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Feedback
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Search

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Food
Foreign Affairs
Language
Poetry Pages
Politics & Society
Science & Technology
Travel & Pursuits

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Go to this
issue's [Table of Contents](#).

APRIL 2000

GOVERNMENT

Regulation by Shaming



Forcing companies to disclose health and safety information can improve customer choices and industry practices -- but it can also distort perceptions of what should be changed

by [Mary Graham](#)

(The online version of this article appears in two parts. [Click here to go to part two.](#))

THE federal government phased out the use of lead in gasoline and household paint twenty years ago, but it is still present in many products. Makers of china, water

faucets, and calcium supplements have recently gone to great lengths to reduce the amount of lead they use. What is remarkable is that these efforts are not the usual attempts to avoid stiff penalties associated with new federal rules. Instead they are a response to a California law that requires companies to provide information to the public about practices that remain perfectly legal. Corporations all over the country are feeling the effects of an increasingly powerful but unheralded government policy tool: mandatory disclosure.

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From the archives:

"Told You So,"
by Cullen Murphy
(September, 1999)

The writing on the wall -- and the bottle, the box, the stroller, the doe...

"The NEXT Industrial

In 1986 California voters approved by a margin of two to one a ballot initiative that required companies to give "clear and reasonable warning" whenever they exposed people to cancer-causing chemicals or substances toxic to the reproductive system in amounts above levels set by the state. The law, known as Proposition 65, prompted few such warnings. But it did inspire a flurry of efforts by nationally known companies -- faced with public humiliation if accused of failing to warn consumers -- to reduce the public's exposure to lead and other toxins. Ten china companies agreed to cut the amount of lead in their glazes by half. Fourteen major plumbing-supply manufacturers agreed to produce brass faucets that were virtually lead-free. Ten producers of calcium supplements agreed to reduce the amount of lead in their tablets to almost nothing. Pet, Inc., a major food processor, sped up its elimination of lead solder from cans of Old

Revolution," by William McDonough and Michael Braungart (October, 1998)

A new approach that aims to solve rather than alleviate the problems that industry makes.

"Whatever Happened to the Cranberry Crisis?", by John F. Henahan (March, 1997)

Are we victims of crisis overkill, or are the dangers all too real? A report on the status of environmental crises, past and present.

From Atlantic Unbound:

Web Citation: "Armchair Activism," (June 24, 1998)

Those too busy (or lazy) for environmental causes have no more excuses.

El Paso chili gravy and Progresso tomatoes.

Other large companies also made rapid changes. Gillette removed a carcinogen, trichloroethylene, from Liquid Paper. Suppliers to Sears, Roebuck reformulated car wax and carburetor cleaner. Dow Chemical took a carcinogen out of its K2r spot remover. Kiwi Brands, a division of Sara Lee, reformulated a waterproofing spray for shoes to remove another carcinogen.

It is not that the companies accepted the idea that their products posed risks to consumers. On the contrary, they argued that the California law in many cases unfairly emphasized risks that were negligible. They found support in W. Kip Viscusi, a professor at Harvard Law School, who studied the law closely and concluded that it probably did more harm than good, by giving people a false impression of the real risks. But the companies changed their products anyway. And because California amounts to 15 percent of the national market for many goods, they often changed them nationwide. Why did the companies make expensive -- and, they believed, unnecessary -- changes? They were bowing to a newly potent political force: regulation by shaming.

With both Democrats and Republicans calling for greater "transparency" in business and government and complaining that national standards are often costly and ineffective, mandatory disclosure is being

Related link:**Prop65 News**

"Your online guide to California's unique environmental statute." Updates on legal developments and conferences pertaining to Proposition 65.

seized on as one way of addressing social problems ranging from persistent pollution to medical errors. "Informational approaches are a lot less expensive than traditional regulation," Cass Sunstein, a law professor at the University of Chicago, says. "They strengthen political processes by informing citizens, and market processes by informing consumers."

