

CLIMATE CHANGE DISCLOSURE: ENSURING THE VIABILITY OF THE INSURANCE INDUSTRY WHILE PROTECTING THE INVESTOR

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INTRODUCTION

As the United States economy encountered financial crisis in the fall of 2008,¹ federal lawmakers on both sides of the aisle demanded increased regulation of banks and financial institutions.² Citing corporate greed, excess, and deregulation as causes of the financial meltdown, many influential leaders argued that the proper solution was greater oversight of Wall Street.³ In an effort to promote greater accountability, John McCain, the Republican Party nominee for the 2008 Presidential election, called for the dismissal of Christopher Cox, the Chairman of the Securities Exchange Commission (“SEC”).⁴ McCain accused him of betraying the trust of the public and maintaining “trading rules that let speculators and hedge funds turn our markets into a casino.”⁵

Although the push for increased regulation did not suddenly arise following the onset of the financial crisis,⁶ the country’s economic downturn

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¹ See Alexandra Twin, *Stocks Crushed: Approximately \$1.2 Trillion in Market Value is Gone after the House Rejects the \$700 Billion Bank Bailout Plan*, CNN, Sept. 29, 2008, http://money.cnn.com/2008/09/29/markets/markets_newyork/index.htm.

² See Phil Izzo, *Economists Expect Crisis to Deepen*, WALL ST. J., Oct. 10, 2008, at A6; Justin Lahart, *World Economy Shows New Strain*, WALL ST. J., Aug. 15, 2008, at A1; Greg Hitt, *Democrats Mull \$300 Billion Stimulus*, WALL ST. J., Oct. 15, 2008, at A3, available at <http://online.wsj.com/article/SB122402768546534409.html>; Kara Scannell, *Rescue Plan Stirs Calls for Deeper Regulation*, WALL ST. J., Sept. 24, 2008, at A1, available at <http://online.wsj.com/article/SB122221359440869183.html>.

³ See, e.g., *Excerpts from the Second Presidential Debate*, N.Y. TIMES, Oct. 8, 2008, at A20.

⁴ Vikas Bajaj & Graham Bowley, *A Bid to Curve Profit Gambit as Banks Fail*, N.Y. TIMES, Sept. 18, 2008, at A16, available at <http://www.nytimes.com/2008/09/19/business/19backlash.html?fta=y>.

⁵ *Id.*

⁶ Stephen Grocer, *Timeline: Two Years in the Credit Crisis*, WALL ST. J. BLOG (Sept. 16,

has significantly increased the likelihood of greater attention and passage of legislation geared toward an increase in oversight and transparency.⁷ Over the past few years, the SEC has handled a substantial escalation in shareholder initiatives aimed at increasing the oversight of financial institutions and providing more information to investors.⁸ One area of particular interest to the Commission has been climate change.⁹ Increasingly wary over its potential impacts on a company's reputation, solvency and profitability, the SEC has faced mounting pressure to require publicly traded companies to disclose information related to climate change's financial impact on their operations and viability.¹⁰ During the 2008 proxy season, lawmakers filed a record number of climate-related shareholder resolutions,¹¹ most demanding greater information regarding how climate change affects the companies.¹² Recognizing the increased concern over this issue, Congress has made efforts to require publicly traded companies to inform securities investors of the risks relating to "the potential . . . impacts of global warming on the interests of the issuer."¹³ Although such legislative initiatives have not been successful thus far,¹⁴ the push for increased disclosure is unlikely to subside in the near future.

2009, 12:30 PM), <http://blogs.wsj.com/deals/2009/09/16/timeline-two-years-in-the-credit-crisis/> (noting that the financial market experienced symptoms of crisis as early as mid 2007, but it wasn't until a year later that the government moved to impose increased regulation on the financial market).

⁷ See *Fed Chief Angered by AIG Rescue*, ORLANDO SENTINEL, Mar. 4, 2009, at A8.

⁸ Thomas Kostigen, *SEC Urged to Act on Climate-Change Rules*, MARKETWATCH, July 24, 2008, <http://www.marketwatch.com/story/sec-should-adopt-disclosure-rules-on-climate-risk>.

⁹ Peter L. Gray, *The SEC Is Getting Hot and Bothered Over Climate Change*, METRO. CORP. COUNS., Jan. 2008, at 11, 11, available at <http://www.metrocorpcounsel.com/pdf/2008/January/11.pdf>.

¹⁰ *Id.*; *Investors Call on SEC to Enforce Climate Change Disclosures*, ENVTL. LEADER, June 16, 2009, <http://www.environmentalleader.com/2009/06/16/investors-call-on-sec-to-enforce-climate-change-disclosures>.

¹¹ CERES & ENVTL. DEF. FUND, CLIMATE RISK DISCLOSURE IN SEC FILINGS: AN ANALYSIS OF 10-K REPORTING BY OIL AND GAS, INSURANCE, COAL, TRANSPORTATION AND ELECTRIC POWER COMPANIES 7 (2009), available at <http://www.ceres.org/Document.Doc?id=473> [hereinafter CERES CLIMATE RISK DISCLOSURE REPORT].

¹² Jacqueline Bell, *Pressure Grows To Disclose Global Warming Risks*, LAW360, Sept. 10, 2008, <http://www.law360.com/articles/67827>.

¹³ See Global Warming Reduction Act of 2007, S.485, 110th Cong. (2007); Global Warming Pollution Reduction Act, S.309, 110th Cong. (2007).

¹⁴ Matthew H. Ahrens, *Should We Tell Our Shareholders about Climate Change?*, IN-HOUSE COUN. COMMITTEE NEWSL. (A.B.A. SEC. ENV'T, ENERGY, & RESOURCES), June 2009, at 10, 12, available at http://www.abanet.org/environ/committees/counsel/newsletter/jun09/InHouseCounsel_June09.pdf.

Insurance companies are particularly concerned about climate change. A 2008 study conducted by Ernst & Young examined the top ten strategic business risks facing the insurance industry and found that climate change is the biggest threat to the industry.¹⁵ This is largely due to the wide range of potential consequences faced, such as “windstorms, flood and heat waves . . . increases in mortality and health problems, the spread of environmentally related litigation, political risk linked to conflicts for control of resources, and effects on capital markets.”¹⁶ Not surprisingly, many consumer groups are advocating increased disclosure by the insurance industry by demanding that companies detail the risks they face as a result of climate change.¹⁷

Insurers are wary of increased disclosure requirements for numerous reasons.¹⁸ Insurers are concerned about the level of uncertainty regarding the ability to accurately predict future risk resulting from climate change, the effect of disclosure on premiums, and the potential for increased litigation following disclosure.¹⁹ Insurers are also worried about the potential revelation of proprietary information in disclosure reports.²⁰ Given the fact that the insurance industry earns profits based on accurate calculation of risk, many companies fear that new regulations will require them to disclose trade secrets that will decrease competitive advantages and hamper profitability.²¹

This note will discuss current disclosure requirements and proposed legislation aimed at requiring companies to disclose information related to the financial risks of climate change to shareholders. It will then analyze the proposals’ potential impacts by focusing on the benefits and risks of disclosure to insurers, as well as the effects on policyholders who may consequently face changes in the availability or affordability of coverage. This note will also discuss potential alternatives that might better address the concerns of both insurers and policyholders. Finally, it will

¹⁵ ERNST & YOUNG, STRATEGIC BUSINESS RISK 2008: INSURANCE 4 (2008), available at [http://www.ey.com/Publication/vwLUAssets/Industry_Insurance_StrategicBusinessRisk_2008/\\$FILE/Industry_Insurance_StrategicBusinessRisk_2008.pdf](http://www.ey.com/Publication/vwLUAssets/Industry_Insurance_StrategicBusinessRisk_2008/$FILE/Industry_Insurance_StrategicBusinessRisk_2008.pdf).

¹⁶ *Id.* at 6.

¹⁷ See, e.g., Ceres, *Insurance Sector*, <http://www.ceres.org/Page.aspx?pid=760> (last visited Nov. 11, 2009) (“Ceres is seeking improved disclosure by insurers on their exposure to climate risk. This will help focus the attention of the industry, as well as the financial markets, on the magnitude of the risk and the need to work toward solutions.”).

¹⁸ See *infra* Part II.B.1.

¹⁹ See *infra* Part II.B.1.

²⁰ See *infra* text accompanying notes 152–57.

²¹ See *infra* text accompanying notes 143–47.

conclude by discussing mitigation techniques that insurance companies can utilize in order to reduce financial risks of climate change, as well as what steps other companies can take to provide greater information to shareholders. This note will provide a recommendation that balances the concerns of the insurance industry by creating carefully tailored disclosure requirements that preserve proprietary information while providing adequate information for both consumers and investors to properly guide their business decisions.

I. DISCLOSURE AND REGULATORY REQUIREMENTS

A. *Current SEC Regulations*

The SEC has promulgated numerous rules and reporting requirements for publicly traded companies.²² Some public interest groups and consumer advocates argue that these regulations already mandate companies to report information regarding climate change's impact on their financial well-being.²³ The requirements that may have particular application to climate change disclosure are Regulations S-K 101, 103, and 303.

S-K 101 requires publicly traded companies to describe the nature of their business and discuss "the *material* effects that compliance with Federal, State and local provisions . . . regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries."²⁴ This regulation may draw even more attention given the House of Representatives' recent passage of a "landmark climate change bill"²⁵ in June of 2009, which would require large American companies to reduce their carbon dioxide emissions, as well as other greenhouse gases.²⁶

Regulation S-K 103 requires a company to explain any "*material* pending legal proceedings, other than ordinary routine litigation incidental

²² MICHELLE CHAN-FISHEL, FRIENDS OF THE EARTH, FIFTH SURVEY OF CLIMATE CHANGE DISCLOSURE IN SEC FILINGS OF AUTOMOBILE, INSURANCE, OIL & GAS, PETROCHEMICAL, AND UTILITIES COMPANIES 6 (2006), available at <http://www.foe.org/camps/intl/SECFinalReportandAppendices.pdf>.

²³ *Id.* at 6–7; Marie Leone, *Will the SEC Go Green?*, CFO.COM, Sept. 19, 2007, http://www.cfo.com/article.cfm/9826963/c_10007226.

²⁴ 17 C.F.R. § 229.101(c) (1) (xi) (2008) (emphasis added).

