

## CORPORATE BOARDS AND THE NEW ENVIRONMENTALISM

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For the past twenty years, one might reasonably have concluded that corporate boards of directors were environmentally insensitive, anti-“green,” and preoccupied with the pursuit of profits without regard for the externalities their businesses generated. Throughout most of this period, any discussion of environmental best practices typically consisted of “us” and “them,” with directors and environmental activists choosing opposite sides on virtually every question.

Today, the division is not so clear, and the blurring of these lines is the topic of this Article. Over the next few pages, I will trace several recent developments that suggest an awakening on the part of corporate boards and corporate management to the desirability of moving toward environmental best practices.<sup>1</sup> I will then consider whether these developments are isolated events (or pseudo-events) or something more important, a true paradigm shift.<sup>2</sup>

I will conclude that the spasms of change we are currently observing represent something significant and enduring. This is not to say that corporate boards are abandoning the shareholder primacy norm. They are, instead, redefining their long-term objectives to take into account the possibility of increased governmental regulation; the increasing risk of a costly response to changing environmental conditions (rising oceans, rising temperatures, localized water shortages, etc.); and growing consumer preference for products sold by companies that are good corporate citizens.

The most sophisticated corporate managers, as a consequence, are now anticipating and shaping ways to (1) minimize regulatory encroachment on their activities; (2) profit from the changing regulatory regime; (3) reduce their exposure to climate change effects; (4) sell products that

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<sup>1</sup> See *infra* Part I.

<sup>2</sup> See *infra* Part II.

can profit from climate change and its consequences; and (5) attract customers for whom environmental impact (“green-ness”) is a salient feature of purchase decisions.

Other scholars have noted that corporations seem increasingly to be embracing environmental “sustainability” as a management concept.<sup>3</sup> This Article offers some additional evidence in support of that claim, and thoughts on *why* this change is occurring. All of the key players across the corporate governance spectrum, including institutional investors, boards of directors, CEOs, investment bankers, analysts, and even D&O insurance carriers, are part of the surprising answer.

## I. THE EVIDENCE

Over the past four years, several significant events have occurred; some of them emerging independently of the others, but each reflecting a changing mindset about the roles of investors and corporations in improving the world’s environment.<sup>4</sup> Each of these events, I argue, has strengthened corporate boards’ sensitivity to environmental issues. The story begins in April, 2002, and accelerates through the summer of 2006.

### A. *The CERES Report on “Value at Risk”*

In April 2002, CERES, a coalition representing primarily American social investors, foundations, and environmental activists,<sup>5</sup> issued a seminal report on the relationship between climate change and shareholder value. Described as “one of the first to place the climate change issue in a governance context for corporate directors and investment fiduciaries,”<sup>6</sup> the report, *Value at Risk: Climate Change and the Future of Governance*,<sup>7</sup>

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<sup>3</sup> See, e.g., Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75, 78-79 (2005) (citing several reasons for this development).

<sup>4</sup> This list of events is by no means exhaustive, but is intended to highlight the depth and complexity of these events, as well as the range of players involved. There have been other events of comparable significance, particularly in Europe and the U.K.

<sup>5</sup> See CERES Home Page, <http://www.ceres.org/> (last visited Mar. 1, 2007) (noting that CERES is an acronym for Coalition for Environmentally Responsible Economies).

<sup>6</sup> Douglas Cogan, *Global Warming Campaign Gains Momentum*, CORP. SOCIAL ISSUES REP., May 2002 [hereinafter *Momentum*].

<sup>7</sup> CERES SUSTAINABLE GOVERNANCE PROJECT, VALUE AT RISK: CLIMATE CHANGE AND THE FUTURE OF GOVERNANCE (2002) [hereinafter VALUE AT RISK], available at <http://www.ceres.org/pub/publication.php?pid=37>.

provided background information on key industries likely to be affected by climate change: transportation, electric power, oil and gas, forest products, agriculture and food, and insurance.<sup>8</sup> The report also set out a series of steps that corporate directors and investment fiduciaries could take to achieve best practices regarding climate change.<sup>9</sup> As I will discuss more fully below, this report changed the focus and language of efforts to influence corporate environmental behavior.<sup>10</sup>

*B. The Global Reporting Initiative*

CERES was also involved with the launch in 2002 of the so-called Global Reporting Initiative (“GRI”).<sup>11</sup> This project, undertaken in collaboration with the United Nations Environment Programme, was designed to standardize corporate reporting procedures by utilizing sector-specific metrics for reporting economic, environmental, and social indicators.<sup>12</sup> Its organizers postulated that comprehensive reporting standards were “the most effective way of making companies aware of their wider impact on society. Similarly, they offer[ed] financial institutions greater ability to decide how to invest, and the companies themselves an opportunity to explain their objectives to an increasingly critical public.”<sup>13</sup>

The heart of the GRI is a set of Sustainability Reporting Guidelines and Technical Protocols for reporting on such specific items as child labor, health and safety, energy usage, and water consumption.<sup>14</sup> These

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<sup>8</sup> See *Momentum*, *supra* note 6.

<sup>9</sup> See *id.* (noting that these practices include conducting a portfolio-wide assessment of risk exposures, incorporating climate change considerations into overall investment strategies, requesting greater disclosure of climate risks by companies wishing to be considered as investment candidates, channeling more investment capital into “clean” energy opportunities, supporting use of the international Greenhouse Gas Reporting Protocol, and encouraging responsible environmental behavior through private meetings and shareholder proposals).

<sup>10</sup> See *infra* Part II.A.

<sup>11</sup> See Global Reporting Initiative, <http://www.globalreporting.org/> (last visited Mar. 1, 2007).

<sup>12</sup> Global Reporting Initiative, A Common Framework for Sustainability Reporting, <http://www.globalreporting.org/Home> (last visited Mar. 1, 2007).

<sup>13</sup> Mark Turner, *Emphasis Put on the “Triple Bottom Line,”* FIN. TIMES, Feb. 8, 2001, at 11.

<sup>14</sup> Global Reporting Initiative, About Reporting Framework, <http://www.globalreporting.org/ReportingFramework/AboutReportingFramework> (last visited Mar. 1, 2007); Global Reporting Initiative, Performance Indicators, <http://www.globalreporting.org/ReportingFramework/G3Online/PerformanceIndicators> (last visited Mar. 1, 2007).

documents were the result of five years of collaboration among companies, NGOs, unions, accountants, academics and governments.<sup>15</sup>

The GRI now claims more than eight hundred companies in its international database.<sup>16</sup> These companies, to one degree or another, are now generating reports in compliance with the GRI Sustainability Guidelines.<sup>17</sup> Though only ten percent of these companies are U.S.-based, that number is growing.<sup>18</sup> GRI and its counterpart, the Carbon Disclosure Project ("CDP"),<sup>19</sup> increasingly influence the way in which corporations disclose their environmental impact.<sup>20</sup>

### C. *The Equator Principles*

In October 2002, a group of international banks convened to address the social and environmental impacts of the projects they finance, especially in developing countries.<sup>21</sup> The product of this effort was dubbed the "Equator Principles."<sup>22</sup> The Principles provide a framework for evaluating debt financing for major governmental and corporate projects, including the construction of dams, oil pipelines, mining operations, power plants, transportation infrastructure, and telecommunications infrastructure.<sup>23</sup> They call for assessment of projects for their impact on indigenous people and biodiversity, pollution potential, and energy efficiency, before any lending commitment is made.<sup>24</sup>

The Equator Principles are, in effect, a floor on top of which individual banks may choose to impose additional environmentally-protective

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<sup>15</sup> Alison Maitland, *Businesses Are Called to Account*, FIN. TIMES, Mar. 28, 2002, at 16.

<sup>16</sup> See Thomas Kostigen, *Globalization for Reporting Guidelines?* (Jan. 25, 2006), <http://www.cfo.com/article.cfm/5434145?f=related>; Global Reporting Initiative, *FAQs—Sustainability Reporting: Who, How, Why*, [http://www.globalreporting.org/AboutGRI/FAQs/FAQ\\_SustainabilityReporting.htm](http://www.globalreporting.org/AboutGRI/FAQs/FAQ_SustainabilityReporting.htm) (last visited Mar. 1, 2007).

