

Disclosure, Management Practices, and Corporate Governance Relating to Climate Change Financial Risks (Updated)

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Actions by the Attorney General of the State of New York in 2008 will affect how public companies disclose and address climate change financial risks. Since August 2008, the Attorney General has announced settlement agreements (the “Agreements”) with two major public utility holding companies, Dynegy Inc. (“Dynegy”) and Xcel Energy Inc. (“Xcel Energy”) (collectively, the “Companies”), pursuant to which the Companies agreed to disclose specified, detailed information about the financial risks of climate change on their businesses and how they are addressing those financial risks in their annual reports on Form 10-K filed with the U.S. Securities and Exchange Commission (the “SEC”) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”).¹ As discussed more fully below, while the disclosures required under the Agreements about financial risks resulting from climate change are consistent with existing SEC disclosure requirements, the new, detailed disclosures required about the Companies’ strategic analyses of climate change financial risks and emissions management are likely to affect both management practices and corporate governance at Dynegy, Xcel Energy, and other companies.

The New York Attorney General’s investigations were conducted pursuant to the Martin Act, a New York state statute that grants broad powers to the Attorney General to subpoena and bring actions against all persons who buy or sell securities in New York.² Given these powers, the Agreements, the Attorney General’s stated goal to “force major energy companies to fully disclose the risks that climate change

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1. “Attorney General Cuomo, Joined by Vice President Gore, Announces Agreement with Major Energy Company, Dynegy Inc.” (October 23, 2008) (available at http://www.oag.state.ny.us/media_center/2008/oct/oct23a_08.html), relating to the execution of an “Assurance of Discontinuance Pursuant to Executive Law § 63(12)” (AOD #08-132), October 23, 2008 (available at http://www.oag.state.ny.us/media_center/2008/oct/dynegy_aod.pdf); “Cuomo Reaches Landmark Agreement with Major Energy Company, Xcel Energy, to Require Disclosure of Financial Risks of Climate Change to Investors” (August 27, 2008) (available at http://www.oag.state.ny.us/media_center/2008/aug/aug27a_08.html), relating to the execution of an “Assurance of Discontinuance Pursuant to Executive Law § 63(12)” (AOD #08-012), August 26, 2008 (available at http://www.oag.state.ny.us/media_center/2008/aug/xcel_aod.pdf).
 2. N.Y. Gen. Bus. Law § 352 (Consol. 2008). The Martin Act gives the New York Attorney General broad powers to conduct public and private investigations and issue subpoenas for any documents of, and bring either a civil or criminal action against, any persons that engage in fraud or deceptive practices in connection with the sale of securities in New York. Unlike the anti-fraud provisions of the federal securities laws, the Martin Act does not require a showing of a willful intent to commit misconduct (or scienter). *See State v. Rachmani Corporation*, 525 N.E. 2d 704 (N.Y. 1988). The Attorney General’s investigations were also conducted pursuant to Executive Law § 63(12), which authorizes the Attorney General to, among other things, petition the Supreme Court of the state to enjoin fraudulent or illegal acts in the conduct of business. N.Y. Exec. § 63(12) (Consol. 2008).

poses to their investors,”³ and various other developments discussed below, public companies should ensure that they fully disclose to investors material financial risks from climate change.

In addition, if the disclosures that the Companies agreed to make become the best practices for all public companies that face material financial risks from climate change, public companies may have to disclose whether or not they have strategies that (i) address the financial risks of climate change, (ii) are under the supervision of the board of directors, and (iii) are assessed as a part of management’s compensation program. Finally, executive officers, directors, and other insiders of public companies should evaluate whether they are aware of any material financial risks to their respective companies, including from climate change, that have not been disclosed publicly before they sell securities.

Disclosures required under the Agreements. The Companies agreed to disclose the following information about financial risks relating to climate change in their annual reports on Form 10-K:

- An analysis of material financial risks associated with existing laws and regulations relating to greenhouse gas emissions and laws and regulations relating to greenhouse gas emissions that are likely to be adopted in the future;⁴
- An analysis of material financial risks from litigation that involves the company and relates to climate change and any climate change–related decisions from any court in any jurisdiction in which the company operates that may have a material financial effect on its business; and
- An analysis of material financial risks from the physical impacts associated with climate change, including any impacts from sea-level increases, extreme weather events, droughts, and changes in temperature.

