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Implementing Corporate Climate Change Responsibility: Possible State Legislative and SEC Responses to Climate Change Through Corporate Law Reform

The U.S. Supreme Court, in *Massachusetts v. EPA*, quoted the following position put forth by the Environmental Protection Agency (EPA): The "well-documented rise in global temperatures" is possibly the "most pressing environmental challenge of our time."[1] Within the opinion, the Court described the "harms associated with climate change" as "serious and well recognized"[2] and acknowledged the "causal connection between man-made greenhouse gas emissions and global warming."[3] The Supreme Court held that the EPA both has the authority to regulate greenhouse gas emissions under the Clean Air Act (CAA) and is in fact required to regulate greenhouse gas emissions, unless the Agency concludes either that greenhouse gases do not contribute to climate change or that it cannot scientifically determine the gases' harmful effects.[4] In light of this holding and the current science on climate change, it is now possible for the EPA to create a national program to address individual and corporate contributions to climate change by enacting greenhouse gas

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1 Massachusetts v. EPA, 549 U.S. 497, 504–05 (2007).

2 *Id.* at 521.

3 *Id.* at 523.

4 Robert V. Percival, Massachusetts v. EPA*: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 127 (2008).

emissions regulations, although the timing and reporting format for this comprehensive regulatory policy is unknown.[5] Not only is this comprehensive reporting possible, it is inevitable. The EPA can no longer reasonably refuse to regulate greenhouse gas emissions given the current state of science and the statutory standards found in the CAA.[6]

However, the process of converting a comprehensive regulatory theory into an enforceable regulation is lengthy and controversial under both the Administrative Procedure Act and the judicial process. For example, the EPA voluntarily began investigations under the CAA to regulate the lead content in gasoline in 1970.[7] Different controls were evaluated in 1971, two different maximum reduction timelines were proposed in 1972, and a lead phase-down was finally adopted in 1973.[8] But this ruling was followed by litigation in multiple federal circuits, finally leading to affirmation by the U.S. Court of Appeals for the Second Circuit in 1976 and by the U.S. Court of Appeals for the D.C. Circuit in 1980.[9] As a result, the lead phase-down regulations did not take effect until *ten years* after the process was initiated.[10]

Returning to greenhouse gases, the EPA did issue an endangerment proposal on April 17, 2009, "proposing to find that greenhouse gases in the atmosphere endanger the public health and welfare of current and future generations."[11] However, the process to obtain greenhouse gas emissions regulation under the CAA is still likely not near: first, a proposed endangerment finding is followed by public comments and

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5 For a discussion of the different comprehensive policies the EPA might adopt, see Thomas D. Peterson et al., *Developing a Comprehensive Approach to Climate Change Policy in the United States that Fully Integrates Levels of Government and Economic Sectors*, 26 VA. ENVTL. L.J. 227 (2008).

6 *Id.* at 228.

7 *Id.* at 256 n.98.

8 *Id.*

9 *Id.*

10 *Id.*

11 Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 18,886, 18,886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. ch. 1). A proposed endangerment finding occurs when the EPA Administrator advises the public that the Agency is planning on recognizing that certain chemicals or circumstances threaten the public health or welfare. *See id.* at 18,888. The public can then submit comments before a final endangerment finding is formalized and released. *Id.*

a final endangerment finding[12] and, *then*, the regulation process begins, including proposed standards based on science, technology, and stakeholder input, public comments, a final order, and implementation—often phasing in over multiple years. Assuming both that greenhouse gas regulation will follow an administrative process similar to that of lead and the EPA immediately started researching a comprehensive greenhouse gas strategy after the 2007 *Massachusetts v. EPA* decision, any national standards and accompanying disclosure structure will likely not be implemented until 2017.[13]

The question thus becomes: How can a business prepare for these unknown but imminent changes? How can a business ensure that it is focusing on and pursuing the "triple bottom line," embracing profit, the planet, and people simultaneously, when making business decisions?[14] Additionally, how can a state, the traditional regulator of business law, prepare its incorporated businesses to weather these changes successfully and efficiently to ensure continued, or greater, business tax revenues and jobs for their citizens? More importantly, how can a state ensure that its incorporated businesses will be able to pursue responsible decisions regarding climate change free from the threat of litigation by dissenting, profit-focused shareholders? Finally, how can the federal government ensure uniformity among businesses for greenhouse gas emissions regulation? This uniformity is crucial for investors and customers to readily compare the extent of a business's climate change responsibility today—without having to wait the ten years it will likely take for the EPA regulations to be formalized.

Environmentally minded citizens are already clamoring for green businesses, sustainability, and social and environmental accountability.[15] Businesses are being assessed by environmentally conscious investors and customers alike based on the companies' role and purpose within the worldwide community, not just on their

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12 Press Release, U.S. Envtl. Prot. Agency, EPA Finds Greenhouse Gases Pose Threat to Public Health, Welfare/Proposed Finding Comes in Response to 2007 Supreme Court Ruling (Apr. 17, 2009), *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/0EF7DF675805295D8525759B00566924.

