented-Environmental-Record-Resolved>.

<sup>27</sup> *Chevron Corp. v. Thomas P. Dinapoli*, as discussed at <http://www.marcgunther.com/chevron-sustainable-really/>, and available at <http://www.theamazonpost.com/wp-content/uploads/Ethical%20Complaint%20against%20DiNapoli%20to%20Joint%20Commission.pdf>.

<sup>28</sup> CHMM® Code of Ethics, Institute of Hazardous Materials Management; Code of Ethics for Engineers, National Society of Professional Engineers®, Am. Institute of Certified Planners’ Code of Ethics & Prof. Conduct (Rev. Oct. 3, 2009)

<sup>29</sup> Fla. R. of Prof. Conduct (2013).