

MEMORANDUM

September 9, 1975

TO : The Commission

FROM : The Division of Corporation Finance

SUBJECT : Disclosure recommendations regarding environmental equal employment and other socially significant matters

RECOMMENDATIONS : (1) That the Commission tentatively approve the following disclosure concepts:

- (a) requiring registrants to indicate the governmental authorities with which they are obligated to file environmental compliance reports and to include a list of such reports as exhibits to such registration statements and reports;
- (b) requiring registrants to disclose past and estimated future capital expenditures, operating costs, and budgetary plans for financing future capital expenditures related to compliance with environmental regulations;
- (c) requiring registrants to set forth a statement of their policy towards environmental issues and concerns;
- (d) requiring registrants to disclose all private and governmental environmental legal proceedings and convictions; and,
- (e) with respect to equal employment opportunity and other socially significant matters, not departing from the Commission's present materiality standard and, therefore, not adopting any new disclosure requirements in these areas.

(2) That the Commission withhold final approval of specific disclosure recommendations until the Division submits implementing releases for the Commission's consideration.

ACTION REQUESTED BY: In conjunction with consideration of the recommendations of the Office of General Counsel by a memorandum of even date.

OTHER OFFICES AND DIVISIONS CONSULTED: Office of General Counsel.

DATE : September 9, 1975.

I. Preliminary Statement

Pursuant to Securities Act Release No. 5569, this Division and the Office of General Counsel have conducted public proceedings (Docket S7-551) regarding:

- (1) such further disclosure, if any, of environmental matters in registration statements, reports and other documents required to be filed with the Commission or furnished to investors pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934 as may be necessary, consistent with the national policy reflected in the federal securities laws, fully to comply with the National Environmental Policy Act of 1969;
- (2) disclosure in such documents of other socially-significant matters; and,
- (3) investors' interest in, and use of, such information.

The Division and the Office of General Counsel have completed summaries and topical analyses of the voluminous record of the proceedings. Pursuant to its review of the record, the Division is now submitting this memorandum in order to obtain the Commission's tentative approval of the Division's recommendations regarding the subject matters of the proceedings.¹ After receipt of the Commission's tentative approval or its guidance with respect to the concepts recommended herein, the Division will submit appropriate releases and proposed amendments to forms and instructions thereto for the Commission's final approval.

Attached as Exhibit 1 to this memorandum is a copy of Securities Act Release No. 5569. Contained therein are nine specific suggested environmental disclosure items (six are numbered in the Release, three are unnumbered).² These suggested requirements and the Commission's current requirements were the subject of extensive comments in the course of the proceedings and, together with such comments, were fully considered by this Division. The Division has

¹ The terms of an order of Judge Charles R. Richey granting the Commission's "motion for a further extension of time in which to complete rulemaking action" (Natural Resources Defense Council, et al. v. Securities and Exchange Commission, et al., discussed *infra*) require that these recommendations be made to the Commission by September 9, 1975.

² The suggested requirements were substantially based upon disclosure recommendations made by the Natural Resources Defense Counsel.

concluded that adoption of the suggested requirements would lead to a substantially increased volume of disclosure which might not be meaningful to most investors and which might obscure information presently required to be disclosed. In addition, it appears that adoption of the suggested requirements would entail the development of information not presently required by the principal agencies directly charged with environmental protection responsibility. Nonetheless, the Division's proposed concepts, infra, do encompass certain of the suggested requirements modified so as to not be inconsistent with existing disclosure requirements and practices.

II. Background

Pursuant to an Order and Opinion of Judge Charles R. Richey in Natural Resources Defense Council, Inc., et al. v. Securities and Exchange Commission, et al., No. 409-73 (D.D.C., December 9, 1974), the Commission announced in Securities Act Release No. 5569 (February 11, 1975) a public proceeding, including public hearings, concerning disclosure in registration statements, reports and other documents filed with the Commission or furnished to investors of environmental, equal employment and other matters of primarily social rather than financial concern. The Commission indicated in the release that it would be seeking public comment (1) to determine whether its present disclosure requirements are adequate in view of the National Environmental Policy Act ("NEPA") and, if not, what further rulemaking action should be taken; and (2) to evaluate the desirability of amending its disclosure requirements with respect to other matters of primarily social rather than financial concern.

