BEFORE THE UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

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File No. 4-547

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SUPPLEMENTAL PETITION FOR INTERPRETIVE GUIDANCE ON CLIMATE RISK DISCLOSURE

The longstanding requirement that publicly traded corporations disclose material information to their shareholders is based on the simple proposition that knowledge is power. Armed with accurate and reliable information about the factors that affect a corporation's value, investors have the power to make rational decisions about where to invest their money. This dynamic sequence of disclosure, comparison among investment options and the decision whether to invest or divest ownership of a corporation is fundamental to efficient functioning of capital markets.

More than two years ago, a broad coalition of the nation's largest institutional investors, asset managers and environmental groups filed a petition seeking guidance from the SEC clarifying corporations' obligation to disclose material information about the risks and opportunities they face in association with climate change.[1] Since that time,

[1] *Request for Interpretive Guidance on Climate Risk Disclosure* (Sept. 18, 2007) (File No. 4-547), submitted by the California Public Employees' Retirement System; California State

knowledge about the pace, scope and effects of climate change has grown dramatically. The policy and economic response to climate change has also advanced considerably.

In a critical recent development, the U.S. Environmental Protection Agency (EPA) in September issued a final rule requiring large sources of greenhouse gas emissions to report those emissions to EPA each year beginning with 2010 emissions.[2] Data from these reports will provide a basis for companies to assess their exposure to the considerable physical, policy, and economic developments associated with a changing climate. This groundbreaking regulatory development and others set forth in this supplemental petition constitute a "known trend" within the meaning of Regulation S-K Item 303, and they trigger the obligation for companies to assess and disclose material emissions data and their analysis of climate risks and opportunities.

These recent developments change the landscape of climate risk disclosure, and make it urgent that the Commission act to assure that emissions data and associated risks, opportunities and management strategies are analyzed by corporations and disclosed in SEC filings. We submit this supplemental petition to address important new regulatory developments, to summarize some of the most significant developments in climate science

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[2] Environmental Protection Agency, "Mandatory Reporting of Greenhouse Gases," 74 Fed. Reg. 56,260 (October 30, 2009).

that have occurred in the past two years, and to demonstrate both the growing demand for disclosure and the continuing failure of corporations to fulfill their existing obligation to disclose material information about their exposure to climate change.

Action on this petition will meet the Commission's current strategic goal of encouraging and promoting informed investment decisionmaking[3] as well as the recently proposed strategic goal of "facilitat[ing] access to information investors need to make informed investment decisions," and will advance toward the proposed outcome that "investors have access to high-quality disclosure materials that are useful to investment decisionmaking."[4] We incorporate into this supplemental petition the original petition filed on September 17, 2007, and the supplemental petition filed on June 12, 2008.

I. CLIMATE-RELATED RISKS ARE MATERIAL TO INVESTORS' DECISIONS.

A. Existing Commission Rules Require Disclosure of Material Climate-Related Information to Investors.

The definition of materiality is directly linked to the question of what a reasonable investor would consider relevant to its investment decisions:

> A fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.[5]

We show below that the investors responsible for trillions of dollars of assets have concluded that the growing weight of scientific, economic and regulatory evidence about the impact of climate change on businesses is highly relevant to their investment decisions. As the Division of Corporation Finance noted in its recent Staff Legal Bulletin No. 14E (CF)

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[3] Securities and Exchange Commission, 2004-2009 Strategic Plan, August 2004, http://www.sec.gov/about/secstratplan0409.pdf

[4] Securities and Exchange Commission, Draft Strategic Plan for Fiscal Years 2010-2015, September 2009, http://www.sec.gov/about/secstratplan1015.pdf

[5] SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (August 12, 1999) (quoting *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

(October 27, 2009) on shareholder proposals, "the adequacy of risk management and oversight can have major consequences for a company and its shareholders." For many companies across all sectors of the economy, climate risks impacts are material for the purpose of the Commission's disclosure requirements.

As set forth in greater detail in the September 2007 petition, various aspects of climate-related information fall under the following provisions of Regulation S-K:

Item 101: Description of Business

Item 103: Legal Proceedings

Item 303: Management's Discussion and Analysis of Financial Conditions and Results of Operations (MD&A)

In particular, the recent scientific, economic, regulatory and legal developments relating to climate change comprise a "known trend" that must be addressed in MD&A. Item 303 requires disclosure of:

> [A]ny such known trends or uncertainties that have had *or that the registrant reasonably expects* will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed. [6]

As the Commission's December 2003 Interpretive Guidance on Management's Discussion and Analysis states, the MD&A should "provide insight into material opportunities, challenges and risks, such as those presented by known trends and uncertainties, on which the company's executives are most focused for both the short and the long term, as well as

[6] 17 C.F.R. Sec. 229.303(a)(3)(ii).

the actions they are taking to address these opportunities, risks and challenges."[7] Climate-related information falls squarely within this description, and therefore must be disclosed under existing Commission requirements.

B. Climate Change Will Have Profound Impacts on Human Health, the Physical Environment and Economies Around the World.

In the last two years, numerous scientific studies have added further weight to the consensus that our physical environment will undergo dramatic changes in connection with climate change. Policy-makers and economists have increasingly focused on the impact these changes will have on entire industries and economies. These observed and imminent impacts will have profound consequences for businesses, and investors need to know how companies propose to respond to this changing environment.

