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VOLUNTARY SUSTAINABILITY DISCLOSURE AND EMERGING LITIGATION

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I. Introduction

Voluntary disclosure by companies of sustainability, corporate social responsibility (CSR), and environmental, social, and governance (ESG) issues is becoming a more common practice throughout the world. (In this article, we use the terms "sustainability," "CSR," and "ESG" interchangeably.) However, a wide variety of approaches to sustainability reporting and disclosure—i.e., communications made by a company which are intended to convey to the public and stakeholders information about a company's behavior, its processes, and other aspects of its operations related to environmental compliance, social performance, and corporate governance—exists across jurisdictions and industries. While some countries and regions have made CSR reporting mandatory (like the European Union), there are currently no broad regulatory mandates in the United States requiring comprehensive sustainability disclosure. Many domestic companies, however, see a value in reporting on their ESG issues to help internally organize their own environmental and social management programs, increase market share, create value, and mitigate risks (including reputational risks). The push for sustainability reporting and disclosure comes from a broad set of stakeholders who are increasingly asking for more detailed information from companies on ESG issues. These stakeholders include consumers, NGOs, local communities, investors, shareholders, government agencies, retailers, and downstream suppliers.

Approaches to voluntary sustainability disclosure in the United States vary. Some companies apply the same rigorous measurement and reporting to their CSR performance as they do to financial performance, employing open reporting, external and independent auditing, and verification processes. Other companies may take a more ad hoc approach to disclosure, sharing information about their corporate sustainability-related activities in a more protective posture, taking into account potential environmental exposure or competitive considerations. The ways in which CSR information is disseminated have also shifted in the past five to ten years, from stand-alone glossy CSR reports issued annually to the online interactive disclosure of real-time CSR performance data, including information regularly shared on social networks. Many companies in the United States maintain social media accounts along with dedicated company websites on sustainability issues, and use these vehicles for sharing and engaging with the public on their CSR performance. At the same time, government regulators are also automating the way data are shared with the public regarding companies' environmental, health, and safety compliance (including information about potential regulatory noncompliance, violations, and incidents provided via searchable electronic databases).

With this increasing volume of CSR information entering the marketplace, and without an agreed set of systemized, mandatory metrics by which disclosure is measured, domestic companies face certain litigation risks. In recent years, there is a growing trend of multiple stakeholders (including investors, customers, and NGOs) who are focused on companies' CSR statements and engage in creative legal strategies to challenge the veracity of such statements in courts of law.

This article first provides an overview of some of the key voluntary reporting guidelines used by U.S. companies in connection with their CSR disclosure, and then examines a few recent cases

that highlight the potential legal risks associated with companies' disclosure of ESG issues, particularly when such disclosure occurs after a company's past environmental, health, or safety disaster or incident.

II. Standards for Voluntary Sustainability Reporting

Although more than a dozen countries and the European Union (Directive 2014/95/EU) have adopted mandatory ESG reporting requirements, no domestic laws or regulations mandate comprehensive CSR reporting. Nor are there laws or regulations that set a clear standard of what topics are considered "material" so as to require disclosure or reporting in the CSR context. Given this regulatory vacuum, there are currently hundreds of voluntary reporting frameworks, requirements, standards, certifications, rankings, and other metrics—sometimes industry-specific or specific to supply chains—that most domestic companies are using to guide their CSR disclosures.

While many reporting frameworks exist, over the past 15 years, companies have most widely adopted the guidelines issued by the Global Reporting Initiative (GRI). Viewed as the standard setter for CSR reporting, GRI (an international, not-for-profit organization) first issued its sustainability reporting guidelines, the "GRI Guidelines," in 1999. Developed in partnership with nongovernmental organizations and industry, the GRI Guidelines' original approach was quite broad (with over 100 "ESG indicators" proposed for use by companies), aiming to promote change toward a sustainable economy by measuring and reporting companies' performance in detail. GRI has periodically updated its guidelines and recently released its fourth generation of standards, the "G4," which applies to reports issued after January 1, 2015. *See* Global Reporting Initiative, G4 Sustainability Reporting Guidelines, *available at* https://www.globalreporting.org/reporting/g4/Pages/default.aspx. The current G4 standards now seek to identify those ESG issues deemed "material" to a company's performance, thus potentially limiting the amount of data a company voluntarily discloses pursuant to the guidelines.