In addition, the Companies agreed to make the following disclosures in their Form 10-K annual reports about their strategic analyses of climate change financial risks and emissions management as long as their greenhouse gas emissions materially affect their financial exposure from climate change financial risks:

- The company’s current position on climate change;
- The following details regarding the company’s emissions management:
 - Estimates (in tons) of its greenhouse gas emissions for the most recent fiscal year;
 - Estimates (in tons) of expected increases in greenhouse gas emissions from certain planned generation projects;⁵

3. “Feature: Fighting Global Warming: How the Office of the Attorney General Is Fighting Global Warming” (available at <http://www.oag.state.ny.us/bureaus/environmental/feature.html>). The Agreements presumably are the blueprints for the New York Attorney General’s negotiation of future settlements with three other energy companies to which the Attorney General sent subpoenas in 2007 demanding information about the potential financial impacts on their businesses from climate change.

4. Dynegy has agreed to disclose the costs of complying with the Regional Greenhouse Gas Initiative, under which certain states in the Northeast and Mid-Atlantic regions have agreed to limit greenhouse gas emissions through a cap-and-trade program. *See infra* note 27.

5. Xcel Energy agreed to disclose estimates (in tons) of expected increases in greenhouse gas emissions from “planned new coal-fired electric generation projects.” Dynegy agreed to make this disclosure for “planned new electric generation projects for which a state or EPA Clean Air Act permit has been sought,” thus expanding disclosure beyond coal-fired electric generation units, which traditionally have been the largest target for efforts to control greenhouse gas emissions. Dynegy’s disclosures may alert the public to the company’s new permit applications earlier than they otherwise would have become aware of such applications.

- Strategies to reduce, offset, or limit its climate change financial risk and adapt to the physical impacts of climate change, including the steps the company is taking to reduce greenhouse gas emissions, the results of strategies to date, and the expected future results of such steps, including greenhouse gas emission–reduction goals; and
- Information about corporate governance actions concerning climate change, including the role of the company’s board of directors, as well as a statement on whether environmental performance, including meeting climate change objectives, is incorporated into officer compensation decisions.

Disclosures that are consistent with existing SEC requirements. The required disclosures about material financial risks are consistent with various SEC requirements currently applicable to the Form 10-K, although the Agreements require specific disclosures that are not identified in the SEC’s requirements.

Item 101 of SEC Regulation S-K requires disclosure about the material effects that compliance with federal, state, and local provisions regulating the discharge of materials into the environment, such as greenhouse gases, or otherwise relating to the protection of the environment, may have on the capital expenditures, earnings, and competitive position of the company. In addition, it requires disclosure of material estimated capital expenditures for environmental control facilities.

Item 103 of SEC Regulation S-K requires disclosure about material legal proceedings, including proceedings contemplated by governmental authorities.⁶ Administrative or judicial proceedings arising under laws or regulations regulating the discharge of materials into, or designed to protect, the environment are considered to be material legal proceedings required to be disclosed if the proceeding is material to the business or financial condition of the company or involves a claim for damages or potential monetary sanctions, capital expenditures, deferred charges, or charges to income in an amount that exceeds 10% of the company’s current assets. However, Instruction 5(C) to Item 103 provides that, where a governmental authority is a party to a proceeding and the proceeding involves potential monetary sanctions, the proceeding must be described unless the company reasonably believes that the proceeding will result in no monetary sanctions or monetary sanctions of less than \$100,000.⁷

Item 303 of SEC Regulation S-K requires management, in its management’s discussion and analysis of financial condition and results of operations, to discuss, among other things, known trends and uncertainties that are reasonably likely to have a material impact on the company’s financial condition or operating performance. The SEC staff has interpreted this item to require disclosure about, among other things, critical accounting estimates, i.e., those estimates and assumptions made in connection with the preparation of financial statements that have a material impact on the company’s reported financial condition and operating performance or are reasonably likely to have a material impact on the company’s future financial condition or operating performance.

6. The quarterly report on Form 10-Q (the “10-Q”) must describe any new legal proceedings and any material developments in such legal proceedings. See Instruction 1 to Item 1 of Part II of the 10-Q.

7. With respect to “sanctions,” Question 105.01 of the SEC Division of Corporation Finance’s Compliance and Disclosure Interpretations of Regulation S-K, updated on July 3, 2008 (available at <http://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>), explains that footnote 30 to the SEC’s Release No. 33-6835 (May 18, 1989) and the letter to Thomas A. Cole (Jan. 17, 1989) clarify that, “while there are many ways a . . . ‘potential monetary sanction’ may be triggered [under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601) (otherwise known as the “Superfund” law)], including the stipulated penalty clause in a remedial agreement, the costs anticipated to be incurred under Superfund, pursuant to a remedial agreement entered into in the normal course of negotiation with the EPA, generally are not ‘sanctions’ within Instruction 5(C) to Item 103.”

