
Retailer Sustainability and the Supply Chain

Leona E. Lewis, Karyn Schmidt, and Mark N. Duvall

Retailers play a pivotal role at the end of the supply chain, delivering end-use products to consumers. Rather than passively accepting what manufacturers and distributors offer, however, retailers are increasingly dictating to upstream suppliers their own environmental requirements for the content and packaging of the products they purchase. These requirements are often characterized in terms of increased sustainability. This article reviews those requirements from the perspectives of both retailers and suppliers. It also examines regulatory requirements imposed on retailers when compliance lies in the hands of the supply chain, and thus becomes a partial motivator for retailer sustainability requirements.

On the surface, a focus on sustainability may appear to be a luxury that a retail company cannot afford. But a closer look reveals sustainability as a cost-effective strategy that keeps the company prepared to proactively escalate sustainability risks, make decisions, and engage in 24/7 dialogue with the public, which is unavoidable in the Internet age.

Frequently, a company's sustainability strategy starts when company executives are asked questions about sustainability goals by the public or shareholders. At that time, it becomes clear that the company should implement a system to facilitate how executives will respond. In addition, new regulatory initiatives adopted in the United States and Europe mean that companies must incorporate new regulatory requirements to manage the ethical, social, and environmental risks in the consumer product supply chain. Today's consumers, investors, and governments expect greater and more detailed transparency in the operations of both publicly traded and privately held businesses on issues such as environmental impact, supply chain, sourcing of consumer products, and use of chemicals in consumer goods.

Sustainability programs have become an important tool for companies in building strategies around new social and environmental risks and public concerns, allocating resources, gathering information, and responding to the rising demand for information disclosure and insistence that companies include sustainability goals in operations. In-house lawyers are frequently close partners in company sustainability programs because of the legal issues that arise in disclosure and overlap with existing regulatory compliance requirements in company operations.

Retailers receive pressure from both the public and governmental agencies to control aspects of consumer goods on their shelves, over which they typically have no direct control, because these goods are purchased from vendors that control their manufacturing and makeup. If it is true that "all politics are local," a globalized supply chain has often left retailers as the last local representatives of the supply chain over which citizens believe they have control. Manufacturing may take

place anywhere in the world, so governments often find retailers as one of the few parts of the supply chain that fall within their jurisdictions. Large well-known national retailers are also frequently the direct importers of many of the products that they sell in the United States.

Retailers' focus on marketing to consumers makes the industry especially vulnerable to accusations of "greenwashing," or unsubstantiated marketing claims that certain products or company efforts have environmental benefits. The Sustainability Consortium, www.sustainabilityconsortium.org, is an organization of industries and other stakeholders working on the development of product-level sustainability measurement and reporting standards that may lead to information that is objective, measurable, complete, relevant, verifiable, and comparable. Companies like Best Buy Co., Inc., are members of The Sustainability Consortium and engage in collaborative efforts to support sustainability programs.

Defining the scope of a proposed sustainability program is an essential starting point. Every company has a different interpretation of what falls within its program, depending on how its brand is perceived by the public, what the company's competencies are, and the products in its industry sector.

The Environmental Protection Agency (EPA) describes "sustainability" in environmental terms:

Sustainability is based on a simple principle: Everything that we need for our survival and well-being depends, either directly or indirectly, on our natural environment. Sustainability creates and maintains the conditions under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic and other requirements of present and future generations.

Sustainability is important to making sure that we have and will continue to have, the water, materials, and resources to protect human health and our environment. www.epa.gov/sustainability/basicinfo.htm#sustainability.

The Dow Jones Sustainability Indexes define "sustainability" to also include social sustainability risks:

Corporate Sustainability is a business approach that creates long-term shareholder value by embracing opportunities and managing risks deriving from economic, environmental and social developments. Corporate sustainability leaders achieve long-term shareholder value by gearing their strategies and management to harness the market's potential for sustainability products and services while at the same time successfully reducing and avoiding sustainability costs and risks. www.sustainability-index.com/07_html/sustainability/corpsustainability.html.

Best Buy's experience provides a good example of the issues companies typically face as they seek to establish and

This article was prepared by Leona E. Lewis, corporate counsel, Best Buy Co., Inc.; Karyn Schmidt, assistant general counsel, American Chemistry Council; and Mark N. Duvall, principal, Beveridge & Diamond, P.C.

