

A R T I C L E

# How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations With Their Securities Disclosures

by James W. Coleman

James Coleman is Assistant Professor at the Southern Methodist University Dedman School of Law.

“[T]his bill could prevent continued production of automobiles . . . [and] is a threat to the entire American economy and to every person in America.”

—*Lee Iacocca, president, Ford Motor Company, on the Clean Air Act of 1970*<sup>1</sup>

“The automobile industry has survived and grown even in countries where government policies have made the cost of car ownership several times higher than it is in the United States. We have no doubt that our industry will continue to grow, because people everywhere place a high value on the individual mobility and on the freedom that this mobility makes possible.”

—*Lee Iacocca, president, and Henry Ford II, chairman, Ford Motor Company, Annual Report 1970*<sup>2</sup>

## I. Introduction

When a public company describes the impact of a proposed regulation it must consider two audiences: regulators and investors. It would like to convince the regulator to avoid burdensome regulations by emphasizing how stringent regulations could cause job losses or

---

*This Article is adapted from James W. Coleman, How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations With Their Securities Disclosures, 40 HARV. ENVTL. L. REV. 47 (2016), and is reprinted with permission. Copyright in the Harvard Environmental Law Review is held by the President and Fellows of Harvard College, and copyright in the Article is held by the author.*

1. *Women's Suffrage and Other Visions of Right-Wing Apocalypse*, THE NEW REPUBLIC, Dec. 21, 2009, <http://www.newrepublic.com/article/womens-suffrage-and-other-visions-right-wing-apocalypse> (alterations in original); HARVEY BLATT, AMERICA'S ENVIRONMENTAL REPORT CARD: ARE WE MAKING THE GRADE? 221 (2004).
2. FORD MOTOR COMPANY, ANNUAL REPORT 1970 3 (Mar. 10, 1971).

reduce investment. But it may wish to convince investors that the company will thrive in the face of any plausible regulatory outcome. These conflicting incentives may lead to inconsistent messages and fuel a perception that industry submissions to regulators and investors are often “cheap talk.”

Despite the common perception that corporations exaggerate the economic impact of regulation, and anecdotal reports of inconsistencies between comments to regulators and reports to investors, to date there has been no empirical study of congruence between submissions to regulators and shareholder letters. This project performs such a study, comparing comments submitted on the United States Environmental Protection Agency's Renewable Fuel Standard rulemakings between 2009 and 2013 with contemporaneous annual statements from the same companies describing their exposure to regulatory risk.

The study empirically demonstrates that oil companies facing costly regulations tailor their messages to each audience—emphasizing the cost and economic danger of regulation while telling shareholders that regulation is merely a cost of doing business with few negative impacts. On the other hand, corporations anticipating beneficial regulations—the ethanol companies planning on mandates for their product—present a more consistent and cautiously optimistic forecast in both fora.

These findings suggest that environmental regulators should monitor corporate securities disclosures to ensure that they are given an accurate picture of the true regulatory risk they may be imposing on companies. It also suggests that the Securities and Exchange Commission and private plaintiffs should scrutinize company comments to determine what regulatory risks companies are pointing out to regulators without disclosing them to investors. Finally, it suggests that corporate counsel should align these two sets of statements to protect public companies

from securities litigation and enhance their credibility in each forum.

## II. The Regulator's Dilemma: Public Decisions, Private Knowledge

In 1970, Ford Motor's president, Lee Iacocca called the Clean Air Act "a threat . . . to every person in America" that "could prevent continued production of automobiles." His statement is an archetype of the prophecies of doom that industry often issues in the face of new regulations. When industry complains about how much a proposed regulation will cost, advocates for regulation may justly respond that such predictions have been wrong in the past. And these advocates often imply that such predictions can be safely ignored. After all, no one listens to the boy who cried wolf.

But the reason such false alarms are dangerous is because they prevent us from recognizing accurate warnings: the problem with "crying wolf" is that there *are* wolves. Some regulatory standards would, in fact, be technically impossible or economically infeasible to achieve. So when regulators set standards through notice-and-comment rulemaking, they almost always consider whether these standards are achievable.<sup>3</sup>

Regulators face a fundamental difficulty when they set regulatory standards, which could be called the "regulator's dilemma". Public regulators often must prescribe standards that require the "best" or "lowest" rate of pollution that is "available", "demonstrated", "achievable", or "practicable".<sup>4</sup> But private industry generally has the most complete information about the monetary cost and practical feasibility of different control technologies.<sup>5</sup> And industry has no motive to accurately report this private information; instead it has an incentive to exaggerate the costs of new pollution control technologies and minimize their benefits to dissuade regulators from mandating new technologies that will reduce industry profits.<sup>6</sup>

As a result, environmental regulators are locked in ubiquitous stand-offs with industry, in which industry claims a new environmental rule is infeasible and the agency must decide whether industry is bluffing. This dilemma is most obvious with command-and-control regulation where the agency directly mandates facilities' emission rates, but can

also arise when an agency sets broader goals for national or statewide reductions. Thus, even market-based regulations are often challenged based on their feasibility or economic impact.<sup>7</sup>