1. Scientific Studies Continue to Show Observed and Imminent Impacts to Our Physical Environment from Climate Change.

The 2007 Petition presented the scientific consensus concerning climate change as reported by the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC). In preparation for the upcoming negotiations in Copenhagen on an international climate change treaty, many of the world's preeminent climate scientists gathered at Copenhagen in March to assess and report on the progress of climate science in the past two years. The report of that gathering concluded that "[r]ecent observations show that greenhouse gas emissions and many aspects of the climate are changing near the

[7] Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 8350, Exchange Act Release No. 48,960, 68 Fed. Reg. 75,056 (December 29, 2003).

upper boundary of the IPCC range of projections." Put simply, "the worst-case IPCC scenario trajectories (or even worse) are being realised."[8]

2. The Impacts of Climate Change Will Have Substantial Economic Effects for Entire Economies and Individual Companies.

The U.S. Global Change Research Program coordinates and integrates federal research on changes in the global environment and their implications for society. Its report published this June, Global Climate Change Impacts in the United States,[9] examined both observed and predicted physical impacts of climate change in the U.S. including increases in air and water temperature, reduced frost days, increased frequency and intensity of heavy downpours, and rising sea levels. Along with these physical impacts, the Global Climate Change Impacts report identified substantial economic risks associated with climate change, including the following:

- Agriculture: "higher levels of warming often negatively effect growth and yields . . . pos[ing] adaptation challenges for crop and livestock production."[10]

- Coastal infrastructure: Sea level rise and associated storm surge risk threatens "[s]ix of the nation's top 10 freight gateways . . . [s]even of the 10 largest ports . . . [and] the U.S. oil and gas industry."[11] Approximately two-thirds of all U.S. oil imports are transported through this region, and sea-level rise could affect this and other commercial activity "valued in the hundreds of billions of dollars annually through inundation of area roads, railroads, airports, seaports, and pipelines."[12]

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[8] Press Release, Climate Change Congress, Key Messages, Mar. 12, 2009, *available at* http://climatecongress.ku.dk/newsroom/congress_key_messages/; www.climatecongress.ku.dk/pdf/synthesisreport/

[9] GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, Thomas R. Karl, Jerry M. Melillo, and Thomas C. Peterson, (eds.). Cambridge University Press, 2009 [hereinafter GLOBAL CLIMATE CHANGE IMPACTS].

[10] *Id.* at 72.

[11] *Id*. at 66.

[12] *Id*.

- Airline traffic: Increases in heat result in payload restrictions, flight cancellations, service disruptions and economic loss at affected airports.[13]

- Insurance: Insured losses from catastrophes have increased dramatically between 1980 and 2005,[14] and the report projects that climate change-related insurance losses will grow in the future.

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court directed EPA to determine whether greenhouse gas emissions threaten the public health and welfare within the meaning of Section 202(a) of the Clean Air Act. Earlier this year, EPA responded by issuing a proposed "endangerment finding" accompanied by an extensive Technical Support Document[15] containing its analysis of the effects of greenhouse gas emissions, including substantial economic effects such as the following:

- Crop losses associated with flooding and reduced farmer profits associated with delayed spring planting;

- Significant losses of the forest resource base due to warmer temperatures and elevated insect activity;

- Property Losses - of the $19 trillion value of all insured residential and commercial property in the U.S. exposed to North Atlantic hurricanes, $7.2 trillion (41%) is located in coastal counties. This economic value includes 79% of the property in Florida, 63% of property in New York, and 61% of the property in Connecticut.

- Significant losses in the energy sector, which heavily relies on water for hydropower and cooling capacity;

- Increasing cost associated with water infrastructure – including drinking water and wastewater treatment;

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[13] A recent illustrative analysis projects a 17 percent reduction in freight carrying capacity for a single Boeing 747 at the Denver airport by 2030 and a 9 percent reduction at the Phoenix airport due to increased temperature and water vapor.

[14] In 1980, catastrophe losses were less than 5 billion (in 2005 dollars), while in 2005, catastrophe losses were roughly 80 billion (in 2005 dollars).

[15] ENVIRONMENTAL PROTECTION AGENCY, TECHNICAL SUPPORT DOCUMENT: ENDANGERMENT AND CAUSE OR CONTRIBUTE FINDINGS FOR GREENHOUSE GASES UNDER SECTION 202(a) OF THE CLEAN AIR ACT, April 17, 2009 *available at* http://epa.gov/climatechange/endangerment/downloads/TSD_Endangerment.pdf; see also 74 Fed. Reg. 18,886 (April 24, 2009) ("Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act.").

- Increased shipping costs associated with "light loading," a practice necessitated by declining water levels; and
- Adverse affects on the tourism industry.

These macroeconomic effects of a changing climate pose risks to individual companies. Institutional investors have sent a climate risk questionnaire to 500 of the world's largest corporations for the last seven years. The latest survey responses provide a sample of how individual companies perceive climate risks.[16] PG&E, for instance, has identified a potential physical risk of reduced hydroelectric generation due to reductions in snowpack in the Sierra Nevada.[17] Its CEO has stated that ". . .PG&E considers climate change to be among the most serious issues ever for our company, our country and the world."[18]

Likewise, Sprint Nextel is attempting to develop portable renewable energy generating units to help counter service interruptions brought on by climate change related drops in energy output.[19] Cobham, a defense contractor, noted that "the physical risk assessment of three of our Florida-based business units identified similar levels of risk arising from hurricanes and flooding. As a result, flood defenses have been improved and roofing reinforced at these locations."[20] Many respondents across all sectors identified changes and developments in the regulation of greenhouse gases as a factor in planning for their financial future.

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[16] CARBON DISCLOSURE PROJECT, 2009 GLOBAL 500 REPORT (2009) *available at* https://www.cdproject.net/CDPResults/CDP%202009%20Global%20500%20with%20Industry%20Snapshots.pdf [hereinafter GLOBAL 500 REPORT].
[17] *Id.* at 168.
[18] Letter of Peter A. Darbee. Chairman, PG&E Corporation, to Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce, September 18, 2009, http://www.pewclimate.org/docUploads/PGE-letter-to-chamber-09-18-09.pdf
[19] 2009 GLOBAL 500 REPORT, supra note 16, at 155.
[20] *Id.* at 116.