<sup>17</sup> See Kostigen, *supra* note 16.

<sup>18</sup> Steve Watkins, *The Sustainable Approach*, INVESTOR'S BUS. DAILY, Apr. 21, 2006, at A3.

<sup>19</sup> CDP collects information from over 1,000 companies worldwide concerning their carbon emissions. Carbon Disclosure Project Home Page, <http://www.cdproject.net/> (last visited Mar. 1, 2007).

<sup>20</sup> See Kostigen, *supra* note 16.

<sup>21</sup> The Equator Principles, *Frequently Asked Questions*, <http://www.equator-principles.com/faq.shtml> (last visited Mar. 1, 2007).

<sup>22</sup> *Id.*

<sup>23</sup> The "Equator Principles": A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing, <http://www.equator-principles.com/principles.shtml> (last visited Mar. 1, 2007).

<sup>24</sup> *Id.*

lending standards.<sup>25</sup> Citigroup, for example, has adopted a policy that recognizes “high-caution zones,” or areas that are ecologically or socially fragile.<sup>26</sup> In addition, “Citigroup will not finance commercial logging in rain forests or projects that harm indigenous populations and will report the projected greenhouse gas emissions of the energy projects it does finance . . . .”<sup>27</sup>

Bank of America will not finance resource extraction in “old-growth rain forests, or . . . logging operations in forests defined as intact by the World Resources Institute.”<sup>28</sup> It also has created a top-level “environmental team” to monitor corporate practices for environmental impact.<sup>29</sup>

JPMorgan Chase & Co. announced in April 2005, that it was adopting a comprehensive environmental policy to address “the challenges of global warming and deforestation and recognize the rights of indigenous nations.”<sup>30</sup> Among other features of the company’s policy, JPMorgan Chase now sets aside “No Go Zones,” or areas where development would endanger critical habitats and where the company will no longer make loans.<sup>31</sup> It also now incorporates a consideration of carbon dioxide emissions into its loan review process for power plants.<sup>32</sup> JPMorgan Chase is widely regarded as having the most far-reaching environmental policy of any financial services company to date.<sup>33</sup>

All three of these companies’ policies can be traced directly to the development of the Equator Principles and the organizing campaign that surrounded them.<sup>34</sup> Today, forty-one banks internationally have embraced one version or another of the Equator Principles.<sup>35</sup> This represents more than eighty percent of the global project-financing market.<sup>36</sup>

<sup>25</sup> *Id.*

<sup>26</sup> *Citigroup Adopts New Environmental Standards*, BUS. & THE ENV’T., Mar. 1, 2004, at 9.

<sup>27</sup> *Environmentalists Get Citigroup Pledge*, N.Y. TIMES, Jan. 22, 2004, at C3.

<sup>28</sup> Jim Cole, *More Firms Taking the “Green” Pledge*, AM. BANKER, Mar. 3, 2005, at 1.

<sup>29</sup> Bank of America, Core Business Practices, [http://www.bankofamerica.com/environment/index.cfm?template=env\\_core\\_bpractices](http://www.bankofamerica.com/environment/index.cfm?template=env_core_bpractices) (last visited Mar. 1, 2007).

<sup>30</sup> *JPMorgan Chase Joins Effort to Save Endangered Forests and Stop Global Warming*, BUS. WIRE, Apr. 25, 2005, [http://www.findarticles.com/p/articles/mi\\_m0EIN/is\\_2005\\_April\\_25/ai\\_n13650828](http://www.findarticles.com/p/articles/mi_m0EIN/is_2005_April_25/ai_n13650828).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See Matthias Rieker, *Environmentalists Give High Marks to JPM Program*, AM. BANKER, Apr. 25, 2005, at 2.

<sup>34</sup> See *infra* Part II.J.

<sup>35</sup> Claudia H. Deutsch, *More Lenders Join in Pledge to Safeguard Environment*, N.Y. TIMES, July 6, 2006, at C11.

<sup>36</sup> Matthew Yeomans, *Banks Go For Green: The World’s Largest Finance Firms Are Taking Into Account the Environmental Impact of Their Lending*, TIME, May 30, 2005, at 13.

*D. The Investor Network on Climate Risk*

In November 2003, CERES was once again the organizer of a key event in this story. CERES, working with the UN Foundation, convened ten American institutional investors, representing one trillion dollars in assets, for the first Institutional Investor Summit on Climate Risk.<sup>37</sup> The group, which included eight public pension fund fiduciaries and two major labor union fund leaders, announced the formation of the Investor Network on Climate Risk ("INCR").<sup>38</sup>

The convening of the INCR represented the first time American institutional investors had coalesced around the specific issue of global climate change.<sup>39</sup> The participants have since maintained the drumbeat for more revealing environmental disclosures at U.S. public companies.<sup>40</sup> They have also organized around the insurance industry and agriculturally-related industries.<sup>41</sup>

Today, membership in INCR has quadrupled.<sup>42</sup> Collectively, INCR's international membership now represents three trillion dollars in assets.<sup>43</sup>

*E. General Electric and the "Ecomagination" Program*

In May 2005, General Electric ("GE") launched a new organization-wide initiative known as "Ecomagination."<sup>44</sup> Designed as more than a marketing slogan, Ecomagination was intended to reconfigure GE's corporate

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<sup>37</sup> *10 Top State, Local, and Union Investors Urge SEC, Corporate, Wall Street Action on Global Warming Risks to Pensions*, PR NEWSWIRE, Nov. 21, 2003, [http://goliath.ecnext.com/coms2/summary\\_0199-3336558\\_ITM](http://goliath.ecnext.com/coms2/summary_0199-3336558_ITM) [hereinafter *Risks to Pensions*].

<sup>38</sup> Investor Network on Climate Risk, INCR Overview, <http://www.incr.com/index.php?page=2> (last visited Mar. 1, 2007).

<sup>39</sup> See *Risks to Pensions*, *supra* note 37.

<sup>40</sup> See Alison Maitland, *Companies Urged to Report Climate Risk*, FIN. TIMES, June 15, 2006, at 6 (describing a letter to SEC chairman Christopher Cox urging disclosure of the risks that global warming poses to companies' financial performance).

<sup>41</sup> *Investors Eye Broader Scrutiny of Corporate Climate Change Risks*, INSIDE EPA, Feb. 24, 2006, <http://www.cdproject.net/viewnewsitem.asp?id=47> (noting that twenty members of the INCR had recently written to thirty American insurance companies, "asking that they provide reports to shareholders by August, 2006, that analyze the health and physical impacts of climate change and the opportunities for investing in clean energy").

<sup>42</sup> INSTITUTIONAL SUMMIT ON CLIMATE RISK, FINAL REPORT 4 (2005).

<sup>43</sup> INCR Overview, *supra* note 38.

<sup>44</sup> Jeffrey Marshall, *Corporate Social Responsibility: Hard Choices on Soft Issues*, FIN. EXEC., July 1, 2005, at 44.

identity and “brand” to encompass three overarching goals: “improving energy efficiency by 30 percent by 2012;”<sup>45</sup> “doubling the sales of eco-friendly products such as solar energy, wind turbines and water purification technologies by 2010;”<sup>46</sup> and improving the company’s profitability.<sup>47</sup>

From the beginning, GE’s CEO Jeffrey Immelt, who is forty-nine years old, served as the project’s champion.<sup>48</sup> He “[led] the effort himself, campaigning for it both inside and outside the company, as well as backing it with large amounts of new investment.”<sup>49</sup> “When it comes to energy efficiency, environmental technology, [and] water solutions,” Immelt has said, “I want to lead forever.”<sup>50</sup>

Among other features of the Ecomagination program are some startling changes in traditional GE management practices. According to *The Economist*:

In [the] future [GE managers] will be judged not only by all the usual measures, such as return on capital, that investors typically care about; they will also be held accountable for helping to save the planet.