This study demonstrates how another set of corporate statements can be used to audit corporations' regulatory submissions, easing the regulator's dilemma. Public corporations must make predictions about the impact of proposed regulations to another audience: their investors. Public companies must file an annual report with the Securities and Exchange Commission (SEC), known as Form 10-K, that summarizes the state of their business and includes a summary of the important risks facing the business.<sup>8</sup>

At least in theory, these predictions are more constrained than statements made to other regulators because corporations may be held liable under SEC Rule 10b-5 for false or misleading statements and omissions made to the public.<sup>9</sup> Annual 10-K reports are a frequent basis for lawsuits under Rule 10b-5, and many scholars have argued or assumed that this liability induces more honest corporate disclosures of risk.<sup>10</sup> Furthermore, accounting bodies and the SEC have pursued several initiatives to improve reporting of risks due to environmental regulation.<sup>11</sup>

Indeed, regulators concerned by Lee Iacocca's prophecies of doom in 1970 would have been reassured if they read Ford Motor Company's contemporaneous Form 10-K disclosures. In its 1970 report, the company assured its investors that it had "no doubt" that domestic operations would continue to succeed because "[t]he automobile industry has survived and grown even in countries where government policies have made the cost of car ownership several times higher than it is in the United States."<sup>12</sup>

This article shows how this alternate set of corporate statements on the impact of regulation, collected in Form 10-K submissions, can be compared to corporate statements on proposed rules. If corporations warn regulators that rules will cause them economic harm but fail to warn their investors of the same risks in 10-K reports, then we can conclude that they are either exaggerating the harm from the rules or failing to disclose important risks to their investors. This type of audit can help regulators gauge the seriousness of corporate warnings and ensure that corporations are adequately disclosing risk to their investors.

3. E. Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1493; Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 61–65 (1985). Even when statutes do not allow regulators to make decisions based on cost, regulators often consider cost as a matter of economic or political necessity. Daniel A. Farber, *Rethinking the Role of Cost-Benefit Analysis*, 76 U. CHI. L. REV. 1355, 1372–79 (2009).

4. Such standards are particularly common under the Clean Air Act, 42 U.S.C. §7411(a)(1), ELR STAT. CAA §§101-618 (prescribing the "best system of emission reduction which . . . has been adequately demonstrated").

5. Jody Freeman & Daniel Farber, *Modular Environmental Regulation*, 54 DUKE L. J. 795, 815 (2005); Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 278–79 (2004); David Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 767, 771 (2008).

6. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 19 (1982); James W. Coleman, *Unilateral Climate Regulation*, 38 HARV. ENVTL. L. REV. 87, 112 (2014).

7. David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 327–28 (1998) (describing how market-based regulations present the same feasibility and complexity problems).

8. 17 C.F.R. §249.310.

9. Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5 (2013); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

10. See, e.g., Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 409 (1990).

11. In 2010, the Securities and Exchange Commission issued binding guidance requiring companies to disclose risks related to climate regulation. Commission Guidance Regarding Disclosure Related to Climate Change; Final Rule, 75 Fed. Reg. 6,290, 6,296 (Feb. 8, 2010).

12. FORD MOTOR COMPANY, *supra* note 2, at 3 (going on to say "[b]ut it will grow more and serve better if governments, unions and manufacturers all accept their share of the responsibility to control costs").

### III. The Renewable Fuel Standard: A Running Battle in Notice-and-Comment Rulemaking

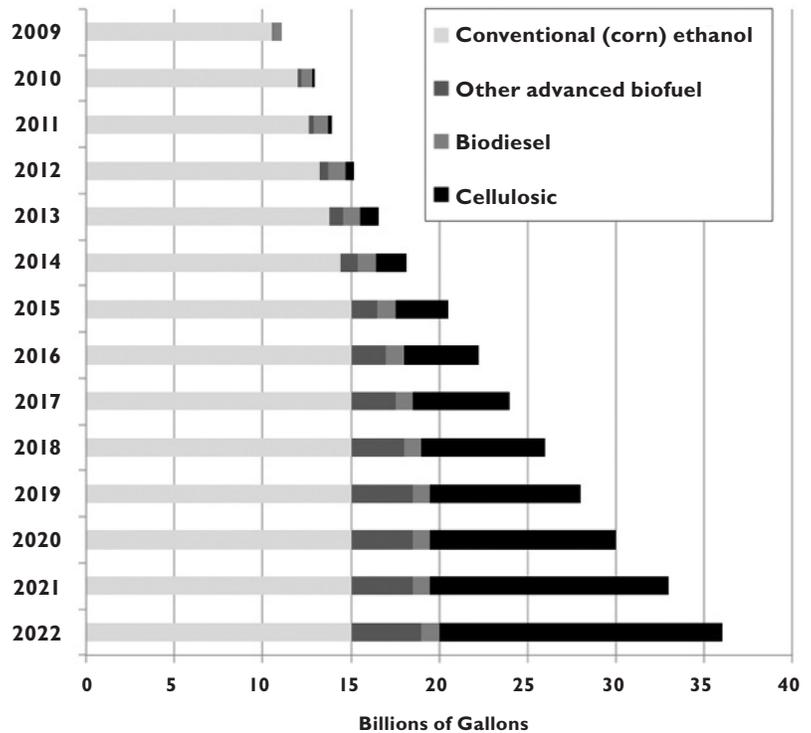
The United States' Renewable Fuel Standard requires oil companies to blend renewable fuels into the fuels that they sell. It presents an ideal test case for developing a method to compare corporate statements to regulators and investors for three reasons. First, the Environmental Protection Agency (EPA) updates the standard each year, giving many opportunities to comment. Second, these standards exemplify a regulator's dilemma: oil companies have frequently warned EPA that its proposed regulations are infeasible, while biofuel companies have disagreed. Third, the United States consumes a fifth of the world's oil production, so its fuel regulations are a crucial source of financial risk even for corporations that participate in international markets.<sup>13</sup>