These limited voluntary disclosures underscore that climate change is a known trend that will have significant impact on entire industries and economies and also on individual companies. It is clear from voluntary disclosures such as sustainability reports and questionnaire responses that companies have begun to analyze these impacts and found them material in many instances.

3. Threats to Water Supply Illustrate How Changing Environmental Conditions Can Materially Affect Corporate Performance.

Water is critical for the economy, and it provides one example of how climate change poses material risks that should be disclosed to investors. Sectors from agriculture to energy rely on an affordable, clean and readily-available fresh water supply.[21] Climate change is widely predicted to exacerbate water supply shortages in the U.S. and around the world. Climate change will intensify demand for water as higher temperatures and drought require more irrigation, and the energy and industrial sectors require more cooling water.[22] Floods and droughts will result in degraded surface water quality and ground water quantity.[23] Finally, climate change will reduce critical water storage in snowpack and cause water shortages in many of the areas that depend on snowmelt for water supply.[24]

Companies' climate disclosures reflect their awareness of water-related risks and opportunities and their potential impacts on companies' bottom lines. For instance, clean, affordable water is the primary ingredient in beverage companies' manufacturing process,

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[21] CERES & PACIFIC INSTITUTE, WATER SCARCITY & CLIMATE CHANGE: GROWING RISKS FOR BUSINESSES & INVESTORS, 1 (2009) *available at* http://www.ceres.org/Document.Doc?id=406 [hereinafter WATER SCARCITY].
[22] *Id.* at 6.
[23] GLOBAL CLIMATE CHANGE IMPACTS, *supra note* 9, at 44.
[24] WATER SCARCITY, *supra note* 21, at 6. For instance, higher water temperatures will be conducive to more rapid bacteria development, making water purification more difficult.

and water scarcity poses serious challenges to future beverage production.[25] The Coca-Cola Company disclosed this water-related information in both its sustainability reports and in its 2007 10-K filing, stating "[a]s demand for water continues to increase around the world, and as the quality of available water deteriorates, our system may incur increasing production costs or face capacity constraints which could adversely affect our profitability or net operating revenues in the long run."[26] Water scarcity likewise affects the agricultural sector, where Heinz noted that "drought reduces the availability of water, [and] Heinz is at risk despite our focus on sustainable agricultural practices."[27] The mining sector relies on large quantities of water in its operations, which makes it particularly susceptible to climate risk.[28] The mining conglomerate Anglo American stated that "[c]limate change has the potential to impact our assets, people, and operations through the long-term availability of water for operations, energy security, disruption to linear infrastructure, flooding affecting mines, storms affecting port availability and rail power supply, and changes in life-of-mine projections."[29]

These disclosures properly identify company-specific risks associated with climate change. They show that climate change impacts can have direct consequences for the core of a company's operations. Investors are entitled to know about these material risks, and how the company intends to adjust its operations in response.

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[25] *Id.* at 23.
[26] *Id.* at 33.
[27] GLOBAL 500 REPORT, *supra note* 16, at 34.
[28] WATER SCARCITY, *supra note* 21, at 25.
[29] GLOBAL 500 REPORT, *supra note* 16, at 145.

C. Regulatory Limits on Global Warming Pollution are a Known Trend that is Gaining Momentum.

Since the investor climate risk petition was filed in 2007, efforts to regulate greenhouse gas emissions and ameliorate the harmful effects of a changing climate have proceeded at every level of government. Regulation of greenhouse gases is a known trend that is gaining momentum. Investors need to know how companies are affected by these regulatory changes, how they intend to deal with them, and what opportunities these changes create for companies.

1. EPA's Greenhouse Gas Reporting Rule Now Requires Corporations to Collect Data About Their Greenhouse Gas Emissions.

For a company that directly emits greenhouse gases, accurate, reliable and comparable emissions data is the cornerstone of meaningful assessment of its exposure to the many physical, regulatory and economic developments that are associated with climate change and our collective efforts to slow, stop and reverse it. Assessment and disclosure of emissions is the first of four elements of disclosure called for in the Global Framework for Climate Risk Disclosure that was proposed by leading institutional investors in 2006 as a model for corporate reporting on climate risk.[30] The four elements of Global Framework reporting are:

- Total historical, current, and projected greenhouse gas emissions
- Strategic analysis of climate risk and emissions management
- Assessment of physical risks of climate change
- Analysis of risk related to the regulation of greenhouse gas emissions

The first step of evaluating a company's own emissions enables it then to move forward to consider the additional elements – strategic analysis of climate risk and emissions

[30] Investor Network on Climate Risk, Global Framework for Climate Risk Disclosure, http://www.incr.com//Document.Doc?id=167

management, assessment of physical risks, and the effect of regulations – that taken together yield the critical information investors need to assess investment choices.

In its Consolidated Appropriations Act of 2008 and Omnibus Appropriations Act of 2009, Congress directed EPA to publish a final rule "to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy . . . ." EPA has now finalized a mandatory greenhouse gas reporting rule that will require large stationary sources of greenhouse gases to report to EPA annually the amount of their emissions.[31] Beginning with emissions during calendar year 2010, this rule will for the first time provide comprehensive, verified, cross-comparable data on greenhouse gas emissions across the U.S. economy.

EPA's new mandatory greenhouse gas reporting rule dramatically changes the landscape of corporate climate change risk disclosure. While some corporations already collect this information, many more do not, and the different methodologies and formats in which emissions data are collected can make comparisons among different sources challenging. When EPA's reporting rule takes effect, no corporation that emits substantial amounts of greenhouse gases can say that it does not have the data to undertake the analysis that investors have increasingly sought.