Based on the record compiled during the course of the proceeding, the staff has prepared two separate reports, an Analysis of Individual Testimony and Letters of Comment (two volumes), and a Topical Analysis of Testimony and Letters of Comment. Each of the reports is being transmitted separately to the Commission.

III. Proposed Concepts

Against the foregoing background, the Division proposes to amend its existing description of business items (Item 9 of Form S-1, Item 5 of Form S-7, Item 3 of Form S-9, and Item 1 of Forms 10 and 10-K) and its existing legal proceedings items (Item 12 of Form S-1, Item 10 of Form 10, Item 5 of Form 10-K, and Item 3 of Form 8-K) to embody the following disclosure concepts:

(1) (a) Environmental Compliance Reports

Registrants would be required to indicate under the above items in their registration statements and reports the governmental authorities with which they are obligated to file environmental compliance reports. In addition, registrants would have to provide, as an exhibit to their registration statements and reports, a list of their environmental compliance reports which are available to the public, together with a statement of where such reports are available for inspection and, if appropriate, how interested persons can obtain a copy. It also would appear appropriate to call for a

statement in registration statements and reports that such an exhibit has been filed with the Commission.

The Division believes that, if adopted, such requirements would enable interested investors to obtain more readily information from those governmental agencies which are directly responsible for environmental compliance. By not requiring that such information itself be filed with the Commission, additional burdens on registrants' and the Commission's resources would be avoided. Moreover, for investors who may not have an interest in extensive environmental data, the readability and understandability of disclosure documents would not be impaired.

(b) Environmental Expenditures

Registrants would be required to disclose:

- (i) capital expenditures for environmental control facilities for each of the last five fiscal years;
- (ii) operating costs related to environmental protection for each of the last five fiscal years;
- (iii) estimated capital expenditures for environmental control facilities for each of the next five fiscal years, if the registrant has reason to know it will be required to make such expenditures,³ and
- (iv) management's present budgetary plan for financing such estimated capital expenditures for the next five fiscal years.

An instruction to the amended items would indicate that when expenditures are partly for the replacement, modification or addition of equipment or facilities, and partly for the purpose of complying with environmental provisions, management should allocate the cost of environmental compliance on a reasonable basis.

By adopting these requirements, which do not include a standard of materiality, the Division believes that investors will better be able to discern a company's actual policy towards environmental issues and concerns.

(c) Environmental Policy

To enable investors to more fully understand and evaluate the impact of environmental requirements on a registrant and the impact of the registrant's activities on the environment, it is recommended that a statement of the registrant's environmental

³ For example, a company which has obtained a variance from a current environmental standard is aware that capital expenditures for environmental facilities will be required to be made within a prescribed future period and should be able to reasonably estimate the amount of such expenditures.

policy should be set forth immediately following the disclosure made pursuant to concepts (a) and (b), supra. The paragraph should state, in general terms, (1) the impact of the registrant's activities on the environment; (2) whether and, if so, the extent to which registrant (a) has changed or altered company policies, production and distribution methods, products, packaging, investments or advertising in order to further environmental values; (b) pre-tests or screens new products, projects, and production methods to minimize or eliminate injury to the environment; and (c) has appointed environmental advisory groups or has made representatives of environmental interests members of registrant's board of directors; and (3) registrant's policy toward environmental issues and concerns.⁴

(d) Environmental Litigation

The Division also recommends that consideration be given to requiring disclosure of all private as well as governmental environmental legal proceedings and disclosure of any convictions. This information could be obtained by amending, as noted, the following existing requirement:

Any such proceedings ~~by governmental authorities~~ shall be deemed material and shall be described whether or not the amount of any claim for damages involved exceeds 10 percent of current assets on a consolidated basis and whether or not such proceedings are considered "ordinary routine litigation incidental to the business"; provided however, that such proceedings which are similar in nature may be grouped and described generically stating: the number of such proceedings in each group; a generic description of such proceedings; the issues generally involved and; if such proceedings in the aggregate are material to the business or financial condition of the registrant, the effect of such proceedings on the business or financial condition of the registrant; and, any conviction or plea of guilty or nolo contendere since the beginning of the last full fiscal year to an indictment or information alleging a violation of any environmental statute.