The stated goals of the Renewable Fuel Standard are to reduce greenhouse gas emissions, reduce reliance on imported petroleum, and develop the country's renewable fuel sector.<sup>14</sup> Renewable fuels like ethanol and biodiesel are used as a substitute for more traditional motor fuels that are derived from oil.<sup>15</sup> When renewable fuels are burned in an engine, they produce greenhouse gas emissions, just like oil products.<sup>16</sup> But when plants grow, they pull carbon dioxide out of the air, so if plants are grown and burned at the same rate, the net impact on the atmosphere is zero.<sup>17</sup> So in theory, replacing oil products with renewable fuels can reduce the net amount of greenhouse gases emitted to the atmosphere as a result of motor fuels.<sup>18</sup>

The Renewable Fuel Standard of the Energy Policy Act of 2005,<sup>19</sup> mandated that a minimum volume of renewable fuel be sold in the United States each year.<sup>20</sup> To comply with this statute, EPA finalized a rule in 2007 that required

fuel refiners to blend renewable fuel into transportation fuels like gasoline and diesel.<sup>21</sup> In 2007, Congress mandated dramatically increasing volumes of separate categories of renewable fuel by setting out year-by-year targets for consumption and extending the standard to include diesel and gasoline as shown in Figure 1.

**Figure 1. Renewable fuel volumes mandated by the Energy Independence and Security Act**



EPA set out to implement the revised Renewable Fuel Standard, sometimes known as "RFS2",<sup>22</sup> through annual rulemakings, mandating specified percentages of four categories of renewable fuel: biomass-based diesel, advanced biofuel, cellulosic biofuel, and total renewable fuel.<sup>23</sup> The Energy Independence and Security Act<sup>24</sup> required EPA to set the annual standard each year by November 30 before the start of the year in which it would apply.<sup>25</sup> But EPA has struggled to meet these deadlines. The final rule for 2010, which also included some requirements for 2008 and 2009, was not published until March 26, 2010.<sup>26</sup> The 2011 and 2012 rules

13. BP STATISTICAL REVIEW OF WORLD ENERGY 9 (2014) (in 2013 the United States consumed 19.9% of global oil production; China is next largest at 12.1%).

14. Energy Independence and Security Act of 2007 (Pub. L. No. 110-140) §801.

15. RANDY SCHNEPF & BRENT D. YACOBUCCI, CONG. R. SERV., R 40155, RENEWABLE FUEL STANDARD (RFS): OVERVIEW AND ISSUES 16 (2013) ("[t]he mandated 36 bgals of renewable fuel will displace about 13.6 bgals of petroleum-based gasoline and diesel fuel, representing about 7% of expected annual U.S. transportation fuel consumption").

16. *Id.*; U.S. ENERGY INFO. ADMIN., FREQUENTLY ASKED QUESTIONS: HOW MUCH CARBON DIOXIDE IS PRODUCED BY BURNING GASOLINE AND DIESEL FUEL? (2014), <http://www.eia.gov/tools/faqs/faq.cfm?id=307&t=11>. In general, when "renewable" fuels are used for combustion, there is no climate benefit in the combustion itself. The benefit, if any, comes from the carbon that is taken out of the air before the product is burned.

17. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 25,040 (May 26, 2009).

18. In fact, the net climate impact of renewable fuels is sharply contested. See KELSI BRACMORT, CONG. RESEARCH SERV., R 41603, IS BIOWATER CARBON NEUTRAL? (2015), <http://fas.org/sgp/crs/misc/R41603.pdf>.

19. Energy Policy Act of 2005 (Pub. L. No. 109-58) (Aug. 8, 2005).

20. *Id.* at §1501 (amending 42 U.S.C. §7545).

21. Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Final Rule, 72 Fed. Reg. 23,900, 23,903 (May 1, 2007).

22. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 24,908 (May 26, 2009).

23. *Id.* at 24,909.

24. 42 U.S.C. §7545(o)(2)(B)(i) (prescribing volumes for renewable fuels, advanced biofuel, cellulosic biofuel, and biomass-based diesel). Prescribed volumes of biomass-based diesel end in 2012 at one billion gallons, which is the plateau for biomass-based diesel shown in this chart, but EPA is given continuing authority to adjust this volume up or down in subsequent years. 42 U.S.C. §7545(o)(2)(B)(i)(IV).