Every GE business unit will have to cut its emissions of carbon dioxide (CO<sub>2</sub>), the main greenhouse gas (GHG) behind global warming, by a different target. Energy-intensive divisions such as plastics and locomotive manufacturing will need to make big cuts in emissions, while the paper-pushers at the group’s financial-services divisions will be told to aim at smaller, but still ambitious, cuts.<sup>51</sup>

In addition to promoting environmental accountability internally, and staking raises and promotions on the successful achievement of internal environmental goals, GE also committed to double its research and development (“R&D”) spending aimed at the creation of “green” products from \$700 million to \$1.5 billion per year.<sup>52</sup> The idea was that GE

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Daren Fonda & Perry Bacon, Jr., *GE’s Green Awakening*, TIME, July 11, 2005, at A10.

<sup>48</sup> *Id.*

<sup>49</sup> *Special Report: The Greening of General Electric: A Lean, Clean Electric Machine*, ECONOMIST, Dec. 10, 2005, at 77 [hereinafter *Greening of GE*].

<sup>50</sup> Fonda & Bacon, *supra* note 47, at A10.

<sup>51</sup> *Greening of GE*, *supra* note 49, at 77.

<sup>52</sup> *Id.* at 78.

would also pursue new lines of business: environmental consulting and “green” construction.<sup>53</sup> According to David Calhoun, a GE vice-chairman, the company had decided to “stop putting our heads in the sand, dodging environmental interests, and go from defence to offence.”<sup>54</sup>

*F. The Second Institutional Investor Summit on Climate Risk*

In May 2005, institutional investors reconvened at the second Institutional Investor Summit on Climate Risk.<sup>55</sup> Once again organized by CERES and held under the auspices of the UN, the 2005 Summit was more than a replay of the 2003 Summit.<sup>56</sup> At this meeting, *hundreds* of institutional investors from around the world discussed how to press companies to address climate change and its associated financial risks.<sup>57</sup>

One focus of the Summit was the continuing dialog with the SEC about the need for more environmental disclosures.<sup>58</sup> A core group of twenty-eight investors at the Summit also announced an environmental Action Plan with goals and timetables.<sup>59</sup> “The plan represents the first time that American and European investors have cooperated on a comprehensive climate risk initiative,” organizers announced.<sup>60</sup> This group also made a powerful statement in favor of environmental best practices. They earmarked one billion dollars for investment in “clean technologies” that would “reduce greenhouse gas emissions.”<sup>61</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See INCR Overview, *supra* note 38.

<sup>56</sup> See *supra* Part I.D.

<sup>57</sup> Eric Assadourian, *The Evolving Corporation: The Role of Stake-holders*, WORLD WATCH, Sept.-Oct. 2005, at 24.

<sup>58</sup> Maitland, *supra* note 40, at 6.

<sup>59</sup> Investor Network on Climate Risk, 10-Point Investor Action Plan, <http://www.incr.com/index.php?page=20> (last visited Mar. 1, 2007). The plan includes a call on companies in the electric power, automobile, and oil and gas sectors to report to investors “how greenhouse gas emissions limits and other climate change scenarios will affect their businesses” and what steps they are taking to prepare; requiring investment managers to disclose “their resources, expertise and strategies for assessing financial risks associated with climate change;” and ranking the world’s one hundred largest companies “on their actions for reducing climate risks” and issuing a scorecard. Amir A. Dossal & Mindy S. Lubber, *Climate Change: Investor Summit Assesses Risks and Opportunities*, UN CHRONICLE, June 1, 2005, at 75.

<sup>60</sup> FINAL REPORT, *supra* note 42, at 4.

<sup>61</sup> *\$1 Billion Committed to “Green Tech” Private Equity*, PENSIONS & INVESTMENTS, May 16, 2005, at 21.

G. *The Business Roundtable “SEE Change” Initiative*

In September 2005, the Business Roundtable announced its “SEE Change” Initiative.<sup>62</sup> “SEE Change” stands for changes in “social, environmental, and economic” priorities.<sup>63</sup>

The program was designed “to encourage American businesses to combine traditional corporate goals of profitability with a commitment to environmental stewardship.”<sup>64</sup> The program called for participants to set their own goals and timetables, decide how to measure results, and make periodic public reports on their progress.<sup>65</sup> For example, DuPont has set as one of its goals the reduction in water use by thirty percent at plants in environments that the United Nations has identified as having limited access to clean water.<sup>66</sup> Sun Microsystems plans to reduce the electrical demands of its data center to ten percent of its current usage by 2008.<sup>67</sup> Chief Executives from Sun Microsystems, Xerox, DuPont, Dow Chemical, Office Depot and American Electric Power were present to launch the SEE Change program.<sup>68</sup>

The program emphasizes two types of goals: “those that fall into the category of ‘doing more with less’ and thereby reducing a company’s environmental footprint; and ‘doing more good’ . . . with new products, technologies, or markets that create value for society.”<sup>69</sup> Not surprisingly, given the source, the “SEE Change” documents emphasize that “sustainable growth strategies should not involve mere ‘do goodism,’ but instead should be designed to produce bottom line benefits to companies.”<sup>70</sup> Though lacking the endorsement of the entire Business Roundtable, the program has now enlisted eighteen of the Roundtable’s one hundred sixty members.<sup>71</sup>

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<sup>62</sup> See Business Roundtable, Initiative: S.E.E. Change, <http://www.businessroundtable.org/taskForces/index.aspx> (follow “S.E.E. Change” hyperlink) (last visited Mar. 1, 2007).

<sup>63</sup> *Id.*

<sup>64</sup> Joe Truini, *The Sustainability Biz; Roundtable Launches Stewardship Initiative*, WASTE NEWS, Sept. 26, 2005, at 4.

<sup>65</sup> *Id.*

<sup>66</sup> DuPont, Reducing DuPont’s Footprint, [http://www2.dupont.com/Sustainability/en\\_US/Footprint/index.html](http://www2.dupont.com/Sustainability/en_US/Footprint/index.html) (last visited Mar. 1, 2007).

<sup>67</sup> Press Release, Sun Microsystems, Sun Microsystems Challenges Industry to Address Sustainable Growth Issues at CEO Forum (Sept. 21, 2005), <http://www.sun.com/smi/Press/sunflash/2005-09/sunflash.20050921.1.xml>.

<sup>68</sup> Truini, *supra* note 64.

<sup>69</sup> *Is There a Green Movement in the Air?*, FORTUNE, Dec. 12, 2005, at S3.

<sup>70</sup> Business Roundtable, Initiative: S.E.E. Change, *supra* note 62.

<sup>71</sup> Press Release, Bus. Roundtable, CEOs from Every Sector of the Economy to Adopt Business Strategies and Projects That Benefit Society, Environment and Economy (Sept. 21, 2005).

*H. Some Other Recent Evidence of a Paradigm Shift*

There are other signs of a green awakening by corporate managers, some of which necessarily have involved support from their boards of directors. Ford and General Motors, for example, though late to the table, have both recently committed to developing vehicles (including trucks) that can run on eighty-five percent ethanol.<sup>72</sup> Dell Computers has committed to increasing “product take-back” by fifty percent<sup>73</sup> and “provid[ing] product end-of-life management solutions that reduce environmental impact.”<sup>74</sup>

Sony has developed a “green” procurement program by which it will only do business with suppliers identified as “green partners,” meaning suppliers committed to limiting the use of heavy metals, asbestos, polyvinyl chlorides, and other toxic products.<sup>75</sup> Even Wal-Mart is experimenting with solar panels for its newest stores and has pledged to eliminate thirty percent of the energy used in its existing stores.<sup>76</sup>

Citigroup, which has some 13,000 facilities worldwide, has “announced a commitment to reduce its greenhouse emissions on a global basis by 10 [percent] by 2011.”<sup>77</sup> It is now one of seventy-nine American public companies to have made this pledge.<sup>78</sup>

Goldman Sachs recently became the first investment bank to adopt a set of environmentally-friendly policies in deciding where to deploy its financing expertise.<sup>79</sup> In May 2006 insurance giant AIG became the first U.S. insurance company to create an office devoted to addressing the insurance risks posed by climate change.<sup>80</sup> More importantly,

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<sup>72</sup> Karen Lundegaard, *Ford, GM Make Big Push to Promote 'Flex-Fuel' Vehicles*, WALL ST. J., Jan. 10, 2006, at B1.

