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A New Face in Corporate Environmental Responsibility: The Valdez Principles

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I. INTRODUCTION

At present, corporate environmental responsibility is compliance-oriented. Corporations are motivated to be responsible for the environment to the extent necessary to avoid liability under laws such as the Comprehensive Environmental Response Compensation and Liability Act (CERCLA),[1] the federal securities laws[2] and the Community Right-to-Know laws.[3] As the scope of liability under envi-

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[1] 42 U.S.C. §§ 9601–9675 (1988) (CERCLA). CERCLA, otherwise known as the Superfund Act, was enacted and funded in 1980. Pub. L. No. 96-510, 94 Stat. 2767, 2801 (1980). The law provides the mechanism for joint federal and state response to releases of toxic substances. *See* 42 U.S.C. § 9604. The main goals of CERCLA are to: 1) facilitate the cleanup of hazardous waste disposal sites and other areas affected by the release of hazardous substances, and 2) to hold responsible parties liable for the costs incurred in cleaning up a site. Franc, *Wrestling With Environmental Compliance*, PA. CERTIFIED PUB. ACCT. J., Spring 1989, at 10. In 1986, CERCLA was amended and refunded. Superfund Amendments and Reauthorization Act (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

[2] The Securities Act of 1933, 15 U.S.C. §§ 77a–77bbbb (1988); the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78ll (1988). The Securities and Exchange Commission requires public corporations to disclose the material effects that compliance with environmental protection laws may have upon corporate operations and business. *See infra* notes 50–71 and accompanying text.

[3] 42 U.S.C. §§ 11,001–11,050 (1988). The Community Right-to-Know laws establish federal reporting and disclosure standards that provide for public awareness when industry is using potentially harmful chemicals in the community. *See* Hazardous Chemical Reporting: Community Right-to-Know, 40 C.F.R. § 370 (1989); Toxic Chemical Release Reporting: Community Right-to-Know, 40 C.F.R. § 372 (1989).

ronmental laws expands,[4] business managers increasingly turn to environmental consultants to determine whether company operations comply with federal and state statutory standards.[5] This approach to corporate environmental responsibility is marginally effective. Environmental regulation statutes set forth the corporate community minimum standards of environmental responsibility with which corporations must comply or face costly liability.

On September 7, 1989, the Coalition for Environmentally Responsible Economies (CERES) proposed a new approach to corporate environmental responsibility in the form of a voluntary code of conduct called the Valdez Principles.[6] The Valdez Principles are progress-oriented. They call on corporations to protect the environment aggressively, not merely to comply with the minimum environmental standards set by federal, state, and local governments.[7] The audit and disclosure provisions of the Valdez Principles are particularly ambitious because, in addition to asking corporations to go beyond what is currently required by law, they potentially expose signatory corporations to increased litigation, increased costs, and disclosure liability beyond that required by federal and state law.[8]

Section II of this Article discusses the expanding legal standards of corporate environmental responsibility under CERCLA and the federal securities laws. Section III explores the likelihood that the Valdez Principles will be equally, if not more, effective in motivating corporations to become aggressive in their approach to environmental responsibility. Section III begins with a look at the Sullivan Principles, a predecessor voluntary code of conduct, to determine whether voluntary codes of conduct can be effective. Section III also explores in depth the most controversial provisions of the Valdez Principles—the disclosure and audit provisions. Section III details the objections that have been voiced by potential signatories,[9] and proposes a restructuring of these disclosure and audit provisions to

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[4] *See* Gold, *Federal Cleanup Act Discards Corporate Veil*, 124 N.J.L.J. 254 (1989). In the past decade, the Environmental Protection Agency (EPA) has heightened enforcement of CERCLA. *Id.* The government also has brought criminal prosecutions against corporate polluters. Finlayson, *Environmental Consultants See a Business Boom*, BUS. INS., Mar. 17, 1986, at 18.

[5] Finlayson, *supra* note 4, at 18.

[6] Coalition for Environmentally Responsible Economies [hereinafter CERES], Valdez Principles (Sept. 7, 1989) [hereinafter Valdez Principles].

[7] *See id.*

[8] Feder, *Who Will Subscribe to the Valdez Principles?*, N.Y. Times, Sept. 10, 1989, § 3, at 6, col. 1.

[9] *Id.* at col. 6.

mitigate objections and facilitate wholesale acceptance of the Valdez Principles.

II. The Legal Framework of Corporate Environmental Responsibility

Environmental laws and regulations force corporations to maintain a minimum level of environmental responsibility. The threat of civil and criminal penalties, assessable against both the business entity and the individuals in charge, is strong incentive to meet federal and state standards for disclosure, processing, and disposal of hazardous substances.[10] CERCLA,[11] the Federal Water Pollution Control Act, (FWPCA),[12] the Toxic Substances Control Act (ToSCA),[13] the Resource Conservation and Recovery Act (RCRA),[14] the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA),[15] and the federal securities laws[16] set forth the federal standards for corporate environmental responsibility. The expanding scope of corporate responsibility in two of these areas is examined below, followed by a discussion of the path corporations have taken to acknowledge their responsibility.

A. Corporate Responsibility Under CERCLA

The scope of corporate liability for hazardous waste contamination under CERCLA is extensive.[17] Corporations that currently own and

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[10] Penalties for violations of certain environmental laws can total fines up to $10,000, assessment of damages, and imprisonment up to three years. Franc, *supra* note 1, at 10. Civil fines levied against the offending business entity or its officers can equal $5000 per day. *Id.*

[11] 42 U.S.C. §§ 9601–9675 (1988).

[12] 33 U.S.C. §§ 1251–1376 (1988).

[13] 15 U.S.C. §§ 2601–2671 (1988).

[14] 42 U.S.C. §§ 6901–6992(k) (1988).

[15] 7 U.S.C. §§ 136–136y (1988).

[16] *See infra* notes 50–71 and accompanying text.

[17] *See* 42 U.S.C. § 9607. CERCLA liability is for the most part grounded in the language of the statute's liability and definitional sections. *Id.* §§ 9601, 9607; *see infra* notes 18–29 and accompanying text. Recently, however, courts have begun to impose CERCLA liability based on a "piercing the corporate veil theory." *See* United States v. Nicolet, Inc., 712 F. Supp. 1193, 1200–03 (E.D. Pa. 1989) (courts may impose CERCLA liability on parent corporations under two alternate theories: direct liability under 42 U.S.C. § 9607(a) or derivative liability pursuant to traditional corporate veil piercing theory); Joslyn Corp. v. T.L. James Co., 696 F. Supp. 222, 224–25 (W.D. La. 1988) (minority rule requiring courts to pierce the corporate veil in order to hold parent corporations or corporate officers liable for cleanup costs of subsidiaries under CERCLA), *aff'd*, 893 F.2d 80, 83 (5th Cir. 1990) (piercing the veil to impose CERCLA liability to be limited to situations in which the corporate entity is used as a sham to perpetrate a fraud or to avoid a personal liability). These cases address the liability of

operate contaminated property, or have formerly owned or operated contaminated property, are liable under CERCLA.[18] Liability also extends to corporations that generated hazardous substances that were sent to the contaminated property[19] and corporations that transported hazardous substances to the property.[20] Notably, the notion of "owners and operators" who may be liable goes beyond the common scenario of the industrial company that owns and operates its own manufacturing plant. "Owners and operators" may include corporate tenants, brokers, developers, lenders, and mere landowners.[21] In addition, "property" includes not only industrial property, but also commercial and residential property.[22]

CERCLA imposes strict liability on corporate owners and operators.[23] Thus, corporations can be held liable regardless of fault.[24] Furthermore, CERCLA liability is joint and several.[25] As such, a corporation with a deep pocket may be held liable for the entire cost of response when it is only responsible for part of the contamination.

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corporate parents in control of subsidiaries whose operations violate CERCLA. While piercing the corporate veil is an extreme position for courts to take, the fact that it is being used to impose liability under CERCLA is another factor increasing corporate environmental responsibility. For a further discussion of corporate liability under CERCLA, see Comment, *Robbing the Corporate Grave: CERCLA Liability, Rule 17(b), and Post-Dissolution Capacity to Be Sued*, 17 B.C. ENVTL. AFF. L. REV. 855 (1990) (authored by Monica Conyngham).

[18] 42 U.S.C. § 9607(a)(1)–(2). Former owners of contaminated property are liable only if they owned the property at the time of disposal of any hazardous substance. *Id.* § 9607(a)(2). "Disposal" is an ambiguous term and may be interpreted to mean any "discharge, deposit, injection, dumping, spilling, leaking, or placing" of hazardous substances into the environment. *Id.* §§ 6903(3), 9601(29).

[19] 42 U.S.C. § 9607(a)(3).

[20] *Id.* § 9607(a)(4). Liability of corporate transporters under this section is limited to those transporters who actually choose the site where the hazardous substances were disposed. *Id.*

[21] *See* 42 U.S.C. § 9601(20)(A)–(D). Mere landowners, as current or former owners of property, are liable for response costs unless they are innocent landowners: persons who had no reason to know of the hazardous substance contamination at the time of purchase. 42 U.S.C. §§ 9601(35)(A)(i), 9607(a), 9607(b)(3). Landowners who wish to avail themselves of the innocent landowner defense should inspect the proposed site prior to purchase and take advantage of any opportunity to do testing, consider whether the purchase price reflects the value of the property if uncontaminated, and consider any commonly known or ascertainable information available about the property. 42 U.S.C. § 9601(35)(B). In addition, courts determining whether a landowner may take advantage of the innocent landowner defense will consider whether the landowner had any specialized knowledge or experience at the time of purchase and whether the landowner had the ability to detect contamination prior to purchase. 42 U.S.C. § 9601(35)(B).

[22] *See* 42 U.S.C. §§ 9601(9), 9607(a)(1).

[23] United States v. Northeastern Pharmaceutical and Chem. Co., 579 F. Supp. 823, 844 (W.D. Mo. 1984), *modified*, 810 F.2d 726 (8th Cir. 1986).

[24] *See id.*

[25] *E.g.*, United States v. Chem-dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983).

To recover costs for which the corporation is not responsible, the corporation must sue for contribution from other responsible parties.[26]

During the past decade the courts have expanded the scope of corporate responsibility under CERCLA. Shareholders and employees who have actively participated in management have been found personally liable for corporate CERCLA violations regardless of individual fault.[27] Those who have not actively participated in management have been held liable based on their ability or opportunity to control corporate operations.[28] In addition, lenders who have participated in management of corporate business before or after foreclosure similarly have been held accountable.[29]

This extension of CERCLA liability to individuals within the corporate structure has raised both the base line of minimum corporate responsibility under the law and the level of environmental awareness in the corporate board room. Some situations in which courts have held individuals and lenders personally accountable for corporate wrongdoing are sketched out below. The impact of this trend on corporate environmental responsibility is also considered.

1. Shareholders Who Actively Participate in Management

Shareholders who have a substantial ownership interest and who actively participate in management of the corporation may be personally liable for cleanup costs as "owner[s] or operator[s]"[30] under CERCLA.[31] Courts define active participation as involvement in the

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[26] Corporations may obtain contribution from other responsible parties through any of the following three mechanisms: 1) private right of contribution under 42 U.S.C. § 9607(a)(4)(B), *see* United States v. Conservation Chem. Co., 628 F. Supp. 391, 404 (W.D. Mo. 1985), 2) federal common law right of contribution, *see* Colorado v. Asarco, Inc., 608 F. Supp. 1484, 1492 (D. Colo. 1985), and 3) express right of contribution under 42 U.S.C. § 9613(f).

[27] *See infra* text accompanying notes 31–33, 37–39.

[28] *See infra* text accompanying notes 34–36, 37–39.

[29] *See infra* text accompanying notes 41–48.

[30] New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985). "[T]he definition of 'owner or operator' excludes 'a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the facility. The use of this exception implies that an owning stockholder who manages the corporation . . . is liable under CERCLA as an 'owner or operator.'" *Id.* (citation omitted).

[31] *See id.* (president and sole shareholder who actively participated in management of the company is an owner and operator under CERCLA); United States v. Bliss, Nos. 84-2086C(1), 87-1558C(1), 84-1148C(1), 84-2092C(1) (E.D. Mo. Sept. 27, 1988) (LEXIS, Genfed library, Dist file) (corporation's president and major stockholder who actively participated in management and had the authority to control disposal of hazardous waste was liable personally as an "owner and operator" under CERCLA); United States v. Northernaire Plating Co., 670 F. Supp. 742,

the day-to-day production and managerial facets of a business. This definition does not include participation solely in the financial aspects of management.[32] Minority shareholders who participate in management may be held personally liable for CERCLA violations as well.[33]

2. Shareholders Who Do Not Participate in Management

Recently, courts have expanded the scope of corporate environmental responsibility under CERCLA to include shareholders and officers who *do not* actively participate in management. Liability of such individuals has been based on their overall responsibility for corporate operations[34] or their capacity to control such operations, although they did not actively participate in the operations.[35] The courts have considered the following factors in assessing the potential CERCLA liability of such non-participating shareholders: the individual shareholder's knowledge of, responsibility for, opportunity

747 (W.D. Mich. 1987) (president and sole shareholder who had responsibility for, and played an active role in, storing and disposing of chemical waste was personally liable as an "owner and operator"), *aff'd sub nom.* United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1527 (1990); United States v. Conservation Chem. Co., 628 F. Supp. 391, 416 (W.D. Mo. 1985) (corporation's founder, president, and 93% shareholder who controlled the corporation's fiscal, management, and environmental operations was liable as an owner and operator under CERCLA); United States v. Mirabile, 23 Env't Rep. Cas. (BNA) 1511, 1512–13 (E.D. Pa. 1985) (president and majority shareholder who managed corporate operations and had the capacity and opportunity to control the disposal of waste was personally liable under CERCLA); United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823, 848 (W.D. Mo. 1984) ("a person who owns *an interest* in a facility and is actively participating in the management can be liable" (emphasis added)), *modified*, 810 F.2d 726 (8th Cir. 1986); United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2131 (D.S.C. 1984) ("to the extent that an individual has control or authority over the activities of a facility from which hazardous substances are released or participates in the management of such a facility, he may be held liable for response costs").

