

## Talking Out of Both Sides of Your Mouth

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James W. Coleman, [How Cheap is Corporate Talk?: Comparing Companies' Comments on Regulations with Their Securities Disclosures](#), 40 *Harv. Envtl. L. Rev.* 47 (2016), abridged in 47 *ELR* 16081 (August 2017).

It doesn't take masses of data or high-powered statistics to generate important results. It takes a good question. James Coleman asks one and thoroughly massages it for insight.

Corporations exercise their speech in multiple audiences. Marketing addresses consumers. The Human Resources Department addresses employees. Coleman focuses on corporate speech to the SEC and the EPA about the proposed [Renewable Fuel Standard](#) between 2009 and 2013.

The number of corporations whose statements in the rule-making procedure and in their annual reports can be compared are small. In 2009, Professor Coleman studied 33 corporations and only 11 in 2013. The small number is not as significant as the lessons we learn when we compare what is said to these two audiences.

The messages are different. To the SEC, in their Annual Reports (10-K's), corporations generally minimize the impact of the proposed rule on their business. To the EPA, some holler that the rule will be unenforceable, cause them ruin and bring harm to the United States. Not a surprising result, but nicely demonstrated.

Royal Dutch Shell provides a good example. It spoke out of both sides of its mouth in 2013. It told the EPA that the Renewable Fuel Standard would "limit the supply of gasoline" and result in "severe economic harm" to its consumers and the public (at 70). In its Annual Report for 2013, Royal Dutch Shell wrote that as a result of "new energy policies in...the USA...[t]he...market for biofuels is growing...[and] We are one of the world's largest biofuels producers" (71 n. 110).

The mention of the biofuels market is noteworthy. Regulations often will impact corporations differently. Depending on the corporations' investment in ethanol, corporations differed in their responses to the Renewable Fuel Standard. Those invested in ethanol and biofuels sometimes urged the EPA on. Those who didn't warned the EPA about the Standard.

The mixed messaging presents a particular problem from a new governance perspective. The new governance, unlike the old command-and-control, relies on corporate cooperation with regulation. Corporations are supposed to contribute their energies and their information constructively, both in their investor reporting and their communications with agencies. In their annual reports, corporations provide information, but more than that, they convey how their energies will be directed so that investors can make predictions about growth. These discussions of their energies should not be mere puffery. The EPA, meanwhile, needed to know whether the rules that it was proposing were feasible for regulated companies. Companies in the industry have more information than does the agency about what realistically can be demanded, but have little incentive to be forthcoming, crying about over-regulation and change for the worse.

Professor Coleman suggests that the predictions in the 10-K's "can be used to audit corporations' regulatory submissions" (at 54), referencing Rule 10b-5 liability. Rule 10b-5 imposes liability for mis-statements in the 10-K, a liability that does not exist when corporations are speaking to regulators during rule-making procedures. (Of course, the PSLRA extended safe harbor protections, but did not eliminate liability for false "predictions," as Professor Coleman emphasizes.)

I am less sanguine than is Professor Coleman about the current viability of 10b-5 litigation to keep corporations honest when they speak to regulators. But, seeking consistency when corporations speak is desirable as a matter of good governance. Much work on corporate compliance is directed to ensuring that the tone at the top is spread throughout corporate undertakings. At the least, we should, as does Professor Coleman, pay attention when corporations speak out of both sides of their mouth.

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