25. 42 U.S.C. §7545(o)(3)(B).

26. Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule, 75 Fed. Reg. 14,670 (Mar. 26, 2010).

were only a few weeks late,<sup>27</sup> but the 2013 rule was not finalized until August 2013<sup>28</sup> and the 2014 rule was so late that EPA decided to just roll it into the 2015 rulemaking.<sup>29</sup>

From 2010 to 2013, 36 public companies filed comments related to the annual renewable fuel standards rulemakings: 16 from the oil industry and other industries that oppose higher ethanol mandates and 20 from the ethanol industry as well as related pro-ethanol businesses.<sup>30</sup> Several companies submitted comments in multiple years, so the 36 companies submitted 56 unique comments over those four years. Figure 2 shows how many comments were filed in each year.

**Figure 2. Number of comments in each year**

	2010	2011	2012	2013
Total	3257	529*	529*	169
Public companies	33	3	9	11
Anti-ethanol companies	14	1	6	7
Pro-ethanol companies	19	2	3	4

\*The 2011 and 2012 rules used a combined docket. Public company comments made clear which year they were addressing, but the total number here is for both years.

The Renewable Fuel Standard remains extremely controversial because of two developments in United States energy markets: a fall in gasoline consumption, and the failure of the renewable fuel industry to produce the quantities of cellulosic ethanol mandated by the Renewable Fuel Standard. When Congress passed the Energy Independence and Security Act in 2007, the United States projected that gasoline use would continue to increase in coming decades, just as it had in past decades.<sup>31</sup> But when the financial crisis hit in 2008, growth in gasoline consumption abruptly ended, and it now seems that gasoline consumption may even be in decline: the United States is now projected to use only half as much gasoline in 2030 as was projected just nine years ago.<sup>32</sup>

The fall in gasoline consumption created substantial problems for the Renewable Fuel Standard because the standard calls for dramatically increasing sales of renewable fuel at the same moment that total fuel sales are falling. Achieving the standard would require a rapid transition to a very high proportion of renewable fuels: gasoline would have to be 25% ethanol by 2022.<sup>33</sup> But conventional automobiles are not designed to run on ethanol blends greater than 10%.<sup>34</sup> This 10% upper limit creates a “blend wall” which limits ethanol sales to about 15 billion gallons annually at current levels of gasoline consumption.<sup>35</sup> The Renewable Fuel Standard demands volumes that reach 15 billion gallons in 2012<sup>36</sup> and 22.25 billion gallons by 2016. Hitting the 2016 target would require either radical shifts in United States energy markets and infrastructure or pointless combustion of billions of gallons of ethanol.<sup>37</sup>

At the same time, renewable fuel producers have not been able to produce nearly as much of one of the mandated categories of fuel—cellulosic biofuel—as the Energy Independence and Security Act requires.<sup>38</sup> The statute required 500 million gallons of cellulosic biofuel in 2012 and 16 billion gallons by 2022.<sup>39</sup> But zero gallons were produced in 2012 and the U.S. now projects that even by 2022, just 327 million gallons will be produced—about 2% of what the statute requires for that year.<sup>40</sup>

As motor fuel use and cellulosic production fell further behind projected levels, EPA’s Renewable Fuel Standard proposal for 2014 effectively admitted the impossibility of meeting the statute’s increasingly ambitious targets. Although the statute mandated an increase in renewable fuels from 16.55 billion gallons to 18.15 billion gallons,<sup>41</sup> EPA proposed to decrease the renewable fuel requirement to 15.21 billion gallons, asserting that it had authority to waive the statutory requirement to avoid the blend wall.<sup>42</sup> EPA also proposed mandating just 17 million gallons of cellulosic ethanol, which is about 1% of the 1.75 billion gallons mandated by the law.<sup>43</sup> EPA’s retreat from the statutory goals caused a furious controversy that ultimately pushed EPA to delay its 2014 standard.<sup>44</sup>

27. Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards; Final Rule, 75 Fed. Reg. 76,790 (Dec. 9, 2010); Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards; Final Rule, 77 Fed. Reg. 1,320 (Jan. 9, 2012).

28. Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards; Final Rule, 78 Fed. Reg. 49,794 (Aug. 15, 2013).

29. Delay in Issuing 2014 Standards for the Renewable Fuel Standard Program, 79 Fed. Reg. 73,007 (Dec. 9, 2014).

30. The 16 anti-ethanol companies are: The Boeing Company, BP plc, Caterpillar, Celanese Corporation, Chevron Corporation, ConocoPhillips, CVR Energy Inc., ExxonMobil Corporation, Ford Motor Company, LyondellBasell Industries N.V., Marathon Petroleum Corporation, Oglethorpe Power Corporation, Phillips 66, Royal Dutch Shell plc, United Refining Company, Valero Energy Corporation. The 20 pro-ethanol companies are Amyris Inc., Archer Daniels Midland Company, Bluefire Renewables Inc., Clean Energy Fuels Corporation, Covanta Holding Corporation, Darling International Inc., Deere & Company, E.I. Du Pont De Nemours and Company, Gevo Inc., Greenshift Corporation, Honeywell International Inc., Iowa Renewable Energy LLC, MagellanMidstream Partners LP, Monsanto Company, Renewable Energy Group Inc., Rentech Inc., Syntroleum Corporation, Tyson Foods Inc., WasteManagement Inc., and Weyerhaeuser Company.