[32] United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,995 (E.D. Pa. 1985).

[33] *See* United States v. McGraw-Edison Co., 718 F. Supp. 154, 157 (W.D.N.Y. 1989) (49% minority shareholder interest in the corporation coupled with active participation in management was sufficient for imposing liability as an "owner and operator"); Vermont v. Staco, Inc., 684 F. Supp. 822, 832 (D. Vt. 1988) (parent corporation's minority shareholders who participated in operations of the subsidiary were personally liable under CERCLA as owning and managing shareholders).

[34] *See* Michigan v. Arco Indus., 29 Env't Rep. Cas. (BNA) 1936, 1941 (W.D. Mich. 1989) (controlling shareholder and chairman of the board of directors may be liable merely for his overall responsibility for operation and management of the site owned by the corporation).

[35] *See* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 745 (8th Cir. 1986) (president, founder, and majority shareholder of a corporation was held individually liable under the Resource Conservation and Recovery Act (RCRA) because he had the capacity and general responsibility as president to control disposal of hazardous waste, despite the fact that he did not participate in day-to-day operations).

to control, and involvement in the disposal process or other processes likely to violate CERCLA.[36] Thus, it is unlikely that the scope of environmental responsibility under CERCLA will expand to encompass individuals who are mere equity participants.[37]

3. Employees Who Are Not Shareholders

Courts have recently expanded the sphere of corporate environmental responsibility under CERCLA to include certain employees. Employees of a corporation who participate in management, yet are not shareholders, may be held liable under CERCLA.[38]

Employee liability in such circumstances is based on the individual's clear authority to direct operational activities that are in violation of CERCLA, regardless of whether the employee actually participated in these activities.[39] As in the case of the shareholder, the issue is whether the employee had authority to control the activity, not whether the employee possessed any formal ownership interest in the corporation.[40]

4. Lenders Under CERCLA

CERCLA provides an express exception from liability for lenders who take a security interest in property requiring remediation and act primarily to protect this security interest.[41] However, lenders must be careful not to participate in management of the borrower's business before or after foreclosure on the property. Otherwise, such participation may provided a basis for holding the lender liable as an "owner and operator" under CERCLA.[42]

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[36] *Arco Indus.*, 29 Env't Rep. Cas. (BNA) at 1940.

[37] *See* 42 U.S.C. § 9601(20)(A). This is consistent with the language of CERCLA. The definition of "owner and operator" excludes a person who "without participating in the management . . . holds indicia of ownership." *Id.*

[38] *Northeastern Pharmaceutical*, 810 F.2d at 744 (company vice-president was liable for arranging for transportation and disposal of hazardous substances).

[39] *See* United States v. Carolawn Co., 21 Env't Rep. Cas. (BNA) 2124, 2131 (D.S.C. 1984). "To the extent that an individual has control or authority over the activities of a facility . . . he may be held liable for response costs." *Id.*

[40] *Northeastern Pharmaceutical*, 810 F.2d at 743.

[41] 42 U.S.C. § 9601(20)(A). The definition of "owner and operator" excludes "a person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility." *Id.*

[42] *See* Bergsoe Metal Corp. v. Fast Asiatic Co., 910 F.2d 668, 672–73 (9th Cir. 1990); Guidice v. BFG Electroplating and Mfg. Co., 30 Env't Rep. Cas. (BNA) 1665, 1670–71 (W.D. Pa. 1989); United States v. Nicolet, Inc., 712 F. Supp. 1193, 1204–05 (E.D. Pa. 1989); United States v. Fleet Factors Corp., 724 F. Supp. 955, 960–61 (S.D. Ga. 1988), *aff'd*, 901 F.2d 1550

a. Prior to Foreclosure

Courts are divided as to which activities between a borrower's default and foreclosure fall within the protection of the lender exception. According to the standard adopted by a number of district courts, lenders are permitted to provide assistance and general management advice to borrowers without risking CERCLA liability if lenders do not "participate in the day-to-day management of the business either before or after the business ceases operation."[43]

Recently, however, the Court of Appeals for the Eleventh Circuit has adopted a stricter standard for lenders seeking to take advantage of the lender exception.[44] According to the Eleventh Circuit, lenders may incur cleanup liability under CERCLA as "owner[s]" and "operator[s]" by "participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."[45] Because it is uncertain which standard the other circuits will follow, to avoid liability lenders should refrain from both participation in day-to-day management and in financial management to the degree that it could influence hazardous waste disposal policy.

b. Foreclosure and Post Foreclosure

Recent interpretations of the lender exception under CERCLA indicate that lenders must be particularly careful of their actions in the course of and post foreclosure.[46] Voluntary foreclosure on property, to protect security interests, may remove lenders' protection under this exception and ultimately expose them to "owner and operator" liability.[47] If this interpretation continues to gain accep-

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(11th Cir. 1990); United States v. Maryland Bank & Trust Co., 632 F. Supp. 573, 578–80 (D. Md. 1986); United States v. Mirabile, 15 Envtl. L. Rep. (Envtl. L. Inst.) 20,994, 20,996–97 (E.D. Pa. 1985).

[43] *Guidice*, 30 Env't Rep. Cas. (BNA) at 1669; *Nicolet*, 712 F. Supp. at 1205; *Fleet Factors*, 724 F. Supp. at 960; *Mirabile*, 15 Envtl. L. Rep. (Envtl. L. Inst.) at 20,996.

[44] *See Fleet Factors*, 901 F.2d. at 1557.

[45] *Id.* Under this standard, it is not necessary for the secured creditor to involve itself in the day-to-day operations of the facility in order to be liable. *Id.*

[46] *See Guidice*, 30 Env't Rep. Cas. (BNA) at 1670–71; *Maryland Bank*, 632 F. Supp. at 578–80.

[47] *Guidice*, 30 Env't Rep. Cas. (BNA) at 1671. In *Guidice*, the court held that "[w]hen a lender is the successful purchaser at a foreclosure sale, the lender should be liable to the same extent as any other bidder at the sale would have been." *Id.* In such situations, the lender exemption does not apply once the lender becomes the record owner of the property. Similarly, in *Maryland Bank*, the court held that the lender exemption covers only those persons who, at the time of the cleanup, hold indicia of ownership to protect a security interest in the land. 632 F. Supp. at 579. Accordingly, because a security interest is terminated upon foreclosure,

tance in the courts, lenders must forgo purchasing at foreclosure sales contaminated property in which they have security interests. If they do purchase contaminated property, they may face potentially expensive CERCLA liability as "owners and operators."[48]

5. Impact of Expanding CERCLA Liability on Corporate Environmental Responsibility

Extending CERCLA liability to lenders and individuals within the corporate structure creates internal pressure on corporations to become environmentally responsible. Corporate officers and managing shareholders who face personal liability under CERCLA have a strong incentive to ensure that corporate operations for which they are responsible meet environmental requirements. Lenders called upon to provide financing for corporations also have incentive to assure that any corporate property they take as security will not subject them ultimately to environmental liability. In order to meet this increased pressure for environmental responsibility, the first step for most corporations is to assess current compliance under the environmental laws. The increasing use of environmental consultants and audits demonstrates that many corporations have taken this step.[49]

B. Corporate Environmental Responsibility Required by Federal Securities Laws

Environmental disclosure requirements set forth by the Securities and Exchange Commission (SEC) under the Securities Act of 1933

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the lender exemption is lost once a lender becomes owner of the property at the foreclosure sale. However, at least one court has held that a lender may invoke the lender exemption to protect itself from a liability after foreclosure and purchase of the property if the lender made no effort to continue debtor's operations, and merely took prudent and routine steps after foreclosure to secure the property against further depreciation. *Mirabile*, 15 Envtl. L. Rep. at 20,996–97.

[48] The 1986 amendments to CERCLA lend support to a narrow reading of the lender exemption. *Guidice*, 30 Env't Rep. Cas. (BNA) at 1670. It is likely that this interpretation will gain such acceptance. "State and local governments acquiring 'ownership or control involuntarily through bankruptcy, tax delinquency, abandonment' or similar means were excluded from liability as owners or operators. Any person who 'owned, operated, or otherwise controlled activities at the facility immediately beforehand' are held liable." *Id.* (citations omitted). "That Congress did not simultaneously amend the statute to exclude from liability lenders who acquire property through foreclosure might indicate that Congress intended to hold them liable as owners." *Id.* at 1670–71 (citing Tom, *Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA*, 98 YALE L.J. 925, 926 (1989)).

[49] *See infra* notes 73–77 and accompanying text.

(1933 Act)[50] and the Securities Exchange Act of 1934 (1934 Act)[51] impose significant disclosure obligations on public corporations. In certain registration statements filed under the 1933 Act and in annual 10-K and quarterly 10-Q reports filed under the 1934 Act, registrants are required to disclose the material effects that compliance with federal, state, and local environmental protection provisions may have upon them.[52] These requirements force corporations to maintain a minimum level of responsibility in the area of environmental disclosure.

1. The Standard of Disclosure

The SEC requires that corporations subject to the regulations disclose material[53] environmental information.[54] Under the SEC rules, corporations required to register must disclose the existence and nature of pending environmental litigation and the instances in which compliance with environmental laws "may necessitate significant capital outlays, may materially affect the earning power of the business, or cause material changes in registrant's business done."[55] In recent years, this disclosure standard has been noticeably expanded.

The language requires that the existence and nature of pending environmental litigation be disclosed. Currently, this includes disclosure of any administrative or judicial proceeding "known to be contemplated" by governmental authorities and arising under federal, state, or local provisions relating to the protection of the environment, or any other material pending administrative or judicial proceeding;[56] any notices of violation, in the nature of cease and desist

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[50] 15 U.S.C. §§ 77a–77bbbb (1988).

[51] 15 U.S.C. §§ 78a–78ll (1988).

[52] Environmental Disclosure Requirements, Securities Act Release No. 6130, Exchange Act Release No. 16,224, Fed. Sec. L. Rep. (CCH) ¶ 23,507(B) (Sept. 27, 1979).

[53] *See, e.g.*, 17 C.F.R. § 230.405 (1990); 17 C.F.R. § 240.12b-2 (1990).

[54] Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Securities Act Release No. 5170, Exchange Act Release No. 9252, Fed. Sec. L. Rep. (CCH) ¶ 23,507 (July 19, 1971).

[55] *Id.*

[56] Compliance with Environmental Requirements, Securities Act Release No. 5386, Exchange Act Release No. 10,116, Fed. Sec. L. Rep. (CCH) ¶ 23,507(A) (Apr. 20, 1973). This amendment was made to Securities Act registration form S-1, item 9(a), instruction 5, 17 C.F.R. § 239.11; form S-7, item 5(a), 17 C.F.R. § 239.26; form S-9, item 3(c), 17 C.F.R. § 239.22; the amendment also was made to Securities Exchange Act registration form 10, item 1(b), instruction 6, 17 C.F.R. § 249,210; finally, the amendment was made to periodic reporting form 10-K, item 1(b), and item 5, 17 C.F.R. § 249.310.

orders, issued by the Environmental Protection Agency (EPA);[57] any administrative proceedings initiated by the registrant;[58] any administrative orders relating to environmental matters, whether or not the orders literally follow a "proceeding";[59] and the nature of the relief sought by the government in a particular administrative proceeding.[60]

The SEC has expanded the scope of information that a registrant must disclose in those instances in which compliance with environmental laws may necessitate capital outlay, affect corporate earning power, or change a business's financial position. The expanded version requires disclosure of the following: the material effects that compliance may have on the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries;[61] material estimated capital expenditures for environmental control facilities for the remainder of the registrant's current and succeeding fiscal year, as well as such further periods as the registrant may deem material;[62] and in certain circumstances, total estimated expenditures for environmental compliance beyond two years in the future.[63]

2. Disclosure of General Policy Toward Compliance

A registrant generally is not required to disclose the company's policy toward environmental compliance.[64] However, there are two

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[57] Conclusions on Proposals Relating to Environmental Disclosure, Securities Act Release No. 5704, Exchange Act Release No. 12,414, [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,495 n.22 (May 6, 1976).

[58] Environmental Disclosure Requirements, Securities Act Release No. 6130, Exchange Act Release No. 16,224, Fed. Sec. L. Rep. (CCH) ¶ 23,507(B) (Sept. 27, 1979).