<sup>73</sup> *Id.* Hewlett-Packard has a similar program. See Lorraine Woellert, *HP Wants Your Old PCs Back*, BUS. WK., Apr. 10, 2006, at 82.

<sup>74</sup> Marcelle Shoop, *Corporate Social Responsibility and the Environment—Our Common Future*, in CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 159, 172 (Ramon Mullerat ed., 2005).

<sup>75</sup> Shoop, *supra* note 74, at 181.

<sup>76</sup> Lauren Etter, *Gauging the Wal-Mart Effect*, WALL ST. J., Dec. 3, 2005, at A9.

<sup>77</sup> *Citigroup Pledges to Reduce Greenhouse Gas Emissions and Joins U.S. EPA Climate Leader Program*, BUS. WIRE, Jan. 23, 2006.

<sup>78</sup> *Id.*

<sup>79</sup> Claudia H. Deutsch, *Goldman to Encourage Solutions to Environmental Issues*, N.Y. TIMES, Nov. 22, 2005, at C3; Jeff French, *Goldman Goes Green; Puts Heat on Rivals*, INVESTMENT DEALERS DIG., Nov. 28, 2005, at 3.

<sup>80</sup> Joel Lang, *The Insurance Industry is Feeling the Heat of Global Warming*, HARTFORD COURANT, July 9, 2006, at 4.

from the perspective of corporate governance concerns, at least one insurance company, Swiss Re, is beginning to ask questions about environmental practices when deciding whether to sell or renew directors' and officers' insurance policies.<sup>81</sup>

## II. REAL OR ILLUSORY?

Okay. So a number of corporate actors, some of them quite unlikely corporate actors, are talking the talk of environmental best practices. Some of them are doing it to capture a promising market niche. Some of them, especially in the extractive industries, are doing it because they see it as essential to their continued presence in resource-rich jurisdictions. A few of them may be doing it altruistically. Surely some of them, however, are trying to flim-flam the public by creating a "green" image and continuing with business as usual. Aren't they?

There are several factors in play right now that lead me to conclude that most of the developments I sketched out in Part I represent something more than just posturing and good public relations. They may, in fact, represent a significant, enduring trend. These factors include: (1) the emergence of a new language of social responsibility—and uniform disclosure practices—that business leaders can embrace; (2) the emergence of high-profile CEOs as norm entrepreneurs within the business community; (3) the increasing role of "cover"-providing alliances that facilitate environmental reforms without requiring a company to be the first mover; (4) increasing support for environmental best practices by mainstream investors; (5) globalization; (6) rising oil prices; (7) climate change; and (8) generational factors. Other factors that will encourage continuing progress are (9) the growing sophistication and coalition-building skills of the social investment community; (10) the growing sophistication and political savvy of environmental activist groups; (11) independent and credible benchmarking programs such as the Dow Jones Sustainability Index and the FTSE4Good Index; and (12) growing support among venture capitalists and hedge funds for "clean energy" and related technologies that make being "green" look sexy, new, and above all, alluring for investors. What follows is a brief elaboration of each of these factors.

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<sup>81</sup> Jill Jusko, *Gentle Persuasion: While a Conservative Presidential Administration Eschews Mandatory CO2 Cuts, Manufacturers Move Ahead with Reductions in Response to Customer and Shareholder Relations and Liability Concerns*, INDUS. WK., Apr. 2006, at 38.

A. *Emergence of a Common Format for “Triple Bottom Line” Reporting and a Shift in Rhetoric from “Global Warming” to “Climate Risk”*

The first condition for a change in behavior is the development of a language that can drive attitudinal change.<sup>82</sup> In the business environment, there has been discussion for decades about “corporate social responsibility” and sometimes “corporate social accounting.”<sup>83</sup> Most of this rhetoric has passed through boardrooms without stopping, as boards insisted on cutting costs, off-shoring production, and managing earnings—all to the end of maximizing shareholder value. None of this was particularly good for the environment.

More recently, scholars have been talking about the “triple bottom line,” a concept embodying a balance between shareholder values and stakeholder values.<sup>84</sup> The “triple bottom line” embraces simultaneous objectives, meeting the needs of people and the environment, while at the same time generating wealth for investors.<sup>85</sup> The Global Reporting Initiative is an early, practical adaptation of the concept of the “triple bottom line.”<sup>86</sup>

Companies have long been vexed by the challenge of reporting their environmental performance in a meaningful way.<sup>87</sup> Now, the GRI has made that task much easier.<sup>88</sup> Having a common language and format

<sup>82</sup> For example, politicians often utilize phrases and evocative words to shape new attitudes about old ideas. The estate tax becomes the “death tax” and “pre-emptive war” becomes “Operation Enduring Freedom.” Business leaders, too, shape behavior by manipulating language. Picking the right word to describe, say, a new automobile or soft drink or high-fashion fabric, is the result of obsessive attention, now extending even to the use of brain scans to monitor subjects’ responses. Julie Tamaki, *Researchers Get a Super Handle on Ads that Work: A Study at UCLA Employs Brain Scans to Gauge Responses to the \$2.5 Million, 30-Second Television Commercials During the Big Game*, L.A. TIMES, Feb. 6, 2006, at C1.

<sup>83</sup> See, e.g., RALPH ESTES, CORPORATE SOCIAL ACCOUNTING (1976); Douglas M. Branson, *Progress in the Art of Social Accounting and Other Arguments for the Disclosure on Corporate Responsibility*, 29 VAND. L. REV. 539 (1976).

<sup>84</sup> See Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 IOWA J. CORP. L. 1, 24 (2005) (exploring the origins of the concept of the triple bottom line.) Triple bottom line reporting encompasses economic and social performance as well as financial performance. *Id.*

<sup>85</sup> See Einer Elhauge, *Sacrificing Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (noting that the “triple bottom line” is only one of many ways of describing a multi-constituency approach to corporate governance).

<sup>86</sup> See Global Reporting Initiative, *supra* note 11.

<sup>87</sup> See generally Global Reporting Initiative, *What We Do*, <http://www.globalreporting.org/AboutGRI/WhatWeDo> (last visited Mar. 1, 2007).

<sup>88</sup> *Id.*

achieves three objectives: (1) greater transparency; (2) consistency over time; and (3) comparability across industries and firms.<sup>89</sup> It also enables the development of transferable expertise. Employees familiar with disclosure protocols such as the GRI can carry that expertise from company to company.<sup>90</sup> By taking away excuses such as “we can’t figure out how to report this,” the GRI has provided an important link in facilitating and advancing change.<sup>91</sup>

Another linguistic development in this story has been the shift from handwringing about “global warming” to the use of the less provocative term “climate risk.”<sup>92</sup> “Increasingly, investors of all types are recognizing that climate change poses large financial risks and opportunities that will bear directly on the bottom lines for shareholders.”<sup>93</sup>

This conclusion was not always obvious. Prior to the CERES report in 2002,<sup>94</sup> very few environmentalists were speaking in terms of financial risk. The shift in language, coupled with CERES’ extraordinary organizational skills, provided a new focus for dialogue and persuasion.

#### B. *Environmentally-Sensitive High-Profile CEOs*

Another factor in the increasing corporate commitment to environmental best practices has been the emergence of high-profile, influential CEOs. Henry M. Paulson, Jr., former chairman and CEO of Goldman Sachs, and Charles O. “Chad” Holliday, Jr., chairman and CEO of DuPont, have both been outspoken on the importance of environmental best practices. Paulson, in particular, before becoming Secretary of the Treasury in 2006, was both a vocal force for environmental improvement and a lightning rod for criticism by defenders of the status quo.<sup>95</sup>

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<sup>89</sup> *Id.*

<sup>90</sup> Global Reporting Initiative, Development Process, <http://www.globalreporting.org/InDevelopment/DevelopmentProcess> (last visited Mar. 1, 2007).