Some familiar kinds of disclosure requirements create economic incentives for companies to improve their practices: nutritional labeling, for instance, aims to influence which processed foods customers buy, and on-time ranking of airlines is designed to aid travelers in making informed choices. Other requirements amount to a kind of corporate shaming. Manufacturers listed among the worst polluters or accused of running sweatshops may change their ways out of fear of customer boycotts, increased regulation, or community hostility. The company's reputation, hard to build and easy to destroy, is at stake.

Some of the nation's largest businesses are fighting back against these new tactics. Last year a coalition of chemical, oil, forest-products, and automobile companies successfully lobbied Congress to direct the Environmental Protection Agency to put various procedural hurdles in the way of information disclosure. Chemical companies invoked risks of terrorism to gain passage of a law that makes it a

criminal offense for government officials to reveal information about the potential impact of accidents on surrounding communities. At least fourteen states have enacted laws to protect food-processing companies from public criticism that is not supported by scientific evidence. One such law briefly ensnared Oprah Winfrey, when Texas cattlemen sued her for saying on television that a description of mad-cow disease "stopped me cold from eating another burger." (The suit was unsuccessful.)

From the archives:

"In the Strawberry Fields," by Eric Schlosser (November, 1995)

The management of California's strawberry industry offers a case study of both the dependence on an imported peasantry that characterizes much of American agriculture and the destructive consequences of a deliberate low-wage economy.

UNTIL recently most disclosure was fragmentary. Even after the passage of the Freedom of Information Act of 1974 the wealth of company information held by the government had to be requested piece by piece; foreknowledge of its location and substance was usually necessary. Nonetheless, enterprising activists, prosecutors, and journalists proved that corporations could be shamed into changing their ways. Cesar Chavez publicized the working conditions of grape pickers in California's San Joaquin Valley, sparking a five-year boycott by 17 million people that eventually resulted in a union contract for the workers. When television reports in 1989 revealed that many apples were sprayed with Alar, a growth regulator that contained small amounts of a carcinogen, apple sales collapsed overnight and the manufacturer withdrew Alar from the market. (It was later agreed that the risk of cancer from Alar-sprayed apples was

"The Destruction of Dolphins," by Kenneth Brower (July, 1989)

In spite of laws intended to protect them, federal indifference and cruel fishing methods once again endanger dolphins.

minimal.) Environmental groups protested that tuna-fishing practices killed dolphins, setting off a two-year tuna boycott that led processors to promise that they would buy only "dolphin-safe" tuna, a label that tuna cans still carry. The government reinforced the campaign with the Dolphin Protection Consumer Information Act of 1990, which set labeling criteria and provided penalties for false information on labels.

The nation's first electronic disclosure requirement was born almost by accident in 1986, when Congress tacked onto a Superfund re-authorization bill the requirement that manufacturing companies report annual release levels of toxic chemicals, facility by facility and chemical by chemical. It is now credited with enormous success -- reducing releases of chemicals subject to the law by more than 40 percent. The provision was part of a response to the release of methyl isocyanate at a Union Carbide pesticide-manufacturing plant in Bhopal, India, in 1984, which left more than 2,000 people dead and 100,000 injured. To most people the Toxics Release Inventory (TRI) looked like just another reporting requirement. But buried in the law was a stipulation that information about toxic emissions also had to be made available to the public and distributed "by computer telecommunications."

Continued...

(The online version of this article appears in two parts. Click here to go to part two.)

Mary Graham is a fellow at Harvard and Georgetown Universities and the author of *The Morning After Earth Day* (1999).

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The Atlantic Monthly; April 2000; Regulation by Shaming - 00.04; Volume 285, No. 4; page 36-40.

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Go to this issue's Table of Contents.