[59] *Id.*

[60] *Id.*

[61] Compliance with Environmental Requirements, Securities Act Release No. 5386, Exchange Act Release No. 10,116, Fed. Sec. L. Rep. (CCH) ¶ 23,507(A) (Apr. 20, 1973).

[62] Conclusions on Proposals Relating to Environmental Disclosure, Securities Act Release No. 5704, Exchange Act Release No. 12,414, [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,495 n.22 (May 6, 1976).

[63] Environmental Disclosure Requirements, Securities Act Release No. 6130, Exchange Act Release No. 16,224, Fed. Sec. L. Rep. (CCH) ¶ 23,507(B) (Sept. 27, 1979). Disclosure of estimated capital compliance expenditures beyond a two-year period is necessary if it appears that after two years there nevertheless will remain material capital expenditures necessary for compliance, or if it appears reasonably likely that material penalties or fines will be imposed for non-compliance. In addition, disclosure of estimated capital compliance expenditures beyond two years is necessary if the registrant reasonably expects that these costs for any future year will be materially higher than costs disclosed for the mandatory two-year period. *Id.*

[64] Conclusions on Proposals Relating to Environmental Disclosure, Securities Act Release No. 5704, Exchange Act Release No. 12,414, [1975–1976 Transfer Binder] Fed. Sec. L. Rep.

exceptions to this rule. First, when a corporation voluntarily discloses information regarding environmental policy, it must make any additional disclosures that would be required to prevent its initial voluntary disclosure from being misleading.[65] Second, if the corporation's policy toward compliance is reasonably likely to result in "substantial fines, penalties, or other significant effects on the corporation," the registrant may be required to "disclose the likelihood and magnitude of the fines . . . and other material effects" in order to prevent the required disclosures from being misleading.[66]

3. Disclosure of Designation as a Potentially Responsible Party

Recently, the SEC has imposed stricter disclosure requirements with respect to designation by the EPA as a potentially responsible party (PRP)[67] under CERCLA. This crackdown was a result of the SEC's recent interpretation of the disclosure required by item 303 of regulation S-K, Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A).[68] According to the SEC's new position, management must disclose a known trend if management cannot determine that the trend is not reasonably likely to occur, and if management determines that a material effect on the registrant's financial condition would be likely if the trend were to come to occur.[69]

Application of these principles to the environmental context may

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(CCH) ¶ 80,495 (May 6, 1976); Disclosure of Environmental Matters in Registration Documents, Securities Act Release No. 5627, Exchange Act Release No. 11,733, [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,310 (Oct. 14, 1975); Notice of Hearings Regarding Disclosure of Environmental Matters, Securities Act Release No. 5569, Exchange Act Release No. 11,236, [1974–1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,110 (Feb. 11, 1975).

[65] Environmental Disclosure Requirements, Securities Act Release No. 6130, Exchange Act Release No. 16,224, Fed. Sec. L. Rep. (CCH) ¶ 23,507(B) (Sept. 27, 1979).

[66] *Id.*

[67] Designation as a potentially responsible party (PRP) means that the corporation potentially falls into one of the four categories of liable persons under CERCLA § 107(A). 42 U.S.C. § 9607(a). In other words, the corporation initially has been classified by the EPA as an "owner," "operator," "generator," or "transporter." *See supra* notes 18–21 and accompanying text. PRP status is significant because thereafter the corporation may be held jointly and severally liable for all response costs at the contaminated site unless one of the § 107(b) defenses or the innocent landowner defense fully relieves the corporation of liability, or the corporation receives contribution or indemnification from other PRPs and is thus relieved of the full burden of liability. *See supra* notes 25–26 and accompanying text.

[68] Reporting Financial Condition and Results of Operation, Financial Reporting Release No. 36, Securities Act Release No. 6835, Exchange Act Release No. 26,831, Fed. Sec. L. Rep. (CCH) ¶ 72,436 (May 18, 1989).

[69] *Id.* ¶ 73,193.

require disclosure of the potential effects of PRP status. By itself, designation as a PRP does not warrant disclosure because designation alone does not provide knowledge of a contemplated government proceeding. However, a registrant's particular circumstances coupled with PRP status may provide such knowledge and trigger a responsibility to disclose.[70] Factors to consider in deciding whether a material effect is reasonably likely to occur and whether disclosure is necessary include the following: whether registrant has been identified correctly as a PRP; whether any statutory defenses are available; whether insurance coverage may be contested; and whether and to what extent potential sources of contribution or indemnification constitute reliable sources of recovery.[71]

4. Impact of Expanding SEC Disclosure Requirements

The expanding environmental disclosure requirements under the 1933 and 1934 Acts necessarily will force corporations to become more environmentally responsible. Not only must corporations meet a higher minimum base line of corporate responsibility through increased disclosure requirements, but also they must become more attentive to whether general corporate operations comply with environmental standards. Such attentiveness is required because general operations, if in violation of CERCLA, ultimately translate to financial obligations under the securities laws.[72]

C. Corporate Response to Increased Liability

Expanding personal liability under CERCLA, coupled with more stringent environmental disclosure requirements from the SEC, have caused corporations to become increasingly aware of environmental responsibilities. This awareness is reflected in corporations' increased use of environmental audits and risk assessments to help manage environmental liabilities.[73]

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[70] *Id.* n.17.

[71] *Id.* ¶ 73,193.

[72] Reporting Financial Condition and Results of Operation, Financial Reporting Release No. 36, Securities Act Release No. 6835, Exchange Act Release No. 26,831, Fed. Sec. L. Rep. (CCH) ¶ 72,436, ¶ 73,193 & n.17 (May 18, 1989) (PRP status that may have a material effect on corporation's financial status must be disclosed); Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Securities Act Release No. 5170, Exchange Act Release No. 9252, Fed. Sec. L. Rep. (CCH) ¶ 23,507 (July 19, 1971) (compliance with environmental laws may necessitate significant capital outlays).

[73] Finlayson, *supra* note 4, at 18, 19.

Companies increasingly use environmental audits to determine whether their operations and facilities comply with federal, state, and foreign environmental laws and regulations. To avoid acquiring environmental problems, firms involved in mergers and acquisitions increasingly perform environmental audits of real estate.[74] Lenders routinely seek information about environmental exposure when reviewing initial applications for loans with real estate offered as collateral and when determining whether to foreclose on a security interest in property.[75]

Risk assessments commonly are used to examine a company's potential for third-party liability arising from a pollution incident and to implement measures to reduce the potential for third-party lawsuits.[76] The use of risk assessments has become increasingly important because corporate civil and criminal liability is expanding while corporate insurance coverage is diminishing.[77]

The growing use of environmental audits and risk assessments shows that corporate environmental responsibility is expanding under the existing legal framework. Despite this increase in corporate awareness, however, it is questionable whether federal and state laws alone can foster a corporate environmental responsibility that aggressively will protect the environment.

Legally imposed corporate environmental responsibility is subject to several inherent limitations. First, legally imposed environmental responsibility stresses corporate compliance with minimum standards to avoid costly liability. This liability scheme, by its nature, hinders aggressive protection of the environment. Corporations need

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[74] Finlayson, *Audits Reduce Pollution Exposure: Panel*, BUS. INS., Apr. 28, 1986, at 55.

[75] *Banks Scramble to Keep from Making Superfund Deposits*, Wall St. J., Oct. 5, 1989, at 1, col. 5.

[76] Finlayson, *supra* note 4, at 19.

[77] See *id.* at 18. Sudden and accidental pollution coverage has been excluded from most general liability insurance policies, and environmental impairment insurance is scarce at best. *Id.* In addition, even when sudden and accidental pollution coverage is included in a policy, there is no certainty that a particular discharge of pollution will be covered. Some courts have taken the position that the insured may recover only where the release of pollutants was abrupt and accidental. *See, e.g.*, Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc., 407 Mass. 675, 680, 555 N.E.2d 568, 572 (1990); *see also* United States Fidelity & Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31, 34 (6th Cir. 1988); Fireman's Fund Ins. Co. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1326 (E.D. Mich. 1988); State v. Amro Realty Corp., 697 F. Supp. 99, 109–10 (N.D.N.Y. 1988). Other courts have held that the insured may recover under sudden and accidental pollution clauses merely where the discharge of pollution was "unexpected and unintended." *See, e.g.*, Claussen v. Aetna Casualty & Sur. Co., 259 Ga. 333, 338, 380 S.E.2d 686, 690 (1989); Summit Assocs. v. Liberty Mut. Fire Ins. Co., 229 N.J. Super. 56, 63, 550 A.2d 1235, 1239 (1988); United Pac. Ins. Co. v. Van's Westlake Union, Inc., 34 Wash. App. 708, 714, 664 P.2d 1262, 1266 (1983).

comply only with designated minimum standards to avoid legal recourse. While minimum standards may increase through passage of new laws or reinterpretation of old laws, they always will limit the extent to which corporations must be responsible for the environment.

Second, legally imposed corporate responsibility is the product of a reactive, not a proactive, lawmaking body.[78] Accordingly, most environmental standards merely respond to, and address, developments that already have occurred,[79] rather than take affirmative measures to protect the environment from future developments. A legal system that fails to orient corporations to the necessity of planning for the future environment again limits the extent of corporate responsibility.

It is unlikely that legally imposed corporate environmental responsibility alone will protect the environment in the manner necessary to combat future environmental problems. The Valdez Principles, however, do offer a potentially proactive and aggressive approach to corporate environmental responsibility.

III. THE VALDEZ PRINCIPLES

The Valdez Principles have the potential to foster aggressive environmental responsibility within the corporate community. They urge companies to abide by the following code:

> **1. Protection of the Biosphere.**
> We will minimize and strive to eliminate the release of any pollutant that may cause environmental damage to the air, water, or earth or its inhabitants. We will safeguard habitats in rivers, lakes, wetlands, coastal zones and oceans and will minimize contributing to the greenhouse effect, depletion of the ozone layer, acid rain, or smog.

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[78] Governments are reactive. R. BAUER & D. FENN, THE CORPORATE SOCIAL AUDIT 16 (1972). Accordingly, laws passed by governments must also be viewed as reactive.

[79] For example, on November 10, 1989, the House passed a liability bill that provides extensive environmental protection in the event of oil spills and allows the states to set stricter liability standards than the federal government. *House Adopts Bill on Oil Spills*, N.Y. Times, Nov. 10, 1989, at A26, col. 5. The House previously had been opposed to giving the states such power, but the *Exxon Valdez* oil spill in Alaska "seems to have shifted house thinking in the issue." Gold, *House Passes Amendment on Spill Liability*, N.Y. Times, Nov. 9, 1989, at A32, col. 1. This is a fitting example of how the government waits for events to occur before it formulates necessary policy, rather than anticipating policy that will deal effectively with such an event in the future.

2. Sustainable Use of Natural Resources.

We will make sustainable use of renewable natural resources, such as water, soils and forests. We will conserve nonrenewable natural resources through efficient use and careful planning. We will protect wildlife habitat, open spaces and wilderness, while preserving biodiversity.

3. Reduction and Disposal of Waste.

We will minimize the creation of waste, especially hazardous waste, and wherever possible recycle materials. We will dispose of all wastes through safe and responsible methods.

4. Wise Use of Energy.

We will make every effort to use environmentally safe and sustainable energy sources to meet our needs. We will invest in improved energy efficiency and conservation in our operations. We will maximize the energy efficiency of products we produce or sell.

5. Risk Reduction.

We will minimize the environmental, health and safety risks to our employees and the communities in which we operate by employing safe technologies and operating procedures and by being constantly prepared for emergencies.

6. Marketing of Safe Products and Services.

We will sell products or services that minimize adverse environmental impacts and that are safe as consumers commonly use them. We will inform consumers of the environmental impacts of our products or services.

7. Damage Compensation.

We will take responsibility for any harm we cause to the environment by making every effort to fully restore the environment and to compensate those persons who are adversely affected.

8. Disclosure.

We will disclose to our employees and to the public incidents relating to our operations that cause environmental harm or pose health or safety hazards. We will disclose potential environmental, health or safety hazards posed by our operations, and we will not take any action against employees who report any condition that creates a danger to the environment or poses health and safety hazards.

9. Environmental Directors and Managers.

At least one member of the Board of Directors will be a person qualified to represent environmental interests. We will commit management resources to implement these Principles, including the funding of an office of vice president for environmental affairs or an equivalent executive position, reporting directly to the CEO, to monitor and report upon our implementation efforts.

10. Assessment and Annual Audit.

We will conduct and make public an annual self-evaluation of our progress in implementing these Principles and in complying

> with all applicable laws and regulations throughout our worldwide operations. We will work toward the timely creation of independent environmental audit procedures which we will complete annually and make available to the public.[80]

The Valdez Principles are not subject to those limitations that hinder the development of corporate environmental responsibility under the legal system. First, the Principles are premised on an intent by corporations to make consistent, measurable progress in taking responsibility for the environment.[81] With the standard of responsibility under the Principles set at continuous progress, rather than consistent compliance, there is no inherent limitation on corporate responsibility. Second, the Valdez Principles are developed by a proactive investor group. As such, the philosophy of the Principles is not merely to respond to the present environmental situation, but to nurture an environmentally responsible economy.[82] Corporate responsibility molded under such an approach likely will be characterized by aggressive activities[83] that surpass the reactive standards set by federal, state, and local governments.