²⁵ Richard Cowan, *House Passes Landmark Climate Change Bill*, REUTERS, June 27, 2009, <http://www.reuters.com/article/politicsNews/idUSTRE55O4R120090626>.

²⁶ American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009) (enacted).

to the business,” where the company or a subsidiary of the company is a party.²⁷ Although courts have not been heavily involved in climate change litigation thus far,²⁸ some are beginning to address lawsuits examining whether private organizations and the insurance companies that represent them can be held liable for contributing to climate change due to their emissions of greenhouse gases.²⁹ In fact, a recent report issued by Swiss Re, a leading insurer in Switzerland, predicted a flood of climate change litigation in the near future, concluding that “[w]e expect . . . climate change-related liability will develop more quickly than asbestos-related claims, and believe the frequency and sustainability of climate-related litigation could become a significant issue within the next couple of years.”³⁰ In such an event, S-K 103 may become increasingly applicable as well.

SEC Regulation S-K 303 has received the most attention from those advocating for increased disclosure.³¹ Included within the Securities Exchange Act of 1934, S-K 303 requires the disclosure of “any known trends or uncertainties” that are reasonably expected to have a material effect on a company’s operations, as well as any information that would help a shareholder understand a company’s financial condition and any changes to that condition.³²

Each of these regulations includes a standard of materiality for requiring disclosure. In *TSC Industries v. Northway*,³³ the Supreme Court provided guidance by defining the standard for materiality as a question of law and fact, stating that a “fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”³⁴ The Court elaborated that the standard does not require a showing of a “substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What [it] does contemplate is a showing of a substantial likelihood that, under

²⁷ 17 C.F.R. § 229.103 (2008) (emphasis added).

²⁸ Mark E. Ruquet, *Climate Change Litigation Set to Explode, Creating Opportunities, Perils for Insurers*, NAT’L UNDERWRITER PROP. & CASUALTY, July 27, 2009, at 14, 14, available at <http://www.property-casualty.com/Issues/2009/July-27-2009/Pages/Climate-Change-Litigation-Set-To-Explode-Creating-Opportunities-Perils-For-Insurers.aspx>.

²⁹ *Id.* at 14, 17.

³⁰ *Id.* at 14.

³¹ Gray, *supra* note 9, at 11; SANFORD LEWIS, INVESTOR ENVTL. HEALTH NETWORK, BRIDGING THE CREDIBILITY GAP: EIGHT CORPORATE LIABILITY ACCOUNTING LOOPHOLES THAT REGULATORS MUST CLOSE 25 (2009), available at <http://www.iehn.org/documents/EightLoopholes.pdf>.

³² 17 C.F.R. § 229.303(a) (2) (ii) (2008) (emphasis added).

³³ *TSC Indus. v. Northway*, 426 U.S. 438 (1976).

³⁴ *Id.* at 449.

all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.”³⁵

Legislators have sought to include disclosure of financial risks from climate change on Form 10-K quarterly reports as a requirement within the disclosure requirements of Regulation S-K 303. For example, two pieces of legislation were introduced in Congress in 2007 to accomplish this goal.³⁶ Introduced by Senator Bernie Standards of Vermont, the Global Warming Pollution Reduction Act would have compelled the SEC to promulgate requirements for “corporate environmental disclosure of climate change risks.”³⁷ The Act included regulations directing issuers of stock to “inform securities investors of . . . 1) the financial exposure of the issuer because of the net global warming emissions of the issuer; and 2) the potential economic impacts of global warming on the interests of the issuer.”³⁸ To make it clear that this disclosure would fall within the requirements of S-K 303 and must therefore be provided on Form 10-K, the Act specifically stated that “global warming constitutes a known trend.”³⁹

Two weeks after the Global Warming Pollution Reduction Act was introduced, Senators John Kerry and Olympia Snowe introduced the Global Warming Reduction Act of 2007.⁴⁰ The language of Section 302 of the bill, related to corporate disclosure, is very similar to the Global Warming Pollution Reduction Act.⁴¹ The Kerry-Snowe bill also contains language declaring climate change to be a “known trend.”⁴² Both bills were referred to Senate committees but saw no movement to the floor for a vote.⁴³

B. *Roadblocks to Regulation*

It is not always clear how the SEC’s reporting requirements should be interpreted with regard to disclosure, specifically in relation to what

³⁵ *Id.*

³⁶ See Global Warming Pollution Reduction Act, S. 309, 110th Cong. (2007); Global Warming Reduction Act of 2007, S. 485, 110th Cong. (2007).

³⁷ S. 309 § 9.

³⁸ *Id.* § 9(a).

³⁹ *Id.* § 9(c) (1) (B).

⁴⁰ S. 485 § 302.

⁴¹ Compare S. 485 § 302, with S. 309 § 9 (both bills require disclosure of the financial and economic impacts of emissions and global warming).

⁴² S. 485 § 302(c) (1) (B).

⁴³ THOMAS, Library of Congress, Legislative History of Senate Bill 309, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.00309>: (last visited Nov. 11, 2009); THOMAS, Library of Congress, Legislative History of Senate Bill 485, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.00485>: (last visited Nov. 11, 2009).

factors a company should consider when calculating risk.⁴⁴ S-K 303, and the Supreme Court interpretations of standards for materiality, provide general guidance, but there remains a lack of clear standards that specify exactly what information companies must disclose.⁴⁵ Part of this is due to disagreement over the nature and severity of climate change,⁴⁶ thereby creating variances in opinion as to whether or not climate change itself constitutes a material effect on a company's operations.

1. The Politics of Climate Change

Climate change issues have become very political, which complicates efforts to achieve consensus.⁴⁷ For example, Nobel Prize winner and former Vice President Al Gore proclaimed that “[t]he debate is over! There’s no longer any debate in the scientific community about [climate change].”⁴⁸ However, more than 32,000 scientists from around the world, 9,000 of whom possess a Ph.D., recently joined together in a statement disagreeing with “alarmist assertions” adopting climate change.⁴⁹ Similarly, in 2006, United States Senator James Inhofe stated in a speech on the Senate floor that the “greatest climate threat we face may be coming from alarmist computer models.”⁵⁰ More recently, a 2009 Gallup poll found that forty-one percent of Americans believe the seriousness of global warming is “exaggerated” in the news.⁵¹ These disagreements and political disputes

⁴⁴ Bell, *supra* note 12, at 3.

⁴⁵ *Id.*

⁴⁶ See, e.g., Cornelia Dean, *Will Warming Lead to a Rise in Hurricanes?*, N.Y. TIMES, May 29, 2007, available at http://www.nytimes.com/2007/05/29/science/earth/29hurr.html?_r=1 (discussing global warming's effect, if any, on the severity and frequency of hurricanes).

⁴⁷ See Dan Shapley, *The Republican-Democratic Split on Global Warming*, DAILY GREEN, Sept. 28, 2007, <http://www.thedailygreen.com/environmental-news/latest/7313>.

⁴⁸ Jonathan Freeland, *Born Again*, GUARDIAN, May 31, 2006, <http://www.guardian.co.uk/film/2006/may/31/usa.environment>.

⁴⁹ *32,000 Scientists Dissent from Global Warming "Consensus,"* ASS'N OF AM. PHYSICIANS AND SURGEONS, May 20, 2008, <http://www.aapsonline.org/newssoftheday/0026>.

⁵⁰ Zachary Coile, *Senator Fights the Tide, Calls Warming by Humans a Hoax*, SAN FRANCISCO CHRON., Oct. 11, 2006, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/10/11/MNGEJLMT8A1.DTL> (noting Inhofe referred to global warming as “the greatest hoax ever perpetrated on the American people.”).

⁵¹ Lydia Saad, *Increased Number Think Global Warming is Exaggerated*, GALLUP, Mar. 11, 2009, <http://www.gallup.com/poll/116590/increased-number-think-global-warming-exaggerated.aspx#1>.

may have also led to reluctance on the part of courts to address climate change issues thus far.⁵²

Although disagreement remains regarding the effects and extent to which humans are accelerating climate change, most politicians and other government officials are still taking the issue very seriously. The United Nations established the Intergovernmental Panel on Climate Change, which, in 2007, released its Fourth Assessment Report examining the causes of climate change and its projected effects.⁵³ Meanwhile, a June 2009 report detailing a government study begun during the Bush administration warned of the severe impacts of climate change on health, agriculture, energy supply, water resources, ecosystems, and other aspects of society.⁵⁴ Some military and intelligence analysts are also concerned about the threat of climate-induced crises such as “violent storms, drought, mass migration, and pandemics” on national security.⁵⁵ Finally, in a joint press release in 2007, Independent Joe Lieberman and Republican Susan Collins, the Chairman and Ranking Member of the Senate Homeland Security and Governmental Affairs Committee, warned of the “dire economic consequences” of global warming on the country.⁵⁶ Although it remains to be seen whether consensus can be reached on the proper solution to this worldwide issue, most governmental actors agree that climate change is at least having discernible effects.⁵⁷

⁵² See, e.g., *Connecticut v. Am. Elec. Power Co.*, 406 F.Supp.2d 265 (S.D.N.Y. 2005) (holding that a public nuisance suit seeking a reduction in greenhouse gas emissions raised a political question impossible to decide without an “initial policy determination of a kind clearly for nonjudicial discretion. . .”).

⁵³ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 26, 29–33 (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf. The report stated that “[m]ost of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic [greenhouse gas] concentrations.” *Id.* at 39 (emphasis in original).

⁵⁴ See U.S. GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 9–12 (2009), available at <http://downloads.globalchange.gov/usimpacts/pdfs/climate-impacts-report.pdf>; John M. Broder, *Government Study Warns of Climate Change Effects*, N.Y. TIMES, June 16, 2009, available at <http://www.nytimes.com/2009/06/16/science/earth/16climate.html>.

⁵⁵ John M. Broder, *Climate Change Seen as Threat to U.S. Security*, N.Y. TIMES, Aug. 8, 2009, available at <http://www.nytimes.com/2009/08/09/science/earth/09climate.html?scp=1&sq=Climate%20change&st=cse>.

⁵⁶ Press Release, U.S. Senate Comm. on Homeland Sec. & Governmental Affairs, Senators Lieberman and Collins Warn of “Dire Economic Consequences” of Global Warming for Insurers, Taxpayers, the Nation (Apr. 19, 2007), available at <http://hsgac.senate.gov/> (click “press”; click “2007”; then scroll to “4/19/07”).