This data will also shine a light on climate-related risks and opportunities of other companies that do business with the large emitters, such as financial and insurance

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[31] The rule requires "suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions submit annual reports to EPA. The gases covered by the proposed rule are carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF_6), and other fluorinated gases including nitrogen trifluoride (NF_3) and hydrofluorinated ethers (HFE)." http://www.epa.gov/climatechange/emissions/ghgrulemaking.html

companies, as well as other companies that buy from and sell to the large emitters. Prompt SEC action to clarify corporations' responsibility to assess the materiality of greenhouse gas emissions data will speed the process of getting this critical information before investors.

2. Proposed Cap and Trade Legislation Is Progressing through Congress.

Congress is actively working on bills to limit greenhouse gas emissions. While the precise provisions are subject to negotiation and vote, there is strong momentum toward a national cap and trade program that will achieve science-based reductions in greenhouse gas emissions. The House of Representatives approved the American Clean Energy and Security Act, H.R. 2454, on June 26, 2009. The bill establishes an enforceable declining cap on greenhouse gas emissions at 17 percent below 2005 levels by 2020 and 83 percent below 2005 levels by 2050. The program would reward clean energy innovation, spur investment in clean energy technologies, and create new jobs manufacturing clean energy solutions for the nation and the global marketplace.

On November 5, 2009, the U.S. Senate Committee on Environment and Public Works approved the Clean Energy Jobs and American Power Act (S. 1733) that would similarly establish a mandatory cap on U.S. global warming pollution and give the private sector the flexibility to pursue the most affordable emissions reduction opportunities through the trading of emissions allowances. The legislation calls for reducing U.S. emissions by 20 percent from 1990 levels in 2020, and 83 percent by 2050.

3. EPA's Proposed Endangerment Determination Under the Clean Air Act.

On April 17, 2009, EPA Administrator Lisa Jackson proposed to find that the following six greenhouse gases endanger the human health and welfare of current and future generations: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.[32] After an exhaustive review of the existing science, the EPA determination documented abrupt climate change impacts as well as climate-related human health perils. The Administrator also proposed to find that "the combined emissions of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons from new motor vehicles and new motor vehicle engines are contributing to this mix of greenhouse gases in the atmosphere." Id. The proposed EPA determination, when finalized, establishes the predicate for completing national greenhouse gas emission standards for new motor vehicles and new motor vehicle engines.

4. EPA's Proposed Rules Triggering Greenhouse Gas Permitting Programs for Large Stationary Sources.

On September 30, 2009, EPA announced two inter-related proposals to address greenhouse gas emissions from new and modified large stationary sources. In the first action, the Agency announced its reconsideration of an Interpretive Memorandum addressing the applicability of the Clean Air Act's pre-construction review and operating permit programs for greenhouse gases.[33] EPA proposed to find that completion of the national greenhouse gas emission standards for passenger vehicles in March 2010, discussed below, would trigger the obligations for new and modified stationary sources to

[32] See 74 Fed. Reg. 18,886 (April 24, 2009) ("Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act").
[33] Prevention of Significant Deterioration (PSD): Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by the Federal PSD Permit Program, 74 Fed. Reg. 51,535 (Oct. 7, 2009) (to be codified at 40 C.F.R. pt. 52).

address greenhouse gases under these permit programs. In the second action, EPA proposed to "tailor" the applicability of the Clean Air Act's pre-construction review permit program to a specified category of large sources, including proposing a 25,000 ton per year carbon dioxide equivalent (CO2e) applicability threshold for new sources.[34] The agency's final action on these dual proposals would trigger permitting obligations including the application of best available control technology to address greenhouse gases from new and modified stationary sources of greenhouse gas emissions while pointedly limiting the obligations to large emitting facilities.

5. Department of Transportation and EPA Proposed Fuel Economy and Greenhouse Gas Regulation.

The EPA and the Department of Transportation have proposed greenhouse gas emissions standards applicable to cars and light trucks.[35] The September 28, 2009 proposal requires vehicles to meet an estimated combined average emissions level of 250 grams of carbon dioxide per mile in model year 2016, comparable to fuel economy of 35.5 miles per gallon. The proposed standards would apply to model year 2012 to 2016 vehicles, and the EPA estimates that the proposal will reduce U.S carbon dioxide emissions by 950 million metric tons and save 1.8 billion barrels of oil over the life of the vehicles. The national proposal responds to the 2007 U.S. Supreme Court mandate, supra at part I.B.2, and will carry out President Obama's landmark May 19 accord with major automakers, the Governor of California, the United Auto Workers Union, and environmentalists. Passenger cars and light-trucks emit nearly 20 percent of the nation's

[34] See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring 74 Fed. Reg. 55,292 (Oct. 27, 2009).
[35] See "Proposed Rulemaking To Establish Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards," 74 Fed. Reg. 49,454 (Sept. 28, 2009).

greenhouse gases in the form of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. As noted above, in April, EPA provisionally found that these four contaminants and two other greenhouse gases endanger human health and welfare.

6. The Clean Air Act Section 209(b) Waiver and the Implementation of California's Comprehensive Programs to Limit Greenhouse Gas Emissions.

In 2004, the California Air Resources Board (CARB), implementing Assembly Bill 1493, adopted landmark regulations to control emissions of greenhouse gases from motor vehicles. Implementation of those regulations was long delayed, however, because of the U.S. Environmental Protection Agency's failure to grant the necessary "waiver of preemption" pursuant to Section 209(b) of the Clean Air Act.

In a major development, on June 30, 2009, EPA Administrator Lisa Jackson granted California the authority under Section 209(b) to implement its regulations, which apply to new passenger cars, pickup trucks and sport utility vehicles.[36] CARB projects that the California regulations will significantly reduce GHG emissions from California passenger vehicles.[37]

The effects of EPA's decision stretch well beyond California. Section 177 of the Clean Air Act allows other states to adopt and enforce regulations identical to California regulations for which EPA has granted a Section 209(b) waiver. Thirteen states – Arizona, Connecticut, Maine, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington – and the District of Columbia have

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[36] See *Notice of Decision Granting Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32,744 (July 8, 2009).