(e) Other Socially Significant Matters

With respect to equal employment opportunity and other socially significant matters, it is recommended that the Commission not depart from the present materiality standard, and, therefore, not adopt any new disclosure requirements in these areas.

(2) The Division recommends that the Commission withhold final approval of specific disclosure requirements until the Division submits implementing releases for the commission's consideration.

⁴ Principal portions of this proposed concept are taken directly from a recommendation of the Natural Resources Defense Council.

IV. Views of Other Offices and Divisions

The general concepts set forth in this memorandum have been discussed with the Office of General Counsel.

V. Recommendations

The Division recommends:

- (1) That the Commission conditionally approve the following disclosure concepts:
 - (a) requiring registrants to indicate the governmental authorities with which they are obligated to file environmental compliance reports and to include a list of such reports as exhibits to such registration statements and reports;
 - (b) requiring registrants to disclose past and estimated future capital expenditures, operating costs, and budgetary plans for financing future capital expenditures related to compliance with environmental regulations;
 - (c) requiring registrants to set forth a statement of their policy toward environmental issues and concerns;
 - (d) requiring registrants to disclose all private and governmental environmental legal proceedings and convictions; and,
 - (e) with respect to equal employment opportunity and other socially significant matters, not departing from the Commission's present materiality standard and, therefore, not adopting any new disclosure requirements in these areas.
- (2) That the Commission withhold final approval of specific disclosure requirements until the Division submits implementing releases for the Commission's consideration.

Attachments

1. Securities Act Release No. 5569

Prepared By

Richard H. Rowe	(51214)
Mary E.T. Beach	(51750)
Edward B. Crosland	(51750)
Craig L. Sparks	(51445)
Paul A. Belvin	(51750)

FOR RELEASE

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

SECURITIES ACT OF 1933
Release No. 5569/February 11, 1975

SECURITIES EXCHANGE ACT OF 1934
Release No. 11236/February 11, 1975

NOTICE OF PUBLIC PROCEEDING REGARDING: (1) SUCH FURTHER DISCLOSURE, IF ANY, OF ENVIRONMENTAL MATTERS IN REGISTRATION STATEMENTS, REPORTS AND OTHER DOCUMENTS REQUIRED TO BE FILED OR FURNISHED TO INVESTORS PURSUANT TO THE SECURITIES ACT OF 1933 AND THE SECURITIES EXCHANGE ACT OF 1934 AS MAY BE NECESSARY, CONSISTENT WITH THE NATIONAL POLICY REFLECTED IN THE FEDERAL SECURITIES LAWS, FULLY TO COMPLY WITH THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969; (2) DISCLOSURE IN SUCH DOCUMENTS OF OTHER SOCIALLY-SIGNIFICANT MATTERS, AND (3) INVESTORS' INTEREST IN AND USE OF SUCH INFORMATION.

The Securities and Exchange Commission hereby announces and directs that a public proceeding be held, including public hearings, concerning disclosure in registration statements, reports and other documents filed with the Commission or required to be furnished to investors pursuant to the Securities Act and the Securities Exchange Act of environmental and other matters of primarily social rather than financial concern, including equal employment matters. Through this proceeding the Commission seeks to determine whether its present disclosure rules are adequate in view of the provisions of the National Environmental Policy Act (NEPA)¹ and, if not, what further rulemaking action should be taken. The Commission also seeks information upon which to evaluate the desirability of amending its disclosure requirements with respect to other matters of primarily social rather than financial concern.