31. ECONOMIC REPORT OF THE PRESIDENT 246 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/cea\\_2015\\_erp.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_2015_erp.pdf).

32. *Id.*

33. CONG. BUDGET OFFICE, THE RENEWABLE FUEL STANDARD: ISSUES FOR 2014 AND BEYOND 2 (2014), <https://www.cbo.gov/sites/default/files/45477-Bio-fuels2.pdf>; BRENT D. YACOBUCCI, CONG. RESEARCH SERV., R40445, INTERMEDIATE-LEVEL BLENDS OF ETHANOL IN GASOLINE, AND THE ETHANOL “BLEND WALL” (2010), <http://fas.org/spp/crs/misc/R40445.pdf> [hereinafter “BLEND WALL”].

34. *Id.* at 5–6.

35. *Id.* at 5.

36. *Id.* at 2. See *supra* Figure 1.

37. 42 U.S.C. §7545(o)(2)(B)(i)(I).

38. “BLEND WALL,” *supra* note 33, at 1.

39. 42 U.S.C. §7545(o)(2)(B)(i)(III).

40. “BLEND WALL,” *supra* note 33, at 6–7.

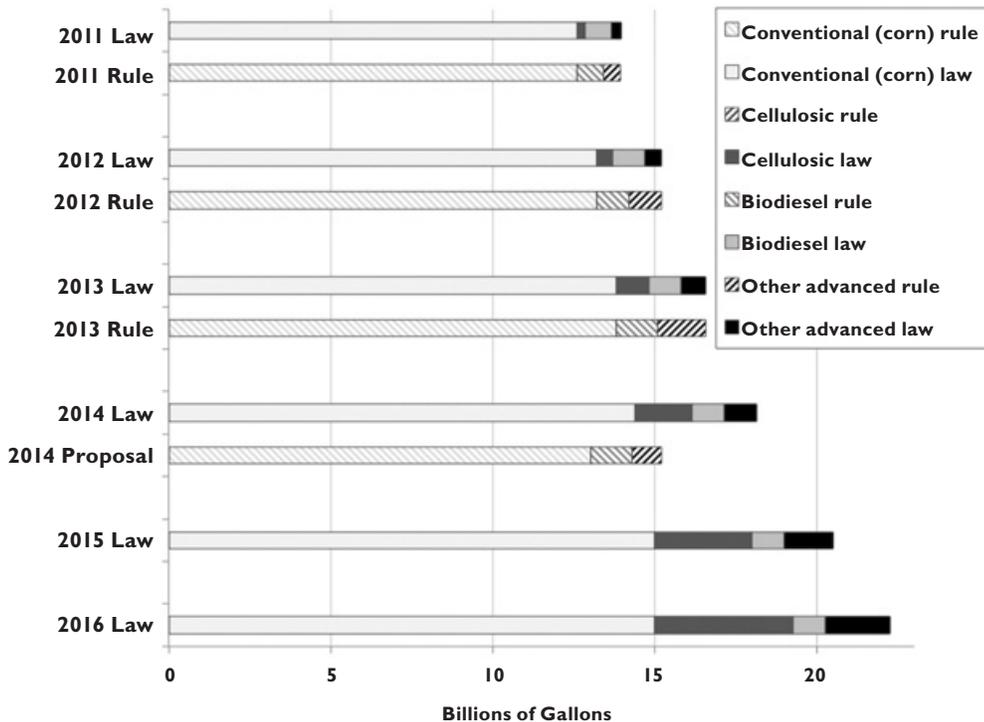
41. 2014 Standards for the Renewable Fuel Standard Program; Proposed Rule, 78 Fed. Reg. 71,732, 71,734 (Nov. 29, 2013).

42. *Id.* (noting that EPA has authority to waive the requirements under 42 U.S.C. 42 U.S.C. §7545(o)(7)(A) if “[t]here is inadequate domestic supply”).

43. *Id.* at 71,755.

44. See Delay in Issuing 2014 Standards, Regulation of Fuels and Fuel Additives: 2011 Renewable Fuel Standards; Final Rule, 75 Fed. Reg. 76,790 (Dec. 9, 2010); Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards; Final Rule, 77 Fed. Reg. 1,320 (Jan. 9, 2012).

