



Enforcement Alert

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U.S. EPA Notifying Defendants of Securities and Exchange Commission's Environmental Disclosure Requirements

Environmental information such as a company's compliance history or involvement in a federal environmental enforcement action may be used by the public to guide its purchasing and

investment decisions.

While governmental disclosure requirements do not promote one type of investment over another, they do facilitate the free flow of information between regulated companies and the public.

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The United States' federal securities regulatory system relies on U.S. Securities and Exchange Commission (SEC) registrants to fully disclose material information to actual and potential shareholders to ensure they can make informed investments, and for proper market functioning. Moreover, full and fair disclosure of material information related to a firm's environmental performance, compliance, and liabilities is essential if stock markets are to accurately reflect the financial condition of publicly traded companies. The availability of this information also enables investors to consider issues of corporate governance and management attitudes toward the environment in making investment decisions.

EPA believes that enforcement of environmental disclosure requirements helps ensure that companies complying with these obligations are not disadvantaged in the market by firms that ignore the duty to disclose their environmental liabilities. EPA further believes that public availability of information regarding environmental performance and compliance will result in

Public Disclosure of Information Can Create an Incentive for Increased Environmental Compliance

market forces that can positively influence environmental behavior. Consequently, the Environmental Protection Agency (EPA) is taking steps to increase the regulated community's awareness of existing disclosure requirements.

In this issue, EPA highlights:

- ✓ **U.S. SEC Regulation S-K's Legal Proceedings Disclosure Requirements;**
- ✓ **Other SEC Environmental Disclosure Requirements;**
- ✓ **Consequences of Failing to Disclose; and**
- ✓ **U.S. EPA's Notification Efforts**

SEC Regulation S-K: Environmental Legal Proceedings Disclosure Requirement

The Securities and Exchange Commission's Regulation S-K, Item 103 (17 CFR 229.103), requires that SEC registrants disclose, on at least a quarterly basis, pending proceedings or proceedings known to be contem-



About Enforcement Alert

Enforcement Alert is published periodically by the Office of Regulatory Enforcement to inform and educate the public and regulated community of important environmental enforcement issues, recent trends and significant enforcement actions.

This information should help the regulated community anticipate and prevent violations of federal environmental law that could otherwise lead to enforcement action. Reproduction and wide dissemination of this publication are encouraged.

For information on how you can receive this publication electronically, see page 3.

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plated by a governmental authority, such as EPA, to which they are a party that arise under federal, state or local provisions that have the primary purpose of protecting the environment.

SEC registrants must disclose proceedings that meet any of the following three qualifying conditions:

Materiality: Any legal proceeding that is “material” to the business or financial condition of the registrant must be disclosed. No bright-line test exists for establishing the materiality of information. The U.S. Supreme Court has held that information is “material” if there is a substantial likelihood that a

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reasonable investor would find the availability of the information to significantly alter the total-mix of information available in the decision-making process. The SEC has also provided some guidance on applying the materiality standard.

10 Percent of Current Assets: Legal proceedings that involve primarily a claim for damages, or that involve potential monetary sanctions, capital expenditures, deferred charges, or charges to income for which the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis must be disclosed. Among other things, the costs of penalties, injunctive relief, and supplemental environmental projects ordered in EPA enforcement proceedings or environmentally based

citizen suits should be considered when determining if this reporting threshold has been met.

Monetary Sanctions: If a governmental authority is a party to the legal proceeding and the registrant has a reasonable belief that the proceeding will result, or has resulted in, monetary sanctions of \$100,000 or more, the legal proceeding must be disclosed.

The same disclosure of environmental legal proceedings is required by Item 103, Instructions 1-4 of the SEC’s Regulation S-B (17 CFR 228.103), applicable to those businesses using the SEC’s small business issuer reporting system.

SEC registrants should note that the duty to disclose information related to these legal proceedings may exist before the actual initiation of a proceeding, so long as the registrant reasonably expects that the qualifying proceeding will be initiated.

SEC registrants have a duty to disclose in their SEC filings a brief description of the proceeding, the factual circumstances that form the basis of the proceeding, and the relief that is sought or has been granted.

Additional SEC Environmental Disclosure Requirements

SEC registrants also should be aware that environmental information may need to be disclosed under **Regulation S-K’s Item 101** (Description of Business), which requires registrants to disclose, among other things, the material effects of complying or failing to comply with environmental requirements on the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. Similarly,

Regulation S-K Item 303 (Management’s Discussion and Analysis of Financial Condition and Results of Operations) requires the disclosure of environmental contingencies that may reasonably have a material impact on net sales, revenue, or income from continuing operations.