⁵⁷ See John Houghton, *Madrid 1995: Diagnosing Climate Change*, NATURE, October 9, 2008, at 737–38, available at <http://www.nature.com/nature/journal/v455/n7214/pdf/455737a>

2. Uncertainties Regarding Disclosure Obligations

Lack of consensus on the magnitude and severity of climate change could be making it difficult for companies to predict its financial effects on their operations.⁵⁸ Courts, however, have not been silent on how companies should address uncertainties in disclosure. In 1992, the SEC examined disclosure of financial uncertainties and forward-looking statements in *In re Caterpillar*.⁵⁹ In *Caterpillar*, the company's management team faced difficulties predicting future performance due to unexpected profits from the previous year and concerns regarding whether it would be able to achieve the same success.⁶⁰ Due to these uncertainties, Caterpillar's forward-looking financial information was not disclosed in Form 10-K, leading the SEC to investigate whether such disclosure was optional, or whether the reporting failure violated Regulation S-K 303.⁶¹ The SEC concluded that this lack of disclosure "left investors with an incomplete picture of Caterpillar's financial condition and results of operations."⁶²

.pdf (noting the countries debated and finally decided on "the balance of evidence suggests a discernible human influence on climate change.").

⁵⁸ *Insurance Sector Concerned by Climate Change Financial Impact*, <http://www.businessspectator.com.au/bs.nsf/Article/Insurance-sector-irked-by-climate-change-W59TQ?opendocument&src=rss> (last visited Nov. 11, 2009) (concluding that insurance companies want to be better educated about climate change before discussing climate change risk coverage).

⁵⁹ *In re Caterpillar*, Exchange Act Release No. 30,532, 50 SEC Docket 903, 907–12 (Mar. 31, 1992).

⁶⁰ *Id.* at 905.

⁶¹ *Id.* at 909–12. The SEC explained the differences between "required disclosure" and "optional forward-looking disclosure" when preparing a Form 10-K, including how such differences affect reporting requirements:

Both required disclosure regarding the future impact of presently known trends, events or uncertainties and optional forward-looking information may involve some prediction or projection. The distinction between the two rests with the nature of the prediction required. Required disclosure is based on currently known trends, events, and uncertainties that are reasonably expected to have material effects. . . . In contrast, optional forward-looking disclosure involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty.

Id. at 910.

⁶² *Id.* The Commission followed the test created to assess whether disclosure is required.

As to prospective information, the MD & A Release sets forth the following test for determining when disclosure is required:
Where a trend, demand, commitment, event or uncertainty is known, management must make two assessments:

The Commission found Caterpillar violated the Exchange Act and ordered the company to develop and maintain procedures in accordance with the requirements of S-K 303.⁶³

Following the *Caterpillar* ruling, companies simply did not know whether, and to what extent, climate change risks needed to be disclosed to avoid increased litigation and fines from the SEC.⁶⁴ To alleviate such concerns, Congress enacted legislation creating safeguards protecting inaccurate disclosure. The Private Securities Litigation Reform Act of 1995,⁶⁵ for example, provides liability protection from “forward-looking statements” as long as the statement is “accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.”⁶⁶ Consequently, given the lack of consensus surrounding the effects of climate change, companies required to disclose information may still be protected by providing a disclaimer concerning the potential for inaccuracies in their predictions.⁶⁷

C. *Increased Pressure to Disclose*

Despite a lack of clarity related to disclosure requirements and confusion over what information must be disclosed, there is increased pressure on companies to disclose whatever information they do possess on climate change’s operational effects.⁶⁸ Though reluctant at first, some companies have gradually made efforts to voluntarily disclose the financial

(1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.

(2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant’s financial condition or results of operations is not reasonably likely to occur.

Id.

⁶³ *Id.* at 913.

⁶⁴ SIMPSON THACHER & BARTLETT LLP, DISCLOSURE OF CLIMATE CHANGE RISK IN SEC FILINGS 1–2 (2008), <http://www.stblaw.com/content/publications/pub780.pdf>.

⁶⁵ Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.).

⁶⁶ 15 U.S.C. § 78u-5(c) (1) (a) (i) (2006).

⁶⁷ *See id.*

⁶⁸ Peyton Fleming, *Investors Achieve Major Company Commitments on Climate Change*, CERES, Aug. 20, 2008, available at <http://www.ceres.org/Page.aspx?pid=928&srcid=705>; SIMPSON THACHER & BARTLETT LLP, *supra* note 64, at 2.

risks of climate change they face.⁶⁹ Given their high levels of carbon emissions, it is not surprising that energy companies have been at the forefront of this initiative, likely resulting from a desire to avoid the negative consequences and litigation that might otherwise result.⁷⁰

Recent efforts to mandate disclosure have been successful. In 2007, New York Attorney General Andrew Cuomo issued subpoenas seeking to determine the level of public knowledge surrounding the financial risks to five New York energy companies that would accompany the proposed building of coal-fired power plants in the state.⁷¹ Letters accompanying the subpoenas questioned whether investors received adequate information concerning financial liabilities associated with the resulting carbon emissions' effects on climate change.⁷²

In an agreement with Cuomo in August 2008, Xcel Energy became the first energy company to enter into an enforceable agreement to publicly disclose financial liabilities resulting from climate change.⁷³ Xcel also agreed to disclose "material financial risks" associated with climate change, such as drought or rising sea levels.⁷⁴ Two months later, Dynegy also reached an agreement with Cuomo to disclose such "material risks."⁷⁵ Although energy companies are the largest greenhouse gas emitters, some

⁶⁹ Weil Gotshal & Manges LLP, *The Legal Ramifications of Climate Change on Business*, ENVTL. L. BULLETIN, Spring 2008, at 1, 3, available at http://www.weil.com/files/upload/Environmental_Law_bulletin_spring_2008.pdf.

⁷⁰ *Id.* (citing specific energy companies).

⁷¹ Felicity Barringer & Danny Hakim, *New York Subpoenas 5 Energy Companies*, N.Y. TIMES, Sept. 16, 2007, at A31, available at <http://www.nytimes.com/2007/09/16/nyregion/16greenhouse.html>. The five energy companies included AES Corporation, Dominion, Dynegy, Peabody Energy and Xcel Energy. *Id.*

⁷² *Id.*

⁷³ See Nicholas Confessore, *Energy Firm to Specify Investor Risk*, N.Y. TIMES, Aug. 28, 2008, at C1.

⁷⁴ *Id.*

⁷⁵ Daniel Edward Rosen, *Power Company to Cue Investors*, NEWSDAY, Oct. 24, 2008, available at <http://www.newsday.com/business/technology/power-company-to-cue-investors-1.765391>. Significant aspects of the agreement included the following: an analysis of financial risks associated with future greenhouse gas legislation and regulations; descriptions of litigation and court decisions that may impact the company; levels of emissions of greenhouse gases and strategies to reduce emissions; the extent, if any, to which "environmental performance factors" are incorporated into officer compensation; and "the impact of an increase in sea level and changes in weather conditions." John Horan, *Dynegy Inc. Agrees with New York Attorney General Cuomo to Disclose Material Risks Related to Climate Change*, GLOBAL CLIMATE L. BLOG (Oct. 27, 2008), <http://www.globalclimatelaw.com/2008/10/articles/securities-disclosure/dynegy-inc-agrees-with-new-york-attorney-general-andrew-cuomo-to-disclose-material-risks-related-to-climate-change/>.

speculate that this pressure to disclose will soon expand to other industries facing similar pressure.⁷⁶

On the federal level, the SEC has come under heavy criticism for its role in the economic collapse and its failure to pursue regulatory enforcement actions adequately, leading critics to believe that “the agency is in as much turmoil as the markets it polices.”⁷⁷ Most notably, the SEC faced a crushing blow to its reputation when it failed to discover a Ponzi scheme run by billionaire Bernard Madoff that defrauded investors of approximately \$50 billion, despite numerous tips and investigations.⁷⁸ Upon assuming her position as the Commission’s new chairman in 2009, Mary Schapiro promised increased enforcement measures and less bureaucratic red tape, stating that “[t]hose who break the law and take advantage of investors need to know that they will face an unrelenting law enforcement agency in the SEC [Enforcement] is, and always will remain, a foundation of our mission.”⁷⁹

Regulatory and law enforcement agencies are not the only groups pressing for increased disclosure. Investors are equally, if not more, concerned, and continue to push for more transparency. In 2008, sixty-seven shareholder proposals related to climate change were filed with U.S. and Canadian companies.⁸⁰ This record number of proposals resulted in nearly half of those companies making positive commitments to address the climate change issue, leading to a withdrawal of the shareholder proposal.⁸¹ Those allowing the proposals to go to a shareholder vote also saw substantial support.⁸² Groups like Ceres, a network of investors, environmental organizations, and other public interest groups, have also been outspoken

⁷⁶ Seth Kerschner, *Power Companies Agree to Expanded Disclosure of Climate Change Risk in Landmark Settlements with New York Attorney General*, ENVTL. DISCLOSURE COMMITTEE NEWSL. (A.B.A. SEC. ENV'T, ENERGY, & RESOURCES), Mar. 2009, at 2, 4–5, available at http://www.abanet.org/enviro/committees/environdisclosures/newsletter/mar09/EnvDiscl_Mar09.pdf (suggesting that the Xcel settlements could provide a precedent for many other public companies).

⁷⁷ *The Securities and Exchange Commission: Growing Insecurities*, ECONOMIST, Jan. 17, 2009, at 73 (“[T]he SEC is fighting to justify its existence. It is unlikely to be unscathed by the planned regulatory overhaul under Barack Obama.”).

⁷⁸ Zachary A. Goldfarb, *New SEC Chief Moves to Toughen Enforcement*, WASH. POST, Feb. 7, 2009, at D2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/06/AR2009020602876.html>.

⁷⁹ *Id.*

⁸⁰ CERES CLIMATE RISK DISCLOSURE REPORT, *supra* note 11, at 7.

⁸¹ *Id.*

⁸² *Id.* (“The average vote for resolutions . . . increased from 18.4% in 2006 to 22% in 2007. In 2008 . . . reports averaged 30.6% support.”).

in their efforts to promote greater transparency, calling for the SEC to require all companies to disclose “[s]trategic analyses of climate risks and emissions management plans . . . [a]ssessments of physical risks related to climate change . . . [and] [a]nalyzes of regulatory risks related to climate change.”⁸³

Given the public demand for increased oversight of business industries and the mounting pressure on the SEC to increase its enforcement activity, it would not be surprising to see strict disclosure laws put into place in the near future.