**Figure 3. EPA changes to Renewable Fuel Standard targets, 2011-2014 (2014 proposal would ramp down mandated renewable fuel volumes while the statute calls for continually increasing volumes)**



#### IV. The Methodology: Comparing Statements to Two Audiences

This study reports a new methodology for comparing statements on the same topic to two audiences. Most actors facing a two-audience problem are smart enough to avoid direct factual contradictions. Instead, actors resolve two-audience problems through differential emphasis, using selective omission, deliberate ambiguity, and exaggeration. Even Lee Iacocca's statement that the Clean Air Act "could prevent continued production of automobiles" does not technically contradict his contemporaneous statement that the "industry will continue to grow."<sup>45</sup> He may have thought that although the Act *could* shut down the car industry, and should be seen as a "threat", his warnings would ensure that its implementation would be altered so that the industry could keep growing. Indeed, his reassurance was specifically predicated on the political strength of the auto industry, which did, at key moments, convince EPA to delay implementation of some of the standards he feared.<sup>46</sup> So although his statements were so inconsistent that they would leave polar opposite impressions on a listener, they do not involve the kind of factual or quantitative contradiction that is easily tested. Thus, testing a two-audience problem for inconsistency means detect-

45. FORD MOTOR COMPANY, *supra* note 2, at 3.

46. Jagul Lee et al., *Forcing Technological Change: A Case of Automobile Emissions Control Technology Development in the U.S.*, 30 *TECHNOVATION* 249, 251 (2010) ("As a result, the timetable for the attainment of the emission reductions was, therefore, delayed several times.")

ing exaggeration, ambiguity, and omission.

To tease out differential emphases, this study catalogues every statement and prediction about the Renewable Fuel Standard made by each of the 36 companies represented in the 56 comment-10-K pairings that were filed from 2010 to 2013. This study compares each year's comments with the first Form 10-K that the company filed after that year's standard was finalized. So far, EPA has never finalized a rule that prescribed significantly different volumes than those proposed. So by the time each company filed its 10-K disclosure, it generally knew that the rule it commented on would come into effect.<sup>47</sup> This provided us with 56 matched pairs of comments to EPA and Form 10-K securities disclosures.

The study uses 59 codes to represent every kind of prediction and statement that companies made related to the Renewable Fuel Standard.<sup>48</sup> The most important codes were those that predicted an impact on the company from the standard, because those codes appeared both in company comments and company 10-K disclosures. Some coded statements appeared only in comments, such as company positions on how provisions of the Renewable Fuel Standard should be modified or retained, endorsements of the comments of a trade association, and predictions about how the Renewable Fuel Standard would affect stakeholders apart from the company. Finally, some coded statements appeared only in securities disclosures such as positive and negative impacts from climate regulation in general, or other descriptions of regulatory risk that may be meant to include the Renewable Fuel Standard, but do not single it out.

The submissions revealed 739 coded statements related to the Renewable Fuel Standard. The most crucial codes were 218 separate predictions about how the Renewable Fuel Standard would affect the company making the statements. To determine how companies used different

47. The one exception to this rule is the 2013 standard, which was not finalized until August 2013. Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards; Final Rule, 78 Fed. Reg. 49,794, 49,798 (Aug. 15, 2013). Nevertheless, by 2013, the Agency had established a pattern of sticking to its proposed volumes, so companies probably would not have expected major deviations in the final rule.

48. These codes are reported in Appendices A and B of the original, unabridged version of this article. See James W. Coleman, *How Cheap Is Corporate Talk? Comparing Companies' Comments on Regulations With Their Securities Disclosures*, 40 *HARV. ENVTL. L. REV.* 47 (2016).

emphasis in the different settings, I calculated how many separate negative impacts each company predicted it would suffer due to the Renewable Fuel Standard in its comments and how many it predicted it would suffer in its 10-K.<sup>49</sup>

The 36 companies were analyzed as two distinct sample groups. The first group comprises anti-ethanol companies that perceive the Renewable Fuel Standard as a risk. The second group comprises pro-ethanol groups that perceive the Renewable Fuel Standard as beneficial to their industry. The companies were classified into one of the two groups based on the number of positive and negative impact predictions identified in their communications to EPA and their statements of support or opposition to the Standard.

Companies had to be separated into two groups because these groups face dramatically different incentives in their comments and securities disclosures. The companies that view the Renewable Fuel Standard as a risk are also referred to here as “anti-ethanol” companies and “oil companies” because most are oil companies that oppose ethanol mandates, even if they produce some biofuels as a sideline to their main business in oil.<sup>50</sup> Similarly, companies that favor the Renewable Fuel Standard are sometimes referred to as “ethanol companies” even though some are merely companies that benefit from the ethanol industry indirectly.

The comments and Form 10-K of all 36 companies were then coded by one coder. Paired t-tests and a Wilcoxon-Mann-Whitney test were performed to determine whether there was a significant difference between how many company-specific risks and benefits were identified in the companies’ comments to EPA and their Form 10-K disclosures.