[37] See CARB, Clean Car Standards - Pavley, Assembly Bill 1493, http://www.arb.ca.gov/cc/ccms/ccms.htm

already adopted the California greenhouse gas emissions standards for motor vehicles and, with EPA's recent waiver decision, those regulations may now go into effect.[38]

California's Global Warming Solutions Act of 2006 (Assembly Bill 32) calls for major reductions in greenhouse gas emissions from all sectors of California's economy. On December 12, 2008, the California Air Resources Board approved a Scoping Plan, as required under the Act, which outlines the numerous and diverse programs and initiatives that will be undertaken to achieve the necessary emissions reductions.[39] The Plan calls for the state to reduce greenhouse gas emissions, as required in the statute, to 1990 levels by 2020 (a 15 percent reduction below today's levels). Consistent with Executive Order S-3-05, the Plan contemplates much deeper reductions in emissions – to 20 percent of 1990 levels – by 2050.[40]

Under the Scoping Plan, CARB has identified 73 diverse measures – ranging from a program to reduce emissions from ships idling at ports, to low carbon fuel standards, to standards for industrial refrigeration, to green building programs, to energy efficiency measures, to renewable portfolio standards – that will, in combination, achieve major reductions in statewide emissions.[41] Many of these measures will be developed in 2009 and 2010 and go into effect by the start of 2011.[42] The Scoping Plan identifies a cap-and-trade program as one of the principal means California will employ to reduce greenhouse

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[38] See 74 Fed. Reg. 32,745 n.9.
[39] See California Air Resources Board, Climate Change Scoping Plan (December 2008) (available at http://www.arb.ca.gov/cc/scopingplan/document/adopted_scoping_plan.pdf) (hereinafter AB 32 SCOPING PLAN).
[40] See AB 32 SCOPING PLAN at ES-2.
[41] See California Air Resources Scoping Plan, Scoping Plan Measures Implementation Timeline (October 12, 2009) (available at http://www.arb.ca.gov/cc/scopingplan/sp_measures_implementation_timeline.pdf) (hereinafter AB 32 IMPLEMENTATION TIMELINE).
[42] See AB 32 SCOPING PLAN at 1; AB 32 IMPLEMENTATION TIMELINE.

gas emissions; CARB is engaged in public hearings and other processes in preparation for adopting a cap-and-trade regulation by January 1, 2011.[43]

7. Other State and Regional Actions to Control Greenhouse Gas Emissions.

Other state and regional climate initiatives have significantly advanced. The Regional Greenhouse Gas Initiative (RGGI), a cooperative effort by ten Northeast and Mid-Atlantic States to limit greenhouse gas emissions, is the first mandatory, market-based CO_2 emissions reduction program in the United States. These ten states have capped CO_2 emissions from the power sector, and will require a 10 percent reduction in these emissions by 2018. The program is now underway.

Western and midwestern states are developing regional programs to reduce greenhouse gases. Seven western states and three Canadian provinces have joined the Western Climate Initiative and committed to reducing global warming pollution 15 percent below 2005 levels by 2020. A similar initiative is underway in the Midwest through the leadership of the "Midwest Greenhouse Gas Reduction Accord" including Iowa, Illinois, Kansas, Michigan, Minnesota, Wisconsin and the Canadian province Manitoba.

In the last two years, many individual states have adopted significant new laws and regulations relating to the control of greenhouse gas emissions. Measures adopted by one or multiple states so far in 2009 include, among many others, new or more stringent renewable portfolio standards; laws establishing "feed-in tariffs" that require utilities to purchase electricity generated by renewable sources at a premium; renewable fuel

[43] See AB 32 SCOPING PLAN at 15; California Air Resources Board, *Cap-and-Trade*, http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm.

standards; new or more stringent greenhouse gas emissions targets; emissions standards for new power plants; and regulations governing carbon capture and sequestration.[44]

8. Climate-Related Litigation.

The U.S. Court of Appeals for the Second Circuit recently allowed a coalition of states and private land trusts to maintain claims under the common law of nuisance against five of the nation's largest emitters of greenhouse gases.[45] Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin and City of New York and three land trusts (Open Space Institute, Open Space Conservancy, and Audubon Society of New Hampshire) took legal action against five major power companies that are among the largest emitters of carbon dioxide in the nation: American Electric Power, Southern Company, Tennessee Valley Authority, Xcel and Cinergy. These power company defendants are collectively responsible for about 650 million tons of carbon dioxide emissions annually, approximately one quarter of the U.S. electric power sector's carbon dioxide emissions, and approximately 10 percent of all manmade emissions in the nation.

The plaintiffs asked the court to abate these companies' heat-trapping carbon dioxide emissions under the federal common law of nuisance – seeking to cap and annually lower emissions. In 2005, a federal district court held that the case presented non-justiciable political questions. But the U.S. Court of Appeals for the Second Circuit vacated the lower court decision and remanded the matter to the district court to consider the claims on the merits. The Second Circuit's decision provides a basis for requiring large

[44] See Pew Center on Global Climate Change, States News (available at http://www.pewclimate.org/states-regions/news?page=1).
[45] *State of Connecticut, et al. v. American Electric Power Company, Inc*., 2009 U.S. App. LEXIS 20873 (2d Cir. September 21, 2009).

greenhouse gas emitters to reduce their emissions even without any action by Congress or EPA.

In *Comer v. Murphy Oil Co.*,[46] the Fifth Circuit Court of Appeals followed the Second Circuit precedent, and held that private plaintiffs had standing to maintain an action for damages based on public and private nuisance, trespass, and negligence against major coal, oil and chemical companies whose emissions, plaintiffs argued, exacerbated Hurricane Katrina's devastating effects.