II. CLIMATE CHANGE’S IMPACT ON THE INSURANCE INDUSTRY

The insurance industry is imperiled by the potential effects of climate change, due particularly to the nature of its business in insuring risk.⁸⁴ Insurance companies examine individual rates of loss for various types of risk and provide financial protection for these risks based on the likelihood of the insured risk occurring.⁸⁵ Most insurance policies are provided by private insurers.⁸⁶ High-risk groups, such as those who have filed many claims, or live or conduct business in a particular area that is prone to increased risk of a claim, however, are often unable to obtain insurance in the private market and instead receive coverage from the public sector through state insurance programs and funds.⁸⁷ If insurers attempt to reduce their exposure or exit high-risk areas, the public sector is often forced to shoulder the burden by insuring these high-risk groups.⁸⁸

A 2007 Government Accountability Office report concluded that both private and public insurers are likely to face increased exposure to

⁸³ Meg Wilcox, *Ceres Applauds EPA Greenhouse Gas Reporting Rule; Renews Call on SEC to Require Mandatory Climate Risk Disclosure in Securities Filings*, CERES, Mar. 10, 2009, available at <http://www.ceres.org/Page.aspx?pid=1058>.

⁸⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, FINANCIAL RISKS TO FEDERAL AND PRIVATE INSURERS IN COMING DECADES ARE POTENTIALLY SIGNIFICANT: REPORT TO THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, U.S. SENATE 1–9 (2007) available at <http://www.gao.gov/new.items/d07285.pdf> [hereinafter GAO INSURER REPORT] (a report analyzing the financial effects of climate change and other weather-related losses on the insurance industry).

⁸⁵ NILS GILMAN, DOUG RANDALL, & PETER SCHWARTZ, GLOBAL BUS. NETWORK, IMPACTS OF CLIMATE CHANGE: A SYSTEM VULNERABILITY APPROACH TO CONSIDER THE POTENTIAL IMPACTS TO 2050 OF A MID-UPPER GREENHOUSE GAS EMISSIONS SCENARIO 13 (2007), available at http://www.gbn.com/articles/pdfs/GBN_Impacts%20of%20Climate%20Change_whitepaper.pdf [hereinafter IMPACTS OF CLIMATE CHANGE].

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ GAO INSURER REPORT, *supra* note 84, at 33.

claims as a result of climate change.⁸⁹ In contrast to nearly all other types of business, insurers are unable to precisely discern most of the expenses for their policies when providing coverage.⁹⁰ As a result, it is difficult to accurately assess vulnerability in order to evaluate how to properly spread the risk.⁹¹

Insurers traditionally calculate costs of coverage related to particular disasters, such as hurricanes, based on historical data and past events.⁹² Climate change, however, alters this level of predictability.⁹³ Additionally, if a particular weather-related event occurs more frequently in one particular area—New Orleans being hit by three consecutive hurricanes with the same strength as Hurricane Katrina, for example—the insurer may no longer wish to assume the risk and choose to stop providing coverage to that particular area.⁹⁴ State insurance pools would then be forced to shoulder the burden of providing coverage to an even greater amount of high-risk groups.⁹⁵

The effect on the insurance industry from Hurricane Katrina provides a warning of the potential impacts of long-term climate change resulting from similar, more frequent, weather-related issues. According to the Insurance Information Institute, Hurricane Katrina caused approximately \$40.6 billion in insured damage.⁹⁶ This represented the largest loss in the history of the industry.⁹⁷ Although one may believe that the disclosure of risk and insurance premiums that accurately reflect the level of risk will lead people to relocate to areas with less of a threatened impact, history has shown this is not the case.⁹⁸ In fact, coastal populations, which

⁸⁹ IMPACTS OF CLIMATE CHANGE, *supra* note 85, at 14.

⁹⁰ AM. ACAD. OF ACTUARIES, CATASTROPHE MGMT. WORK GROUP, CATASTROPHE EXPOSURES AND INSURANCE INDUSTRY CATASTROPHE MANAGEMENT PRACTICES 10 (2001), *available at* http://www.actuary.org/pdf/casualty/catastrophe_061001.pdf [hereinafter CATASTROPHE EXPOSURES].

⁹¹ *Id.* at 6 (stating that “[f]uture insurance losses must be estimated.”).

⁹² *Id.* at 10–11.

⁹³ GAO INSURER REPORT, *supra* note 84, at 8 (noting that climate change may affect the weather-related events). If the historical data is no longer predictable, it may cause problems for insurance companies. CATASTROPHE EXPOSURES, *supra* note 90, at 11 (discussing the flaws with using historical data to predict future policy periods).

⁹⁴ CATASTROPHE EXPOSURES, *supra* note 90, at 13.

⁹⁵ *Id.* at 20.

⁹⁶ Press Release, Ins. Info. Inst., Hurricane Katrina and Insurance: Two Years Later (Aug. 27, 2007), *available at* <http://www.iii.org/media/updates/press.775235/>.

⁹⁷ *Id.*

⁹⁸ *See, e.g.,* Kelley M. Jancaitis, *Florida on the Coast of Climate Change: Responding to Rising Seas*, 31 ENVIRONS: ENVTL. L. & POL'Y J. 157, 191 (2008) (discussing the growth in

represent particularly high-risk areas, are expected to increase in the near future, with a projected growth of eighteen million people “over the next 25 years . . . in the coastal states of Florida, California, Texas, and Washington” alone.⁹⁹

The problem of concentrated risk is perhaps most evident in Florida, where some insurers have begun to reduce coverage or eliminate service altogether. After a state regulator denied State Farm’s proposed 47.1 percent average rate increase on home insurance premiums in 2009, the company decided to pull out of the Florida property insurance market.¹⁰⁰ Citing its “‘substantially weakened financial position’ related to its inability to obtain approval of ‘what it believes to be adequate property insurance rates,’” the state’s second largest property insurer left more than 1.2 million home and property owners to seek coverage elsewhere.¹⁰¹ This is likely to place additional strains on the state insurance pool and catastrophe fund, which are already under heavy financial burdens.¹⁰²

The federal government is not heavily involved with insurance issues; insurance is primarily a state-regulated industry.¹⁰³ In recent years, however, interest groups and Congress have attempted to increase federal oversight of the industry.¹⁰⁴ In 2008, Congressman Paul Kanjorski of Pennsylvania introduced the Insurance Information Act of 2008, which would establish an Office of Insurance Information (“OII”) in the Depart-

Florida coastal counties despite higher insurance premiums).

⁹⁹ NAT’L OCEANIC AND ATMOSPHERIC ADMIN., COASTAL: THE POTENTIAL CONSEQUENCES OF CLIMATE CHANGE 6 (2001), available at <http://www.cop.noaa.gov/pubs/das/das21.pdf>.

¹⁰⁰ Daniel Hays, *State Farm Pulls Out of Florida Property Market*, NAT’L UNDERWRITER PROP. & CASUALTY, Jan. 27, 2009, available at <http://www.property-casualty.com/News/2009/1/Pages/State-Farm-Pulls-Out-Of-Florida-Property-Market.aspx>.

¹⁰¹ *Id.*

¹⁰² Michael Grunwald, *Could Florida Survive the Big One?*, TIME, Sept. 5, 2008, available at <http://www.time.com/time/nation/article/0,8599,1839219,00.html>.

¹⁰³ Mark Boozell, *Future of the Business Disciplines, Regulation and Oversight of the U.S. Insurance Marketplace: The Evolving Arguments Around Federalizing Insurance Regulation*, PROF. INS. AGENTS INS. FOUND., August 2009, available at <http://www.pianet.com/doc/FutureOfRegulation.pdf>.

¹⁰⁴ See, e.g., Arthur D. Postal, *Financial Services Roundtable Pitches Proposal for Federal Insurance Regulation: Minority within TARP Oversight Panel also Pushes for Regulatory Consolidation*, NAT’L UNDERWRITER PROP. & CASUALTY, Feb. 9, 2009, available at <http://www.property-casualty.com/Issues/2009/5/Pages/Financial-Services-Roundtable-Pitches-Proposal-For-Federal-Insurance-Regulation.aspx> (citing the proposed creation of an “omnibus federal services regulator,” which would also increase the power of the federal government to oversee the insurance industry).

ment of the Treasury.¹⁰⁵ Under the Act, one of the functions of the OII would be “to advise the Secretary [of the Treasury] on major domestic and international insurance policy issues, including matters that affect consumers and insurers.”¹⁰⁶ The bill never passed, but it was reintroduced in May of 2009.¹⁰⁷ The 2009 bill also directs the OII to “serve as a liaison between the Federal Government and the individual and several States regarding insurance matters of national importance and international importance.”¹⁰⁸

Meanwhile, the National Insurance Consumer Protection Act of 2009, introduced in the House by Rep. Melissa Bean, would create an Office of National Insurance (“ONI”) in the Department of the Treasury.¹⁰⁹ Appointed by the President and confirmed by the Senate, the National Insurance Commissioner would be the head of the ONI¹¹⁰ and would be charged with “oversee[ing] the organization, incorporation, operation, regulation, and supervision of national insurers and national insurance agencies.”¹¹¹ The ONI would also have the authority to obtain “prompt and reasonable access to officers, employees, agents, books, records, and documents of such insurer or agency.”¹¹² Such sweeping access to non-public information would give the federal government greater insight into the industry and allow for an enhanced examination into the effectiveness of current state regulations. Furthermore, it may also lead to increased federal regulation of the industry.

A. *Lack of Disclosure Thus Far*

Insurance companies have been hesitant to publicly provide information regarding the financial risks of climate change. Friends of the Earth, an international environmental network composed of seventy-seven

¹⁰⁵ Insurance Information Act of 2008, H.R. 5840, 110th Cong. § 313 (2007).

¹⁰⁶ *Id.* § 313(c) (2).

¹⁰⁷ Sara Hansard, *Insurance Information Act of 2009, NARAB II Likely to Face Uphill Battle in Senate*, INVESTMENT NEWS, May 31, 2009, available at <http://www.investmentnews.com/article/20090531/REG/305319986> (noting the bill was “not taken up by the Senate.”). See Insurance Information Act of 2009, H.R. 2609, 111th Cong. (2009).

¹⁰⁸ H.R. 2609 § 313(c) (1) (D).

¹⁰⁹ National Insurance Consumer Protection Act of 2009, H.R. 1880, 111th Cong. § 101 (2009).