<sup>91</sup> See Global Reporting Initiative, What We Do, *supra* note 87.

<sup>92</sup> See James Pressley, *Kermit’s Friends: How 3M, Ikea and Intel Profit by Being Green*, BLOOMBERG, Oct. 24, 2006, <http://www.bloomberg.com/apps/news?pid=20601088&refer=muse&sid=aTiKxILzqbLQ>.

<sup>93</sup> Press Release, CERES, New Ceres Study: Mutual Funds Give Climate Change Proxy Resolutions a Cold Shoulder, Even as Pension Funds Warm Up to Them (Dec. 7, 2004) (quoting Pam Soto, President of the Civil Society Institute), *available at* [http://www.ceres.org/news/news\\_item.php?nid=97](http://www.ceres.org/news/news_item.php?nid=97).

<sup>94</sup> VALUE AT RISK, *supra* note 7.

<sup>95</sup> Christine Williamson, *Bird Man: Goldman Sachs CEO Has a Natural Passion for Conservancy*, PENSIONS & INVESTMENTS, Dec. 26, 2005, at 3.

At the peak of his corporate power, Paulson was not only CEO of Goldman Sachs but also chairman of the Nature Conservancy.<sup>96</sup> He was also, and not coincidentally, the architect of Goldman Sachs' path-breaking environmental policy.<sup>97</sup> He was not reticent about promoting environmental values within his company. "I very much wanted Goldman Sachs to have an environmental policy and drove very hard to make this happen," he has said.<sup>98</sup>

Chad Holliday offers another model of the environmentally-attuned CEO. Author of a book advocating corporate environmental responsibility,<sup>99</sup> Holliday has led DuPont to a seventy percent reduction in greenhouse gas emissions since 1990.<sup>100</sup> The company has also reduced its energy use by more than seven percent.<sup>101</sup> (In the process the company has saved three billion dollars.)<sup>102</sup> As a result, *Business Week* recently named DuPont as the nation's "top green company."<sup>103</sup> CERES, too, has given DuPont high scores on such measures as board oversight of environmental issues, public disclosure of environmental activities, and strategic planning to address climate change.<sup>104</sup>

Holliday is a tireless promoter of thoughtful planning for the future (including the inevitability of climate change) and the need for a new national energy policy.<sup>105</sup> He was one of the handful of high-profile CEOs who endorsed the Business Roundtable's SEE Change Initiative.<sup>106</sup> He also recently served as the chair of the Roundtable's Environment, Technology & the Economy Task Force.<sup>107</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> See *supra* note 79 and accompanying text.

<sup>98</sup> Williamson, *supra* note 95.

<sup>99</sup> CHARLES O. HOLLIDAY, JR. ET AL., WALKING THE TALK: THE BUSINESS CASE FOR SUSTAINABLE DEVELOPMENT (2002).

<sup>100</sup> Interview by Becky Quick with Chad Holliday, CEO DuPont (CNBC television broadcast June 5, 2006).

<sup>101</sup> *Id.*

<sup>102</sup> David J. Lynch, *Corporate America Warms to Fight Against Global Warming*, USA TODAY, June 1, 2006, at 1B.

<sup>103</sup> Adam Aston & Burt Helm, *The Race Against Climate Change—How Top Companies are Reducing Emissions of CO<sub>2</sub> and Other Greenhouse Gases*, BUS. WK., Dec. 12, 2005, at 61.

<sup>104</sup> DOUGLAS G. COGAN, CORPORATE GOVERNANCE AND CLIMATE CHANGE: MAKING THE CONNECTION (2003), available at <http://www.ceres.org/pub/publication.php?pid=45>.

<sup>105</sup> Eric Roston, *Going Green: DuPont's CEO Believes His Company's Science Can Help Reduce the Earth's Pollution*, TIME, Dec. 11, 2005, at A34.

<sup>106</sup> *Id.*

<sup>107</sup> *Holliday to Chair Environmental Panel*, CHEM. WK., Aug. 11, 2004, at 8.

Other corporate leaders, like Paul Anderson of Duke Energy and, of course, Jeffrey Immelt of GE, are beginning to emerge as environmental leaders.<sup>108</sup> As in other areas of corporate management, agents of change in the foreseeable future will be powerful, visible, bold leaders like these.

### C. “Cover”-Providing Alliances

For decades, various interest groups have served as organizing centers for corporate social responsibility initiatives. An early model was CERES. Following a massive oil spill in Prince William Sound in March 1989, CERES issued the “Valdez Principles” (named for the tanker *Exxon Valdez*, which was responsible for the oil spill).<sup>109</sup> These principles, now known as the CERES Principles, include a commitment to protect the biosphere, engage only in sustainable resource use, reduce waste, conserve energy, and provide public disclosure of environmental activities.<sup>110</sup>

From the beginning, CERES’ supporters urged companies, largely through negotiation but also through the shareholder proposal process, to adopt the Valdez/CERES Principles and improve their environmental performance.<sup>111</sup> More than 50 public companies have now signed on to the Principles.<sup>112</sup>

CERES later fostered the creation of the Global Reporting Initiative and the Investor Network on Climate Risk.<sup>113</sup> It periodically issues thoughtful reports on companies’ efforts to improve their environmental conduct<sup>114</sup> and makes annual awards for the best “corporate citizen” reports and other disclosure practices.<sup>115</sup> CERES offers credible data and brings together powerful groups.<sup>116</sup>

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<sup>108</sup> See Lynch, *supra* note 102 (noting that Anderson was promoting a taxation scheme that would penalize companies based on their emission of greenhouse gases).

<sup>109</sup> CERES Principles, <http://www.ceres.org/coalitionandcompanies/principles.php> (last visited Mar. 1, 2007).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See *supra* Parts I.D, I.F.

<sup>114</sup> See, e.g., CERES, ExxonMobil’s Corporate Governance on Climate Change, [http://www.ceres.org/pub/docs/Ceres\\_XOM\\_corp\\_gov\\_climate\\_change\\_053006.pdf](http://www.ceres.org/pub/docs/Ceres_XOM_corp_gov_climate_change_053006.pdf) (last visited Mar. 1, 2007).

<sup>115</sup> See CERES-ACCA Sustainability Reporting Awards, [http://www.ceres.org/sustreporting/reporting\\_awards.php](http://www.ceres.org/sustreporting/reporting_awards.php) (last visited Mar. 1, 2007).

<sup>116</sup> See, e.g., MIRANDA ANDERSON & DAVID GARDINER, CLIMATE RISK AND ENERGY IN THE AUTO SECTOR 19 (2006), available at [http://www.ceres.org/pub/docs/Ceres\\_auto\\_sector\\_report\\_042806.pdf](http://www.ceres.org/pub/docs/Ceres_auto_sector_report_042806.pdf) (discussing findings made at a conference of institutional investors and auto industry experts convened by CERES in December of 2005).

Today, there are several such coalitions and alliances, though few are as sophisticated or influential as CERES. Each has a specific identity, each has a multi-constituent membership base, and each sets goals and objectives for corporations to achieve.<sup>117</sup> Then, they report on compliance (or failure). For example, the London-based Marine Stewardship Council sets guidelines for responsible fisheries.<sup>118</sup> The Forest Stewardship Council sets comparable guidelines for loggers.<sup>119</sup> A group of major American utility companies has just organized a project called PowerTree Carbon, which will reforest thousands of acres in Mississippi, Louisiana, and Arkansas to capture more than 1.6 million tons of carbon dioxide from the atmosphere.<sup>120</sup>

The value of these alliances is threefold: (1) they provide a mechanism for promoting change that does not require a participant to step forward as a first-mover or to act alone; (2) they provide credibility by publishing data, offering informed interpretation, and awarding prizes for selected performers; and (3) they provide a forum for the exchange of information and mutual reinforcement.