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implement a sustainability strategy. After examining where it could have the most impact and what the best fit was for its business strategy, Best Buy defined three aspirations to drive its corporate responsibility and sustainability efforts:

1. Be a global champion for human ingenuity and opportunity;
2. Be an advocate for consumers in the world of technology; and
3. Be fiscally, environmentally, and socially accountable for its brands and business operations worldwide.

Using these aspirations as a guide, Best Buy enlisted the help of Business for Social Responsibility (BSR), an industry-leading organization for the development of sustainable business strategies. BSR conducted a materiality assessment that helped evaluate Best Buy's business by interviewing executives and analyzing 60 sustainability issues in view of their

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impact on the business and importance to consumers, communities, government, and others. Best Buy reviewed the work with external stakeholders, social and environmental nongovernmental organizations, and socially responsible investment fund representatives.

From this research, the following areas emerged as the focus of Best Buy's sustainability strategy:

1. Product Stewardship: Best Buy will provide leadership in our industry across the lifecycle of our products, from product design to end-of-use solutions.
2. Sustainable Solutions: Best Buy will provide products

and services that help our customers live more sustainable lives.

3. Access Through Connections: Best Buy will build business models that enable people to gain all the benefits of the connected world.
4. Inspired Workplace: Best Buy will provide a workplace or opportunity and be a preferred place of employment because of our sustainability efforts. <http://sustainability.bby.com/introduction/>.

Defining goals to include in a sustainability program is a critical step. Inherent in many corporate sustainability goals is significant legal compliance risk in operations deployed to meet the goals. One of Best Buy's most notable environmental goals is its one-billion-pound recycling goal by the end of 2014. In the United States, consumers recycle more electronics through Best Buy than any other retailer: 83 million pounds of consumer electronics and 73 million pounds of old appliances were collected for recycling in fiscal year 2011. <http://sustainability.bby.com/management-approach/product-stewardship/second-life-and-recycling/>. An electronics recycling program, especially one of this size, needs an environmental compliance program to support the operations. Standards for selection of third-party recyclers must be created, and the logistics of the operation must be reviewed for compliance risk with solid waste and export laws.

Government initiatives can provide programs that may form the basis of company sustainability programs. In May 2010, Best Buy became a partner in EPA's Responsible Appliance Disposal (RAD) program. <http://sustainability.bby.com/management-approach/product-stewardship/second-life-and-recycling/>. As part of the RAD program, EPA "serves as a technical clearinghouse on responsible appliance disposal program development and implementation; calculates annual and cumulative program benefits in terms of [ozone depleting substances] and [greenhouse gases] emission savings and equivalents and, as available, potential cost savings . . ." www.epa.gov/Ozone/partnerships/rad/. EPA also provides information on a range of environmentally sustainable practices. www.epa.gov/gateway/science/sustainable.html.

Nongovernmental organizations are also good sources of guidance on sustainability standards applicable to company operations. One of the most well known is the U.S. Green Building Council, developer of Leadership in Energy and Environmental Design (LEED), an internationally recognized green building certification system. Twenty-two Best Buy retail stores in the United States are LEED-certified as part of Best Buy's North American goal to reduce absolute carbon dioxide equivalent emissions (CO₂e) by 20 percent over a 2009 baseline, called Best Buy's "20-by-20" goal. <http://sustainability.bby.com/management-approach/product-stewardship/20-by-20-goal/>.

The Supplier's Perspective: Responding to Retailer Requirements

To an upstream supplier, the proliferation of retail sustainability programs can be daunting. Historically, the manufacturer of an end-use product and its suppliers were focused on whether the composition and formulation of a given product were compliant with federal and state law and applicable industry standards. Manufacturers of consumer goods would work with their suppliers to ensure that the raw materials used satisfied applicable requirements; for example, a maker of

food-service ware might seek contractual assurances from its material suppliers that the material of construction is approved for that use by the Food and Drug Administration (FDA). The raw-material supplier, in turn, might seek contractual assurances from the manufacturer of the consumer good that the good is intended for and will be marketed only for certain uses.

In general, the retailer had a much less active role in the development and formulation of products to be sold at retail (with a notable exception for store-branded or so-called generic products sold under the retailer's label). Retailers might offer a range of end-use products based on product popularity and market trends. The proliferation of retailer sustainability programs has radically changed this process.