Background

This proceeding has been initiated primarily to assure that the Commission's disclosure requirements are fully consistent with the requirements of NEPA and to consider equal employment and other matters pursuant to an Order and Opinion of Judge Charles R. Richey

¹ 42 U.S.C. §4321, et seq.

in Natural Resources Defense Council, Inc., et al. v. Securities and Exchange Commission, et al., No. 409-73 (D. D.C., December 9, 1974). Judge Richey suggested that the Commission should “resolve two overriding factual issues. The first is the extent of ‘ethical investor’ interest in [this] type of information. . . . The second issue is what avenues of action are available which ethical investors may pursue and which will tend to eliminate current practices that are inimical to the environment and equal employment opportunity.” Judge Richey emphasized that “the SEC should not limit itself to these questions. Rather, it must imaginatively exercise its authority and expertise.”²

Scope of Inquiry

In this proceeding the Commission seeks to obtain the views of the public concerning whether, and to what extent, information that does not necessarily have direct and immediate economic significance might nevertheless be the type of information that a reasonable investor would wish to have in making an investment decision or giving a proxy. In this connection, the Commission will welcome any views concerning (1) the advisability of its requiring disclosure of socially-significant matters, (2) whether and on what basis these disclosures might be viewed as being material, particularly where these matters may not be considered material in an economic sense, (3) the basis and extent, if any, of the Commission’s authority to require disclosure of matters primarily of social concern but of doubtful economic significance, and (4) the probable impact, if any, of such disclosure on corporate behavior.

The Commission recognizes that certain members of the public may find environmental and other socially-significant disclosures of importance in making their investment decisions. At the same time, it is the Commission’s responsibility to require disclosure of information that the investing public generally would find material in making their investment decisions. And the Commission must take due care that its disclosure requirements elicit meaningful, effective disclosure without causing disclosure documents to be excessively technical or obscure. The Commission believes that data concerning the extent of the investing public’s interest in the use of environmental and other socially-significant disclosures is necessary for determining to what extent, if any, adoption of new disclosure requirements would be consistent with the Commission’s statutory authority and with the essential considerations of national policy that the securities laws were designed to effect.

² Judge Richey ordered the Commission to take further rulemaking action in conformity with the procedural requirements of the Administrative Procedure Act, which he found had not been fully complied with when the Commission’s forms were amended on April 20, 1973, pursuant to NEPA. While the Commission does not agree with Judge Richey that it did not satisfy the procedural requirements of the Administrative Procedure Act, it is herewith attempting fully to comply with his order.

The fact that the Commission is conducting these proceedings should not be taken to indicate any view as to its authority to assist members of the investing public in matters of primarily social rather than financial concern.

The Commission's existing disclosure requirements concerning the environment and equal employment matters remain in effect pending further action by the Commission.³

* * *

ENVIRONMENTAL DISCLOSURES

Existing Requirements

A primary purpose of this proceeding is to determine whether the provisions of NEPA require that the Commission's existing environmental disclosure requirements must be revised, expanded or limited or would permit them to remain in effect. The existing environmental disclosure requirements, adopted in Securities Act Release 5386, call for disclosure of the material effect of compliance with Federal, State and local environmental laws and regulations on the operations of the registrant and its subsidiaries. In addition, the rules and instructions contained in that release require disclosure with respect to certain administrative and judicial proceedings arising under Federal, State, or local provisions regulating the discharge of materials into the environment or otherwise relating to the protection of the environment. All environmental proceedings initiated by a government authority are treated as being material and required to be disclosed. Those proceedings which are similar in nature, however, may be grouped and described generically.