Another prominent standard-setting group is the Sustainability Accounting Standards Board or "SASB." SASB was formed in 2011 as an alternative to the GRI Guidelines with a specific focus on publicly listed companies in the United States. SASB's approach focuses on developing accounting standards to help public companies identify and disclose the types of ESG issues that are material to their business performance in order to anticipate investors' needs when factoring sustainability performance into investment decisions. SASB is currently in the process of developing guidance for disclosing material sustainability issues and sustainability metrics at an industry level for approximately 80 industries in 10 sectors. All industry sector guidance documents are expected to be completed in 2016. *See* SASB, *Key Dates & Status*, *available at* http://www.sasb.org/standards/status-standards/.

Many other voluntary sustainability disclosure standards exist but over the past decade they have largely evolved from a "boil the ocean" approach recommending the disclosure of hundreds of issues, to a focus on materiality and integrated reporting that connects a company's ESG performance with its financial performance. Nevertheless, the volume of ESG data and information that are currently provided by companies to the public is vast and easily accessible. Sophisticated plaintiffs are taking note and aggressively alleging inconsistencies between a company's ESG statements and its actions, as discussed below.

III. Emerging Case Law

Recently, investor and consumer plaintiffs have been taking aim at companies' voluntary CSR statements in class action litigation. These cases reflect the importance of CSR communications, demonstrating that certain investors and consumers will challenge the veracity of such statements, particularly in connection with their investment

and consumer-product purchasing decisions. And courts have begun recognizing a plaintiff's right to rely on voluntary CSR communications in making consumption decisions. For example, in an opinion denying a defendant's motion to dismiss a consumer class action, the Central District of California stated:

> Consumers typically base their purchasing decisions on the price and quality of a product. As consumers have grown more aware of the social, environmental, and political impact of their purchasing decisions, they have tended to look to more factors, including company-wide operations, to inform their consumption choices. Consumers receive this information from a variety of sources, but one of the most direct and important remains the company itself. Companies, realizing this, have tailored their marketing to such consumers. It should not be unexpected then, that when companies make misrepresentations about their company-wide operations, they face potential liability in court to consumers who relied on those representations in purchasing their products

Stanwood v. Mary Kay, 941 F. Supp. 2d 1212 (C.D. Cal. 2012). In *Mary Kay*, the court denied defendant's motion to dismiss plaintiff's claim that she was wrongfully induced to purchase cosmetics by alleged false statements regarding whether defendant tested its products on animals. Among other things, the court concluded that whether the defendant tested its products on animals was a material fact with respect to plaintiff's purchasing decision. However, in March 2014, the court granted plaintiff's motion to voluntarily dismiss the suit with prejudice.

Two recent securities class action decisions specifically addressed investors' alleged reliance on defendants' ESG statements made in CSR reports and through other means. Notably, these ESG statements were issued in response to, and in the aftermath of, previous environmental and safety incidents, and both the Southern District of West Virginia and the Southern District of Texas held that certain ESG statements were actionable. *In re Massey Energy Sec. Litig*., 883 F. Supp. 2d 597 (S.D. W. Va. 2012); *In re BP PLC, Sec. Litig*., No. 4:12-cv-1256 (S.D. Tex. Sept. 30, 2013). *In re Massey* was filed after a decline in Massey Energy's share prices in the aftermath of the April 2010 Upper Big Branch Mine incident that resulted in the death of 29 miners. The case had its roots in the company's response to an earlier incident that occurred in 2006 at a separate operation, the Alma No. 1 mine in West Virginia. As described by the *In re Massey* court, the company's post-Alma response included a wide-ranging effort to promote its commitment to mining safety and various safety improvement initiatives. From 2007 to 2010, Massey allegedly made a concerted effort to publicize its commitment to safety as reflected through a range of corporate statements, including mandatory SEC filings and accompanying materials, as well as voluntary communications such as CSR reports, press releases, and statements made during investor conferences.