¹¹⁰ *Id.* § 101(b) (2).

¹¹¹ *Id.* § 102(a) (1).

¹¹² *Id.* § 201(c) (1).

national member groups,¹¹³ reviewed the 2004 SEC filings of all one hundred six publicly-traded insurance companies and found that just five companies discussed the impacts of climate change in their annual reports.¹¹⁴ Compared to other sectors, the insurance industry lags far behind in the level of disclosure provided to investors.¹¹⁵ However, a 2009 survey of twenty-seven insurers, conducted by Ceres, found that nine had some level of climate change disclosure in their SEC filings,¹¹⁶ signifying slow, but gradual improvement.

It is doubtful that insurers are failing to disclose due to a total lack of information on climate change. In fact, many insurers have begun to use forward-looking catastrophic risk models to assess areas of vulnerability and analyze their financial risks.¹¹⁷ These computer-based models allow insurers to utilize information related to climate change when calculating and managing risk.¹¹⁸ Using multiple sources of scientific data, historical events, and mathematical formulas, these sophisticated models can predict the magnitude, frequency, intensity, and likely damage arising from future catastrophic events.¹¹⁹ While most insurers utilize the services of catastrophe modeling firms, some have even begun to create their own catastrophe models.¹²⁰

Although there are uncertainties regarding the long-term effects of climate change, risk models used by insurers do retain some degree of reliability. Sarah Tran of Georgetown University Law Center explains that despite the inability of risk models to precisely determine when a major weather event will transpire, such models allow insurers to assess the likely amount of loss if such an event does occur.¹²¹ Additionally, forward-

¹¹³ Friends of the Earth International, Who We Are, <http://www.foei.org/en/who-we-are> (last visited Nov. 11, 2009).

¹¹⁴ FRIENDS OF THE EARTH, CLIMATE RISK REPORTING IN SEC FILING OF PUBLICLY-TRADED PROPERTY & CASUALTY INSURERS 1 (2005), available at http://www.climate-insurance.org/upload/pdf/FriendsoftheEarth2005_Climate_Risk_Reporting_casualty_and_property_insurers.pdf.

¹¹⁵ CERES CLIMATE RISK DISCLOSURE REPORT, *supra* note 11, at v.

¹¹⁶ *Id.* at 32.

¹¹⁷ *Derivative Solutions Provides Software to Insurance Companies to Calculate Standard & Poor's RBC and FPC Models; Software Calculates Risk Exposure for Insurance Companies*, BUS. WIRE, Dec. 11, 2003, available at <http://www.allbusiness.com/banking-finance/financial-markets-investing-securities/5789936-1.html>.

¹¹⁸ GAO INSURER REPORT, *supra* note 84, at 5.

¹¹⁹ CATASTROPHE EXPOSURES, *supra* note 90, at 8–9, C-1 to C-3.

¹²⁰ GAO INSURER REPORT, *supra* note 84, at 30 n.34.

¹²¹ Sarah M. Tran, *Updated Hurricane Models: A New Opportunity to Insure Against Climate Change*, 14 B.U. J. SCI. & TECH. L. 73, 102 (2008).

looking models are more accurate than the traditional approach, which assesses rates based on historical loss.¹²²

Some insurance regulators are skeptical about the use of catastrophe models due to a concern that such models would cause unjustifiably high insurance rates.¹²³ Others, however, have begun to allow greater use of these models for rate-setting purposes. In 2006, for example, the Massachusetts Insurance Commissioner authorized a residual market insurer to exceed the statutory insurance rate cap after allowing the insurer to use rate setting models to more accurately reflect risk.¹²⁴

Following the 2005 hurricane season, Risk Management Solutions, a risk modeling company that provides services to over four hundred insurers and other financial institutions, also adjusted its models and predicted a forty percent rise in insurance loss estimates across the Gulf Coast, Florida, and the Southeast.¹²⁵ Given the fact that many of these forward-looking models represent a higher probability of hurricanes making land-fall than long-term historical data reflects, it is not surprising that this has led to higher premium rates for consumers in those regions.¹²⁶

B. NAIC's Progress in Increasing Disclosure: Balancing Competing Views

Despite reluctance on the part of insurers to disclose financial risks due to climate change, regulators have made progress towards achieving transparency. The National Association of Insurance Commissioners ("NAIC"), an organization of state insurance regulators created to ensure solvency within the industry,¹²⁷ recently created the Climate Change and Global Warming (EX) Task Force to analyze "the impact of climate change on insurance consumers, insurance providers and insurance regulators . . . [and to] examine the implications of climate change on insurer solvency, the availability of affordable insurance coverage for the nation's insurance consumers and its impact on insurance regulation."¹²⁸ Over the objections

¹²² *Id.* at 75.

¹²³ *Id.*

¹²⁴ Mass. Prop. Ins. Underwriting Ass'n Rate Filings, No. R2005-14, at 18, 21 (Mass. Div. Ins. June 30, 2006) (decision and order), available at http://www.mass.gov/Eoca/docs/doi/Legal_Hearings/R2005-14.pdf. See also Tran, *supra* note 121, at 75–76.

¹²⁵ *Insurance Risk Models Rise with Elevated Storm Frequency, Severity*, ENV'T NEWS SERVICE, Apr. 13, 2006, <http://www.ens-newswire.com/ens/apr2006/2006-04-13-05.asp>.

¹²⁶ *Id.*

¹²⁷ KENNETH ABRAHAM, *INSURANCE LAW AND REGULATION* 108–09 (4th ed. 2005).

¹²⁸ National Association of Insurance Commissioners, *Climate Change and Global Warming*

of insurance industry representatives,¹²⁹ the task force adopted a white paper in June 2008 entitled *The Potential Impact of Climate Change on Insurance Regulation*.¹³⁰ The white paper described the potential effects of climate change on the solvency of the insurance industry and called for increased regulation to mitigate its consequences.¹³¹ It also discussed the potential for insolvency that the insurance industry faces as a result of climate change,¹³² calling for regulators to work together to “develop new solvency regulatory tools to meet the challenges of climate change.”¹³³ The report concluded with a call for action by stating that “[t]he issue of disclosure deserves immediate attention by insurance regulators.”¹³⁴

1. Insurance Industry Concerns

At approximately the same time that the Climate Change and Global Warming Task Force was adopting its white paper, it was also developing a “Climate Risk Disclosure Proposal,” which, if passed, would require insurance companies to disclose details to regulators, and to the public, related to their financial risks from climate change.¹³⁵ When the

(EX) Task Force, http://www.naic.org/committees_ex_climate.htm (last visited Nov. 5, 2009).

¹²⁹ ClimateandInsurance.org, Disclosure, <http://www.climateandinsurance.org/disclosure.html> (last visited Nov. 5, 2009).

¹³⁰ Press Release, Nat’l Ass’n of Ins. Comm’rs, Climate Change Study Focuses on Insurance Impact (June 2, 2008), http://www.naic.org/Releases/2008_docs/climate_study.html. See also NAT’L ASS’N OF INS. COMM’RS, THE POTENTIAL IMPACT OF CLIMATE CHANGE ON INSURANCE REGULATION: DRAFT (Draft May 28, 2008), available at <http://dnr.wi.gov/environment/protect/gtfgw/documents/NAIC20080530.pdf> [hereinafter CLIMATE CHANGE WHITE PAPER].

¹³¹ CLIMATE CHANGE WHITE PAPER, *supra* note 130, at 3.

¹³² *Id.* at 1–2.

¹³³ *Id.* at 3.

¹³⁴ *Id.* at 15.

¹³⁵ See NAT’L ASS’N OF INS. COMM’RS, CLIMATE RISK DISCLOSURE PROPOSAL: SECOND DRAFT (Draft May 28, 2008) [hereinafter NAIC PROPOSAL SECOND DRAFT] (on file with author).

NAIC later sent out a third draft of the proposal. NAT’L ASS’N OF INS. COMM’RS, CLIMATE RISK DISCLOSURE PROPOSAL: THIRD DRAFT (Draft Aug. 15, 2008), available at http://states.naic.org/documents/committees_ex_climate_risk_disclosure_080815_draft.pdf [hereinafter NAIC PROPOSAL THIRD DRAFT]. The two proposals, however, are substantively similar and garnered similar complaints. Compare NAIC PROPOSAL SECOND DRAFT, *supra* note 135, with NAIC PROPOSAL THIRD DRAFT, *supra* note 135 (proposals asked companies to disclose information on the same topics). Proposed disclosure requirements included: revealing whether the company has altered its investment strategy after considering the impact of climate change and global warming on its investment portfolio, steps the company has taken to encourage policyholders to mitigate losses due to climate change, a description of the company’s use of computer models to assess climate change impacts, any known climate change trends that might have a material effect on the company’s financial con-

proposal was opened for public comment by insurers and public interest groups, there were significant concerns from both sides.

Most insurance companies were adverse to the NAIC's proposal for increased disclosure requirements.¹³⁶ Some argued that it is unreasonable to ask an insurance provider to produce quantifiable information related to the impact of climate change on their operations when scientific information on the subject continues to evolve.¹³⁷ Others shared concerns over uncertainty related to how an insurer would translate long-term climate change trends into predictions about risk from extreme weather and adverse health conditions.¹³⁸ Skepticism also remains regarding how valuable the information provided would even be. Even though the aforementioned energy companies recently reached an agreement with New York Attorney General Andrew Cuomo to disclose financial risks due to climate change, some believe that the disclosures are likely to be vague "because it's impossible to know exactly what will happen in the future—not just what laws and regulations might be enacted but how the earth's climate might actually change."¹³⁹

dition, geographic locations where the company has increased rates or limited sales due to climate change effects, how climate change might affect future liquidity and capital needs, and any steps the company has taken to engage key constituencies on the issue of climate change. NAIC PROPOSAL SECOND DRAFT, *supra* note 135, at 1–2; NAIC PROPOSAL THIRD DRAFT, *supra* note 135, at 2–3.

¹³⁶ See, e.g., Letter from Andrew Melnyk, Ph.D, Managing Director, Research, Am. Council of Life Insurers, to Sean Dilweg, Chairman, Climate Change and Global Warming (EX) Task Force (Sept. 15, 2008), available at http://www.climateandinsurance.org/news/080303_ACLI.pdf [hereinafter Letter from Andrew Melnyk] (“[T]here is still uncertainty regarding the implications of climate change on catastrophic weather-related events in specific regions of the world.”).