*D. Increasing Support from Mainstream Investors for Environmental Best Practices*

One of the most important trends to have emerged in the past several years is that investors have become more outspoken on environmental issues, especially in their documented support of “green” shareholder proposals.<sup>121</sup> The votes on these proposals are no longer stuck in single digits.<sup>122</sup> Shareholders are constantly making their presence felt. For example,

Almost a quarter of the shareholders of the Southern Company, one of the nation’s largest utilities, voted at the annual meeting today [in 2003] to require the company to

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<sup>117</sup> See Anastasia O’Rourke, *A New Politics of Engagement: Stockholder Activism for Corporate Social Responsibility*, 12 BUS. STRATEGY & THE ENV’T 227 (2003).

<sup>118</sup> Marine Stewardship Council, About MSC, [http://www.msc.org/html/content\\_462.htm](http://www.msc.org/html/content_462.htm) (last visited Mar. 1, 2007).

<sup>119</sup> Forest Stewardship Council, About Us, [http://www.fscus.org/about\\_us/](http://www.fscus.org/about_us/) (last visited Mar. 1, 2007).

<sup>120</sup> PowerTree Carbon Co., Electric Power Companies, Tree Planting and PowerTree Carbon Company, LLC (n.d.), <http://www.powertreecarboncompany.com/ProjectSummary.pdf>.

<sup>121</sup> Meg Voorhes, *The Rising Tide of Shareholder Activism*, 11 CORP. STRATEGY TODAY 20, 20 (2005).

<sup>122</sup> *Id.* at 28.

analyze and report on the potential financial risks associated with its emissions of the pollutants that cause global warming.

At the same time, shareholders of ExxonMobil, the world's biggest oil company, meeting in Dallas, gave a similar level of support to several resolutions on environmental issues. One, which would require the company to report on how it would increase its investments in renewable energy, was backed by 21 percent of the shareholders, and another, on how it would respond to the risks of global warming, was supported by 22 percent.<sup>123</sup>

These numbers are not aberrational. According to the Investor Responsibility Research Center, "[t]hree global warming resolutions filed with oil companies in 2004 set new records for shareholder support—27.0 percent at Marathon Oil, 31.4 percent at Anadarko Petroleum and 37.1 percent at Apache."<sup>124</sup>

The numbers are even more impressive when one looks at proposals calling for the publication of "sustainability reports," such as those prescribed by the Global Reporting Initiative.

In a few short years, sustainability reporting has emerged as one of the most strongly supported areas in social issues proxy voting. The issue first appeared in 2002, when two proposals came to votes, one at Cooper Industries and the other at R.R. Donnelley, asking the companies to issue a sustainability report. In 2004, the number of proposals filed jumped to 28. Of the 11 that came to votes, six asked the target companies to issue a report following the GRI format, and the remainder asked more generally for a sustainability report without specific reference to GRI. The average support for these proposals came to 25.1 percent. The highest vote—42.2 percent—came at Ryland Group, where Calvert Group, an SRI firm, asked it to report in GRI format.<sup>125</sup>

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<sup>123</sup> Katharine Q. Seelye, *Environmental Groups Gain As Companies Vote on Issues*, N.Y. TIMES, May 29, 2003, at C1.

<sup>124</sup> Voorhes, *supra* note 121, at 28.

<sup>125</sup> *Id.* at 32.

This pattern continued into the 2005 and 2006 proxy seasons.<sup>126</sup> In 2005, a shareholder proposal at ExxonMobil urging disclosure of environmental activity garnered 28.3% of the vote, representing 1.5 billion shares valued at \$83.3 billion.<sup>127</sup> In 2006, the average vote on shareholder proposals advocating sustainability reporting of one type or another was 26.5%, up 18% from the previous year.<sup>128</sup>

### *E. Globalization*

Another factor supporting increased environmental sensitivity is the globalization of business. Many American corporations have employees and facilities outside of the United States.<sup>129</sup> Increasingly, these outposts are having to abide by the Kyoto accords and other environmental restrictions.<sup>130</sup> As a result, American corporations are learning how to function in a carbon-constrained environment.<sup>131</sup> And, they are using the lessons learned overseas to prepare for what many believe is the inevitability of carbon limitations in the United States.<sup>132</sup>

On a broader scale, corporations are coming to understand that “[a] company that is really good at managing its environmental footprint or taking proactive steps to keep pollution out of landfills or out of airsheds or watersheds is going to be better positioned almost no matter what for any new environmental legislation that comes down the pike.”<sup>133</sup> As a result, some investors are now using environmental proactivity as a proxy for outstanding management of other issues.<sup>134</sup> As one analyst observed,

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<sup>126</sup> ISS 2006 Proxy Season Review, <http://www.issproxy.com/proxyseasonreview/2006/index.jsp> (last visited Mar. 1, 2007).

<sup>127</sup> Lisa Mastny, *ExxonMobil Investors Show Record Support for Climate Change Resolution*, WORLD WATCH, Sept.-Oct. 2005, at 8.

<sup>128</sup> ISS 2006 Proxy Season Review, *supra* note 126.

<sup>129</sup> Ted Pincus, *Chicago Firms Rally to Eco-Friendly Policies*, CHI. SUN-TIMES, Mar. 28, 2006, at 55.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> See Aston & Helm, *supra* note 103, at 59 (noting that at a meeting of power company executives in November, 2005, four out of five of those present agreed that “once President George W. Bush was no longer in office, the U.S. would impose mandatory curbs on the emissions of carbon dioxide and other greenhouse gases linked to global warming”).

<sup>133</sup> Ellie Winninghoff, *Green Capitalism* (Dec. 8, 2004), <http://dir.salon.com/story/feature/2004/12/08/sri/index.html> (quoting Julie Gorte, director of social research at the Calvert Group).

<sup>134</sup> *Id.*

“[m]anagement that is thinking ahead in areas where it’s not yet required to by the books [is] likely to be looking ahead in all areas of [its] business.”<sup>135</sup>

#### F. *Rising Energy Prices*

It is not an accident that many companies are paying increased attention to environmental issues at precisely the time when oil prices are the highest in American history. For example, Wal-Mart recently pledged not only to reduce its greenhouse gas emissions but also to increase the fuel efficiency of its truck fleet.<sup>136</sup> (Wal-Mart’s truck fleet is the largest in the U.S.).<sup>137</sup> Scores of other companies, too, are now working on fuel efficiency strategies.<sup>138</sup> In fact, energy efficiency is one of the most common objectives identified by corporations today and for a very good reason. Simply stated, the dramatically rising cost of oil has caused just about every business to re-think its environmental priorities, as a survival strategy.<sup>139</sup> And, nobody expects the price of oil to fall back to 2004 prices anytime soon.<sup>140</sup>

#### G. *Global Climate Change*

Along with rising oil prices, the elephant in the room in our story is the existence of climate change. It is fair to say that an increasing number of American businesses now recognize climate change as both a reality and an opportunity.<sup>141</sup> Insurance companies, of course, have begun to understand that climate change presents a gigantic challenge to them in terms of anticipating (and pricing for) risks associated with global warming,

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<sup>135</sup> *Id.* (quoting Bruce Herbert, president of Newground Social Investment, an asset management firm).

<sup>136</sup> Felicity Barringer, *Wal-Mart to Seek Savings in Energy*, N.Y. TIMES, Oct. 25, 2005, at C1.

<sup>137</sup> *Id.*

<sup>138</sup> See, e.g., Blake Farmer, *Nashville Trucking Companies Go High Tech*, NASHVILLE CITY PAPER, Oct. 15, 2006, [http://www.nashvillecitypaper.com/index.cfm?section=0&screen=ews&news\\_id=52714](http://www.nashvillecitypaper.com/index.cfm?section=0&screen=ews&news_id=52714) (noting that local companies were switching their fleets to automatic transmissions and installing energy-saving auxiliary power units).

<sup>139</sup> *Can Business Be Cool?*, ECONOMIST, June 8, 2006, [http://economist.com/business/display\\_story.cfm?story\\_id=7037026](http://economist.com/business/display_story.cfm?story_id=7037026).