Retailer sustainability programs are now taking close aim at the composition, packaging, and environmental impacts of end-use products. In some cases, these programs extend to objectives beyond the environmental footprint of an end-use product, such as a desire to be able to offer "less toxic" end-use products; to eliminate specified chemicals from the manufacturing process; or even to inject social objectives, such as specifying labor-force requirements.

From a supplier's perspective, these programs can have a number of benefits for the supply chain and the public. Some of the more robust retailer sustainability programs invite suppliers to participate in the development or implementation of the program, which can provide suppliers with the opportunity to explain product design and manufacturing considerations, as well as material selection. When retailers engage in an open discussion with suppliers about these issues, the result can be a much deeper understanding of product performance and benefits, which can be used by retailers to support their decision making as well as their marketing.

Participation by suppliers can be particularly valuable as retailers seek to respond to customer demand at a local or regional level. For example, a retailer with stores in the northern Midwest might be particularly interested in understanding how the brands of children's hockey gear that it offers will withstand subzero temperatures, which may require a deeper understanding of which raw materials are used in the gear, and how those raw materials compare.

Aside from the value of improved information about product composition, these programs have been highly effective in helping retailers achieve a number of other objectives. Innovations in design and recycling of product packaging are notable successes. Partially in response to such retailer sustainability programs, packaging has been redesigned for source reduction and use of lightweight packaging, which can reduce the amount of fuel used when transporting goods. Retailer programs have also been leaders in offering at-store recycling programs and in seeking innovative ways to reduce solid-waste generation destined for landfill. Successful programs have addressed baling and recycling of cardboard and flexible plastic film, as well as extended reuse and recycling of pallets.

The biggest challenge faced by suppliers in retailer sustainability programs lies with attempts to specify the chemical composition of end-use products. These efforts expand sustainability programs beyond environmental concerns and benefits, seeking to address health and safety considerations of end-use products. This encroaches into areas of product design and manufacture that are generally subject to preexisting regulatory schemes and, often, elaborate schemes driven by federal regulation. Pharmaceuticals, for example, are well regulated

by the FDA, as is food contact packaging. Other products may require the addition of flame retardants so that the finished good can meet regulatory fire-performance requirements.

At the outset, it is problematic for a retailer sustainability program to seek specifications that relate to particular chemicals because these chemicals may play a critical role in the manufacture or performance of the end-use product. Many materials simply cannot be made without precursor chemicals; it is impossible, for example, to make polyethylene, a widely used plastic, without using the monomer ethylene in the production process.

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Such chemical-specific specifications also necessitate an alternatives analysis. A lesson learned from early sustainability program efforts was the peril of seeking to restrict a particular chemical in end-use products without first understanding how widely that chemical was used or present in end-use products, why it was used, what benefits it delivered, what alternatives were available, and whether the alternatives were in fact superior across all performance categories. Alternatives analyses must be made across all product attribute categories to be effective and to avoid the phenomenon of what is commonly called the doctrine of unintended consequences.

The worst-case scenario involves a retailer specification made to achieve a particular outcome (better performance with respect to one product attribute, or deselection of a particular material or chemical) that results in an undesirable trade-off in another category. It might be possible to specify construction of a biodegradable tricycle, for example, but would anyone seriously want to accept the loss of product safety and performance in a tricycle made of sticks and grass?

End-product manufacturers and their suppliers face uphill challenges when retailer sustainability programs seek to impose single-chemical restrictions outside the regulatory context. It may be necessary or advisable to be able to present risk-assessment information regarding the chemical at issue to the retailer's sustainability program officer. This requires an evaluation of the hazard presented by a given chemical through toxicological testing and an understanding of exposure potential from the consumer product. Many chemicals may be present at trace levels that, although detectable, are so small that they do not present a risk to human health, or the risk is negligible, or the risk is offset by a critical product benefit.

More mature sustainability programs have avoided single-attribute specifications for products (e.g., recyclability) in favor of life-cycle assessment (LCA) approaches. An LCA assesses the environmental impacts of a product, process, or

service by compiling an inventory, across the entire life cycle, of energy and material inputs and environmental releases, and it presents an evaluation of environmental impacts in order to support informed decision making. Wal-Mart's sustainability program, for example, anticipates that LCAs will ultimately provide data for sustainability product labels for products sold at retail in its stores and online.