¹³⁷ *Id.*

¹³⁸ See, e.g., Letter from Am. Ins. Ass'n, Nat'l Ass'n of Mutual Ins. Co.'s, and Prop. Casualty Insurers Ass'n of Am., to Sean Dilweg, Chairman, Climate Change and Global Warming (EX) Task Force (Sept. 15, 2008), available at http://www.naic.org/documents/committees_ex_climate_risk_disclosure_080815_comments_ahip_et.al.pdf [hereinafter Letter from Insurance Groups]; see also Letter from Charles M. Feinen, Counsel, State Farm Mutual Auto. Ins. Co., to Sean Dilweg, Chairman, Climate Change and Global Warming (EX) Task Force (June 30, 2008), available at http://www.naic.org/documents/committees_ex_climate_risk_disclosure_080630_comments_State_Farm.pdf (“[T]he ramifications of . . . climate change are unknown and will not result in an immediate and sudden impact like the risks . . . insured by the insurance industry.”).

¹³⁹ Amy Miller, *Power Companies Reveal Climate Change Financial Risks*, TEX. LAW., Jan. 12, 2009.

Some insurers were particularly concerned with how investors would react if financial risk information were to be released.¹⁴⁰ The insurance companies feared that the sensitive material may be misused, because there are no governing rules directed at protecting the company's interests.¹⁴¹ Specifically, some companies were concerned that "[p]ublicly traded companies disclosing forward-looking information in their SEC filings are given statutory immunity from private lawsuits for good-faith, forward-looking disclosures, but it is not clear that the individual states have comparable laws to immunize the insurance industry for the forward-looking statements the Proposal would require."¹⁴²

Insurers are also concerned about the release of proprietary information through required disclosure. In a letter to the chairman of the Climate Change and Global Warming (EX) Task Force, Travelers Companies, Inc. expressed concern that requiring disclosure of "geographic locations or specific perils 'for which the company has increased rates' could be read to mandate disclosure of highly-sensitive, competitive information."¹⁴³ The release of proprietary information and trade secrets may also have anti-competitive effects on the industry, thereby decreasing the incentives of insurers to innovate.¹⁴⁴ In certain instances, companies are required to disclose information to regulators and government agencies but are given assurances that the information will remain confidential.¹⁴⁵ However, some insurance industry representatives remain apprehensive that such a standard for climate disclosure would be effective due to the possibility that "various freedom of information acts and similar laws may significantly limit the ability of regulators to maintain the confidentiality of data and other information."¹⁴⁶ Furthermore, despite assurances by regulators regarding confidentiality, courts retain the ultimate authority to decide whether information provided must be released to the public.¹⁴⁷

¹⁴⁰ *See id.*

¹⁴¹ Letter from Insurance Groups, *supra* note 138.

¹⁴² *Id.*

¹⁴³ Letter from Gary L. Smith, Sr. Vice President of Gov't Relations, The Travelers Companies, Inc., to Sean Dilweg, Chairman, Climate Change and Global Warming (EX) Task Force (Sept. 15, 2008) (on file with author).

¹⁴⁴ Letter from David Snyder, Vice President and Assistant General Counsel, Am. Ins. Ass'n, to Mr. Eric Nordman, Director of Research, Nat'l Ass'n of Ins. Commissioners (Sept. 15, 2008) [hereinafter Letter from David Synder] (on file with author); Letter from Andrew Melnyk, *supra* note 136.

¹⁴⁵ Letter from Insurance Groups, *supra* note 138.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

If investors become aware of the risk insurers are taking on, they may decide to invest elsewhere. To prevent this, insurers may opt to reduce their liability exposure, ultimately leading to a lack of coverage available to consumers.¹⁴⁸ State pools offering insurance policies to those unable to obtain coverage in the private market—designed to be a last resort for consumers unable to obtain private insurance—needed a \$715 million bailout from the legislature in order to cover their losses from the 2004 and 2005 hurricane seasons.¹⁴⁹ A prolonged lack of coverage would place an even greater burden on the residual markets.¹⁵⁰ Ironically, states might then have an incentive to favor very limited disclosure of financial risk. Meanwhile, if insurance becomes too cost prohibitive, many property owners may ultimately choose to take the risk and suffer severe consequences if a catastrophe occurs. If the government then steps in to bail them out, this may create a moral hazard as well.¹⁵¹

In addition to the potential for increased claims as a result of the frequency of climate-change related events, insurance companies may face a possible increase in litigation resulting from disclosure.¹⁵² With limited exceptions, insurance companies are still required to pay for defense costs whether or not a plaintiff is successful in a lawsuit.¹⁵³ In one sense, the increased premium costs for high-level emitters of greenhouse gases provide an incentive to such companies to reduce their emissions.¹⁵⁴ Nevertheless, liability for the effects of climate change is still a relatively new legal theory, and it is difficult for insurers to accurately predict potential expo-

¹⁴⁸ Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559, 1581 (2008).

¹⁴⁹ Chris Holly, *Report: Record Losses Prompt Insurers to Address Global Warming Risks*, ENERGY DAILY, Aug. 24, 2006.

¹⁵⁰ See, e.g., Holbrook Mohr, *Dale Mulls 397.8 Percent Insurance Hike for Coastal Residents—'Wind Pool' Says it Needs Funds to Re-insure Members*, MEMPHIS COM. APPEAL, June 6, 2006 (discussing Mississippi's program that provides insurance for property that traditional companies won't cover).

¹⁵¹ See *Hurricane Katrina: Important Policy Questions Amid the Devastation and Recovery*, KNOWLEDGE@WHARTON, Jan. 25, 2006, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1364> (discussing the moral hazard problems associated with Hurricane Katrina).

¹⁵² See, e.g., Leslie Eaton & Joseph Treaster, *Insurance Woes for Hurricane Katrina Victims*, INT'L HERALD TRIB. (Sept. 2, 2007), <http://www.nytimes.com/2007/09/02/business/worldbusiness/02iht-orleans.4.7353442.html> (discussing the fact that despite insurance companies paying out \$11 billion in claims to Louisiana residents in the two years following Hurricane Katrina, there were sixty-six hundred insurance-related lawsuits that were filed in federal district courts).

¹⁵³ ABRAHAM, *supra* note 127, at 588.

¹⁵⁴ Hecht, *supra* note 148, at 1597.

sure to litigation.¹⁵⁵ The insurance industry already handles the largest annual amount of lawsuits amongst all sectors in the United States, averaging approximately seventeen hundred per year.¹⁵⁶ In 2005 alone, the average insurer in the United States incurred defense costs of approximately \$36 million.¹⁵⁷ Increased exposure to litigation related to climate change will likely increase total liabilities. Consequently, speculative, and potentially inaccurate, disclosures may result in increased litigation and financial harm to insurers.¹⁵⁸

Litigation over the revelation of trade secrets may become a factor as well. The American Insurance Association (“AIA”) expressed concern that “an avalanche of litigation that could threaten the solvency of reporting insurers” could also arise as a result of the disclosure of proprietary and sensitive information that would have an adverse impact on insurers, insureds, and investors.¹⁵⁹

2. Concerns of Consumers, Public Interest Groups, and Investors

Consumer groups were more receptive to the idea of increased disclosure. Some explained that by requiring insurance companies to provide detailed responses, insurers would in turn examine more fully the potential liabilities they face and take steps to address these risks.¹⁶⁰ With additional information regarding the risk insurers face, both investors and consumers will be better informed when making an investment or pur-

¹⁵⁵ *Id.* at 1598.

[M]any liability theories are untested in courts, making it difficult to assess the scope or magnitude of potential liability. Not only does this inhibit an insurer’s ability to accurately price a policy, but it also prevents the insurer from being able to provide accurate financial information to shareholders regarding the impact of climate change on their financial situation.

Id.

¹⁵⁶ Christina Ross, Evan Mills, & Sean B. Hecht, *Limiting Liability in the Greenhouse: Insurance Risk-Management Strategies in the Context of Global Climate Change*, 26 A STAN. ENVTL. L. J. 251, 259 (2007) (citing Meg Green, *Study: Insurers Facing More Lawsuits than Any Other Sector*, BEST’S REV., Jan. 1, 2007, at 74) [hereinafter *Limiting Liability in the Greenhouse*].

¹⁵⁷ *Id.*

¹⁵⁸ Letter from David Snyder, *supra* note 144.

¹⁵⁹ *Id.*

¹⁶⁰ Letter from Consumer and Env’tl. Org., to Sean Dilweg, Chairman, Climate Change and Global Warming (EX) Task Force (Sept. 9, 2008).

chasing coverage.¹⁶¹ Furthermore, advocates for disclosure argued that insurers are in the business of calculating the cost and nature of risks and messaging the public about risk concerns,¹⁶² insisting that information regarding the financial risk companies face due to climate change will send a clear message to those whose locations or activities are very risky, thereby encouraging them to locate in other areas or take steps to mitigate the risk.¹⁶³ Although some consumer groups were initially against the proposal because they felt it didn't mandate enough disclosure, a compromise was ultimately reached after they agreed to the removal of a provision that would have required top executives to attest to the accuracy of such information and include it as part of their annual statements.¹⁶⁴

C. *Adoption of Climate Risk Disclosure Survey*

The NAIC has made significant progress with insurers towards developing a comprehensive agreement that satisfies the concerns of both insurers and investors. In February 2009, after a compromise was reached between industry groups and consumer advocacy organizations,¹⁶⁵ members of the NAIC's Climate Change and Global Warming Task Force voted in favor of the revised "Climate Risk Disclosure Survey," thereby requiring insurers to disclose information regarding the financial impacts of climate change and how their company is addressing these challenges.¹⁶⁶

The survey, which implements the draft from December 12, 2008, asks the following eight questions:

¹⁶¹ *Id.*

¹⁶² *Insurers Try to Calculate Risks of Climate Change* (NPR radio broadcast Jan. 22, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=18288195>.

¹⁶³ *Id.*

¹⁶⁴ Meg Fletcher, *NAIC Requires Disclosure of Climate Change Risks*, BUS. INS., Mar. 22, 2009, available at <http://www.businessinsurance.com/article/20090322/ISSUE01/100027351>.