13 *See* Peterson et al., *supra* note 5, at 256 n.98.

14 Kathleen Gilligan, *Trends, Predictions and Compliance in Green CSR; Special Issues for Law Firms*, *in* GREEN TECHNOLOGY LAW AND BUSINESS 2009: STRATEGIES FOR FINANCE, CARBON TRADING, IT, AND CARBON NEUTRAL POLICIES 201, 206 (PLI Corp. Law and Practice Course Handbook Series No. 1718, 2009).

15 *See* Peterson et al., *supra* note 5, at 228.

profitability.[16] Environmentally and socially responsible investors—and even some board members—should urge that quarterly profit returns be joined with considerations of sustainability when assessing the success of a business by arguing that businesses should be reconceived "to fit into the Earth community of the present for the future."[17] As evidence of this mounting pressure, $2.71 trillion of the $25.1 trillion being invested in the United States in 2008 was invested in accordance with the Socially Responsible Investing guidelines.[18] Many of these investors chose "green" mutual funds that invest only in environmentally responsible companies.[19] These green mutual funds allow environmentally conscious investors to ensure that their financial resources reflect their interest in stopping the waste of Earth's natural resources.[20]

However, despite this mounting public pressure, most investors remain in the dark about which businesses are pursuing responsible decisions regarding climate change and, more importantly, on how an individual corporation's interpretation of climate change responsibility compares to its competitors' interpretation. This information is simply not available to the investing public in a readily digestible format. This lack of comparable information is leading some investors to decide against making environmentally conscious choices in their investments despite a developed interest, thus freezing out part of the environmentally responsible investing market. In addition to investors being unable to access this information, businesses are also frozen as a result of the uncertainty experienced by other profit-driven shareholders and directors regarding the extent of protection against dissenting, profit-driven shareholder suits afforded to them by the business judgment rule.

Additional uncertainty arises concerning the form and substance of a disclosure when a business voluntarily decides to disclose information regarding its climate change responsibility. What should the disclosure's scope be: per facility, nationwide, or worldwide? Should emissions be reported on an annual basis or by daily

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16 Judith E. Koons, *Earth Jurisprudence: The Moral Value of Nature*, 25 PACE ENVTL. L. REV. 263, 332–33 (2008).

17 *See id.* at 337.

18 Soc. Inv. Forum, Overview for Financial Professionals, http://www.socialinvest.org/resources/professionals.cfm (last visited Dec. 27, 2009).

19 Rebecca Clarren, Green Investing 101 (Nov. 26, 2007), http://www.salon.com/mwt/good_life/2007/11/26/green_investing/.

20 *See id.*

maximums? Should the disclosure include direct and indirect emissions? Where is the line drawn on what emissions are included, and who draws it? These questions, which reveal current reporting uncertainties, turn to fear as a company worries that, if it includes all emissions from all sources worldwide and its competitor only includes direct emissions from U.S. facilities, then the company will appear to be the larger polluter in comparison, while the reality may be very different. This concern leads many companies to choose not to report their impact on climate change at all, choosing instead to wait the ten years it may possibly take for the EPA to finalize its greenhouse gas emissions policy.

However, as discussed above, public concern over climate change is growing, and both shareholders and consumers are already arguing for climate change responsibility through disclosure and mitigation of greenhouse gas emissions. Shareholders and consumers are eager to know the implications their business activities are having on climate change *today*, not ten years from now. This Comment calls on state legislatures and another federal agency, the Securities and Exchange Commission (SEC), to support this process. The authorizing and other constituency provisions of state business corporation laws should be modified to explicitly support social and environmental responsibility. This legislative support can then be relied upon to protect and direct corporate decisions that account for climate change when the business judgment rule fails due to a lack of case law and inconsistency in court decisions. Mandatory provisions with explicit guidance on how to account for climate change responsibility could allow for uniform disclosure and mitigation across the states. However, as a result of the "race to the bottom,"[21] only general, voluntary provisions will pass through the state legislatures as states are forced to choose the least costly, and thus least effective, regulations to ensure that corporations will remain incorporated within their state.

An additional option would be for the SEC to step in and clarify a business's disclosure obligations in relation to climate change responsibility and create uniform guidelines that could be applied throughout the nation. Through a combination of encouragement of new state laws and protections for general climate change responsibility and the SEC's establishment of explicit federal guidelines for clarification and uniformity, climate change disclosure

[21] For a description of the "race to the bottom," see *infra* Part II.B.

and mitigation would be possible and protected under existing laws without the need to wait for the EPA's greenhouse gas emissions policy.