9. International Developments.

Nearly 100 world leaders gathered in New York on September 22, 2009 for the United Nations Summit on Climate Change. The summit helped to strengthen momentum for a fair, effective, and protective climate agreement when heads of state and environment ministers from around the world meet for two weeks of climate talks in Copenhagen this December. The Copenhagen talks will attempt to negotiate a successor to the Kyoto Protocol, which called for countries to reduce their greenhouse gas emissions below 1990 levels.

II. THE GROWING INVESTOR DEMAND FOR CLIMATE DISCLOSURE REMAINS LARGELY UNMET.

While the physical, economic and regulatory developments associated with climate change described above strongly support the conclusion that climate change poses material risk to many corporations, the growing investor demand for climate related disclosure

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[46] 2009 WL 3321493; 2009 U.S. App. LEXIS 22774 (5th Cir. Miss. Oct. 16, 2009). *But see Village of Kivalina v. Exxon Mobil Corp.,* 2009 WL 3326113 [No. 08-01138] (N.D. Cal., Sept. 30, 2009) (concluding that a Native Alaskan village lacked standing to maintain a nuisance suit against two dozen oil and electric power companies and that its claims were barred by political question doctrine).

provides yet more evidence in support of disclosure. The investor community has made it increasingly clear that information on climate risk is a necessary part of investment decisions. And yet publicly-traded companies have not responded with the meaningful disclosure investors seek.

A. Investors Continue to Seek Climate Risk Disclosure.

Shareholder Resolutions. In 2009, investors filed 68 shareholder resolutions seeking information on various aspects of climate risk, including greenhouse gas emissions, emission reduction strategies and targets, energy efficiency strategies, corporate responses to climate change, and the impact of climate change on emerging markets.[47] In 2008, investors filed 57 resolutions seeking information on climate change.[48]

Investor Network on Climate Risk Letter. In June of 2009, forty-one members of the Investor Network on Climate Risk and other leading global investors representing $1.4 trillion in assets called on the SEC to improve disclosure by issuing formal interpretive guidance on material climate change risks, enforcing existing disclosure requirements, recognizing shareholder rights to submit resolutions on issues including climate change, and using the Global Reporting Initiative as a framework for requiring disclosure of material environmental, social, and governance risks such as climate change.[49]

Investor Questionnaire. This year, the Carbon Disclosure Project surveyed 500 of the world's largest corporations on behalf of 475 institutional investors with $55 trillion in assets under management. Four hundred and nine companies responded, providing

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[47] Ceres, *Investors Achieve Major Company Commitments on Climate Change*, August 24, 2009, http://www.ceres.org/Page.aspx?pid=1121.
[48] Investor Network on Climate Risk, Climate Resolutions Toolkit – 2008, Mar. 6, 2008, http://www.ceres.org/Page.aspx?pid=1061.
[49] Investor Network on Climate Risk, *Investors with 1.4 Trillion in Assets Call on SEC to Improve Disclosure of Climate Change and Other Risks*, June 12, 2009, http://www.incr.com/Page.aspx?pid=1107

information on emissions, risks and opportunities related to climate change, and strategies for managing those issues.[50] Despite the high (82%) response rate, only 51% of responding companies reported emission reduction targets, and only 36% reported carbon reduction targets beyond the year 2012. In addition, of the 328 respondents to a similar survey of S&P 500 companies, only 34% disclosed emission reduction targets.[51]

This lack of hard data and long-term planning disadvantages investors, who require this information to make informed investment decisions and protect their portfolios. Furthermore, voluntary disclosures of this type lack the rigor and accountability inherent in 10-K reports certified by senior management pursuant to enforceable legal requirements.

Market Research Services. Bloomberg Professional Service bills itself as "providing the most comprehensive and advanced set of financial data, real time market coverage, news, analytic tools, portfolio solutions and research." In a telling indication of the importance of climate-related information to investors, Bloomberg's service now features a "carbon emissions" tab on its equity research homepage. The fact that the leading research tool used in the investment community now includes carbon emissions on its menu of corporate information speaks volumes about the importance of emissions and climate risk to today's investor. And the fact that this tab often contains no data speaks to the need for SEC action to assure that investors have access to this critical information.

B. Legislators, Law Enforcement, Regulators, and Standard Setting Organizations Have All Joined the Call for Greater Climate Disclosure.

Since the climate risk petition was filed with the SEC in September 2007, Congressional leaders have called for SEC action on climate disclosure, the New York

[50] GLOBAL 500 REPORT, *supra n*ote 16.
[51] Carbon Disclosure Project 2009, S&P 500 REPORT, p. 7.

Attorney General has entered into three landmark settlements setting forth a framework for climate disclosure, and three organizations have developed climate risk disclosure frameworks or guidance. These settlements and frameworks, in addition to the *Global Framework for Climate Risk Disclosure* and the 2007 petition, together provide a consistent baseline of information investors require, and provide models for the Commission as it considers how to provide guidance to registrants about disclosing material climate-related information.

Congressional Request for Action on Climate-Related Disclosure. On December 6, 2007, Senator Chris Dodd, Chairman of the Senate Committee on Banking, Housing, and Urban Affairs and Senator Jack Reed, Chairman of the Subcommittee on Securities, Insurance and Investment, wrote a letter to then-Chairman Cox urging that the Commission issue guidance on climate disclosure, asking for ongoing updates about efforts to enhance guidance, and requesting a report on the adequacy of disclosure relating to climate change and the regulation of greenhouse gas emissions. The letter asked the Commission to issue interpretive guidance to "ensure greater consistency and completeness in disclosure of material information related to climate change and current and probable future governmental regulation of greenhouse gas emissions, provide information for registrants on whether and how to disclose such matters; and ensure that investors have access to material climate change information."