¹⁶⁵ *Id.*

¹⁶⁶ Phil Gusman, *NAIC Task Force Adopts Climate Change Survey to Help Assess Impact on Insurers*, NAT'L UNDERWRITER PROP. & CASUALTY, Mar. 2, 2009, at 16, 16, available at <http://www.property-casualty.com/Issues/2009/8/Pages/NAIC-Task-Force-Adopts-Climate-Change-Survey-To-Help-Assess-Impact-On-Insurers.aspx>. See NAT'L ASS'N OF INS. COMM'RS, INSURER CLIMATE RISK DISCLOSURE SURVEY (2008), available at http://www.naic.org/documents/committees_ex_climate_climate_risk_disclosure_survey.pdf [hereinafter INSURER CLIMATE RISK DISCLOSURE SURVEY].

1. Does the company have a plan to assess, reduce or mitigate its emissions in its operations or organizations? If yes, please summarize.
2. Does the company have a climate change policy with respect to risk management and investment management? If yes, please summarize. If no, how do you account for climate change in your risk management?
3. Describe your company's process for identifying climate change-related risks and assessing the degree that they could affect your business, including financial implications.
4. Summarize the current or anticipated risks that climate change poses to your company. Explain the ways that these risks could affect your business. Include identification of the geographical areas affected by these risks.
5. Has the company considered the impact of climate change on its investment portfolio? Has it altered its investment strategy in response to these considerations? If so, please summarize steps you have taken.
6. Summarize steps the company has taken to encourage policyholders to reduce the losses caused by climate change-influenced events.
7. Discuss steps, if any, the company has taken to engage key constituencies on the topic of climate change.
8. Describe actions your company is taking to manage the risks climate change poses to your business including, in general terms, the use of computer modeling.¹⁶⁷

Designed "to provide regulators, shareholders and the public with substantive information about the risks posed by climate change to insurers and the actions insurers are taking in response to their under-

¹⁶⁷ Gusman, *supra* note 166, at 16.

standing of climate change risks,”¹⁶⁸ the survey requires insurers with annual premiums greater than or equal to \$500 million to annually submit the Insurer Climate Risk Disclosure Survey to the company’s domicile state.¹⁶⁹ On March 17, 2009, the survey was officially adopted by the NAIC executive committee.¹⁷⁰ Given the fact that the NAIC is a third-party non-governmental organization lacking the power to adopt binding rules, however, the survey is subject to approval by the states on an individual basis, and it is unclear how many states will opt to require their insurance companies to submit the survey.¹⁷¹

D. *Benefits of Disclosure*

Many insurance companies fail to realize the benefits that may be derived from providing the public with information regarding their financial exposure to climate change. Some companies are using the issue of climate change to obtain a competitive advantage and provide increased business opportunities.¹⁷² By assessing and subsequently minimizing the potential exposure of a company’s assets to climate-change related risks, a business can enhance its reputation for sustainability, which may significantly impact an investor’s propensity to become involved with the company.¹⁷³

Swiss Re is perhaps the most well-known example of an insurer utilizing climate change to its competitive advantage. In 1989, Swiss Re characterized climate change as an “emerging risk,” and has undertaken significant measures to develop an appropriate and “effective response.”¹⁷⁴ By 1991, the company had developed its own Internal Eco Team.¹⁷⁵ In its marketing brochures, Swiss Re states that its “actions are based on the premise that it is in the interest of shareholders, clients and employees, the wider stakeholder community and society in general to tackle this

¹⁶⁸ *Id.*

¹⁶⁹ Press Release, Nat’l Ass’n of Ins. Comm’rs, Insurance Regulators Adopt Climate Change Risk Disclosure (Mar. 17, 2009), http://www.naic.org/Releases/2009_docs/climate_change_risk_disclosure_adopded.htm.

¹⁷⁰ *Id.*

¹⁷¹ Gusman, *supra* note 166, at 17.

¹⁷² Stephen Bernhut, *Corporate Climate Change*, CA MAG., Jan. 1, 2009.

¹⁷³ *Id.*

¹⁷⁴ SWISS RE, PIONEERING CLIMATE SOLUTIONS 3 (2008), available at http://www.swissre.com/resources/40304f804a1dfa2687d8d71e1eec54e8-Pioneering_climate_solutions.pdf.

¹⁷⁵ *Id.*

[climate change] issue.”¹⁷⁶ Swiss Re also emphasizes its “long-standing tradition of sharing the results of its research with the public and other stakeholders affected by climate change. By doing so, [it] intend[s] to help society reduce risk and improve resilience, for instance through introducing smart regional planning and stringent building codes.”¹⁷⁷ By the end of 2007, Swiss Re had invested over 600 million Swiss Francs, approximately 596 million USD,¹⁷⁸ in “green assets” and became the first insurer ever to provide carbon insurance.¹⁷⁹

Some insurers are joining other financial institutions to coordinate an effective group response towards climate change disclosure and mitigation. In December of 2008, Swiss Re joined global financial institutions Cr dit Agricole, HSBC, Standard Chartered, and reinsurer Munich Re to create The Climate Principles.¹⁸⁰ The group’s objective is to “encourage retail banks to enable customers [to] take action to become climate friendly and insurance institutions to inform clients on climate risks and mitigation technologies.”¹⁸¹ It will also work to coordinate responses to developing climate change issues while pushing for increased transparency.¹⁸² Munich Re has been actively involved in addressing climate change in other areas as well. The company recently submitted a proposal at a United Nations climate change summit calling for the creation of a mechanism to assist poor people in adapting to climate change risks.¹⁸³

1. Insurance Companies Can Mitigate Loss Resulting from Climate Change

There are numerous steps that insurance companies can take to mitigate risks stemming from the effects of climate change. First, the insurance industry, in conjunction with the NAIC, should work with state legislatures to provide incentives for homeowners, businesses, and other insurers to mitigate the effects of climate change.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 9.

¹⁷⁸ See Xe.com, Currency Converter, <http://www.xe.com/ucc/> (last visited Nov. 5, 2009) (calculated six hundred million Swiss Francs into USD).

¹⁷⁹ SWISS RE, *supra* note 174, at 11–12.

¹⁸⁰ *Global Finance Leaders Unveil New Climate Change Principles*, Indian Express Finance, Dec. 15, 2008, <http://in.biz.yahoo.com/081214/203/6z709.html>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

Some state legislatures have been very active in encouraging mitigation from climate change. Florida, for example, created the MySafe Florida Home Grant Program in 2006 to encourage hurricane safety inspections and raise public awareness of the financial benefits of hurricane awareness measures.¹⁸⁴ The program provides a financial incentive by offering grant awards of up to \$10,000 for home mitigation projects, including up to \$5,000 from the state in matching funds.¹⁸⁵ Meanwhile, South Carolina's Omnibus Coastal Property Insurance Reform Act of 2007 created a hurricane loss mitigation grant program similar to that of Florida.¹⁸⁶ Designed to provide financial assistance to homeowners for structural improvements that would mitigate loss from major climatic events,¹⁸⁷ the South Carolina Safe Home Grant ("SCSH") program also provides up to \$10,000 in grant funds for specified mitigation improvements, \$5,000 of which the state can "match."¹⁸⁸ The SCSH program has awarded over six hundred grants since its establishment; most funding was targeted toward the regions of the state most vulnerable to the effects of climate change.¹⁸⁹ Additionally, the state allocates grants to municipalities for the development of mitigation strategies and enforcement of building code regulations.¹⁹⁰

Tax incentives may provide additional incentives for mitigation. South Carolina, for example, provides three types of tax credits for costs associated with mitigation activities and insurance purchases.¹⁹¹ The first implements a tax credit for retrofitting houses to make them more resistant to catastrophic events, such as hurricanes.¹⁹² The second provides a credit for the sales taxes spent on the purchase of the above-mentioned retrofitting equipment.¹⁹³ Lastly, residents can receive a tax credit for casualty insurance premiums that exceed five percent of their annual

¹⁸⁴ My Safe Florida Home, *About the Program*, <http://www.mysafefloridahome.com/abouttheprogram.asp> (last visited Nov. 11, 2009).

¹⁸⁵ FLA. STAT. ANN. § 215.5586(2) (b) (West Supp. 2009).

¹⁸⁶ Elisabeth A. Ondera, *Testing the Waters: The South Carolina Coastal Captive Insurance Act as Part of a Multifaceted Approach to the Coastal Insurance Conundrum*, 59 S.C. L. REV. 599, 599, 605 n.72 (2008); S.C. CODE ANN. § 38-75-485 (2008).

¹⁸⁷ § 38-75-485(C).

¹⁸⁸ § 38-75-485(C) (b).

¹⁸⁹ SC Safe Home, *About SC Safe Home*, <http://www.scsafeflhome.sc.gov/About/> (last visited Nov. 11, 2009).

¹⁹⁰ S.C. CODE ANN. § 38-75-480 (2008).

¹⁹¹ See Ondera, *supra* note 186, at 604–05.

¹⁹² S.C. CODE ANN. § 12-6-3660(A)–(B) (2008).

¹⁹³ S.C. CODE ANN. § 12-6-3665 (2008).

adjusted gross income.¹⁹⁴ These financial incentives encourage those who might not otherwise look into mitigation techniques and green building options to further explore these possibilities.

Insurers have become more involved with the promotion of green building projects as well.¹⁹⁵ AIG, for example, has established AIG Environmental, a green building program designed to offer premium discounts of up to ten percent for properties which have received certification by the United States Green Building Council's Leadership in Energy and Environmental Design ("LEED") rating system.¹⁹⁶ Other insurers such as Zurich, Travelers, and Ace, have expanded their coverage plans to offer "green" endorsements which would insure construction projects that utilize LEED Green Building and Green Globe Assessment and Rating System standards.¹⁹⁷ The companies also offer coverage for rebuilding of properties to green certification levels.¹⁹⁸

III. ASSESSING THE PROPER LEVEL OF DISCLOSURE

Even if states require companies to disclose climate-related information, the SEC is a separate and independent federal agency that retains the right to require publicly-traded companies to report additional information.¹⁹⁹ Given the unique concerns facing the insurance industry, however,²⁰⁰ it is imperative that the SEC exercises caution to avoid potentially disastrous effects.

To protect insurance companies from additional litigation costs and liabilities associated with inaccurate disclosure, the SEC should ensure

¹⁹⁴ S.C. CODE ANN. § 12-6-3670 (2008).

¹⁹⁵ MARSH, THE GREEN BUILT ENVIRONMENT IN THE UNITED STATES: 2008 YEAR-END UPDATE OF THE STATE OF THE INSURANCE MARKET 1 (2008), *available at* http://www.theburnscompanies.com/documents/MARSH_Green_Mkt_Rpt2_MA8-10211_1.09_5609_000.pdf (noting "an increased interest among insurance companies in green building.").