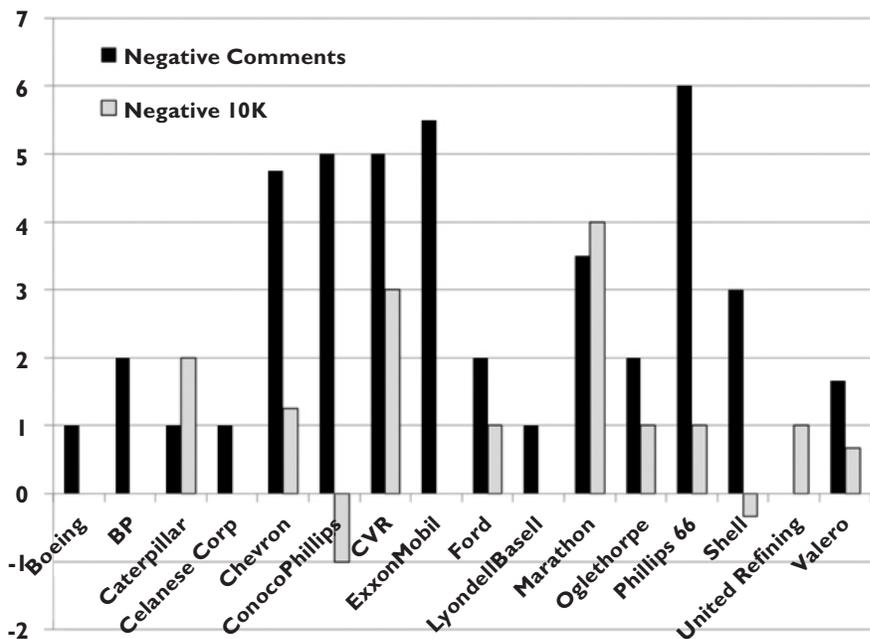
## V. Results: Oil Companies Warn Regulators and Reassure Investors

The study confirms the hypothesis that oil companies tell regulators that the Renewable Fuel Standard will harm them financially while simultaneously assuring investors that the company is well positioned to comply. When these companies submitted comments, they identified more than three times as many ways that the standard would harm them as were identified in their contemporaneous securities disclosures. Figure 4 shows the average number of negative comments that these companies reported dur-

ing the entire period studied. Of the 16 companies with a negative view of the Renewable Fuel Standard, 13 identified more negative impacts in their comments than in their securities disclosures.

In fact, some oil companies even identified the Renewable Fuel Standard as a boon in their 10-K disclosures and as a bane in their comments. For example, Shell told EPA that without major changes the Renewable Fuel Standard would “limit the supply of gasoline,”<sup>51</sup> which would prevent it from serving customers and cause “severe economic harm.”<sup>52</sup> In contrast, the only thing it told its investors about the Renewable Fuel Standard was that the standard would boost biofuels, which it implied was good because in addition to its primary business as an oil company it was also one of the “largest biofuels producers.”<sup>53</sup> These comments are shown as negative values in Figure 4.

**Figure 4. Average negative impacts identified by companies that perceive the Renewable Fuel Standard as a risk in comments and Forms 10-K filed from 2010-2013**



In contrast, companies that favor the Renewable Fuel Standard, such as ethanol interests, actually identified slightly more impacts from the Renewable Fuel Standard in their 10-K disclosures. This confirms that the result for oil companies is not driven by an inherent difference

49. To focus on separate predictions, each code was counted just once per document. For example, if a company stated that the Renewable Fuel Standard was infeasible in the introduction, body, and conclusion of its comment that was only counted as one prediction.

50. As noted above, *supra* note 30, three of these companies are actually companies who are dependent on oil—Boeing, Caterpillar, and Ford—not oil companies per se.

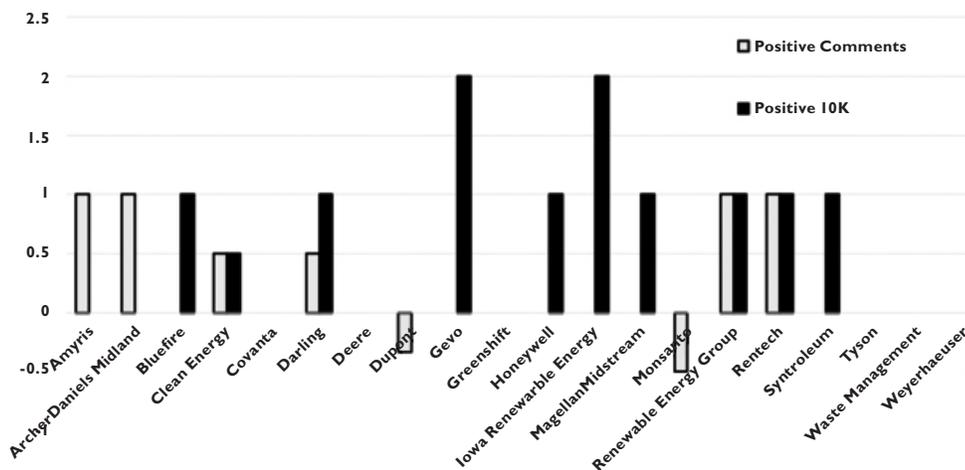
51. Shell Oil Product US, Letter to EPA on Regulation of Fuels and Fuel Additives: 2013 Renewable Fuel Standards (proposed rule), EPA-HQ-OAR-2012-0546-0085, 8, Apr. 5, 2013, <http://www.regulations.gov> (accessed March 18, 2015) at 2. (“If the blend wall is not appropriately addressed, it will limit the supply of gasoline and diesel fuel and have significant adverse impacts on consumers.”).