Item 503 of SEC Regulation S-X requires disclosure about factors that make an investment in a public company risky or speculative.⁸ These factors must be updated to reflect material developments, such as new evidence on the risks of climate change, new legislation or regulations relating to climate change, or new estimates of material costs to reduce greenhouse gas emissions.⁹

Some of the disclosures required by the Agreements may also be required in a company's notes to its financial statements. Statement of Financial Accounting Standards No. 5, "Accounting for Contingencies" ("FAS 5"), requires disclosure of the nature of a contingency for which a loss has been accrued, the amount accrued, if material, and any additional material loss that is reasonably likely to have been incurred.¹⁰ The Financial Accounting Standards Board (the "FASB") proposed to expand the disclosures required by FAS 5 to address "constituents' concerns that the disclosures about certain loss contingencies under existing guidance do not provide sufficient information in a timely manner to assist users in assessing the likelihood, timing, and amounts of cash flows associated with loss contingencies."¹¹ Others have expressed similar concern about the adequacy of disclosures about uncertainties that may affect a company's results. Given such concerns, the Final Report of the SEC's Advisory Committee on Improvements to Financial Reporting recently recommended that the SEC and the FASB should work together to develop a disclosure framework to

[r]equire disclosure of the principal assumptions, estimates, and sensitivity analyses that may impact a company's business, as well as a qualitative discussion of the key risks and uncertainties that could significantly change these amounts over time. This would encompass transactions recognized and measured in the financial statements, as well as events and uncertainties that are not recorded.¹²

New detailed disclosures in the Agreements that affect management practices and corporate governance. The additional information about management practices relating to greenhouse gas emissions and corporate governance matters, which are required by the Agreements as long as the Companies' greenhouse gas emissions materially affect their financial exposure from climate change financial risk, are not the types of disclosures that have generally been made in a Form 10-K. If these additional disclosures made by the Companies become the best practices for disclosure, investors, analysts, and the SEC may demand such disclosures from all public companies that have material financial risks from climate change.

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8. Material changes in risks must be disclosed in the 10-Q under Item 1A of Part II of the 10-Q by public companies other than smaller reporting companies (as defined in Rule 12b-2 under the Exchange Act (17 C.F.R. § 240.12b-2)).
 9. Risk factors and other cautionary language should be updated from period to period as a company's fortunes change to enhance the company's ability to rely on the safe harbor protection in Section 27A of the Securities Act of 1933, as amended (15 U.S.C. § 77z-2), and Section 21E of the Exchange Act (15 U.S.C. § 78u-5). *See, e.g., Asher v. Baxter International Inc.*, 377 F.3d 727 (7th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005).
 10. Paragraph 8 of FAS 5, (March 1975) (available at http://www.fasb.org/pdf/aop_FAS5.pdf).
 11. FASB, "Exposure Draft of a Proposed Statement of Financial Accounting Standards, Disclosure of Certain Loss Contingencies, an amendment of FASB Statements No. 5 and 141(R)" (June 5, 2008) (available at http://www.fasb.org/draft/ed_contingencies.pdf). On September 24, 2008, the FASB decided to develop an alternative disclosure requirement that takes into account the concerns raised by certain commentators on the proposed expanded disclosures. In addition, it decided to field-test both the proposed and the alternative disclosure requirements and to delay the announced proposed effective date for the new disclosure requirements to financial statements for the fiscal years ending after December 15, 2009. *See* FASB, "Summary of Decisions Reached—FASB Board Meeting 9-24-08" (available at http://www.fasb.org/news/SDR_Contingencies_09-24-08.pdf). FASB redeliberations on proposed disclosures are anticipated after public roundtable discussions expected in March 2009. *See* Meeting Handout for December 15, 2008 Meeting with Financial Accounting Standards Advisory Council (available at http://www.fasb.org/fasac/12-15-08_fasac_handout.pdf).
 12. Recommendation 1.2, "Final Report of the Advisory Committee on Improvements to Financial Reporting to the United States Securities and Exchange Commission" (August 1, 2008) (available at http://www.sec.gov/about/offices/oca/acifr_finalreport.pdf).