In theory, the Valdez Principles may be heralded as a new and aggressive approach to corporate environmental responsibility. Practically, however, the success of the Valdez Principles turns on whether a voluntary code can motivate corporations to shoulder a burden beyond what is legally required, and whether the disclosure and audit provisions of the Principles can be drafted in a manner to overcome present corporate objections.

Corporate experience in South Africa under the Sullivan Principles indicates that a voluntary code of conduct, demanding responsibility beyond that legally required, may be successful if certain social and economic factors that motivate corporations to comply with the code of conduct are present. In addition, review of various techniques used in social audits suggests that the controversial disclosure and

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[80] Valdez Principles, *supra* note 6; Feder, *Who Will Subscribe to the Valdez Principle?*, N.Y. Times, Sept. 10, 1989, § 3, at 6, col. 1.

[81] Valdez Principles, *supra* note 6. Under the Valdez Principles, corporations take a pledge to "update [their] practices continually in light of advances in technology and new understandings in health and environmental science . . . and make consistent measurable progress in implementing [the Principles]." *Id.* at 1.

[82] Valdez Principles, *supra* note 6.

[83] For example, CERES intends that corporate signatories will strive to use the best available technology (BAT) in combatting environmental pollution from their facilities. Telephone interview with Michael Fleming, CERES staff member (Jan. 11, 1991). This is currently required in only specific circumstances under the Clean Air Act, and not at all under most other environmental statutes.

audit standards may be structured in a manner acceptable to both the drafters and the potential signatories.

A. Corporate Experience with Voluntary Codes of Conduct in South Africa: The Sullivan Principles

In 1977, Reverend Leon H. Sullivan established the Sullivan Principles in an effort to promote social justice and eliminate apartheid.[84] These Principles are a voluntary code of conduct for American corporations operating in South Africa.[85] The Sullivan Principles call for non-segregation of the workplace, equal employment practices, equal pay, development of training programs for the advancement of blacks and other nonwhites, increasing the number of blacks and other nonwhites in management positions, improving the quality of employees' lives outside the workplace, and working to eliminate laws that impede justice.[86] Signatory companies are required annually to release data on company performance.[87] Using this information, a consulting firm compiles and releases a public report comparing the performance of all signatory companies to a standard of socially responsible behavior.[88]

1. Success of the Sullivan Principles

Since their inception in 1977, the Sullivan Principles have had a positive impact on apartheid,[89] as well as on the attitudes of American corporations and investors. The Sullivan Principles have com-

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[84] D. HAUCK, M. VOORHES & G. GOLDBERG, TWO DECADES OF DEBATE: THE CONTROVERSY OVER U.S. COMPANIES IN SOUTH AFRICA 155–58 (1983) [hereinafter TWO DECADES OF DEBATE].

[85] *See id.*

[86] *See* J. LEAPE, B. BASKIN & S. UNDERHILL, BUSINESS IN THE SHADOW OF APARTHEID: U.S. FIRMS IN SOUTH AFRICA 217–18 (1985) [hereinafter BUSINESS IN THE SHADOW OF APARTHEID]; *Going All-Out Against Apartheid,* N.Y. Times, July 27, 1986, § 3, at 1, col. 2, 27, col. 4.

[87] TWO DECADES OF DEBATE, *supra* note 84, at 158.

[88] *See* ARTHUR D. LITTLE, INC., TWELFTH REPORT ON THE SIGNATORY COMPANIES TO THE STATEMENT OF PRINCIPLES FOR SOUTH AFRICA 4, 28–30 (1988) [hereinafter TWELFTH REPORT].

[89] *See* BUSINESS IN THE SHADOW OF APARTHEID, *supra* note 86, at 221; N.Y. Times, June 4, 1987, at D6, col. 1 (observation by Adrian Botha, South African Executive Director of the American Chamber of Commerce representing American companies operating in South Africa). Reverend Sullivan also agrees that the Principles did show a notable record of corporate responsibility. Auerbach, *Sullivan Abandoning S. African Code,* Wash. Post, June 4, 1987, at E1, col. 4, E4, col. 1.

batted apartheid by helping black South Africans gain workplace rights in numerous businesses and by helping black industrial labor unions win official recognition.[90] The Sullivan Principles influenced American corporations in South Africa by making them aware of injustices in the employment system,[91] by providing a focus for company programs,[92] and by unifying the companies to act as a group "sense of strength through numbers" as they confront social issues in South Africa.[93] Finally, the Sullivan Principles offer investors standards by which they can measure the social responsibility of American firms in South Africa[94] and use such information to make moral determinations concerning their investments.[95]

American signatory corporations helped achieve progress against apartheid. Specific instances of progress are evident during the first five years of operations under the Sullivan Principles.[96] By 1982, only one of the reporting signatory companies had failed "to achieve complete, de facto non-segregation of their facilities."[97] Similarly, all but two signatory companies

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[90] *Going All-Out Against Apartheid*, N.Y. Times, July 27, 1986, § 3, at 1, col. 2.

[91] TWO DECADES OF DEBATE, *supra* note 84, at 120 (corporate executives agree that the Sullivan Principles have made them more aware of problems in South Africa and have forced them to pay more attention to their operations there); BUSINESS IN THE SHADOW OF APARTHEID, *supra* note 86, at 135.

[92] D. MYERS, U.S. BUSINESS IN SOUTH AFRICA: THE ECONOMIC, POLITICAL, AND MORAL ISSUES 97 (1980) [hereinafter U.S. BUSINESS IN SOUTH AFRICA]. Some company representatives characterize the Sullivan Principles as a catalyst that led companies to systematize programs for desegregation, training, and employee housing, and plan on a more systematic basis. *Id.* In addition, without the Sullivan Principles, corporate executives agreed that "they would not have established means of pooling information to enable each company to learn from the experience of others." TWO DECADES OF DEBATE, *supra* note 84, at 120.

[93] TWO DECADES OF DEBATE, *supra* note 84, at 120. According to one company executive interviewed by the Investor Responsibility Center, the Sullivan process made companies "less timid" about confronting social issues in South Africa because "acting in concert [is] easier than . . . doing it all by yourself." *Id.*

[94] *See* Feder, *A Wary Reception for Sullivan Stand*, N.Y. Times, June 8, 1987, at D5, col. 5. Many universities have incorporated corporate compliance with the Sullivan Principles into their overall investment policy. *See* U.S. BUSINESS IN SOUTH AFRICA, *supra* note 92, at 339. As of 1983, more than a dozen institutions—including Brandeis, Carleton, Cornell, the University of Kansas, Macalester, the University of Minnesota, Mount Holyoke, Oberlin, the University of Pennsylvania, Wellesley, Wesleyan, and Yale—adopted policies requiring that they not hold stock in companies that operated in South Africa and have declined to sign the Sullivan Principles. TWO DECADES OF DEBATE, *supra* note 84, at 69.

[95] Feder, *A Wary Reception for Sullivan Stand*, N.Y. Times, June 8, 1987, at D5, col. 5.

[96] Most advancements during these first years dealt with the first three Sullivan Principles, which called for desegregation, fair employment practices, and equal pay for equal work. TWO DECADES OF DEBATE, *supra* note 84, at 118, 155–56.

[97] TWO DECADES OF DEBATE, *supra* note 84, at 118 (citing ARTHUR D. LITTLE, INC.,

reported that all benefits available to whites were also available to employees of other races on an equal basis.[98] In addition, by 1982, all reporting companies were paying all races at the same rate for equal work and had been doing so for the past two years.[99]

Accomplishments of signatory companies in recent years reflect current progress.[100] During 1988 and 1989, signatory companies contributed approximately sixty million dollars to socially responsible programs for minorities.[101] Contributions to education and training of minorities continued to rise, as evidenced by a thirteen percent increase in the number of bursaries[102] and an eleven percent increase in Adopt-a-School grants.[103] The fostering of minority entrepreneurs continued, as reflected in recent increases of aid to minority business and in purchases from minority businesses.[104] The most striking evidence of progress, however, can be seen in the area of minority job advancement. The number of minorities filling job vacancies for managerial, supervisory, and professional positions has increased steadily in the past six years.[105] Notably, the number of whites supervised by minorities has risen marginally from 3.1% in 1983 to 8.4% in 1989.[106]

The statistics indicate that the Sullivan Principles continue to be a vehicle for positive change. More importantly, the Sullivan Principles are a continuing source of guidance for American corporations

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SIXTH REPORT ON THE SIGNATORY COMPANIES TO THE SULLIVAN PRINCIPLES (October 31, 1983)).

[98] *Id.*

[99] *Id.* at 119.

[100] Since all signatories repeatedly have met the requirements of principles 1–3, TWELFTH REPORT, *supra* note 88, at 2, 5, most noteworthy progress has come in implementation of principles 4–7, which deal with education, training and advancement, community development and social justice. *See* ARTHUR D. LITTLE, INC., THIRTEENTH REPORT ON THE SIGNATORY COMPANIES TO THE STATEMENT OF PRINCIPLES FOR SOUTH AFRICA 9–31 (October 31, 1989) [hereinafter THIRTEENTH REPORT]; TWELFTH REPORT, *supra* note 88, at 7–27.

[101] *See* THIRTEENTH REPORT, *supra* note 100, at 1. Signatory companies contributed 169 million rands, which, according to conversion rates in June 1989, equals approximately $60 million. *See* TWELFTH REPORT, *supra* note 88, at 1; THIRTEENTH REPORT, *supra* note 100, at 8.

[102] *See* THIRTEENTH REPORT, *supra* note 100, at 1, 10.

[103] *See* TWELFTH REPORT, *supra* note 88, at 1, 8.

[104] *See* THIRTEENTH REPORT, *supra* note 100, at 1, 20–21; TWELFTH REPORT, *supra* note 88, at 1, 18–19. Since 1983, purchases from minority businesses have risen a total of 260%. *See* THIRTEENTH REPORT, *supra* note 100, at 21; TWELFTH REPORT, *supra* note 88, at 19.

[105] *See* THIRTEENTH REPORT, *supra* note 100, at 16; TWELFTH REPORT, *supra* note 88, at 15.

[106] *See* THIRTEENTH REPORT, *supra* note 100, at 15; TWELFTH REPORT, *supra* note 88, at 13.

striving to be socially responsible amidst the racial oppression in South Africa.

2. Social and Economic Pressures Behind the Success of the Sullivan Principles

The success of the Sullivan Principles is largely a result of underlying social and economic pressures. For most corporations, the decision to adopt the Sullivan Principles was influenced heavily by the following social and economic pressures: increased media reporting; university hype and rising public interest concerning the role of business in South Africa;[107] the need to improve corporate image and credibility with domestic groups;[108] the growing number of shareholder resolutions calling for adoption of the Sullivan Principles;[109] and the growing use of the Sullivan Principles by investors as a measure for moral determinations regarding their investments.[110]

These same social and economic pressures continue to play a role in a corporation's decision to remain a signatory of the Principles. Many investors still use the Sullivan Principles as a yardstick for screening South African investments,[111] and shareholders continue to raise South Africa-related resolutions.[112]

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[107] *See* U.S. BUSINESS IN SOUTH AFRICA, *supra* note 92, at 93–94. Media coverage of South Africa increased substantially in 1976. *Id.* at 93. Later in the 1970s, major publications included articles on American business involvement in South Africa, and interest among the American public, particularly among college students, remained high. *Id.* Companies thought the Sullivan Principles would meet the public's demand for information through releasing social audits and publicizing company efforts in South Africa. *See* TWO DECADES OF DEBATE, *supra* note 84, at 104.

[108] TWO DECADES OF DEBATE, *supra* note 84, at 104.

[109] BUSINESS IN THE SHADOW OF APARTHEID, *supra* note 86, at xxxi. Shareholder resolutions in support of the Sullivan Principles were successful for several reasons: first, managers were prepared to pay some price, such as a large contribution to South Africa, to avoid embarrassing disruptions at annual meetings and the high cost of management time in fighting these resolutions; second, shareholder resolutions focused American managers on opportunities to adopt policies beneficial to both the managers and Black South Africans; and third, large institutional investors adopted policies that limited investment in securities of firms with South African operations. *Id.*

[110] *See* U.S. BUSINESS IN SOUTH AFRICA, *supra* note 92, Appendix E, at 339; Feder, *A Wary Reception for Sullivan Stand*, N.Y. Times, June 8, 1987, at D5, col. 5.

[111] *See* TWO DECADES OF DEBATE, *supra* note 84, at 121. One commentator has noted that the "institutional investors and others have made it clear that they expect companies operating in South Africa to sign and implement the Sullivan [P]rinciples as a minimum social responsibility requirement and undoubtedly would scrutinize closely any company that withdrew from the [P]rinciples." *Id.*

[112] *Id.* at 62. Although the South African-related shareholder resolutions peaked in 1980 with 38, and they have decreased somewhat since then, shareholder resolutions remain influential in company decisionmaking. *Id.*

3. Reverend Sullivan's Abandonment of the Principles in 1987

Driven by social and economic forces, the Sullivan Principles thus far have been successful. Reverend Sullivan's withdrawal of his support for the Principles in June 1987 after calling on American companies to divest from South Africa[113] and the subsequent divesting by many American companies[114] should not change this characterization.