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LCAs can be highly informative, complete, high-quality instruments conducted in accordance with international standards, such as the International Organization for Standardization (ISO) 14000 series. The most robust retailer sustainability programs will rely on the highest quality LCAs. Suppliers participating in the development or administration of retailer sustainability programs should be familiar with LCAs, and there is value in requesting and supporting ISO-compliant LCAs.

A growing trend building on the value of LCAs has been increased use of Environmental Product Declarations (EPDs) to cover all environmental aspects of products in specific categories. An EPD is based on an LCA completed in accordance with the ISO 14040 series. Product manufacturers validate their declarations using Product Category Rules (PCRs) in compliance with ISO standards. EPDs facilitate comparison of LCA data by standardizing the goals and scope, calculation rules, and format for its disclosure. Early EPDs focused on comparing carbon footprints for products in a given category. More recent EPDs, such as for office chairs and thermal insulation, have addressed all major categories of environmental impact under ISO standards (e.g., resource use, global-warming potential, acidification potential, ozone-depletion potential, photochemical oxidant formation, eutrophication, and generation of waste—hazardous and nonhazardous).

An ISO-compliant EPD can be used in end-use product marketing and can be used by the retailer as a tool to help consumers compare environmental impacts for the product in a given category. It remains to be seen whether PCRs will gain popularity as a tool for retailers and consumers. The next generation of retailer sustainability programs may provide preferential credit to product manufacturers that complete EPDs, or that establish this requirement. The growth of EPDs could

shift the focus of the next generation of retailer sustainability programs to areas that are not covered in environmental LCAs, such as social or worker ethics issues, or allow more targeted programs that focus on local or regional sourcing of raw materials or labor.

Another trend to watch is the evolution away from retailer-specific sustainability programs (with the exception of lead or flagship programs already well established by industries or specific retailers such as Wal-Mart, Home Depot, and Marks & Spencer) to sustainability consortia. Consortia with membership outside a single supply chain allow for sharing of best practices across industries and can stimulate creative thinking. However, the membership of such consortia, work outputs, and degree of transparency should be considered in advance, particularly with respect to whether the consortia output is intended to be an industry standard.

Supply Chain-Based Regulatory Requirements for Retailers

As regulated companies, retailers have long been subject to consumer product safety laws. Increasingly, retailers are subject to regulatory requirements based on product content or origin. Compliance with these laws often involves engagement with suppliers. The need for such engagement can be a partial motivation for retailers seeking to impose sustainability requirements on their suppliers.

Retailers typically sell consumer products that are subject to a myriad of federal statutes administered by the Consumer Product Safety Commission (CPSC). For example, under the Consumer Product Safety Act (CPSA), the CPSC has established consumer product safety standards for certain products, such as bicycles and lawn mowers. The Poison Prevention Packaging Act mandates the use of child-resistant packaging under certain circumstances. These are primarily design-based standards. While retailers can check product designs, they are reliant on their suppliers for compliance. Retailers can be subject to reporting and recall obligations if the designs are noncompliant with a product standard, contain a product defect, or pose a substantial risk to consumers.

The Federal Hazardous Substances Act (FHSA), also administered by the CPSC, is primarily a labeling statute. Retailers rarely, if ever, change the labels on products they receive from their suppliers. Even with store-brand (private-label) products, retailers must rely on their suppliers for compliance. The labeling will depend in part on the chemicals present in the product, information that is not always available to retailers.

Retailers may also be subject to other regulatory restrictions based on the content of products. For example, under the CPSA (as amended by the Consumer Product Safety Improvement Act of 2008), retailers are prohibited from selling certain children's products containing lead or phthalates above low thresholds. Because there are no federal regulatory disclosure requirements for those chemicals, retailers must depend on their suppliers for compliance.

Some retailers sell pesticides (including antimicrobials) that must be registered with EPA and meet labeling and other requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). While retailers look to their suppliers for compliance with FIFRA requirements, EPA has directed its enforcement staff for fiscal year 2012 to target retailers themselves, stating:

Regions should focus on national or regional retail chains operating multiple stores nationwide or in a multi-state area. Such stores often market similar products throughout their network of stores so that compliance issues can have corporate-wide implications. Such consumer-based retail stores typically offer a wide variety of pesticide device products, so addressing noncompliance at this level can immediately impact multiple pesticide producers.