The court held that allegations in the plaintiffs' complaint regarding certain ESG statements about the company's safety record were actionable. Such statements included, for example: "no coal company can succeed over the long term without a total commitment to safety" (from a 2009 Corporate Social Responsibility Report); statements emphasizing that "safety first" was "not just a slogan" (from various 2008 press releases); and "we have a better performance record than the industry . . . and safety programs in place that exceed the law . . . [w]hat you often don't see in the press is number one, how safe the industry is; number two, how safe Massey is in comparison" (statement by Massey's then-CEO at an energy industry conference). Plaintiffs alleged that these statements were false and misleading in light of, among other things, defendant's fatality rate (alleged to be the worst in the nation) and the company's allegedly below-average compliance record under the Mine Safety and Health Act. On June 4, 2014, the case settled with approximately $265 million going to class members, $31.8 million to legal fees, and $590,000 to litigation expenses.

Order Awarding Attorneys' Fees and Expenses, *In re Massey Energy Sec. Litig.*, No. 5:10-cv-00689-ICB (S.D. W. Va., June 4, 2014).

A similar pattern may be discerned in securities litigation involving the BP Deepwater Horizon incident in 2010 in which a federal district court ruled that several BP ESG statements were actionable. Memorandum and Order, *In re BP PLC, Sec. Litig*., No. 4:12-cv-1256 (S.D. Tex. Sept. 30, 2013). At issue were certain ESG statements of then-CEO Tony Hayward regarding BP's operating management system (OMS), a process safety program established in the aftermath of a previous incident, the 2005 Texas City BP refinery explosion, and highlighted in a number of subsequent public statements. Plaintiffs alleged that certain statements were "misleading because they repeatedly emphasized the all-encompassing, consistent nature of OMS, without disclosing that it was not designed to and would not apply to project sites owned by contractors." Such statements included, for example, that the OMS "turns the principle of safe and reliable operations into reality by governing how every BP project, site, operation, and facility is managed"; Hayward's statement in BP's 2008 sustainability review that OMS "is to be implemented at each BP site"; and Hayward's statements in the 2009 sustainability review that OMS had been implemented in the Gulf of Mexico in 2008. The court held these and other statements to be actionable because "six out of seven offshore drilling units in the Gulf of Mexico in early 2010 were owned by contractors, including, notably, the Transocean-owned Deepwater Horizon."

On the consumer side, in the past several months, class actions have been filed alleging that defendants violated California state consumer protection law by making false and misleading ESG statements that induced consumers to purchase their products. For example, in an action filed in April 2015 against Chiquita, plaintiffs alleged that the defendant "falsely represents itself as an exemplar of environmental stewardship and omits the truth about its environmental and harvesting practice." Complaint, *Campbell v. Chiquita Brands Int'l*, No. 15-cv-02860 (C.D. Cal. Apr. 17, 2015). The lynchpin of plaintiffs' complaint relates to the alleged environmental performance of non-Chiquita owned banana farms that are claimed to be owned by a Guatemalan company that supplies approximately 95 percent of the bananas sold by Chiquita. Plaintiffs aver a litany of environmental harms allegedly caused by Chiquita's supplier, including that it does not use buffer zones when applying pesticides near schools and homes; it uses aerial fumigation near schools and homes; children and adults suffer from health problems as a result of pesticide use; and the company does not utilize buffer zones near rivers, resulting in an array of pollution effects. In light of these alleged conditions, plaintiffs claim to have been wrongfully induced to purchase bananas by Chiquita's CSR statements, including: "Chiquita has taken several measures to reduce its water footprint [at banana] farms . . . as well as measures to reduce pollutant loadings to receiving waters . . . [including] heavy mulching, cover crops and buffer zones to reduce water runoff" (2009–2012 CSR report) and "[D]id you know? 100% of our banana plantations have been modified to conserve wildlife habitats, natural resources, and promote community well-being" (Chiquita website).

In sum, recent litigation demonstrates that courts are willing to consider plaintiffs' claims of reliance on CSR statements. Similar actions are likely to be brought in the future, and the pending Chiquita case will test the boundaries of California consumer protection laws.

IV. Conclusion

As companies continue to provide real-time data to the public about their CSR performance, accuracy and consistency in company disclosure will be the name of the game. NGOs and other stakeholders now have easy access to an increasing amount of corporate information about ESG performance, and are able to (with the help of advanced search engines) easily collate data from multiple sources (such as federal and state regulatory agency databases) to evaluate the accuracy and consistency

of ESG statements. Time will tell if this emerging trend of litigation is here to stay, but to proactively address potential liability, businesses may consider establishing and implementing company-wide measures to ensure the accuracy and consistency of their ESG statements and evaluate any risks with respect to their existing ESG disclosures.

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