Reverend Sullivan abandoned the Principles because he felt that they had failed to bring about the end of apartheid and that it was time for more drastic action.[115] Sullivan's action, however, does not indicate that the Principles were a failure. Sullivan himself acknowledged that the Principles alone could not end apartheid.[116] They were one of many forces that, if combined, would bring about the end of apartheid.[117] Therefore, the fact that apartheid had not been abolished by Sullivan's self-imposed deadline of June 1987 means not that the Principles truly failed, but that they, along with other forces, failed to keep pace with Sullivan's own expectations. In addition, many companies in South Africa that did not divest still adhere to the Principles and have made progress in combatting apartheid.[118] Such progress is an indication of the continuing success of the Sullivan Principles.

American corporations divesting from South Africa is not an indication of any shortcoming of the Sullivan Principles. On the con-

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[113] *See* Auerbach, *Sullivan Abandons S. African Code*, Wash. Post, June 4, 1987, at E1, col. 4; Battersby, *South Africa Reacts Angrily to Sullivan Call*, N.Y. Times, June 4, 1987, at D6, col. 1.

[114] A total of 136 firms divested from South Africa between 1984 and June 17, 1987. Swardson, *Officials Deny Pressure Led to Bank Divestiture: Citicorp Is the 136th U.S. Firm to Leave Nation*, Wash. Post, June 17, 1987, at F1, col. 5. As of October 31, 1989, a total of 59 American signatories to the Sullivan Principles remain in South Africa, as compared with the 92 that remained at the close of 1987. *See* THIRTEENTH REPORT, *supra* note 100, at 5.

[115] *See* Potts & Skrzycki *Many Companies Reject Call to Leave*, Wash. Post, June 4, 1987, at E1, col. 2. Sullivan did note, however, that "the Principles have caused a revolution in industrial race relations in South Africa." *Id.*

[116] TWO DECADES OF DEBATE, *supra* note 84, at 102.

[117] *Id.*

[118] *See generally* THIRTEENTH REPORT, *supra* note 100; TWELFTH REPORT, *supra* note 88; Potts & Skrzycki *Many Companies Reject Call to Leave*, Wash. Post, June 4, 1987, at E1, col. 2 (companies will stay in South Africa because they find it difficult to conclude that continuing to help blacks there is counterproductive); Feder, *Sullivan Asks End of Business Links with South Africa*, N.Y. Times, June 4, 1987, at A1, col. 1 (business groups say that companies' continued presence in South Africa remains the best hope for social change); Battersby, *South Africa Reacts Angrily to Sullivan Call*, N.Y. Times, June 4, 1987, at D6, col. 1 (U.S. companies will continue with the Sullivan program and not turn off the tap on social responsibility).

trary, such divesting was a tribute to the success of the Principles and the forces behind them. The Sullivan Principles focused shareholders, investors, and the American public on the ways in which social and economic pressures can be mobilized to influence corporate social responsibility.[119] Thus, when much of the investing public and Reverend Sullivan decided that, to be socially responsible, American corporations should divest, not comply with the Sullivan Principles, these same social and economic forces were used successfully as weapons to achieve such divesting.[120]

The fact that the corporate divesting was so widespread is an exciting prospect for the Valdez Principles. In the future, whether social and economic pressures are used to back a formal voluntary code of conduct such as the Sullivan Principles or an informal policy such as divesting, one may expect the outcome to be similarly successful.

B. External Forces Likely to Influence Corporate Response to the Valdez Principles

The social and economic strategies used by activists to pressure corporate behavior in South Africa have been characterized as a "basic blueprint" that will be influential in steering corporate performance in other social responsibility campaigns.[121] The growing

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[119] *See supra* notes 107–12 and accompanying text.

[120] Social pressure in the form of concern for company image and the mounting activist campaign against corporate involvement in South Africa were cited among the reasons given for corporate pullout. Risen, *G.M. to Pull Out of South Africa*, L.A. Times, Oct. 21, 1986, pt. 1, at 14, col. 1; Kristof, *U.S. Companies Cut Some South African Links*, N.Y. Times, Apr. 29, 1985, at A1, col. 3, D8, col. 3. Economic pressures were considered the main force behind divestiture. Isikoff, *Threat to Profits Spurs U.S. Exodus from South Africa*, Wash. Post, Nov. 17, 1986, at 1, col. 1. Divestiture by shareholder public institutions, including colleges, universities, and state and local governments, was considered one particularly influential economic tactic. *Id.* at A20, col. 2. According to tabulations at the height of divestiture, 116 colleges and universities, 19 state governments, and 83 cities and counties had passed anti-South African measures requiring the sale of $22 billion worth of securities in United States corporations and banks involved in South Africa. *Id.* The divestiture of California state securities alone required the sale of $9.5 billion in state securities. *Id.* The passage of "selective purchasing laws" that restricted public contracts to the United States companies involved in South Africa was considered the other economic tactic influential in spurring firms to pull out of South Africa. *Id.* at A20, col. 3. By November of 1986, two state governments (Maryland and Michigan) and 31 cities and counties (including Los Angeles, New York, and the District of Columbia) had passed selective contracting laws. *Id.* This form of economic pressure was thought to be the most severe because American corporations lost business in the United States based on the fact that they were doing business in South Africa. *Id.*

[121] *Id.* at A20, col. 1 (observation made by Tim Smith, executive director of the Interfaith Center on Corporate Responsibility).

influence of these "blueprint" strategies in contexts other than Apartheid indicates that they are capable of warming corporate reception of the Valdez Principles, just as they motivated acceptance of, and compliance with, the Sullivan Principles in South Africa.

1. Social Pressures

Media pressure will be influential in gaining corporate support for the Valdez Principles. In any given week, hardly a day goes by when the public is not reminded of pressing environmental concerns such as toxic emissions, ocean dumping, waste disposal, and chemical spills.[122] Extensive public awareness of environmental issues will increase the pressure on corporations to sign on to the Valdez Principles. Support of the Valdez Principles ultimately will help reduce public criticism that firms are not environmentally conscious and will help corporations maintain a positive public image.[123]

Strong public interest was essential to the social movement that pressured corporations operating in South Africa to comply with the Sullivan Principles and ultimately divest. Public interest is likely to be much more significant in galvanizing support for increased corporate environmental responsibility because, unlike the social problems in South Africa, environmental problems in the United States are not miles away, but in our own backyard.[124] Notably, strong public uprising was evident in response to the *Exxon Valdez* oil spill.[125] Consumers boycotted Exxon oil stations and sent back Exxon

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[122] An informal survey of the New York Times during four consecutive days in November 1989 reflects the abundance of articles dealing with environmental issues. *See* Schneider, *U.S. Seeks to Store Nuclear Waste at Army Bases to Save Plutonium Plant*, N.Y. Times, Nov. 10, 1989, at A27, col. 1; Wald, *Tritium Released at a Weapons Lab*, N.Y. Times, Nov. 9, 1989, at A30, col. 1; Gold, *House Passes Amendment on Spill Liability*, N.Y. Times, Nov. 9, 1989, at A32, col. 1; Lewis, *Thatcher Urges Pact on Climate*, N.Y. Times, Nov. 9, 1989, at A17, col. 1; James, *New Jersey Towns Face a Fall Compost Crisis*, N.Y. Times, Nov. 8, 1989, at B2, col. 4; Cushman, *New Rules Sought on Shipping Toxic Material*, N.Y. Times, Nov. 8, 1989, at A20, col. 1; Montgomery, *U.S., Japan and Soviets Prevent Accord to Limit Carbon Dioxide*, N.Y. Times, Nov. 8, 1989, at A8, col. 3; Hanley, *New Jersey Questions Superfund Priority*, N.Y. Times, Nov. 7, 1989, at B1, col. 2.

[123] Support of the Sullivan Principles brought such advantages to American companies in South Africa. BUSINESS IN THE SHADOW OF APARTHEID, *supra* note 86, at 221; U.S. BUSINESS IN SOUTH AFRICA, *supra* note 92, at 94.

[124] McPherson, *Ethical Investing*, WILLAMETTE WEEK, Aug. 24, 1989, at 14, 15.

[125] The activist group Citizens for Environmental Responsibility was formed in response to the Valdez spill. *Citizens for Environmental Responsibility Urges Consumers to Boycott Exxon*, Business Wire, Apr. 18, 1989 (available on NEXIS, Wires file). One member recalls that the idea for the group began simultaneously in many parts of the country as if the "oil spill touched a nerve and triggered an instant network of people." *Id.*

credit cards.[126] Such consumer action is clear evidence of public concern with environmental issues.

2. Economic Pressures

Economic pressures were cited by financial analysts and corporate management as the real reason that corporations initially complied with the Sullivan Principles[127] and later chose to divest.[128] While currently the environmental context contains no parallels to the South African selective contracting laws, socially responsible investors and shareholders are exerting on corporations significant pressures to be environmentally responsible.[129] In the environmental context, the parallel to corporate divestiture—the move by public institutions to sell securities of companies with South African ties—appears to be socially responsible investing. The socially responsible investor purchases securities and products only in firms that meet positive criteria, such as environmental sensitivity and delivery of safe products and services; such an investor also screens corporations to avoid investing in firms that meet negative criteria, such as weapons manufacturing.[130] Socially responsible investing began in the 1920s when religious institutions began purging portfolios of "sin stocks" and weapons manufacturers.[131] Today, $450 billion is invested based on social criteria, and there are currently a dozen socially

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[126] White, *10,000 Angry Credit Card Holders Deluge Exxon with Plastic*, L.A. Times, May 2, 1989, pt. IV, at 1, col. 5. While the returned cards represented only one-seventh of one percent of Exxon's 7 million credit cards, Exxon was concerned sufficiently about the development to issue statements pleading its side of the case. *Id.*

[127] *See* N. MAKGELTA & A. SEIDMAN, OUTPOSTS OF MONOPOLY CAPITALISM: SOUTHERN AFRICA IN THE CHANGING GLOBAL ECONOMY 73 (1980). Corporations signed the Sullivan Principles in an effort to convince the public that they, the corporations, should be encouraged to remain and even expand their holdings in South Africa. *Id.*

[128] In numerous newspaper articles covering corporate divestment from South Africa, the threat to corporate profit was cited as the main reason for leaving. *See, e.g.*, Isikoff, *Threat to Profits Spurs U.S. Exodus from South Africa*, Wash. Post, Nov. 17, 1986, at A1, col. 1; Risen, *G.M. to Pull out of South Africa*, L.A. Times, Oct. 21, 1986, pt. I, at 14, col. 1 (G.M. cites losses and deterioration of the South African economy as factors in pullout decision); Kristof, *U.S. Companies Cut Some South African Links*, N.Y. Times, Apr. 29, 1985, at A1, col. 3 (American companies deciding to scale back or sell off operations in South Africa publicly cite declining profitability of South African operations); Claiborne, *Citicorp to Sell S. African Subsidiary*, Wash. Post, June 17, 1987, at F1, col. 2 (Citibank pulls out as South African connection had become unprofitable and was directly affecting the company's bottom line).

[129] *See* McPherson, *supra* note 124, at 14.

[130] *See id.*

[131] *See id.* at 15.

responsible investment funds that specialize in this area.[132] This represents over a ten-fold increase in this industry since 1985.[133]

Socially responsible investing could play a large role in fostering corporate environmental responsibility. First, the $450 billion invested annually according to socially responsible criteria is more than twenty times greater than the $22 billion divested from firms operating in South Africa; the preference given to socially responsible firms was crucial to the decision by firms operating in South Africa to pull out of South Africa.[134] If environmental concerns become a focus of socially responsible investing, instead of being one of many criteria,[135] firms would feel the economic pressure directly and would consequently act in a more environmentally responsible manner.[136] Second, socially responsible investing recently has become a competitive alternative to investing in firms without social criteria screens.[137] Responsible investors no longer have to sacrifice profit to invest according to socially responsible ideals. Third, fund managers expect socially responsible environmental investing to make a dramatic leap forward in future years for two reasons: the environment is the predicted hot topic of the 1990s;[138] and, because the environment is in everyone's backyard, it is increasingly a concern of the entire investing public.[139]

Socially responsible investment funds and other private investors will begin to screen clients according to compliance with the Valdez Principles. This will mirror the activity in the early 1980s, when screening for compliance with the Sullivan Principles was a popular

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[132] *See id.*

[133] *Id.* at 14.

[134] Isikoff, *Threat to Profits Spurs U.S. Exodus from South Africa*, Wash. Post, Nov. 17, 1986, at 1, col. 1, A20, col. 3.

[135] Socially responsible investment funds already screen investments for environmental responsibility. *See* Kirkpatrick, *Environmentalism: The New Crusade*, FORTUNE, Feb. 12, 1990, at 44, 47. It is likely that these funds will adopt compliance with the Valdez Principles as one criterion in the environmental screening process because many social investment funds already are members of CERES. *See* Valdez Principles, *supra* note 6, Statement of Intent.

[136] CERES already has organized a broad coalition of environmentalists and investment professionals, together representing more than $100 billion in assets, that is calling for corporations to be more environmentally responsible. Davidson, *SIF Announces Valdez Principles with $150 B Worth of Backers, Wide Press Coverage*, FORUM, THE NEWSLETTER OF THE SOCIAL INVESTMENT FORUM, Winter 1989, at 1, 4.

[137] *See* Wiles, *Mutual Funds: Putting Your Money Where Your Morals Are*, L.A. Times, Oct. 14, 1990, at D5, col. 1.