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The day it became clear that disclosure was a powerful regulatory tool was June 30, 1988, when Richard J. Mahoney, then the head of Monsanto, made a dramatic announcement on the eve of the first TRI reporting deadline. Mahoney said bluntly that he had been astounded by the magnitude of Monsanto's annual release of 374 million pounds of toxins. He vowed to cut the release of air emissions by 90 percent worldwide by the end of 1992 -- news to the engineers at the company's thirty-five plants. A year later, when the EPA announced first-year results for all companies, *USA Today* ran a special report naming the worst polluters, and the National Wildlife Federation published a book titled *The Toxic 500*. Such companies as Du Pont and 3M vowed to reduce toxic pollution. Corporate shaming had produced results.

Now dozens of disclosure requirements have been enacted, and with Congress deadlocked on most social-policy issues and new regulatory measures stalled by political obstacles, many more requirements are on the way. Requirements are being used for national initiatives ranging from stopping

discrimination to improving airline service.

Last October 55,000 local water authorities began reporting to their customers on contaminants in their drinking water, and the largest systems posted their reports on the Internet, as required by the Safe Drinking Water Act of 1996.

To deter discrimination, the Home Mortgage Disclosure Act requires banks, savings and loans, and credit unions with assets of more than \$30 million to disclose the geographic distribution of their mortgage and home-improvement loans and the race, gender, and income of applicants.

Long-standing national laws require car manufacturers to inform the public of how well each of their models has performed in standardized crash tests and how many miles per gallon each model gets. Auto-safety regulators are working on new disclosure requirements that will allow car buyers to determine the relative effectiveness of all cars' lights and brakes and the likelihood of rollovers.

In the wake of revelations, in the mid-1990s, that major fashion houses were buying merchandise from sweatshops in the United States and abroad, the U.S. Department of Labor urged retailers to disclose supplier information, established a "trendsetter list" showcasing companies with high standards, and proposed the adoption of a "no sweat" label.

Congress requires airlines to release on-time records and baggage-handling reports (which the Department of Transportation uses to rank the airlines) and safety information. Soon Congress may add disclosure of ticket-pricing practices and reasons for flight delays or cancellations as part of a proposed "passenger bill of rights" that has won broad bipartisan support.

Related link:

"Preventing Death and Injury From Medical Errors Requires Dramatic, System-Wide Changes," (November 29, 1999)

A brief by the Institute of Medicine's Office of News and Public Information.

Momentum for national disclosure of serious medical mistakes has been growing rapidly since the Institute of Medicine, part of the National Academy of Sciences, reported last November that 44,000 to 98,000 people die each year as a result of medical errors. Several states require hospitals to disclose mistakes that result in death or serious injury. For example, New York recently revamped its reporting system to release such information on the Internet when the state takes action against a hospital. General Motors, General Electric, and six other large employers have said that they will steer employees toward those hospitals that make the fewest mistakes.

Jenny Craig and Weight Watchers recently agreed to disclose information about the risks associated with their regimens, as part of a Federal Trade Commission effort to make diet programs safer.

A ten-year battle over the meaning of "organic" as applied to fruits and vegetables may end this year, with agreement on the first national labeling criteria for informing

shoppers about the conditions under which crops are raised. A 1997 Department of Agriculture proposal that the term "organic" include irradiated and genetically altered crops was withdrawn after it triggered 275,000 letters of protest.

Following the rapid and relatively uneventful introduction of genetically engineered crops into the United States in the past five years (half of all soybeans and one third of all corn now grown in the United States have been genetically altered), pressure is mounting to label such foods and products containing them. The European Union approved a similar labeling provision in 1997.

LIKE other kinds of regulation, disclosure requirements can miss the mark. Consider the example of the Toxics Release Inventory, one of the oldest and most successful requirements. Its success is more limited than one might think.