New York Attorney General Enforcement Action and Settlements. In 2007, New York Attorney General Andrew Cuomo subpoenaed five large energy companies—AES, Dominion Resources, Xcel Energy, Dynegy Inc, and Peabody Energy—to investigate whether they had adequately disclosed risks from climate change in SEC filings. In 2008 and 2009, New York announced groundbreaking agreements with Xcel Energy, Dynegy and

AES that require those companies to improve their disclosure of climate risks in SEC filings. These agreements require the companies to disclose in their 10-K filings (a) analysis of financial risks from regulation, including both present law and probable future law, (b) analysis of financial risks from litigation, (c) analysis of financial risks from physical impacts of climate change, and (d) to the extent the companies' GHG emissions materially affect their financial exposure from climate change risk, a strategic analysis of climate change risk and emissions management, including estimated greenhouse gas emissions for the reporting year, expected increases in greenhouse gas emissions from planned new coal-fired generation projects, strategies to reduce climate change risk and to adapt to the physical impacts of climate change, the results of strategies undertaken to date and the expected effect of such strategies on future greenhouse gas emissions, and corporate governance of climate change.

National Association of Insurance Commissioners' Mandatory Disclosure Requirement. The National Association of Insurance Commissioners (NAIC), the organization of insurance regulators from the 50 states, assists regulators in serving the public interest and achieving fundamental insurance regulatory goals.[52] This year the NAIC unanimously approved a mandatory requirement for insurers with annual premiums of $500 million or more to disclose climate risks to regulators, shareholders and the public beginning in May 2010.[53] The NAIC disclosure survey requires reporting on issues relevant to any publicly traded companies: emissions reduction plans, climate change risks, and climate risk management actions, and on issues most relevant to the insurance industry: the company's climate change policy for investment management, the impact of climate

[52] For more information, *see* http://www.naic.org/index_about.htm
[53] NAIC Insurer Climate Risk Disclosure Survey, *available at* http://www.naic.org/committees_ex_climate.htm

change on its investment portfolio, and engagement with policyholders. The survey, the first of its kind in any industry[54], was developed through a consensus process including representation from regulators, investors, and regulated companies.

Climate Disclosure Standards Board. The Climate Disclosure Standards Board (CDSB) is a consortium of seven business and environmental groups whose joint mission is to advance climate change-related disclosure in mainstream reports by developing global guidance for corporate reporting. The CDSB's draft reporting framework, released for public comment in May, was developed by a working group including representatives of the big four accounting firms and professional accounting bodies, and will be finalized in 2010.[55] The framework calls for disclosure on four topics: greenhouse gas emissions, strategic analysis of climate change, regulatory risks, and physical risks. As of October, public comments had been received from over 20 organizations including accounting firms, public pension funds, and corporations.

ASTM International. ASTM International, one of the largest voluntary standards development organizations in the world, has developed a draft standard, expected to become final in January 2010, for disclosure related climate change exposures and risks[56]. The standard is designed to help reporting entities provide disclosure in financial statements "regarding material financial impacts attributed to climate change."[57] It asks

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[54] Testimony of Wisconsin Insurance Commissioner Sean Dilweg on behalf of the NAIC, *at* Senate Committee on Commerce, Science and Transportation hearing, Climate Science – Empowering Our Response to Climate Change, March 12, 2009.
[55] CDSB Reporting Framework, Exposure Draft, *available at* http://www.cdsb-global.org/reporting-framework/
[56] ASTM Work Item 21096: New Guide for Disclosure Related to Climate Change Exposures/Risks, *available at* http://www.astm.org/DATABASE.CART/WORKITEMS/WK21096.htm
[57] Lewis B. Jones, ASTM Issues Draft Standard on Climate Change Disclosure, pp. 5-7, American Bar Association, Environmental Disclosure Committee Newsletter, March 2009.

for, among other information, disclosure of a strategic analysis of risks and opportunities, relevant regulatory requirements related to climate change and their financial impacts, and the estimated likelihood, magnitude, and timing of financial impacts attributed to climate change. Like any ASTM standard, this standard is being developed through a consensus process that fully considers comments both for and against and includes balloting of select ASTM members.

C. Current Corporate Disclosures Do Not Provide Investors the Information They Need to Assess Climate Risks.

At least three recent reports have extensively reviewed SEC filings to gauge the current state of climate disclosure, and one report has examined the level of disclosure provided in voluntary sustainability reports. The disappointing results show that SEC action to clarify the obligation to disclose climate risks is urgently needed because corporations have yet to respond to the growing investor demands for climate disclosure. Both the quantity and the quality of climate reporting remain strikingly low.

1. **Reclaiming Transparency in a Changing Climate, Trends in Climate Change Disclosure form 1995 to the Present,** CEES (the Center for Energy and Environmental Security at the University of Colorado), Ceres, and Environmental Defense Fund (June 2008).

This report, jointly prepared by the Center for Energy and Environmental Security at the University of Colorado (CEES), Ceres and Environmental Defense Fund, included an exhaustive review of nearly 6400 10-K filings by S&P 500 companies from 1995 through 2008.[58] Its key findings included the following:

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[58] This study is part of a larger research project entitled ClimatePledges run by CEES. As part of this larger project, CEES has made available online the entire dataset for the study, in a fully searchable database. The Coyote 10-K database covers 750 companies that are current and former members of the S&P 500, 6,354 10-K filings, and 79,012 associated exhibits from 1995 to the second quarter of 2008. Available online at http://coyote.climatepledges.org.

- **The vast majority of S&P 500 companies remain silent with respect to the risks and opportunities posed by climate change.** 76.3 % of annual reports filed by S&P companies in 2008 failed to include any mention of climate change.