[138] Kirkpatrick, *supra* note 135, at 44.

[139] McPherson, *supra* note 123, at 15.

amendment to the investment policy of many universities and investment funds.[140]

Shareholder influence in the form of voting strategies and shareholder resolutions are a second source of economic pressure on corporations to become more environmentally responsible.[141] The potential of this influence was demonstrated in the recent activities of the New York City pension fund. In May of 1989, the New York City Employee Retirement System (NYCERS) successfully threatened to withhold its votes from management candidates unless management acted in a manner that NYCERS felt was environmentally responsible.[142] If such activism spreads to other funds and institutional investors, large block shareholders such as NYCERS may become a driving force behind corporate environmental responsibility.[143]

Like shareholder voting, shareholder resolutions calling for corporate adoption of the Valdez Principles may exert economic pressure for corporations to be environmentally responsible. Resolutions in support of the Valdez Principles, like resolutions in support of the Sullivan Principles, may be successful on economic grounds.[144]

First, corporate managers may be prepared to pay some price, such as compliance with the environmental provisions of the Valdez Principles, to avoid embarrassing disruptions of annual meetings and the high cost of management time associated with fighting such resolutions. The shareholder aggravation factor was very effec-

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[140] *See* U.S. BUSINESS IN SOUTH AFRICA, *supra* note 92, at app. E. For example, Amherst College adopted a South African related investment policy in 1977 whereby the college would consider selective divestment of stock in companies that fail to carry out the goals of the Sullivan Principles. *Id.*

[141] Nichols, *Pension Funds Plan New Forays into Oil Companies' Board Rooms*, PLATT'S OILGRAM NEWS, June 5, 1989, at 5.

[142] *Id.* By coupling a threat to withhold their votes from management candidates with a massive campaign in the media, NYCERS pressured Exxon to appoint an environmentalist to the board and create a committee to deal with environmental issues. *Id.* NYCERS holds shares in other major oil companies such as Chevron, Mobil, Amoco, Occidental, Phillips Petroleum, and Unocal, and thus has the potential to pressure for environmentally responsible activities by these companies as well. *Id.*

[143] The push for activism by large block shareholders may already be in motion. Prominent individuals such as Harrison J. Goldin and Gray Davis, the comptrollers of New York City and the State of California respectively, have made public statements supporting aggressive corporate environmental responsibility. *See* Statement by California Comptroller Gray Davis, Sept. 7, 1989 [hereinafter Statement by Davis]; Remarks by New York City Comptroller Harrison J. Goldin, Statement on the Establishment of the Valdez Principles, Sept. 7, 1989 [hereinafter Remarks by Goldin].

[144] *See supra* note 109.

tive in extracting some form of appeasement from managers of companies with South African operations.[145] Managers often made especially large contributions to South African community development in an effort to avoid the shareholder criticisms.[146] It is not unreasonable to suggest that managers would make a similar environmental contribution, by signing on to an acceptable form of the Valdez Principles, to avoid shareholder dissatisfaction and protest.

Second, acceptance of the Valdez Principles may be mutually beneficial to management interests and the environmental interests that shareholders are trying to protect. The Principles may benefit management by focusing and systematizing management's approach to environmentally sensitive operations,[147] by providing management with the added safety of "working in numbers" with other signatories to change the way industry views environmental responsibility,[148] by improving company image and credibility to attract and keep investor capital,[149] and by potentially strengthening competitive position in world markets.[150] Third, acceptance of the Valdez Principles will help ensure that the corporation will not lose investments from socially responsible investment and pension funds.[151]

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[145] BUSINESS IN THE SHADOW OF APARTHEID, *supra* note 86, at xxxi.

[146] *Id.*

[147] Corporate executives noted that the Sullivan Principles had a measurable impact on company operations by helping signatories systematize current programs to help underprivileged South Africans and systematize plans for future programs. U.S. BUSINESS IN SOUTH AFRICA, *supra* note 92, at 97. Similarly, the Valdez Principles may help systematize a company's current and future plans in the area of environmental responsibility. This would lead to greater efficiency and some cost savings for management.

[148] Executives stressed that the Sullivan Principles gave companies a sense of "strength in numbers" in confronting issues in South Africa. TWO DECADES OF DEBATE, *supra* note 84, at 120. While this was viewed as a moral support for companies attacking apartheid, it also may be viewed as an economic support for companies attacking environmental issues. Engaging in aggressive corporate responsibility will be costly for companies. The fact that competitors in the industry are also signatories and are also figuring this cost into profits will be somewhat of a relief for managers of Valdez signatories.

[149] *See* TWO DECADES OF DEBATE, *supra* note 84, at 104.

[150] *See* Bavaria, *Business, Clean Up Your Environmental Act!*, Newsday, Sept. 7, 1989, at 77, col. 2. 3M Corporation's decision to institute its "Pollution Prevention Pays" program was equally beneficial to the corporation and to the environment. The program has advanced 3M's technology, strengthened its competitive position in world markets, and saved $235 million. *Id.* The program also saved the environment from 100,000 tons of air pollutants, 10,000 tons of water pollutants, 150,000 tons of sludge, and 1.5 billion gallons of wastewater. *Id.*

[151] *See supra* note 135.

C. Structuring Disclosure and Audit Provisions for the Valdez Principles

The social and economic atmosphere seems ripe for fostering a voluntary code of environmental conduct. Nevertheless, before the business community will accept the Valdez Principles, CERES must overcome specific objections that potential signatories have voiced with regard to the audit and disclosure provisions. Review of the federal disclosure standards, as well as various techniques used in social audits and internal corporate audits, suggests that these provisions may be structured in a manner that will preserve CERES's goals and pacify corporate objections.

The disclosure provision, as it presently reads, would require each signatory company to:

> disclos[e] to [its] employees and to the public incidents relating to [its] operations that cause environmental harm or pose health or safety hazards, . . . disclose potential environmental, health or safety hazards posed by [its] operations, and . . . not take any action against employees who report any condition that creates a danger to the environment or poses health and safety hazards.[152]

This provision is intended to elicit disclosure of all incidents, as opposed to the periodic disclosures required under the audit provision.[153]

Potential signatories to the Valdez Principles have voiced two major objections to the proposed disclosure provision. First, corporate sources argue that such a broad disclosure policy will lead to increased litigation against their companies.[154] Second, corporate sources note that it would be difficult to agree to a disclosure policy that might create disclosure liability beyond that specified in state and local law.[155] In other words, potential signatories view the disclosure provision as requiring corporations voluntarily to open a Pandora's box, which may result in costly litigation accompanied by civil and criminal penalties. Finally, there is concern that the broad disclosure provision will cause confidentiality problems.[156]

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[152] Valdez Principles, *supra* note 6, at 2.

[153] Telephone interview with Michael Fleming, CERES Staff Member (Jan. 11, 1991).

[154] Feder, *Who Will Subscribe to the Valdez Principles?*, N.Y. Times, Sept. 10, 1989, § 3, at 6, col. 1.

[155] *Id.*

[156] *See* Zoll, *Changing Corporate Conduct—Two Perspectives*, ENVTL. F., Mar./Apr. 1990, at 33, 45.

The disclosure provision in its present form is not acceptable. Few signatories will expose themselves voluntarily to the increased costs that likely would stem from compliance with the proposed provision. In addition, few signatories will release information regarding policies on disclosure of accidents and hazard assessments unless safeguards exist to protect the proprietary nature of such information.

An acceptable disclosure provision must strike a compromise between CERES's goals and the practical concerns of the potential signatories. CERES would like disclosure under the Valdez Principles to help investors make informed decisions about environmental issues;[157] signatories, on the other hand, are concerned primarily with bottom line financial issues and confidentiality concerns.[158]

Accordingly, a compromise disclosure provision requires that, first, signatories disclose, at a minimum, all information previously required to be disclosed by law. Thereafter, additional disclosure may be dictated by the degree to which social and economic pressures behind the Valdez Principles influence corporate policy.[159] As such, CERES achieves its goal of providing a useful source of environmental information for investors while signatories incur no substantial additional cost in making this disclosure.[160] Furthermore, CERES sets a reasonable and attainable disclosure standard, one that neither will recruit potential signatories, nor will turn them away.[161]

1. Tying Disclosure to Legal Standards

Federal regulations already require extensive disclosure of a company's production of hazardous chemicals or any chemical spills or releases. Accordingly, a disclosure provision that initially mimics the federal disclosure standards would provide a high base line for disclosure, would not be burdensome for signatories, and would not compromise CERES's goals.

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[157] Telephone interview with Michael Fleming, CERES Staff Member (Jan. 11, 1991).

[158] *See supra* notes 154–56 and accompanying text.

[159] *See supra* text accompanying notes 122–51.

[160] The additional cost for signatories would be the cost of becoming a signatory and thereafter any cost in compiling its previously released disclosure. *See infra* note 180 and accompanying text.

[161] *See* Comment, *The Valdez Principles: Is What's Good for America Good for General Motors?*, 8 YALE L. & POL'Y REV. 180, 195 (1990). The author notes that "[c]orporations will not sign a code whose standards are too stiff. By establishing reasonable benchmarks, first organizers can recruit more companies. Once the companies are on board, organizers can gradually increase the stringency of the standards. Most companies will be reluctant to abandon the code once they have publicly signed." *Id.*

Specifically, under the federal laws, when reportable quantities of hazardous substances are released into the environment, the National Response Center in Washington must be notified immediately.[162] When extremely hazardous substances are released into the environment and pose a risk to those outside the bounds of the facility, predesignated community emergency coordinators for the area affected by the release must be notified at once.[163]

In addition, when industry uses potentially harmful chemicals in a community, the Community Right-to-Know regulations require corporations to provide the public with important information on the hazardous and toxic substances located in, and released by, corporate facilities within the community.[164] With regard to hazardous substances, owners and operators of a facility must submit to the committees, commissions, and fire departments that have jurisdiction over the facility a material safety data sheet[165] and an inventory form for each hazardous chemical present at the facility.[166] The public generally has access to the information provided in these reports.[167] With regard to toxic chemicals that have been manufactured, processed, or otherwise used in excess of the predetermined threshold quantity, owners and operators of facilities must submit a report to the EPA and the state where the facility is located.[168]

Use of this federal disclosure standard initially is consistent with the notion that the Valdez Principles should not be "weapons of coercion,"[169] but a "starting point from which corporations can . . . develop a workable approach to environmentally responsible corpo-

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[162] Designation, Reportable Quantities, and Notification, 40 C.F.R. § 302.6 (1990).

[163] Emergency Planning and Notification, 40 C.F.R. § 355.40 (1989). Owners and operators in this situation are required to disclose: the identity of the substance involved in the release, an indication of its hazardous nature, an estimate of the quantity released, the duration of the release, the media into which the release occurred, and any anticipated acute or chronic health risks associated with the release. *Id.*

[164] *See* Hazardous Chemical Reporting: Community Right-to-Know, 40 C.F.R. § 370 (1989); Toxic Chemical Release Reporting: Community Right-to-Know, 40 C.F.R. § 372 (1989).

[165] "Material safety data sheets" are data sheets containing information on hazardous chemicals; facilities must prepare the material safety data sheets pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (1988), and regulations promulgated under that Act. 40 C.F.R. § 370.20(a) (1989).

[166] *Id.* § 370.21.

[167] *See id.* §§ 370.30–.31.

[168] 40 C.F.R. § 372.30 (1989). For purposes of this section, "toxic chemicals" refers to toxic chemicals as defined under § 313 of title III of the Superfund Amendments and Reauthorization Act of 1986. *Id.* § 372.1. Requirements for the submission of information relating to the release of toxic chemicals are set forth in 40 C.F.R. § 372 (1989).

[169] *See* Remarks by Goldin, *supra* note 143, at 3.

rate policy making."[170] CERES need not force a corporation to accept a broad and potentially costly disclosure policy prior to signing on to the Valdez Principles. Signing on is the "starting point." Thereafter, corporations voluntarily will develop a stricter and potentially more costly disclosure standard, as warranted by evolving economic and societal pressures.[171]

2. Providing for Greater Public Access to Information

CERES should accept the limited disclosure provision suggested above. However, to realize CERES's goal that the disclosure be helpful to investors, it would be useful to structure a disclosure provision that contains a mechanism for wider dissemination of disclosed information. The mechanism could be suspended if wider dissemination would incur substantial additional cost.[172]

An acceptable disclosure mechanism would make reported information more available to the investing public in a useful, yet inexpensive form. Ideally, such a disclosure mechanism would provide for a centralized repository of disclosed information, classified by company, that is easily accessible to the public. This may be accomplished by linking the disclosed environmental information to one of the financial reporting services—such as Dun & Bradstreet, Standard & Poors, or Value Line—that already publishes financial analyses on individual companies periodically.[173] The reporting group could develop a separate environmental reporting service, similar to existing financial reporting services, that would publish compilations of disclosed environmental information on a frequent basis.[174] The

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[170] *Id.*

[171] Similarly, the Sullivan Principles were the "starting point" for corporate social responsibility in South Africa. As social and economic pressures pushed for corporate responsibility beyond mere adherence to the Sullivan Principles, corporations switched gears and complied. The same potential exists for social and economic pressure to influence the course of environmental responsibility under which the Valdez Principles exist. *See supra* notes 122–51 and accompanying text.