Industry can outsmart the regulators. Companies that use toxic chemicals have found many ways to avoid public humiliation. Initially nearly a third simply failed to report -- often owing to confusion about the law's requirements, according to a 1991 General Accounting Office report. And as many as half of the claimed reductions in toxic waste in the reports that were filed from 1991 to 1994 were really only paper changes -- for example, according to a telephone survey of eighty

facilities by Hampshire Research Associates, redefining on-site recycling, which must be reported, as "in-process recovery," which need not be. Also, companies frequently substitute "off-list" chemicals for listed ones. Whether this is a net gain for public health is anyone's guess: such substitutions are not reported, and more than 90 percent of the chemicals most commonly used in the United States have yet to be fully tested for toxicity.

Selective publicity can create a selective view of reality. What Congress leaves out of disclosure requirements matters. In the case of toxic chemicals, Congress left out most of the problem. The TRI requires disclosure of some of the toxins used by large manufacturers. This spring the electrical-power industry, the mining industry, and several others will for the first time report on their toxic emissions, by chemical and by facility. But the sources of most airborne toxic pollution in the United States are cars, trucks, and buses (41 percent) and small businesses (35 percent). Also missing from the TRI is information on levels of human exposure and on chemical toxicity, making it impossible to calculate risks.

Information without reliable interpretation is of little use. Like much of the information the government releases, TRI results are hard for non-experts to understand. Long lists of numbers and abstruse narrative descriptions are not helpful to people who are trying to assess the immediate risks of

living near a chemical company or a power plant. Yet the EPA releases raw data with little interpretation.

Current industry lobbying should not compromise the public's access to information held by the government. But new requirements that use disclosure as a means of regulation should pass four tests. First, is disclosure the right regulatory tool for the job at hand? If the threat to health is serious enough, banning the product may be warranted. Assuring a reasonable level of safety may call for national standards. Reducing risks when information is plentiful may require the use of taxes or other economic incentives.

Second, is disclosure cost-effective? Costs can be substantial. The public pays for processing, verifying, and communicating information; corporations pay for collecting new data, redesigning products, and changing processes. Disclosure should give the public more bang for the buck than spending the same amount of money to improve health, safety, and the environment in other ways.

Third, will disclosure be accurate, timely, and complete enough to give a true picture? Information requirements can be expensive, ineffective, or counterproductive. And legitimate concerns about corporate confidentiality, personal privacy, and national security may limit the information that can be made available to the public. So may political maneuvering.

Fourth, is the disclosure accompanied by guidance to help people evaluate risks? Kip Viscusi, at the Harvard Law School, suggests developing a uniform risk vocabulary that clarifies the degree of danger. Supreme Court Justice Stephen Breyer has gone further, in his book *Breaking the Vicious Circle* (1993), proposing the creation of a corps of civil servants, insulated from politics and powerful enough to set national priorities for addressing risks. He envisions a group with broad experience, able to build common assumptions, track advancing science, and address emerging problems.

The Internet can help. Computer users can easily see the order of magnitude of each problem and the degree of uncertainty in each set of data. The Environmental Defense Fund's Scorecard Web site (www.scorecard.org) provides one view of the future. It combines most federal information on environmental conditions. Users can slice and dice data forty different ways, to explore the relative importance of environmental problems, their local context (the site can be searched by ZIP code), the presence and health effects of specific toxic chemicals or other pollutants, and the degree of data uncertainty. They can customize a fax to send to a company of their choice or tailor e-mail to a congressman. The site, which has received high marks for credibility, is less than two years old and cost \$1.5 million to create.

The Institute of Medicine's current proposal for reporting medical mistakes provides an excellent example of a carefully constructed disclosure requirement. Mistakes that result in death or serious injury must be disclosed, but near misses and minor errors are to be reported confidentially, to encourage internal discussion of how to remedy problems before they cause serious harm. Resources for follow-up are built into the system.

Mandatory disclosure has now taken its rightful place beside the power to tax and the power to frame national standards as a means of carrying out public priorities. But disclosure is no panacea. It can be costly or ineffective. Requirements should be approached with care. They are just as difficult to craft -- and enforce -- as any other government mandate.

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The Atlantic Monthly; April 2000; Regulation by Shaming - 00.04 (Part Two); Volume 285, No. 4; page 36-40.

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