Failure to Disclose: The Consequences

The antifraud provisions of federal securities laws are designed to protect investors and ensure that information about companies does not contain material omissions or misstatements. Federal securities laws authorize the SEC to investigate any person or entity suspected of violating federal securities laws or SEC rules. In addition, the federal securities laws also grant express private rights of action for some specific types of violations. The SEC has authority to issue cease-and-desist orders and to seek injunctive orders in federal district court against persons for violations of the securities laws, including violations of the fraud provisions.

In addition, SEC may seek monetary penalties in federal district court from persons who have violated a cease-and-desist order or federal securities laws. The court determines the penalty based upon the facts and circumstances of the case. The monetary penalties may consist of fines ranging from \$5,000 to \$500,000 for each violation. Generally, the maximum fine for each violation is \$100,000 for a natural person and \$500,000 for entities. However, a court can impose a greater fine than the maximum penalty to match the amount of the defendant’s gross monetary gain, if it exceeds the maximum penalty amount.





EPA Notifying Parties in Enforcement Actions of Disclosure Requirements

EPA has begun notifying parties to certain EPA-initiated enforcement actions of their potential duty to disclose the proceeding to the public by filing with the SEC. Recipients of EPA's "Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings" are provided information about SEC's disclosure requirements that may apply to the EPA-initiated legal proceeding.

Greater awareness of these disclosure requirements is expected to result in increased compliance, and, consequently, may improve the ability of market forces to influence environmental performance. EPA intends to monitor the disclosures made by parties to its enforcement actions and will share this information with SEC.

EPA also is developing a centralized webpage with information related to environmental financial disclosure requirements. The webpage will include information on recently concluded EPA

enforcement actions that may be subject to SEC disclosure requirements, and a link to SEC's Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system that enables users to access annual (10-K) and quarterly (10-Q) disclosure statements, and other forms electronically.

For information about SEC disclosure requirements contact the SEC's Office of Senior Special Counsel for Disclosure Operations at (202) 942-1888. This line is dedicated to answering questions related to environmental disclosure issues. Information about SEC disclosure requirements and access to the EDGAR system can be found on the SEC website at www.sec.gov.

For information about EPA's activities encouraging greater awareness of environmental disclosure requirements contact Shirin Venus, Office of Planning, Policy Analysis and Communications, (202) 564-0177.

EPA's "Notice of Securities and Exchange Commission Registrants' Duty to Disclose Environmental Legal Proceedings" can be found at http://www.epa.gov/oeca/main/strategy/oppac_notice.html.

Get News and Information Electronically

EPA's Office of Enforcement and Compliance Assurance, now offers an email, subscription-based information service called "OCORELINK." Subscribers to this electronic service (known as a "listserv") will receive periodic news and information about Office of Compliance products and compliance trends designed to help the regulated community meet its compliance requirements. You'll also receive important information from the Office of Regulatory Enforcement on enforcement issues, recent trends and significant enforcement actions, and will be notified when issues of its newsletters, *Enforcement Alert* and the *Audit Policy Update*, have been posted on the web.

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Useful Compliance Assistance Resources

U.S. Securities and Exchange Commission:
<http://www.sec.gov>

SEC Staff Accounting Bulletin, No. 99-Materiality (17 CFR Part 211), Aug. 1999:
<http://www.sec.gov/interps/account/sab99.html>

EPA Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings:
http://www.epa.gov/oeca/main/strategy/oppac_notice.html

Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system (designed to increase the efficiency and fairness of the securities market for the benefit of investors, corporations, and the economy by accelerating the receipt, acceptance, dissemination, and analysis of time-sensitive information filed" with the SEC):
<http://www.sec.gov/edgar.shtml>

OECA's Office of Planning, Policy Analysis, and Communications:
<http://www.epa.gov/oeca/main/offices/oppac.html>

Sector Facility Indexing Project (brings together environmental and compliance and enforcement information from a number of data systems to produce facility-level profiles for five industry sectors):
<http://www.epa.gov/oeca/sfi>

EPA EnviroFacts Warehouse (facility-level information in multiple EPA databases):
http://www.epa.gov/enviro/index_java.html

Audit Policy Information:
<http://www.epa.gov/oeca/ore/apolguid.html>

Compliance Assistance Centers:
<http://www.epa.gov/oeca/mfcac.html>

Small Business Gateway:
http://www.epa.gov/smallbusiness/major_environmental_laws.htm



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