[172] Cost was a large factor in corporation opposition to the disclosure provisions. *See* Feder, *Who Will Subscribe to the Valdez Principles?*, N.Y. Times, Sept. 10, 1989, § 3, at 6, col. 1. Cost likely will be a large factor in determining whether such a consolidated mechanism for disclosure ultimately is accepted.

[173] These financial reporting services compile and publish financial and management analyses on the companies at varying degrees of frequency. Some provide quarterly reports, some monthly reports, and others provide a daily newswire of information.

[174] Clearly, to be useful to investors and achieve CERES disclosure goals, this information must be published more frequently than an annual audit. However, due to the cost of compiling and printing such material, it is likely that a monthly release would be an appropriate compromise.

reporting group also could develop a news service that investors could contact by telephone or modem to access information disclosed to government or community sources.

Under each of these scenarios, as with financial reporting services, companies and investors would share the cost of compiling and disseminating the disclosed information.[175] Companies would pay a fee to subscribe to the service, and investors would pay a fee to access the compiled information. In terms of cost, a telephone or news service probably would be the best option because it would avoid the printing and setup cost that would be incurred in using either an existing or a new printed reporting service.

According to the 1990 CERES Guide to the Valdez Principles,[176] CERES intends to disseminate a CERES Report annually for each signatory. Each Report, which will be prepared by the signatory, will discuss the company's progress in meeting the requirements of the Valdez Principles.[177] At present, the section of the Report relating to disclosure requires each signatory to present a narrative discussion on, among other things:

> —the [signatory's] policy regarding disclosure of accidents and incidents at company facilities that may cause environmental harm or pose hazards to worker or public health and safety [and] —[h]ow . . . the [signatory] systematically share[s] hazard assessment documents with workers, state and local officials, and community leaders.[178]

While such a Report would provide the necessary mechanism for wider dissemination of disclosed information to the public, it has several limitations.

Annual distribution of the CERES Report on each signatory will not provide investors with a continual and updated source of information. A monthly service or a telephone or modem service would provide investors with more current information. In addition, the

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[175] Sharing the cost between the companies and interested investors is standard among the existing financial analysis reporting services that currently exist.

[176] CERES, THE 1990 CERES GUIDE TO THE VALDEZ PRINCIPLES 11 [hereinafter THE 1990 CERES GUIDE].

[177] *Id.*

[178] *Id.* at 15. Additionally, more detailed questions will be developed be CERES in consultation with a Corporate Advisory Committee comprised of signatory companies. *Id.* at 12. The requirements set forth in the *1990 CERES Guide* are consistent with CERES's objective of providing signatories with an opportunity to describe the means they have used for compliance with the disclosure provisions. *Id.* at 11. In addition, if a signatory feels that a particular disclosure question does not apply to its business, the signatory may explain why in the CERES Report. *Id.*

questions in the CERES Report currently focus on environmental policy and procedure, and omit any compilation of disclosures made to governmental and community sources.

If the scope and distribution limitations are overcome, the CERES Report can function as an effective mechanism for disclosure. The narrative format of the Report minimizes confidentiality concerns.[179] Furthermore, the cost to signatory companies for compilation and dissemination of the CERES Report is essentially the annual fee required of all signatories to the Valdez Principles,[180] not an additional cost such as those that would be associated with several of the alternative disclosure mechanisms discussed above.

3. Confidentiality Concerns

Any compilation service that merely reports information that signatories already have disclosed to various governmental and community sources, as required by law, will not raise any new confidentiality concerns. However, confidentiality concerns will arise if the compilation also reports signatories' policies on, for example, disclosure of accidents and hazard assessments.[181] Signatories' policies, while of interest to investors and investment managers, may contain proprietary information. Accordingly, to avoid friction, signatories should be allowed to review any compilation containing information

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[179] Because the disclosure of company policy toward reporting of environmental accidents and hazard assessments is structured as a narrative, signatories have control over which information is included in the CERES Report and may avoid releasing proprietary information. THE 1990 CERES GUIDE, *supra* note 176, at 11, 15. In addition, because any summaries of a signatory's CERES Report highlighting information for investors will be shown to signatories for comment before they are made public, signatories can clarify any misinterpretation on the part of CERES regarding information in the CERES Report prior to its release to the public.

[180] *See* THE 1990 CERES GUIDE, *supra* note 176, at 21. To help defray costs to CERES for establishing and maintaining lists of signatory companies, preparing and distributing the annual CERES Report, and disseminating information obtained in the Reports, CERES will require signatory companies to pay a fee in proportion to their size. *Id.*

Companies that become signatories in 1990 will pay a first-year fee scaled according to world-wide gross revenues. For example, the fee for companies with revenues of less that $5 million is $100, and the fee for companies with revenues of greater than $10 billion is $15 thousand. *Id.* Beginning in 1991, CERES will charge signatories annual fees according to the costs of managing and disseminating data. *Id.* The maximum fee will not exceed $15 thousand. *Id.* In the future, signatory companies likely will incur an additional fee to pay for certification of answers in the CERES Report by outside parties, because it is anticipated that this eventually will be required by CERES. *See id.* at 12.

[181] CERES intends to include such disclosure in the CERES Report. *See id.* at 15. Accordingly, other mechanisms for disclosure may seek to include such information.

on company disclosure policies and remove any proprietary information prior to its release to the public.[182]

4. The Audit Provision

The audit provision, as it presently reads, would require each signatory corporation:

> [to] conduct and make public an annual self-evaluation of [its] progress in implementing these Principles and in complying with all applicable laws and regulations throughout [the corporation's] worldwide operations [and to] work toward the timely creation of independent environmental audit procedures which [it] will complete annually and make available to the public.[183]

CERES envisions that this provision eventually will require a comprehensive environmental audit with examination standards much like those that the Financial Accounting Standards Board (FASB) has developed for financial audits.[184] Further, CERES intends that the audit be far more sweeping than environmental audits currently done by lenders and purchasers of real estate.[185]

Corporate sources and environmental advisors to the business community have objected to the proposed audit provision on several grounds. First, any environmental audit comparable to a financial audit is likely to be circumspect, providing coalition members with less information than they anticipate.[186] Second, environmental auditing is "simply too diverse and fluid" to support an approach as

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[182] CERES has adopted this policy in the CERES Report. *See supra* note 179 and accompanying text. Any other disclosure method adopted also should incorporate this safeguard.

[183] Valdez Principles, *supra* note 6, at 2.

[184] N.Y. Times, Sept. 10, 1989, § 3, at 6, col. 6.

[185] *Id.* For example, a comprehensive environmental audit of company operations and company real estate requires evaluation of compliance with all relevant federal, state, and foreign laws and regulations. This process potentially would entail using checklists and questionnaires to evaluate compliance at each of the corporations' manufacturing plants and facilities; reviewing workers compensation "loss runs" to evaluate pollution and health problems; making periodic visits to facilities to review compliance efforts; checking that each waste disposal contractor used by the corporation has its own pollution liability insurance and certificate of insurance; making sure that all underground storage management systems are in place; evaluating the history of all real estate owned by the corporation, such as checking chain of title, the status of any cleanup liens, and the National Priorities List; and performing a site inspection and evaluating the likely path of pollutants on any real estate owned. Finlayson, *supra* note 5, at 19.

[186] Feder, *Who Will Subscribe to the Valdez Principles?*, N.Y. Times, Sept. 10, 1989, § 3, at 6, col. 1. S. Noble Robinson, head of Risk Management at Arthur D. Little, Inc., noted, "If they say, 'We have reviewed Company X's performance in accord with generally accepted accounting principles and it is fine,' that doesn't get you into a very exposed state in terms of nitty-gritty details." *Id.*

structured as a financial audit.[187] Third, the proposed audit is likely to be costly. A considerably detailed audit would be necessary to minimize the chance that environmental problems would remain hidden from outside auditors[188] and to meet CERES's goal that the audit be far more sweeping than real estate audits. Such detail in the audit translates to increased cost. Fourth, an audit alone is not capable of creating the modern environmental management program CERES seeks because audits monitor primarily company compliance with the law, and "not every aspect of environmental performance—such as management awareness and attitude—is quantifiable."[189] And fifth, the requirement of an independent auditor essentially jeopardizes the effectiveness of the audit.[190]

In addition, the type of audit envisioned by CERES poses a number of potential objections that corporations and their advisors have not yet raised. Corporations may object to an extensive independent environmental audit if it means losing the confidentiality protection available to a corporation when such an extensive audit is done internally.[191] Corporations also may object to the annual audit performed by independent auditors because they may lose the ability to control the scope and timing of the audit and accompanying disclosure, as well as the ability to avoid disclosure of facts that, although not legally relevant, can be highly embarrassing or damaging.[192] Finally, corporations may be concerned that the independent audit, like the disclosure provision, may be a Pandora's box that could expose corporations to costly litigation and perhaps civil and criminal penalties.[193]

It is possible for CERES to structure an audit that both mollifies corporate objections and meets CERES's goals. However, such an

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[187] Friedman, *Don't Sign the Valdez Principles*, ENVTL. F., Mar./Apr. 1990, at 32, 40.

[188] Feder, *Who Will Subscribe to the Valdez Principles?*, N.Y. Times, Sept. 10, 1989, § 3, at 6, col. 1. This is a common fate of financial audits that are limited in scope. *Id.*

[189] Friedman, *supra* note 187, at 40.

[190] *See id.* at 41. "In-house individual[s], familiar with the operations and credible to the facility . . . can determine far more about what is right or wrong with a facility than an outsider." *Id.*

[191] *See* S. BLACK & R. POZIN, INTERNAL CORPORATE INVESTIGATIONS §§ 6.01–.03 (1989). Corporations that perform extensive internal environmental audits may protect from disclosure many of the documents generated during the investigation. *See id.* This protection is grounded alternatively in the attorney-client privilege and the work product privilege, or in the self-evaluative privilege. *Id.* Corporations that perform their own audits and release significant material from the investigation to an outside auditor may lose these privileges under a waiver theory. *Id.* § 6.04. Corporations that allow independent auditors to do the audit in the first place may never have these privileges to lose.

[192] *Id.* § 2.01; R. BAUER & D. FENN, *supra* note 78, at 31.

[193] *See* Feder, *supra* note 188.

audit would not be a conventional one that merely checks compliance with environmental laws. It would be structured as a questionnaire and would entail three facets: an operational review, an environmental assessment, and a watch on the processes signatories use to manage environmental affairs. Financial accounting standards should not provide the primary model for environmental auditing standards.

a. Using a Questionnaire Format

One of the main corporate objections to the audit proposed by CERES is its prohibitive cost, due mostly to the audit's comprehensive nature. CERES, however, views detail in the audit as essential to fulfilling its obligation to help investors make informed decisions.[194] Structuring the data collection phase of the audit in the form of an extensive questionnaire is likely to quiet objections to cost while still offering CERES the opportunity to elicit enough detail for a comprehensive audit.[195] Furthermore, in the event that the audit is not performed by an outside auditor as anticipated by CERES, the questionnaire will serve to focus, in an objective fashion, any audit performed by internal personnel.

Corporations may find the use of the questionnaire to gather information for the audit acceptable for several additional reasons. An extensive questionnaire has been used effectively in the past as a vehicle for gathering information concerning corporate compliance with voluntary codes of conduct.[196] Furthermore, questionnaires enable auditors to elicit information necessary for both quantitative and qualitative analysis of corporate behavior.[197] Such analysis is essential to a comprehensive audit assessing corporate compliance with the Valdez Principles.[198] In addition, use of an extensive ques-

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[194] *See id.*

[195] *See* S. BLACK & R. POZIN, *supra* note 191, § 4.02. Questionnaires are known to offer auditors the ability to obtain detailed information over broad areas at low overall cost. *Id.*

[196] *See* TWELFTH REPORT, *supra* note 88, at 28–30. Arthur D. Little Company uses both long and short form questionnaires to gather information on corporate compliance with the Sullivan Principles in South Africa. *Id.*

[197] *See id.* at 29. Sullivan Principles signatories who submitted a full length questionnaire were evaluated both quantitatively and qualitatively in the areas of education, training and development, community development, and social justice. *Id.*

[198] For example, auditors will need to perform quantitative analysis on data to assess corporate compliance with pollution control regulations and to compare such compliance with others in the industry. Compliance provisions 1, 3, and 5 of the Valdez Code deal with minimizing the release of damaging pollutants, minimizing the waste, and reducing environmental and health risks respectively. The three sections will require some type of quantitative analysis. *See* Valdez Principles, *supra* note 6. In addition, CERES intends to compare each

tionnaire to gather information effectively limits the scope of the audit and accordingly is more favorable to signatories than a method of gathering information that gives auditors widespread access to internal corporate affairs. Finally, structuring the audit as a questionnaire provides flexibility to auditors in eliciting information beyond a signatory's compliance with environmental laws. Narrative answers prepared by the signatory's staff can be tailored to provide operational reviews of the facility, as well as environmental assessments of contaminated sites and ongoing threats to workers and the community. Both of these elements are critical in ascertaining whether the signatory has adopted a modern approach to environmental management.[199]

b. Financial Accounting Standards as a Model

CERES intends, in the long term, to set the standards for environmental audits, in much the same way the FASB functions for financial audits.[200] However, using the FASB, a regulatory agency, as a model for CERES's role in environmental auditing carries many negative connotations and should be discarded if CERES wishes to develop truly progressive environmental auditing procedures.