<sup>140</sup> Energy Information Administration, *Short-Term Energy and Winter Fuels Outlook*, <http://www.eia.doe.gov/emeu/plugs/ploct05.html> (last visited Mar. 1, 2007) [hereinafter *Fuels Outlook*].

<sup>141</sup> *Can Business Be Cool?*, *supra* note 139.

rising oceans, and changing climatological patterns.<sup>142</sup> Companies in the power industry, too, are beginning to realize the need for increased capacity, relocation of facilities, and more efficient energy production.<sup>143</sup>

Many of the developments I have noted above—in particular, the Investor Network on Climate Risk, the 2003 and 2005 Institutional Investor Summits, and much of GE's Ecomagination program<sup>144</sup>—are in large part a reaction to global climate change. And, like globalization and the price of oil, global climate change is unlikely to reverse itself any time soon.

#### H. *Generational Factors*

Surely one of the drivers behind changing corporate environmental practices is the shift in power from the post-war generation to the baby boom and post-baby boom generations. According to one observer, “younger companies” and companies with a younger employee base are “baking the social responsibility concept into their culture[s]—and demanding investors accept the cost.”<sup>145</sup> Some critics decry this shift, of course. One has suggested that “a lot of these [younger employees] are confused.”<sup>146</sup>

There are two facets to this generational shift. First, most businesses now understand that recruitment and retention of high-quality workers depends, in part, on conveying a sense that these workers are part of an admirable organization.<sup>147</sup> One characteristic of an admirable organization is its environmental footprint.<sup>148</sup> Second, young workers bring to the workplace a depth of understanding of environmental issues that the previous generation simply did not share.<sup>149</sup> “Given the proliferation of

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<sup>142</sup> Aston & Helm, *supra* note 103, at 61-62 (noting that a 2005 study by the Association of British Insurers shows that “[a] slight uptick in intense storm activity could boost annual wind-related insurance losses, to as much as \$150 billion a year—an increase equivalent to two to three Hurricane Andrews in an average season”).

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* Parts I.D-F.

<sup>145</sup> Brian Grow, *The Debate Over Doing Good*, BUS. WK., Aug. 15, 2005, at 78.

<sup>146</sup> Nicholas Wapshott, “Forget Tree-Hugging and Get Back to Making Money”—Steve Milloy Wants Corporate America to Focus on the Bottom Line, DAILY TELEGRAPH, Apr. 23, 2006, at 7.

<sup>147</sup> See, e.g., Grow, *supra* note 145 (noting that many companies are now burnishing their image as socially responsible companies in order to attract younger workers); Abby Ellin, *M.B.A.'s With Three Bottom Lines: People, Planet and Profit*, N.Y. TIMES, Jan. 8, 2006, at Educ. Life Supp. 22 (describing a growing interest in sustainability among MBA students).

<sup>148</sup> Ellin, *supra* note 147.

<sup>149</sup> See *id.*

environmental laws in the last three decades, particularly in the United States, companies have increasingly hired an environmentally knowledgeable workforce, who can then become ‘change agents’ within the organization.”<sup>150</sup> This trend, too, is unlikely to abate.

*I. The Growing Sophistication of the Social Investment Community*

At the heart of many of the developments I described in Part I are highly-sophisticated institutional investors committed to significant environmental values. Funds like Calvert, Domini, and Pax are constituent members of CERES, and many of them played key roles in the development of the Global Reporting Initiative and the 2003 and 2005 Summits on Climate Risk.<sup>151</sup> Politically-skilled pension fund fiduciaries, too, including the state treasurers of California, Connecticut, Maine, Maryland, New Mexico, Oregon, and Vermont, have played visible roles in promoting greater environmental sensitivity within their portfolio companies.<sup>152</sup>

As others have noted, these investors “have become savvier about how to sell the concept [of sustainability], taking it beyond the simple issue of morality.”<sup>153</sup> The success of the projects outlined above are a testament to these investors’ increasing focus on a package of proposals that corporations can embrace and to their persistence—through shareholder proposals, high-profile conferences, reports, awards, and behind-the-scenes jawboning—in raising and re-raising critical issues.<sup>154</sup> The social investment community is not only getting bigger, it is getting smarter.<sup>155</sup>

*J. The Growing Sophistication of Environmental Activist Groups*

One of the prominent players in the development of the Equator Principles and the new lending practices at Citigroup, Bank of America, and JPMorgan Chase (and thirty-eight others)<sup>156</sup> was the Rainforest Action

<sup>150</sup> Williams & Conley, *supra* note 3, at 78.

<sup>151</sup> See *supra* Parts I.B, I.D, I.F.

<sup>152</sup> 2005 INSTITUTIONAL INVESTOR SUMMIT ON CLIMATE RISK, *supra* note 151 (noting that all these officials were signatories to the Call to Action at the 2005 Summit on Climate Risk, along with other state and city officials, and managers of funds such as CalPERS, CalSTRS, and the New York State Teachers Retirement System).

<sup>153</sup> Marshall, *supra* note 44, at 47.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See *supra* Part I.C.

Network ("RAN").<sup>157</sup> Through its Global Finance Campaign, RAN has pressed hard on banks providing funding for governments and companies engaged in harmful environmental practices.<sup>158</sup> Using classic community organizing techniques, RAN sponsored a "BBQ the Banks" demonstration and cookout in front of Wells Fargo's corporate headquarters in San Francisco.<sup>159</sup> Its members plastered the city with signs reading "Wells Fargo: Lootin' and Pollutin' Since 1852" in the days before the company's annual meeting.<sup>160</sup> RAN issued a caustic report accusing JPMorgan Chase of contributing to the destruction of Indonesia's rain forest<sup>161</sup> and sent protestors to the CEO's home in upscale Greenwich, Connecticut.<sup>162</sup>

RAN also engaged, however, in more discrete arm-twisting. Let's face it—circuses alone were unlikely to persuade forty-one powerful, multinational banks to adopt something as intrusive as the Equator Principles. RAN's success was based at least as much on crafting shrewd (and achievable) demands, persistent negotiation, and effectively playing one bank off against another.<sup>163</sup> RAN's current executive director, Michael Brune, is not only an experienced community organizer, he also has a background in economics and finance.<sup>164</sup>

RAN is one of the "bad cops" in the environmental world,<sup>165</sup> while groups like CERES and the World Wildlife Organization are seen by CEOs and directors as "good cops." CERES, in particular, has deftly developed a network of financially sophisticated staffers and has learned to work effectively with elected officials, NGO's, investment analysts, CEOs, environmental technocrats, and the press. CERES' current executive director, Mindy Lubbers, is a lawyer with, not coincidentally, MBA.<sup>166</sup>

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<sup>157</sup> Rainforest Action Network, The Global Finance Campaign, [http://ran.org/what\\_we\\_do/global\\_finance/](http://ran.org/what_we_do/global_finance/) (last visited Mar. 1, 2007).

<sup>158</sup> *Id.*

<sup>159</sup> Cole, *supra* note 28, at 2.

<sup>160</sup> Jeffrey Marshall, *Turning Up the Noise on CSR*, FIN. EXEC., June 1, 2006, at 28.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Bill Birchard, *Nonprofit Muscle: Buoyed by Billions of Dollars in New Funding, NGOs are Increasingly on CEO Radar Screens*, CHIEF EXEC., Jan.-Feb. 2005, at 42. Recently, Brune acknowledged the importance of working effectively with corporate officials. "[Brune] says his group realized in the late 1990s that it had to change its approach. 'We needed to become more sophisticated in the boardroom, rather than simply being on the outside generating political capital,' he says." *Id.*

<sup>165</sup> See, e.g., Marc Gunther, *The Mosquito in the Tent: A Pesky Environmental Group Called the Rainforest Action Network is Getting Under the Skin of Corporate America*, FORTUNE, May 31, 2004, at 158 (describing some of the group's tactics).

<sup>166</sup> CERES Staff, <http://www.ceres.org/ceres/staff.php> (last visited Mar. 1, 2007).