- **While there has been an increase in the quantity of 10-K filings that contain discussions of climate risks and opportunities, the quality of these discussions is low.** Only 5.5% of annual reports filed by the S&P 500 in 2008 identified at least one risk posed by climate change and articulated a strategy for managing and mitigating that risk.

- **Less than 10% of S&P companies in the financial sector discussed climate change in 10-K reports filed in 2008.** This anemic reporting rate is particularly troubling given the enormous risks posed by climate change to the insurance industry, and the role of major banks in financing infrastructure projects. In 2008, global advisory firm Ernst & Young indicated that "climate change is the greatest strategic risk currently facing the property/casualty insurance industry."

- **The utilities sector led all other S&P 500 sectors in discussing climate change in 10-K reports filed in 2008.** Only 3.2% of utilities sector companies failed to mention climate change in 10-K reports filed in 2008. Despite this low failure-to-mention rate, however, utilities sector disclosures still failed to provide high informational value to investors as only 35.5% of these companies identified at least one climate change risk and articulated a management or mitigation strategy for addressing that risk.

2. Climate Risk Disclosure in SEC Filings, An Analysis of 10-K Reporting by Oil and Gas, Insurance, Coal, Transportation and Electric Power Companies, Ceres and Environmental Defense Fund (June 2009)[59]

This report, authored by the Corporate Library, evaluated the state of climate risk disclosure by 100 global companies in five sectors that have a strong stake in preparing for the policy responses to a changing climate. Even among this group of companies most directly affected by climate change, there was only limited disclosure: Fifty nine of the 100 companies made no mention at all of their greenhouse gas emissions or their positions on climate change, 28 had no discussion of the climate risks they face, and 52 failed to disclose

[59] Ceres and Environmental Defense Fund, http://www.ceres.org/Document.Doc?id=473

any actions to address the risks of climate change. For those companies that did mention climate change, the informational quality of the reporting was often low.

3. Climate Change Disclosure: Out With the Old; In with the New? McGuire Woods, LLP[60] (January 2009)

The law firm of McGuire Woods, LLP reviewed approximately 350 10-K disclosures filed in 2008 to assess the state of climate related disclosure, including what was being disclosed and where in their reports companies were placing climate related disclosure. Their findings included:

> [V]ery few companies made any type of 10-K disclosure regarding GHG emissions or climate change. Out of approximately 350 companies reviewed, only 42, or 12.2% made any disclosure whatsoever regarding GHG emissions or climate change. Of the [42] companies making disclosure:
>
> - 34 addressed impacts/risks related to current or proposed regulation of GHG emissions;
> - 20 discussed efforts related to reducing GHG emissions;
> - 8 provided disclosure regarding the amount of their GHG emissions;
> - 6 discussed physical impacts/risks related to climate change; and
> - 2 disclosed legal proceedings related to GHG emissions or climate change.

These three recent reviews of current and past disclosure of climate risks show that both the quantity and the quality of reporting fail to comply with current disclosure regulations, which require companies to address climate risks – or any other risks – if those risks are material to their operations. Among the thin ranks of companies that have begun to address climate change in their filings, the quality of the information conveyed is often quite low. Investors are not well served by boilerplate language that merely mentions the existence of climate change and the generic risks that it poses to the economy. Both the letter and the spirit of the disclosure rules require a corporation to analyze risks *to its own*

[60] McGuireWoods, LLP, http://www.mcguirewoods.com/news-resources/publications/climate%20change%20disclosure.pdf

operations, to disclose those risks if they are material, and to explain how it plans to deal with the risks. The current poor state of disclosure demonstrates that guidance from the SEC on climate disclosure is necessary to improve both the quantity and quality of disclosure.

Voluntary disclosures pursuant to the various investor requests and in sustainability reports have begun to provide the market some information about climate risks. But as shown in a 2007 report prepared by KPMG for the Global Reporting Initiative, these voluntary disclosures do not contain the same level of rigor or address the full range of information required in reports filed pursuant to mandatory SEC rules and certified by senior management. In *Reporting the Business Implications of Climate Change in Sustainability Reports*,[61] KPMG reviewed 50 sustainability reports from Financial Times 500 companies around the world. It found that although most of these 50 companies addressed climate change in their reports, the majority did not address risks to their businesses and instead reported extensively on new business opportunities associated with climate change. The failure to examine emissions, risks and an associated management strategy provided an incomplete picture to investors. The report also found that the reports examined "did not report on the financial implications of risks or opportunities related to climate change, for example expected costs of complying with future regulations or expected profits from the sale of new climate change related products."

[61] KPMG, Reporting the Business Implications of Climate Change in Sustainability Reports, (2007) http://www.globalreporting.org/NR/rdonlyres/C451A32E-A046-493B-9C62-7020325F1E54/0/ClimateChange_GRI_KPMG07.pdf

III. INTERPRETIVE GUIDANCE IS NEEDED TO CLARIFY THE EXISTING REQUIREMENT TO DISCLOSE MATERIAL INFORMATION RELATING TO CLIMATE CHANGE.

Climate change is profoundly altering the physical, economic and regulatory environment in which companies operate in ways that pose material risks and opportunities over the short- medium- and long-range perspective. Despite the increasingly urgent nature of these known trends, most companies have not responded by disclosing in their SEC filings the material risks and opportunities they face in connection with climate change, or describing how they intend to deal with these changes. While voluntary disclosure regimes have provided an important start in educating the market, they have not been effective at providing investors the reliable, cross-comparable information required by SEC disclosure rules.

Existing disclosure rules provide the mandatory framework for disclosure of material risks and opportunities companies face in connection with climate change, and analysis of their plans to deal with these changes. In light of the ongoing and widespread failure to comply with these disclosure requirements, we respectfully renew the request that the Commission act promptly to clarify that existing disclosure requirements apply to climate change.

Respectfully submitted,

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DATE: November 23, 2009