Possible Additional Disclosure Requirements

It has been suggested that the Commission adopt amendments to its registration statement and report forms to require that registrants describe, with respect to each major activity or product:

- (1) the nature and extent, quantified to the degree feasible, of the resulting environmental pollution or injury to natural resources;
- (2) the feasibility of reducing such pollution or injury under existing technology, including a description of alternatives and the cost of each;
- (3) the prospects for improving that technology;
- (4) existing and projected expenditures for reducing such pollution or injury;
- (5) legal requirements affecting the impact of the registrant's activities on the environment, including requirements for licenses and permits and outstanding court or administrative orders; and

³ Securities Act Release No. 5386 (April 20, 1973);
Securities Act Release No. 5170 (July 19, 1971).

- (6) pending or threatened judicial or agency proceedings, whether initiated by private or governmental bodies, challenging registrant's compliance with environmental protection standards.

It has further been proposed that the Commission require disclosure concerning whether a registrant has changed its products, projects, production methods, policies, investments or advertising to advance environmental values and a general statement of the registrant's policy towards environmental issues and concerns.

It also has been suggested that (a) certain disclosure might be required only of registrants which, by reason of their size or business, are considered to have major potential for causing environmental harm, and (b) certain disclosures might be included in prospectuses, proxy or information statements, or annual reports to security holders whereas others might be included only in documents which are filed with the Commission and are available for public inspection, but which are not distributed to the public.

The Commission would appreciate comment on the foregoing, including the possible criteria for determining (a) which registrants should be required to make proposed disclosures, and (b) which disclosures should be included in documents distributed to the public.

OTHER MATTERS OF SOCIAL CONCERN

Existing Requirements

The Commission has issued an interpretative release concerning the responsibility of registrants to report material legal proceedings, including those related to equal employment practices,⁴ and the Commission has taken enforcement action against certain companies which failed adequately to disclose illegal political contributions made by or on behalf of the corporation.⁵ On the other hand, in response to a petition for rulemaking, the Commission determined during the past year not to adopt rules that would have imposed affirmative action requirements upon securities exchanges, national securities associations, and their members with respect to employment discrimination.⁶ It has also rejected a petition for the promulgation of specific rules concerning disclosure with respect to political contributions.⁷ In addition the Commission's staff has had reason to consider a variety of socially-oriented proposals that have been submitted for corporate consideration by shareholders pursuant to Rule 14a-8 under the Security Exchange Act.

⁴ Securities Act Release No. 5170 (July 19, 1971).

⁵ See, e.g., S.E.C. v. American Ship Building, Dist. Ct., Dist. of Col., Litigation Release No. 6534 (Oct. 4, 1974).

⁶ Securities Exchange Act Release No. 10597 (January 14, 1974);
Securities Exchange Act Release No. 11189 (January 20, 1975).

⁷ Securities Exchange Act Release No. 10325 (August 7, 1973).

Possible Additional Disclosure Requirements

(1) Equal Employment Litigation:

It has been suggested that the Commission amend its registration and report forms to require that registrants provide information concerning any proceedings in any court or before any agency challenging the registrant's compliance with the Equal Employment Opportunity Act⁸ or the employment regulations pertaining to federal contractors. The Commission will consider that proposal in the course of this proceeding.

(2) Equal Employment Statistics:

It has been suggested that certain registrants be required to disclose in registration statements and periodic and other reports the statistical data showing the percentage and number of minority and female employees in each of specified job categories that is contained on Forms EEO-1 which the company is required to file with the Equal Employment Opportunity Commission. The Commission feels that it would be difficult, if not impossible, to make a meaningful evaluation of a company's current hiring and promotion practices based solely upon the raw statistical data reported on forms EEO-1.⁹ In the course of the proceeding the Commission will consider contrary views or whether, in any event this or comparable information would be or could reasonably be made meaningful to members of the investing public, and, if so, whether disclosure requirements of that type may and should be adopted.

(3) Other Topics of Social Concern:

The Commission would welcome further comment on these and any other matters of social concern to members of the investing public, and alerts the public to the fact of its earlier consideration of certain of these matters in order to provide information that may be of value to persons seeking to comment at this time. The Commission's objective in requesting such comment is to determine generally the extent and nature of investor interest in topics primarily of social concern but of doubtful economic relevance. Proposals concerning equal employment

⁸ 42 U.S.C. Section 2000c.