Disclosure about greenhouse gas emissions and strategies to reduce such emissions may become an expected part of the analysis of a company's material financial risks from climate change. Rather than having to admit that they have no strategies to analyze and address the effects of climate change, including the effects of greenhouse gas emissions, public companies that face material financial risks from climate change are likely to adopt such strategies. In addition, the Companies' disclosures about the roles of their boards of directors concerning climate change and the relationship between officer compensation and environmental performance may lead to demands for similar information from other public companies.

Therefore, public companies should consider adopting these management practices and corporate governance measures if they face material financial risks from climate change. As is often the case, disclosure requirements change behavior—and it can be expected that many companies may in time want to be in a position to favorably disclose their responses to material financial risks from climate change and the incorporation of environmental performance into their business practices and corporate governance approach, including officer compensation decisions.

Additional reasons why companies may decide to provide the disclosures required by the Agreements.

Increasingly, investors are demanding more disclosures about climate change financial risks. In October 2006, a coalition of institutional investors, environmental groups, and others released the Global Framework for Climate Risk Disclosure (the "Global Framework"), which they described as "a statement of investor expectations for comprehensive corporate disclosure."¹³ Similar to the disclosures required by the Agreements, the Global Framework urges companies to disclose, if applicable, (i) data on their total greenhouse gas emissions; (ii) analyses of their climate risk and emissions-management practices, such as disclosure about the company's position on climate change, an explanation of significant emissions management actions taken by the company, and a description of corporate governance actions taken to address climate change financial risk, including disclosures of whether executive compensation is tied to meeting corporate climate objectives; (iii) assessments of the physical risks to their businesses from climate change; and (iv) analyses of regulatory risks relating to climate change.

In September 2007, another coalition (which includes the New York Attorney General and some of the members of the Global Framework coalition) submitted a petition to the SEC, which they supplemented in June 2008, requesting that the SEC issue interpretive guidance relating to public companies' disclosure obligations concerning climate change risks.¹⁴ The petition suggested that the SEC's interpretive release describe how companies should evaluate whether they face risks in connection with climate change and direct companies to disclose, to the extent material, physical risks associated with climate change, financial risks associated with present or probable regulation of greenhouse gas emissions, and legal proceedings relating to climate change.¹⁵

13. Available at http://www.unepfi.org/fileadmin/documents/global_framework.pdf.

14. File No. 4-547, "Petition for Interpretive Guidance on Climate Risk Disclosure," submitted by multiple petitioners, including the California Public Employees' Retirement System, Ceres, the Environmental Defense Fund, and officials from nine states, including the Attorney General of New York (September 18, 2007), supplemented by a Supplemental Petition (June 12, 2008) (the "Supplemental Petition") (available at <http://www.sec.gov/rules/petitions.shtml>).

15. In July 2008, the SEC received a petition from the Free Enterprise Action Fund, which also submits shareholder proposals, seeking "interpretive guidance that would warn registrants against making potentially false and misleading statements pertaining to global warming and other environmental issues" because of its view that there is inadequate evidence of the effect of humans on global warming. File No. 4-563, "Petition for Interpretive Guidance on Public Statements Concerning Global Warming and Other Environmental Issues," submitted by Steven J. Milloy and Thomas Borelli of the Free Enterprise Action Fund (July 21, 2008) (available at <http://www.sec.gov/rules/petitions/2008/petn4-563.pdf>).

More recently, on October 22, 2008, the Investor Network on Climate Risk, a coalition of institutional investors, sent a letter to the SEC in response to the SEC's request for comments on ways to modernize its disclosure system, in which the coalition stated that "specific guidance on climate risk disclosure for 10-K filings is urgently needed" and requested that the modernization of the SEC's disclosure system include "consistent, comparable standards for disclosure of climate risk information."¹⁶ The letter further requested that the SEC: (i) include the goal of improving climate risk disclosures in SEC filings as part of the charter of the Federal Advisory Committee to be formed by the SEC to improve financial reporting (the "Committee"); (ii) appoint an investment professional as a member of the Committee in order to ensure that the investor views on these issues are represented; and (iii) create a subcommittee of the Committee to consider how material environmental, social, and governance data can be integrated into registrants' SEC filings.