One of CERES' most outstanding strengths, in addition to its financial sophistication, is its staying power. CERES began laying the groundwork for the Global Reporting Initiative in 1997.<sup>167</sup> When the first Guidelines were issued in 2002, CERES' then executive-director, Robert Massie, acknowledged "[w]e're in year five of a 30-year process."<sup>168</sup>

RAN and CERES are certainly exceptional, but they are not alone. The universe of environmental interest groups, like the universe of social investors with whom they often work, is growing and professionalizing.<sup>169</sup>

### K. *Third Party Assessment*

As economists know, competition is often a good motivator for change. Just as colleges strive to inch up in the *U.S. News & World Report* rankings, many companies today value their position on "top 10" lists or other tournament rankings. Thus, the emergence not only of endorsements from social or "green" investment funds but more recently of media "sustainability" rankings, has for many stimulated a desire for inclusion and visibility.<sup>170</sup> The Dow Jones Sustainability Index (launched in 1999)<sup>171</sup> and the FTSE4Good Index (launched in 2001)<sup>172</sup> are now both regarded as desirable destinations for many companies. These companies proudly trumpet their inclusion in these indexes.<sup>173</sup> And, when CERES recently published its ranking of companies based on their climate change policies,<sup>174</sup> several of the listed companies immediately promoted their presence at the top of that list.<sup>175</sup>

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<sup>167</sup> Forest Stewardship Council, About Us, *supra* note 119.

<sup>168</sup> Maitland, *supra* note 15, at 16.

<sup>169</sup> See Birchard, *supra* note 165, at 42.

<sup>170</sup> Mike Scott, *Ethical Stance Gives Bottom Line Boost*, FIN. TIMES, June 12, 2006, at 4.

<sup>171</sup> Dow Jones Sustainability Indexes, <http://www.sustainability-index.com/> (last visited Mar. 1, 2007).

<sup>172</sup> FTSE, FTSE4Good Index Series, [http://www.ftse.com/Indices/FTSE4Good\\_Index\\_Series/index.jsp](http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp) (last visited Mar. 1, 2007).

<sup>173</sup> See Scott, *supra* note 171, at 4.

<sup>174</sup> Press Release, CERES, BP Receives Top Scores in First-Ever Ranking of 100 Global Companies on Climate Change Strategies (Mar. 21, 2006), [http://www.ceres.org/news/news\\_item.php?nid=154](http://www.ceres.org/news/news_item.php?nid=154).

<sup>175</sup> See, e.g., DuPont, Sustainability, External Recognition, [http://www.dupont.com/sustainability/en\\_us/External\\_Recognition/](http://www.dupont.com/sustainability/en_us/External_Recognition/) (last visited Mar. 1, 2007); Press Release, Alcoa, Alcoa Ranked Among Top Companies on Climate Change and Governance by Leading Environmental Group; Alcoa #2 in the U.S. (Mar. 21, 2006), [http://www.alcoa.com/global/en/news/news\\_detail.asp?pageID=20060321005106en&newsYear=2006](http://www.alcoa.com/global/en/news/news_detail.asp?pageID=20060321005106en&newsYear=2006).

Other ranking schemes also now single out environmental winners and losers. Citigroup recently unveiled its Sustainability Mining Index, which purports to distinguish mining companies “that are best positioned to create value from sustainable development” from “those which are at risk of destroying value” based on their environmental practices.<sup>176</sup> A group known as BankTrack has ranked 39 international banks across thirteen indicators, “from climate change to human rights.”<sup>177</sup>

*Fortune* now ranks the Fortune Global 100 companies on measures of corporate responsibility and accountability.<sup>178</sup> *Business Week* has also identified a list of top carbon cutters and environmental leaders.<sup>179</sup> If anything, companies are now facing a proliferation of these ranking schemes, which may ultimately devalue a high ranking under any one of them. Still, the lure of “first” or “best” remains powerful in the corporate world.

*L. Support and Investment from Venture Capitalists and Hedge Funds*

A final factor in this story is the emerging interest of venture capitalists and hedge funds in supporting energy-efficient businesses and clean technologies. In 2004, investments in clean technologies, including wind and solar power and techniques to capture and burn the gas generated by landfill waste, represented only a small percentage of the venture capital market.<sup>180</sup> Today, more than one hundred venture capital funds are investing in clean technologies.<sup>181</sup> In the first two quarters of 2006, venture capitalists invested \$379 million in so-called “cleantech companies,” up from \$231 million in all of 2005.<sup>182</sup>

*Business Week* has captured the current scene well:

You know a cultural movement is real when the money men get on board. In just the past year a broad swath of financiers—venture capitalists, hedge funds, investment

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<sup>176</sup> Dorothy Kosich, Citigroup Supports Environmental, Social Sustainability, MINEWEB, Mar. 17, 2006, [http://www.mineweb.net/sections/sustainable\\_mining/976437.htm](http://www.mineweb.net/sections/sustainable_mining/976437.htm).

<sup>177</sup> *Banks Told to Improve CSR Standards*, BANK MKTG. INT'L., Feb. 1, 2006, at 14.

<sup>178</sup> Telis Demos, *Managing Beyond the Bottom Line*, FORTUNE INT'L., Oct. 3, 2005, at 70.

<sup>179</sup> Aston & Helm, *supra* note 103, at 61.

<sup>180</sup> Fiona Harvey, *Time to Clean Up? The Climate is Looking Healthy for Investment in Green Technology*, FIN. TIMES, June 22, 2005, at 15 (noting that only six percent of venture capital was being invested in clean technologies).

<sup>181</sup> Matt Richtel, *Promoting Alternative Energy Without Being Too Green*, N.Y. TIMES, Aug. 25, 2006, at C6.

<sup>182</sup> *Id.*

banks, public pension funds, and even stodgy insurers—have begun sinking billions of dollars into producers of ethanol, fuel cell superbatteries, microscopic bugs that turn glucose into plastic, environmentally friendly pesticides, anything that might tap into the green craze. Saving the planet, protecting America, doing God’s work, cynically exploiting a feel-good trend—call it what you will. Wall Street sees money to be made.<sup>183</sup>

Obviously, the “smart” money has decided that there is a future in clean energy technologies and that the return on investment in these technologies is likely to be attractive. What does this mean for already-public companies? Likely, more well-financed customers for their environmental products, and more acquisition possibilities.<sup>184</sup> Of course, this bubble, like others, may pop. But in the meantime, Wall Street’s support for clean technology may give some breathing space to projects like Ecomagination and encourage more companies to embrace disclosure formats like the GRI.

#### CONCLUSION

What should one make of the foregoing story? At a minimum, there have been a series of events over the past four years that offer hope for enlightened corporate environmental behavior.<sup>185</sup> Moreover, these events appear to be grounded in observable and (mostly) sustainable trends.<sup>186</sup>

Critics may well read this story quite differently than I do and despair of the wholly inadequate response of both governments and corporations to the worldwide environmental peril we are in.<sup>187</sup> Indeed, many troubling trends counterbalance the items I sketched out in Part II. These countertrends include grotesque consumerism, not only in the United States but in newly-successful economies; continuing profligate use of energy resources, especially in the United States; obstinate politics; political upheavals; and, underlying it all, runaway population. To be clear, I don’t think we have landed in eco-heaven.

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<sup>183</sup> Emily Thornton & Adam Aston, *Wall Street’s New Love Affair: Why Some of the World’s Smartest Investors Are Betting Billions on Clean Energy*, BUS. WK., Aug. 14, 2006, at 48.

<sup>184</sup> *See id.*

<sup>185</sup> *See supra* Part I.

<sup>186</sup> *See supra* Part II.

<sup>187</sup> *See, e.g.*, JAMES GUSTAVE SPETH, *RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT* (2004).

Nevertheless, there is reason for optimism that the combined efforts of groups like CERES, the Investors Climate Risk Network, insurance companies, enlightened CEOs, directors concerned about their directorial reputations (and concerned, too, about the impact of off-balance sheet risk), and the technically-skilled subordinates that support them all, will continue to flourish. The *Environmental Law & Policy Review* might want to pencil in a return engagement of this symposium a decade from now. We'll see in 2016 just how far corporate actors have come.