⁹ To the extent that unequal educational opportunity or unequal educational incentive has produced a lack of qualified women or minority group members in certain job categories, or to the extent that other factors may limit the number of qualified women or minority group members in a particular area, individual employers would find it most difficult to recruit a substantial number of women and minority group members to jobs within those categories. Raw statistics, reflecting only the fact that a company has not successfully recruited persons within these categories would provide little or no insight into the quality or extent of the company's recruitment efforts. See Letter, dated February 10, 1975, from George A. Fitzsimmons, Secretary, Securities and Exchange Commission, to Natural Resources Defense Council, Inc., Project on Corporate Responsibility, Inc., and Center on Corporate Responsibility, Inc. (SEC File No. 4-179).

disclosure have been mentioned to illustrate, but not to exhaust, the range of social interests about which the Commission solicits comment.

* * *

The Commission invites comment from all interested persons. The Commission specifically invites comments from legal scholars, public-interest groups, foundations, colleges, universities, and registrants. The Commission would also appreciate comments from persons who have expertise or experience in the development of investment practices which take into account an issuer's environmental posture or any other area of social concern such as equal employment practices. The Commission also invites comments from investment managers and trustees as to whether concern with "non-economic" investment considerations is consistent with fiduciary responsibilities under applicable law. It would be particularly helpful if managers of corporations would provide the Commission with information concerning the extent to which socially-significant matters have been considered at shareholders meetings and the extent to which they have been accepted or rejected when put to a vote.

Any interested person wishing to submit specific written comments concerning the inquiries set forth herein is invited to do so at any time prior to May 14, 1975.¹⁰ All comment letters should be submitted in duplicate, addressed to George A. Fitzsimmons, Secretary, Securities and Exchange Commission, Washington, D. C. 20549, and should be captioned with File No. S7-551. All such communications will be made part of the record of the proceeding and will be available for public inspection. In addition, the petitions, releases, and suggested rule changes to which this release refers, the court's opinion in Natural Resources Defense Council v. Securities and Exchange Commission, and certain documents prepared in connection with that litigation, have been placed in File No. S7-551 and are likewise available for public inspection.

The public hearings are scheduled to commence on Monday, April 14, 1975 at the Commission's office in Washington, D. C. Any interested person desiring to make an oral presentation of his views at the hearings is requested to write or call William F. Davinger, Office of the General Counsel (Tele. 202/755-1387). It has been tentatively determined to limit oral statements generally to 15 minutes each plus such further time as may be necessary to answer questions. Depending upon the number of persons requesting to be heard, appearances may be more limited. Additional time may be granted at the discretion of the hearing officer upon written request timely submitted with copies of the witness's prepared statement. All witnesses shall be required to submit 25 copies of their prepared statements three business days in advance of their scheduled date of appearance.

¹⁰ Judge Richey's order of December 9, 1974, referred to at page 2, requires the Commission to "take further rulemaking action within 120 days of this order." The Commission intends to file a motion requesting that this period be expanded to afford ample opportunity for public comment and Commission consideration of the matters discussed in this release. The plaintiffs in the case pending before Judge Richey have indicated that they will not oppose such a motion. Should the motion be denied, however it will be necessary to shorten the comment period and accelerate the hearing schedule specified herein.

Persons making oral statements should be prepared to respond to specific inquiries from the Commission staff. Any persons may in writing submit to the hearing officer questions that he wishes to have directed to a particular witness or groups of witnesses; but the hearing officer will determine in his sole discretion whether or to what extent to direct those questions to any witness.

This public proceeding has been ordered by the Commission pursuant to Sections 19 and 21 of the Securities Act, Sections 21 and 22 of the Securities Act and Rule 4(b) of the Commission's Rules of Practice.

For the Commission

George A. Fitzsimmons
Secretary