Investors have also been using shareholder proposals to call for information about climate change financial risks as well as other environmental issues. Ceres, a coalition of investors, environmental organizations, and other public interest groups concerned about global climate change, reported that a record 57 climate-related shareholder proposals were submitted for inclusion in proxy statements in 2008, of which 25 were withdrawn after companies reached agreements with the proponents of the proposals.¹⁷ The proposals that were the subject of shareholder vote received an average of 23.5% of shareholder votes for approval, according to Ceres.¹⁸ In recent years, shareholder proposals on environmental issues have represented the largest category of social proposals submitted by shareholders to public companies.¹⁹

In addition, shareholder proposals requesting companies to review and report on the economic, social, and environmental impacts of their businesses, so-called "sustainability" reporting, received approval of between 40% and 46.4% of the votes at four companies in 2007.²⁰ More than 1,500 companies worldwide publish sustainability reports that follow the Global Reporting Initiative guidelines (the "Guidelines").²¹ In 2007, of the half of the 100 largest publicly traded companies in the United States that issued sustainability reports, more than a third followed elements of the reporting template of the Guidelines.²² A survey of disclosures about climate change in sustainability reports issued in 2006, however, determined that companies reported much more on potential opportunities from climate change than on the financial risks from climate change.²³

Institutional investors have contacted companies to obtain information on greenhouse gas emissions outside the shareholder proposal process as well. The Carbon Disclosure Project, which is backed by 385

16. Investor Network on Climate Risk letter dated October 22, 2008 (available at <http://www.incr.com/Page.aspx?pid=952>).

17. "Investors Achieve Major Company Commitments on Climate Change" (Aug. 20, 2008) ("Ceres") (available at <http://www.ceres.org/NETCOMMUNITY/Page.aspx?pid=928&srcid=705>).

18. *Id.*

19. As You Sow, "Proxy Season Preview 2008—Helping Foundations Align Investment and Mission," at 4 (available at <http://www.asyousow.org/publications/proxy-preview-2008.pdf>).

20. *Id.* at 3.

21. See Global Reporting Initiative—What We Do (available at <http://www.globalreporting.org/AboutGRI/WhatWeDo>). The Global Reporting Initiative, which describes itself as a large multistakeholder network of experts in multiple countries worldwide, first issued the Guidelines in 2000 and has revised the Guidelines periodically since then. The Guidelines are the most widely used sustainability reporting framework.

22. "SIRAN/Social Investment Forum Report Finds Strong Growth in CSR Web Sites, CSR Reports and Use of Global Reporting Initiative Guidelines" (July 17, 2008) (available at <http://www.socialinvest.org/news/releases/pressrelease.cfm?id=112>).

23. Global Reporting Institute and KPMG, "Reporting the Business Implications of Climate Change in Sustainability Reports" (2007), p. 5 (available at http://www.globalreporting.org/NR/rdonlyres/C451A32E-A046-493B-9C62-7020325F1E54/0/ClimateChange_GRI_KPMG07.pdf).

institutional investors with \$57 trillion in assets under management, annually distributes a questionnaire to over 3,000 companies, requesting information on greenhouse gas emissions and the business risks of climate change. The Carbon Disclosure Project compiles the data it receives and publishes it in the form of an annual report.²⁴

Congress has also been concerned about climate change. The Lieberman-Warner Climate Security Act of 2007 would have required the Environmental Protection Agency (the “EPA”) to establish a program to decrease greenhouse gas emissions; an early version of the bill would have required the SEC to adopt regulations requiring disclosure of material risks relating to climate change. Although the bill was blocked from further consideration by the Senate on June 6, 2008, a majority of senators appear to support strong, economywide cap-and-trade legislation.²⁵ Further, in a letter dated 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, asked the SEC to issue guidance on climate disclosure and report on the adequacy of disclosure relating to climate change and the regulation of greenhouse gas emissions.²⁶

These congressional efforts will likely be strengthened by the incoming new presidential administration, which has signaled that it intends to pursue significant efforts with respect to climate change. Although uncertainties exist as to the nature and specifics of any such efforts, based on proposals made during the 2008 presidential campaign, draft legislation in Congress, and activity at the EPA, we believe it is likely that new programs or legislation will include a combination of some or all of the following: (i) a cap-and-trade program, (ii) energy efficiency and renewable energy standards, (iii) development of coal-fired power plants with carbon capture and sequestration, (iv) investments in advanced battery technology and biofuels for vehicles, and (v) international climate change agreements.

In the wake of the Agreements, the increasing focus of shareholder activists on climate change financial risks, and expected moves by Congress and the new administration, disclosures regarding any material financial risks of climate change and other environmental matters may be advisable for public companies. In addition, the SEC may be influenced by the petitions, the Agreements, congressional and presidential actions, and the other initiatives discussed above to review disclosures more rigorously to ensure appropriate information about material financial risks from climate change is included.