¹⁹⁶ *Id.* at 5–6. *See also* U.S. Green Building Council: LEED, <http://www.usgbc.org/leed> (last visited Nov. 11, 2009) (information about LEED standards).

¹⁹⁷ MARSH, *supra* note 195, at 7–8.

¹⁹⁸ *Id.* at 8.

¹⁹⁹ U.S. Securities and Exchange Commission, How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, <http://www.sec.gov/about/whatwedo.shtml> (last visited Nov. 11, 2009) ("Companies with more than \$10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports.").

²⁰⁰ *See supra* Part II.

that the Private Securities Litigation Reform Act²⁰¹ applies to any forward-looking statements made by insurers related to climate change. The NAIC has a similar and equally effective means of accomplishing this goal by including specific language in the Climate Risk Disclosure Survey allowing insurers who voluntarily disclose forward-looking information to “disclaim any responsibility for the accuracy of such forward-looking information.”²⁰² If an insurer provides forward-looking information in good faith, “it may condition its response with a waiver of any claim under any theory of law based on the inaccuracy of such information.”²⁰³ Providing similar language in future SEC regulations will alleviate some of the concerns associated with providing forward-looking predictions that prove to be fallible.

As previously discussed, predicting litigation costs and potential exposure resulting from climate change is an extremely difficult task.²⁰⁴ Insurers should, therefore, be allowed to provide broad statements of potential risk without having to quantify the potential exposure. This will alert investors to potential areas they should be concerned about without having to rely on little more than a guess.²⁰⁵ To additionally address the concerns of investors and consumer groups, insurers should be required to broadly describe future strategies to deal with the problem. Such information does not need to be quantitative, nor should companies be required to provide a roadmap of their business plans. Investors should receive enough information, however, to understand whether or not the company is taking the problem seriously and how they are responding to the issue. This may include statements of whether an insurer uses risk models or whether they provide incentives for mitigation. This would allow the investor to make an educated and informed decision about whether to invest or sell.

Although insurers should not be required to release proprietary information to the public,²⁰⁶ such as that obtained from catastrophe risk models, state regulators must still have access to enough confidential data to exercise oversight and to ensure the solvency of a particular insurer is not at risk. Thus, such confidential information must still be disclosed

²⁰¹ See *supra* notes 65–67 and accompanying text.

²⁰² INSURER CLIMATE RISK DISCLOSURE SURVEY, *supra* note 166, at 1.

²⁰³ *Id.*

²⁰⁴ See *supra* notes 152–55 and accompanying text.

²⁰⁵ In the instructions for the Climate Risk Disclosure Survey adopted by the NAIC, there is a provision stating that an insurer is “not required to provide quantitative information.” INSURER CLIMATE RISK DISCLOSURE SURVEY, *supra* note 166, at 1.

²⁰⁶ Many insurance companies were initially concerned that proprietary information would be released in the disclosure. See *supra* notes 143–44 and accompanying text.

to regulators, allowing them to maintain proper oversight while protecting proprietary information.²⁰⁷

State regulators must also identify and aggressively pressure companies that are engaging in unsafe coverage practices to alter their behavior. The idea that a company is “too big to fail”²⁰⁸ is no longer an excuse to avoid oversight and regulation. Insurers that continue to write a disproportionately high amount of policies in areas heavily prone to climate change must justify their decisions to regulators and demonstrate their ability to remain solvent following a climatic event. If a company is overly engaged in risky behavior, the public has a right to be informed. Safe harbor statutes, however, must be adequately developed to prevent the public release of sensitive information that may inhibit competition.

Most importantly, insurers, regulators, policymakers, and the general public cannot ignore the perils the insurance industry faces due to climate change. Prior to the onset of the current financial crisis, there were many warnings that risky practices by banks and other financial institutions were susceptible to detrimental effects.²⁰⁹ Many of these warnings, however, went unheeded, even at the highest levels of government.²¹⁰ If insurers can demonstrate to regulators that their risk models—or other sources of information and data—indicate that premiums need to be raised in order to sustain the amount of coverage provided to a particular region, then regulators need to allow for such adjustments. Meanwhile, those moving to areas most vulnerable to climate change must also accept the realities and costs associated with such a move. For example, the Florida coastline is home to many high-value properties;²¹¹ it is essential that in-

²⁰⁷ Obviously, it would be essential for the regulators to keep the information confidential to allay the fears of some companies. See *supra* notes 145–47 and accompanying text.

²⁰⁸ Catherine Rampell, *Defining ‘Too Big to Fail,’* N.Y. TIMES ECONOMIX BLOG (Aug. 20, 2009, 5:08 PM), available at <http://economix.blogs.nytimes.com/2009/08/20/defining-too-big-to-fail/> (discussing what it means to be “too big to fail . . .”).

²⁰⁹ See, e.g., Edmund L. Andrews, *Loose Reins on Galloping Loans; Efforts to Regulate Risky Mortgage Innovations Are So Far Ignored*, N.Y. TIMES, July 15, 2005 (discussing how regulators were ignoring the risk of certain types of mortgages); Katie Benner, *Chanos: G7 Ignored Crisis Warning*, CNNMONEY, Aug. 26, 2009, http://money.cnn.com/2009/08/26/news/international/chanos_warning_g7.fortune/index.htm?postversion=2009082612 (discussing how a hedge fund manager warned the G7 finance ministers in 2007 of the eventual systematic banking failure).

²¹⁰ *Bush Administration Ignored Warnings of Pending Financial Meltdown*, FOX NEWS, Dec. 1, 2008, available at <http://www.foxnews.com/story/0,2933,460044,00.html>.

²¹¹ FLA. ATL. UNIV., FLORIDA’S RESILIENT COASTS, A STATE POLICY FRAMEWORK FOR ADAPTATION TO CLIMATE CHANGE 9 (2007), available at <http://www.flclimatechange.us/ewebeditpro/items/O12F17808.pdf>.

insurance premiums reflect the risks associated with owning property in an area so susceptible to climate-induced catastrophes.²¹² Accurate information regarding the risk of such properties, combined with appropriate insurance premiums to reflect that risk, may ultimately reduce the projected population growth in areas most affected by climate change.

Climate change is just one of the many issues affecting the insurance industry on a national scale. Although the establishment of the Office of Insurance Information was unsuccessful in the past, many in Congress are still pushing for a federal office to regulate national insurers in each state.²¹³ A federal official with knowledge of the insurance industry may be effective in assuring that the unique concerns of the industry and its relationship with climate change are properly addressed. Given the fact that many insurance companies provide coverage in multiple states, such an official would be able to provide valuable insight for establishing minimum standards of nationwide disclosure to promote greater uniformity in the means of addressing the issue.

Insurers should also be required to provide information regarding current risks related to climate change and how the company is dealing with these risks. Although this need not require quantitative data, investors are very wary of undisclosed risks and deserve to know whether their company is addressing an issue that has the potential to have catastrophic consequences.²¹⁴ This will provide a strong incentive for insurers to take climate change more seriously.

Insurers should adopt a more proactive approach to addressing climate change in other ways as well. Promotion and implementation of mitigation techniques and green building initiatives will help alleviate an insurer's risk and ease the effects of climate change while providing incentives for insureds to mitigate their own risk.²¹⁵ While budget constraints may vary the types and amounts of aid states can offer through grant programs and tax credits, mitigation programs provide an incentive for both property owners and insurers to reduce the potential effects of climate change, thereby increasing the likelihood that an insurer will remain

²¹² See *supra* notes 99–101 and accompanying text (discussing Florida's coastline and the concentrated risk problem in such a vulnerable area).

²¹³ Arthur D. Postal, *Optional Federal Charter Momentum Builds, Especially for Life Insurers*, NAT'L UNDERWRITER PROP. & CASUALTY, Mar. 16, 2009. See also *supra* notes 104–12 (discussing the Insurance Information Acts).

²¹⁴ *Limiting Liability in the Greenhouse*, *supra* note 156, at 264.

²¹⁵ See *supra* Part II.D.1.

willing to write coverage in higher risk areas.²¹⁶ Ultimately, this may have the effect of reducing the insurer's financial exposure to the effects of climate change while increasing the willingness on the part of an investor to purchase stock in the company.

CONCLUSION

The current state of the economy, the overwhelming popular distrust of corporate America, and increasing concern over changes in the environment have led many investors and consumer groups to demand increased information regarding the financial effects of climate change on publicly traded companies. Recent efforts have been successful in requiring energy companies such as Xcel and Dynegy to disclose such information which financially impacts their operations.²¹⁷ While the SEC has not yet taken action to address climate change disclosure through public reporting,²¹⁸ Congress—in addition to citizen groups—continues to put pressure on an agency already beleaguered by public outcry over its lack of oversight and enforcement. All of these factors have created a “perfect storm” for increased climate change reporting requirements.

The NAIC's recent adoption of the Climate Risk Disclosure Survey demonstrates that the insurance industry has not gone unnoticed in the movement toward greater transparency. Although the survey does not require insurers to disclose climate change information on their financial statements and the states retain the authority to choose whether or not to administer it,²¹⁹ this development is not insignificant. Given the move toward increased disclosure, most states will likely adopt the survey in one form or another, causing many insurers to disclose information they otherwise would have preferred to be kept secret.

If the SEC adopts increased climate change reporting requirements, publicly-traded insurance companies will be significantly affected. It is very important that the SEC understand that the unique characteristics of the insurance industry create an enhanced risk that the dissemination of climate change information, particularly associated with proprietary data, may significantly impact premiums, availability of coverage, and

²¹⁶ See Ondera, *supra* note 186, at 603 (describing South Carolina's Coastal Captive Insurance Act's intention to make the state “a more attractive place to write policies.”). See also *supra* Part II.D.1 (discussing mitigation programs).

²¹⁷ See *supra* notes 71–76.

²¹⁸ See *supra* Part I.A and accompanying text.

²¹⁹ See *supra* notes 169–71.

even solvency. It is vital, nevertheless, that the public become aware of the risks insurers face in order to play an active role in the mitigation of such risk. Through carefully-tailored disclosure requirements that provide enough information for an investor to make an informed decision while encouraging insurers to address climate change in a meaningful and practical way, the public will have greater confidence in the industry, sensitive information will be protected, and insurers will be able to remain solvent.