The private sector generally views regulatory agencies in the United States at arm's-length; they consider regulatory agencies legalistic and reliant upon "confrontational coercion" to achieve their goals.[201] CERES will have difficulty obtaining signatories if their role in developing and overseeing auditing standards is perceived in this negative fashion. In addition, financial accounting standards themselves are perceived as discrete rules relating to, among other things, the timing of profit and loss recognition,[202] accounting for research and development costs,[203] and the capitalization of interest

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corporation's pollution control technology with the best available technology (BAT) for that particular industry. Telephone interview with Michael Fleming, CERES staff member (Jan. 11, 1991). Auditors also will need information to perform some type of qualitative analysis of corporate compliance with the Valdez Principles because CERES plans to document both corporate intention to comply with the Valdez Principles and any recognizable changes in such corporate intention. *Id.*

[199] *See* Friedman, *supra* note 187, at 40.

[200] Davidson, *supra* note 136, at 3.

[201] *See* D. Okimoto, Political Inclusivity: The Domestic Structure of Trade 321 (July 1985) (unpublished paper prepared for Japan Political Economy Research Conference).

[202] PRIOR PERIOD ADJUSTMENTS, Statement of Financial Accounting Standards No. 16 (Fin. Accounting Standards Bd. 1977).

[203] ACCOUNTING FOR RESEARCH AND DEVELOPMENT COSTS, Statement of Financial Accounting Standards No. 2 (Fin. Accounting Standards Bd. 1974).

cost.[204] Environmental auditing is considered too "diverse and fluid" to be analyzed effectively under such a structured approach.[205]

Accordingly, CERES should try to identify openly with regulatory bodies that seek to achieve their ends through a cooperative approach involving negotiation and mutual accommodation, rather than with the regulatory approach industry associates with the FASB. The fact that, in practice, CERES does approach the development of auditing standards through mutual negotiation with signatories[206] may not in and of itself dispel the negatives of identifying with the FASB. Also, CERES should strive to develop more comprehensive auditing standards without relying heavily on the financial accounting standards as a model. The diversity among industries dealing with environmental issues, as well as the diversity of the issues themselves, lends itself to a completely unique approach to auditing, one that must be worked out by CERES and signatories together.

c. *Process of Environmental Management: Checklist and Rating Systems*

Good audits are said to be not mere checklists, but operational reviews.[207] However, a good audit may include a checklist of the processes used by signatories in moving toward the goal of aggressive environmental management. Such a list could be used to determine whether each signatory is using the most modern methods of environmental management according to the standards of the signatory's industry.[208]

The checklist generally would assess the procedures signatories use to achieve the basic objectives of environmental management:

> [a]n environmental management program should include regular, timely, and uniform reporting from the operating line through senior management to the board of directors. . . . [I]t should seek prompt identification and resolution of environmental problems. . . . [I]t should identify developing issues and trends and establish preventive programs and procedures, such as no-

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[204] CAPITALIZATION OF INTEREST COST, Statement of Financial Accounting Standards No. 34 (Fin. Accounting Standards Bd. 1979).

[205] Friedman, *supra* note 187, at 40.

[206] THE 1990 CERES GUIDE, *supra* note 176, at 19. "CERES plans to work with signatory companies in devising audit standards that are effective and manageable." *Id.*

[207] Friedman, *supra* note 187, at 41.

[208] Performance evaluations that seek to compare signatories in the same industry, or apples to apples, is "only common sense," according to one supporter of the Valdez Principles. Meyers, *Business's New Ten Commandments*, ENVTL. F., Mar./Apr. 1990, at 33, 42.

> tification and review of capital expenditures for pollution control technology.[209]

In preparing the checklist, CERES should ascertain which signatories are in the forefront of environmental management in each industry, and list the procedures that they follow in addressing environmental issues.[210] Thereafter, as part of the audit, the procedures of other signatories could be "checked" against those of the "model" for the industry.

CERES may consider instituting a rating system to compare how signatories in each industry fair against the model.[211] A rating system evaluating firms within each industry is essential because environmental issues are industry-specific, and any disclosure without some idea of the industry standard would be misleading.[212] Accordingly, a rating of signatories on this basis would help investors determine just how sophisticated a signatory's environmental management program is compared to others in the industry. It essentially would provide a yardstick of commitment to environmental progress.

d. Public Report of Audit Results

After the audit is complete, corporate signatories are likely to have concerns over the tone and degree of specificity of any report made available to the public. Corporations will find it difficult to agree to a level of disclosure in the audit that could lead to increased

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[209] Friedman, *supra* note 187, at 40.

[210] Elements of an effective environmental management program vary with the type of industry involved. *Id.* at 40.

[211] Rating systems currently are used by socially responsible investment firms to "rate firms on the environment." Kirkpatrick, *supra* note 135, at 47. Franklin Research & Development of Boston rates companies on a scale of 1 to 5, using several factors to make the analysis. *Id.* Each company starts with a score of 3, which is then increased or decreased based on corporate actions to help or harm the environment. *Id.*

In addition, rating systems have been used in the past to rate compliance with voluntary codes of conduct. One such system was used by Arthur D. Little Company to reflect the progress of signatories to the Sullivan Principles in relation to others. *See* TWELFTH REPORT, *supra* note 88, at 28.

[212] Norms against which the public can judge a firm's performance are particularly important to include in an audit report so that the context of disclosure is not misleading. Four types of norms have been suggested for inclusion in a social audit: performance by other companies in the industry, performance by similar firms in the same geographical location, performance with respect to legal requirements, and performance with respect to what is possible in a given location. R. BAUER & D. FENN, *supra* note 78, at 72. Comparison of a firm's performance against norms in the industry is the most informative context when evaluating environmental issues.

litigation, require disclosure beyond federal and state requirements,[213] cause confidentiality problems,[214] or place corporations in a misleading or unfavorable light.[215] CERES, however, does not contemplate minimal public disclosure in the audit, but intends that the audit enable environmentalists and investors to determine the status of the corporation's environmental management program. For example, an audit should reveal whether the grounding of the *Exxon Valdez* is a sign that Exxon is operating in an unsound way compared with other oil companies, or whether the corporation was just unlucky.[216]

The annual CERES Report provides a mechanism for disseminating audit results to the public while pacifying corporate objection. Essentially, to comply with the reporting requirements for the auditing and assessment provisions, signatories will provide narrative answers to the following questions, among others:

> —Describe the company's annual health, safety, and environmental assessment of its operations and company compliance with environmental laws and regulations.
> —How does the company make an annual audit of its production processes and other activities to ascertain how it can use less hazardous materials and produce less waste?
> —When has the company conducted and up-dated audits of all its properties to identify sites of contamination?
> —Does the company have an outside audit firm review and comment upon its internal audit procedures? Do outside reviews include some form of spot-checking of a company's internal audit results?[217]

Because each signatory writes its own answers to questions in the CERES Report,[218] confidentiality, tone, and specificity problems virtually are eliminated. Signatories can draft answers in a manner in which they feel comfortable. For example, signatories may limit disclosure of information in sensitive areas to that legally required under federal or state law,[219] thereby avoiding increased litigation

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[213] *See* Feder, *supra* note 188. This same issue will arise again in the context of objections to the separate "disclosure" provision of the Valdez Principles.

[214] *See* Zoll, *supra* note 156, at 45.

[215] *See supra* note 192 and accompanying text.

[216] *See* Feder, *supra* note 188.

[217] THE 1990 CERES GUIDE, *supra* note 176, at 16. Additional, more detailed questions will be developed by CERES in consultation with a Corporate Advisory Committee comprised of signatory companies. *Id.* at 12.

[218] *Id.* at 11. The CERES Report gives each signatory the opportunity to explain and discuss their achievements in complying with each principle. *Id.*

[219] *See supra* notes 162–69 and accompanying text.

or penalties. In addition, signatories can ensure that disclosures on company performance are informative and not misleading to the public. The narrative format also allows signatories to comment on their own individual environmental performance as reflected by audit results.[220]

The suggestions for structuring the audit provision were based on an analysis of the methodologies that have been used for corporate, social, and financial audits in light of voiced and anticipated signatory objections. However, the best way for CERES to ensure that the audit provision would be structured in a manner acceptable to corporations was to obtain corporate input in formulating specific guidelines for the audit. It is apparent that CERES worked with signatory companies to devise audit protocols that are both effective and manageable.[221]

IV. CONCLUSION

The legal framework of corporate environmental responsibility is extensive; laws alone, however, cannot effectively promote corporate environmental responsibility because our government acts primarily in a reactive, not a proactive, manner.[222] Accordingly, CERCLA, the SEC disclosure rules, and the Superfund disclosure rules can never foster a truly aggressive approach to corporate environmental responsibility. They will impose liability only on those who are not environmentally responsible enough to meet minimum environmental standards. At best, legally required corporate responsibility can supply a high base line for environmental responsibility in those areas under the Valdez Principles, such as disclosure, where corporations will not be as aggressive initially.

As a voluntary code of environmental conduct, the Valdez Principles can successfully foster an aggressive approach to corporate environmental responsibility. Given that the disclosure and auditing provisions of the code are drafted in a manner that appears to be acceptable to corporations, the social and economic pressures that propelled the Sullivan Principles are likely to persuade corporations to sign on to the Valdez Principles and strive toward compliance.

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[220] THE 1990 CERES GUIDE, *supra* note 176, at 11. A variation of this technique was used successfully in the Arthur D. Little Reports on the Signatory Companies to the Sullivan Principles. There, individual signatory comments were anonymous and were used primarily to "convey the nature of the activities performed by the Signatories to alleviate unfair conditions in South Africa." TWELFTH REPORT, *supra* note 88, at 2.

[221] THE 1990 CERES GUIDE, *supra* note 176, at 19.

[222] R. BAUER & D. FENN, *supra* note 78, at 16.

Meanwhile, the atmosphere for the acceptance and success of the Valdez Principles continues to ripen. Since the release of the Valdez Principles in 1989, CERES has obtained sixteen signatories at the time of this writing.[223] In the Spring of 1990, shareholders in five major companies voted in unprecedented numbers for increased corporate environmental responsibility.[224] The shareholder votes far exceeded both CERES's expectations and the track record for any similar resolution calling for a voluntary code of conduct, such as the Sullivan Principles or the McBride Principles.[225] College officials predict that environmental concerns could attract as much attention on campuses in the 1990s as divestiture from South Africa did in the 1980s.[226] For example, Radcliffe College and Stanford, among others, have begun to vote in favor of all resolutions asking companies to report on the Valdez Principles.[227] Finally, polls show that the public is beginning to believe that protecting the environment is important and that environmental improvements must be made regardless of cost.[228]

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[223] Telephone interview with Michael Fleming, CERES staff member (Jan. 11, 1991).

[224] CERES "Valdez Principles" Shareholder Resolutions Garner Record-Breaking Totals (June 7, 1990) (CERES press release). American Express, Atlantic Richfield, Exxon, Kerr-McGee, and United Pacific were the target of efforts by shareholders to require that the companies report on their compliance with the Valdez Principles. *Id.* Thirteen other companies agreed to file the requested report before the resolution went before shareholders. *Id.*

[225] *Id.* All five Valdez Resolutions tallied at least 8.5% of the shareholder vote. *Id.* According to Joan Bavaria, CERES co-chairperson, vote totals exceeding three percent on a resolution introduced without company support are considered a success. *Id.* The vote totals for the five Valdez Resolutions were as follows: American Express—8.5%, Atlantic Richfield—14.2%, Exxon—9.5%, Kerr-McGee—16.7%, and Union Pacific—13.6%. *Id.*

[226] Magner, *Efforts Under Way to Persuade Universities to Use Investments to Press Business on the Environment*, Chronicle of Higher Educ., Apr. 25, 1990, at A1, col. 4. Some investment advisors to universities believe that the environment could attract more attention and emotion than South Africa because the environment affects everyone and everyone can do something about it. *Id.* However, there are those that doubt that environmentalism will affect campuses as strongly as the divestiture movement because: first, there is likely to be little agreement among campuses as to what constitutes environmentally sound corporate behavior; second, there is not yet the same sense of outrage about the environment as there was with South Africa; and third, because colleges have research labs that produce hazardous waste, criticizing corporate practices may be the case of the "pot calling the kettle black." *Id.* at A1, col. 3, A3, col. 3. CERES, however, is undaunted by such doubts and has started distributing a student action guide as of fall 1990 to rouse campus support for the Valdez Principles. CERES, STUDENT ACTION GUIDE TO THE ENVIRONMENT (Fall 1990).

[227] Magner, *supra* note 226, at A3, col. 2.

[228] Kirkpatrick, *supra* note 135, at 44, 46. The New York Times/CBS News poll asks people whether "protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of cost." *Id.* at 46. Seventy-nine percent of those polled in June of 1989 agreed with the statement as opposed to 45% in September 1981. *Id.* Accordingly, it appears that public opinion is swaying in favor of environmentalism.

The Valdez Principles are progress-oriented in a time when laws are reactive and the public, investors, and shareholders want more. Once the wrinkles are ironed out, the Principles will open a new and aggressive phase of environmental awareness and corporate environmental responsibility.