The Toxic Substances Control Act (TSCA) requires all nonexempt chemical substances to be on the TSCA Inventory, and in some cases EPA has imposed restrictions on products containing certain chemical substances. In many instances, articles (generally, end-use products with a fixed design whose design figures in the use of the product) are exempt from these requirements. Most TSCA requirements fall on chemical manufacturers, and very few fall directly on retailers. When retailers import products, however, EPA considers them to be the manufacturers of all the chemical substances in those products. Products not constituting articles (e.g., liquids and particles of all kinds, such as laundry detergent and many auto supplies) are subject to TSCA Inventory and other TSCA requirements with respect to their component chemical substances. For imported products, retailers are the only companies in the supply chain subject to those requirements. EPA is also considering restrictions on articles containing certain chemical substances (e.g., textiles treated with particular flame retardants), so retailers that import such articles will be solely responsible for compliance. Because retailers do not actually manufacture those products, however, they must confirm with their foreign suppliers that the products they import meet TSCA requirements.

In addition to federal requirements, numerous state requirements triggered by chemicals in products may apply to retailers that sell those products. Several states have enacted legislation to prohibit the sale of baby bottles and sippy cups made from polycarbonate containing residual bisphenol A (BPA). Some states limit the sale of certain products containing more than threshold amounts of phthalates, flame retardants, or heavy metals. For example, California enacted a phthalate limit for certain children's products in 2007, and in 2011 it adopted a limited BPA ban. California has its own version of the European Union's regulation on restrictions on the use of certain hazardous substances (RoHS). California's RoHS sets maximum limits on the presence of heavy metals in certain electronic devices. Labeling requirements under the FHSA may not identify these chemicals, so retailers must depend on suppliers to comply with these restrictions.

Under Proposition 65, California requires warnings for consumers at the point of retail sale for products containing chemicals listed as carcinogens or reproductive hazards. Proposition 65 requirements for consumer warnings are routinely applied to out-of-state manufacturers, but they do not always provide appropriate warnings. In-state retailers are separately accountable under Proposition 65. Because product labels may not include Proposition 65 warnings, retailers must depend on their suppliers for information necessary for compliance. That information may be in the form of an assurance that Proposition 65-listed chemicals are not present at levels that would trigger a warning requirement.

Several laws also trigger requirements based on the origin of product components. For example, the federal Lacey Act, administered by the Animal and Plant Health Inspection Service of

the Agriculture Department, makes it unlawful to import, export, transport, sell, receive, acquire, or purchase any plant (with some exceptions) taken in violation of any governmental law that protects plants, including foreign law. This means that it prohibits the importation or sale of wood that was illegally logged, or products made from such wood. In a publicized case, a U.S. guitar maker, Gibson Guitar Corporation, was targeted under the Lacey Act in 2011. Retailers that import or sell products made in whole or part of wood (e.g., furniture) must comply with this restriction. Because retailers are not wood-product manufacturers, they must rely on their suppliers for compliance.

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Conflict-minerals reporting requirements are another example of origin-based requirements. Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Securities and Exchange Commission (SEC) to adopt rules requiring any publicly held company to disclose whether "conflict minerals" are necessary to the functionality or production of a product that the company has manufactured "or contracted to have manufactured." Conflict minerals include gold, cassiterite, wolframite, columbite-tantalite, or their derivatives originating from the Democratic Republic of the Congo and adjoining countries. The derivatives include tin, tungsten, and tantalum, metals used in electronics and other products. In proposed implementing regulations, the SEC has proposed that retailers that arrange for the manufacture of private-labeled products for which conflict minerals are necessary would be subject to the disclosure requirements, even if the retailers had no influence over the manufacturing specifications of the products.

Clearly, for these and other regulatory requirements, retailer compliance depends on actions of the upstream supply chain. Thus, retailers have strong incentives to mandate that their suppliers help them achieve regulatory compliance. Retailer requirements for their suppliers can prohibit or limit the presence of chemicals that would trigger regulatory obligations. They can also demand that suppliers pass on information that would allow retailers either to make required disclosures and warnings or to determine that they will not purchase products with certain characteristics. Without minimizing the retailer commitment to sustainability, this consideration of regulatory compliance may help explain why some retailers have adopted or strengthened the criteria that their suppliers must meet. 