Challenges to preparing the climate change disclosures. The preparation of disclosures that are consistent with the Agreements may require considerable effort by some companies. For example, to assess the financial risks of legislation and regulation, a company would have to analyze not only existing laws and regulations but also proposed laws and regulations that would have a material financial effect on its business in each of the jurisdictions in which it does business if it concludes that such proposed legislation or regulations are likely to be adopted.²⁷ The requirement to describe material risks of court

24. See, e.g., Carbon Disclosure Project Report 2008 (available at <http://www.cdproject.net/reports.asp>).

25. See “Majority of Senators Step Forward to Support Mandatory, Comprehensive Climate Legislation” (June 6, 2008) (available at <http://lieberman.senate.gov/newsroom/release.cfm?id=298862>).

26. See Supplemental Petition, *supra* note 14, at 5.

27. The decision of the Supreme Court in *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), that the EPA has the authority to regulate greenhouse gases under the Clean Air Act has led to proposed rule-making by the EPA on greenhouse gas regulations. In addition to regulatory actions by states and other jurisdictions, utility companies will have to evaluate the impact of regional agreements among states to reduce greenhouse gas emissions, such as the Regional Greenhouse Gas Initiative, which imposes a mandatory cap and trade program to reduce carbon dioxide emissions from power plants. See Regional Greenhouse Gas Initiative Fact Sheet (available at http://www.rggi.org/docs/RGGI_Executive_Summary.pdf). As discussed above, Congress has also considered the risks of greenhouse gas emissions.

decisions in which the company was not a party based on the impact of such decisions on the company may require companies to monitor court decisions more closely than they have historically. An assessment of the physical impacts of climate change and other environmental matters also may present challenges to companies, given the uncertainties in predicting the future effects of climate change. The development of policies and strategies relating to emissions management may need to take into account every part of the company's operations, from monitoring and gathering data about emissions and taking steps to reduce emissions to taking management's success in those areas into account in making compensation decisions.²⁸

Those companies that have not developed policies and strategies to address the material financial risks of climate change will need to develop such strategies if they want to provide, or are asked by their shareholders to provide, the types of disclosures agreed to by the Companies. Preparation of such disclosures for a Form 10-K may challenge even those companies that have developed such strategies because of the enforcement actions and litigation that may be brought for inaccurate disclosure by the SEC, state attorneys general and other state agencies, as well as private plaintiffs.²⁹

Morgan Lewis can help. Morgan Lewis's energy and environmental attorneys are working with utility and other companies on renewable energy projects, "clean" technologies, emission trading, and other strategies to manage greenhouse gas emissions and sustainability, while also closely tracking legislation, regulatory actions, and litigation involving greenhouse gas emissions.³⁰ In addition, our securities lawyers are experienced with disclosure and financial reporting issues and can help companies evaluate the extent to which they want to provide the types of disclosures agreed to by the Companies. Finally, our corporate governance and executive benefits attorneys can also help companies evaluate corporate governance actions in the area of risks of climate change, including compensation decisions that drive and reward environmental stewardship.

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28. A recent report commissioned by Ceres and authored by Risk Metrics Group notes that none of the 63 companies examined for purposes of the report had taken the step of linking executive compensation to climate change initiatives, although companies are beginning to address climate change in their operations, product development, and supply chain management; are increasing their disclosures about climate change issues; and have given board committees and members of senior management specific environmental-related responsibilities. "Corporate Governance and Climate Change—Consumer and Technology Companies" (December 2008) (available at <http://www.ceres.org/Document.Doc?id=397>).

29. The exposure to potential litigation questioning the adequacy of climate change disclosures suggests that companies should review their officer and director liability insurance policies. Such policies may include language that excludes coverage if the lawsuit relates to pollution. Given the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency* (see *infra* note 27) that greenhouse gas emissions are a "pollutant" under the Clean Air Act, companies should make sure that a case alleging inadequate disclosure about greenhouse gas emissions would be covered by their officer and director liability insurance policies. The firm has attorneys who can assist with that review.

30. See Morgan Lewis, "White Paper—Communicate: An Overview of Climate Change Law" (May 2008) (available at http://www.morganlewis.com/pubs/LIT_ClimateChangeLaw_WhitePaper_15May08.pdf).

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