52. *Id.* at 3 (“EPA should use its general waiver authority to adjust the standards down to reasonably achievable levels to avoid severe economic harm.”).

53. Royal Dutch Shell plc, Annual Report (Form 20-F), at 57 (Feb. 24, 2013) (“The international market for biofuels is growing, driven largely by the introduction of new energy policies in Europe and the USA that call for more renewable, lower-carbon fuels for transport. . . . We are one of the world’s largest biofuels producers.”).

between the format of comments and 10-K disclosures. Together these results instead suggest that oil companies send inconsistent messages because, unlike ethanol companies, they face different incentives when they address these different audiences. In fact, the ethanol company result is a kind of flip-side of the oil company result; together these results suggest that oil companies send inconsistent messages because, unlike ethanol companies, they face different incentives when they address these different audiences.

**Figure 5. Positive impacts identified by companies that perceive the Renewable Fuel Standard as a benefit in comments and Form 10-K**



## VI. How Securities Disclosures Can Be Used to Assess Accuracy of Warnings in Regulatory Comments and Vice Versa

The methodology developed here will be a crucial tool for environmental regulators, public and private enforcers of security disclosures, and corporate counsel. First, environmental regulators should compare the comments they receive with companies' security disclosures, to gain a more realistic view of the economic harm that their regulations can cause. Regulators cannot ignore corporate comments because setting technology-based or feasibility-driven standards requires massive amounts of private information best known by these companies. But, as this study demonstrates, comments from private companies can present a very exaggerated picture of the cost of regulation.

### A. Environmental Regulators Should Assess the Accuracy of Comments by Comparing Them With Contemporaneous Security Disclosures

Regulators can retain the benefit of private information, but improve its accuracy, by matching comments with contemporaneous security disclosures. Even when comments and securities disclosures are not technically inconsistent, they often leave very different impressions about how feasible a proposed rule will be for industry. Thus, securities

disclosures can be an interpretive aid for regulators, helping them suss out which regulations actually may be infeasible.

Regulators should also request that companies submit excerpts from their securities disclosures that show exactly how seriously they take the threat of regulation. The burden of this requirement would be minimal because companies have already drafted these disclosures. Regulators could simply offer to give particular consideration to comments that were accompanied by these excerpts from securities disclosures. No further sanction would be necessary; if a company failed to make this submission, a regulator could answer the comment by noting that it was unsupported by the company's own security disclosures.

### B. Securities Regulators and Plaintiffs' Counsel Can Use Comments on Environmental Regulations to Audit the Completeness of Securities Disclosures

Securities regulators and plaintiffs' counsel can also use this study's methodology to improve corporate disclosures because they can use public companies' comments to identify material risks absent from their securities disclosures. Pursuant to existing disclosure requirements, the Securities and Exchange Commission should insist that companies' securities disclosures include the risks that they identify in their comments to regulators. The Commission should use its existing authority to enforce its disclosure requirements through escalating sanctions beginning with comment letters and progressing to enforcement actions. Moreover, when a company is harmed by environmental regulations, injured investors can also sue companies under Securities and Exchange Commission Rule 10b-5 when their disclosures did not present a complete picture of the company's exposure to regulatory risk. By scrutinizing corporate comments, private plaintiffs can give public companies an incentive to make their securities disclosures consistent with their comments to regulators.

### C. Corporate Counsel Should Ensure Corporate Comments on Regulations Are Consistent

Finally, if corporations' comments on public regulation can be compared to corporate securities disclosures, there is no longer any advantage to presenting inconsistent messages to the two audiences. To avoid liability and enhance the credibility of company comments on regulation, corporate counsel should ensure that the company is not tel-

ing different audiences different stories about the potential impact of regulation.<sup>54</sup> Indeed, companies should consider voluntarily including relevant excerpts from their securities disclosures with their comments to agencies to demonstrate how seriously they take the dangers of overregulation that they are combating. Due to past exaggerations, regulators may dismiss unsupported warnings. Companies can restore their credibility by showing regulators that they take their warnings seriously enough to share them with investors as well.

## VII. Conclusion

Two audiences—environmental regulators and investors—both need to know how regulations may impact

public companies. But when they face adverse regulations, corporate talk is cheap: oil companies made very different predictions about the impact of the Renewable Fuel Standard in their comments and securities disclosures.

Fortunately, by measuring this discrepancy, this study will help regulators, investors, and companies to cure it. Regulators must integrate review of securities disclosures into their rulemaking process to gain a more accurate picture of the risks they are imposing on industry. On the flip-side, securities regulators and investors should review comments on regulation to identify regulatory risks that companies are not disclosing. Finally, corporate counsel should anticipate this scrutiny by harmonizing the messages it sends in comments and disclosures.

---

54. One reason for inconsistent messages could be that different lawyers are drafting comments and security disclosures. If this is the case, corporate counsel will have to take extra precautions to ensure these different drafters produce consistent messages.