In Part I, this Comment explores a recent corporate perspective termed climate change responsibility, which examines the connection between corporations and climate change, and the litigation risks faced by businesses that choose the responsible alternative. Building on this baseline, this Comment examines two potential state legislative methods to allow for climate change disclosure. First, Part II investigates a strategy of mandatory state corporate law modification requiring detailed greenhouse gas emissions disclosure and mitigation that is unlikely to be passed due to a race to the bottom. Part III then surveys a policy of optional state modification of authorization and constituency provisions, including a successfully passed Oregon model, which implements general support for increased environmental responsibility that, while optional, is more likely to be enacted. Moving to federal law, Part IV looks at the drafting and implementation of guidelines detailing both the scope and form for greenhouse gas emissions disclosures by the SEC to reinterpret the existing disclosure requirements in light of climate change responsibility. As a reflection on this discussion, the Appendix provides an example of SEC guidelines under Items 101 and 103 of Regulation S-K specifically addressing climate change disclosure that could be adopted and implemented. Through the combination of state legislative encouragement and protection and SEC guidelines creating uniformity, it may be possible to create a system of climate change responsibility in which businesses, investors, and customers can easily compare and make decisions today based on their future impact on the world's climate.

I
THE CONNECTION BETWEEN CLIMATE CHANGE, GREENHOUSE GAS EMISSIONS, AND CORPORATIONS

A. A Brief History of Anthropogenic Greenhouse Gas Emissions

In 1896, Swedish chemist Svante August Arrhenius posed a theory that the carbon emissions created by humans during the process of coal combustion could lead to a warming of the Earth's atmosphere.[22]

[22] *See* Svante Arrhenius, *On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground*, 41 PHIL. MAG. & J. SCI. 237, 249 (1896).

Arrhenius explained that carbon emissions have higher absorption coefficients than the regularly occurring atmospheric composition of gases and, thus, that these emissions have the ability to trap additional solar energy within the atmosphere.[23] This theory has since become a well-documented reality as scientists have found that increases in global temperatures coincide with significant increases in carbon concentrations in the atmosphere.[24] Similar to Arrhenius's original model, it is now understood that carbon gases in the atmosphere trap the sun's infrared radiation and prevent the release of that radiation back into space.[25] The collection of carbon gases with the ability to both trap the sun's heat and subsequently raise the atmospheric temperature is known as greenhouse gases, which traditionally includes carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_20), hydroflourocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6).[26]

While the science behind the capacity of these greenhouse gases to raise the Earth's temperature has been clear for some time, the understanding of the interaction between large corporations and their human-induced greenhouse gas emissions has taken the public longer to grasp. Beginning in the late 1970s, the U.S. government began to officially fund research into the correlation between climate processes, greenhouse gas emissions, and the sources and sinks of these emissions.[27] This research has now expanded to a global scale, recently resulting in the following conclusion by the 2007 Intergovernmental Panel on Climate Change:

> Most of the observed increase in globally averaged temperatures since the mid-20th century is very likely [i.e., greater than 90% certainty] due to the observed increase in anthropogenic greenhouse gas concentrations. . . . Discernible human influences now extend to other aspects of climate, including ocean warming, continental-average temperatures, temperature extremes and wind patterns.[28]

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23 *Id.* at 248–49.

24 Massachusetts v. EPA, 549 U.S. 497, 504–05 (2007).

25 *Id.* at 505.

26 CAL. CLIMATE ACTION REGISTRY, CALIFORNIA CLIMATE ACTION REGISTRY GENERAL REPORTING PROTOCOL: REPORTING ENTITY-WIDE GREENHOUSE GAS EMISSIONS VERSION 3.1, at 6 (2009), *available at* http://www.climateregistry.org/resources/docs/protocols/grp/GRP_3.1_January2009.pdf.

27 *Massachusetts*, 549 U.S. at 507.

28 PEW CTR. ON GLOBAL CLIMATE CHANGE, THE CAUSES OF GLOBAL CLIMATE CHANGE: SCIENCE BRIEF 1, at 5 (2008) (first alteration in source) (citing Intergovernmental Panel on Climate Change, *Summary for Policymakers*, *in*

B. Connecting Anthropogenic Greenhouse Gas Emissions to Corporations

Once the connection between climate change and anthropogenic greenhouse gas emissions was proven with ninety percent certainty, the next step was to pinpoint the sources of these greenhouse gas emissions. Research showed that the largest source of both carbon dioxide emissions and overall greenhouse gas emissions was just as Arrhenius predicted: fossil fuel combustion.[29] Fossil fuel combustion is central to the business model of several large American businesses. For example, Chevron Corporation, a Pennsylvania corporation that engages in oil and gas exploration and refining, emitted sixty-eight million tons of greenhouse gases in 2006.[30] Ninety percent of those emissions is the result of fossil fuel combustion, which occurs during the standard operating procedure of flaring and venting natural gases, a by-product of the crude oil refining process.[31] BP America, Inc., a Delaware corporation that owns and operates the largest oil refinery in California, emitted sixty-five million tons of carbon dioxide in 2006.[32] ConocoPhillips Company, a Delaware corporation that operates three oil refineries in California, emitted 62.3 million tons of carbon dioxide in 2006.[33] If one also included the emissions from the

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INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 1, 5 (Susan Solomon et al. eds., 2007)), *available at* http://www.pewclimate.org/docUploads/global-warming-science-brief-august08.pdf.

29 U.S. ENVTL. PROT. AGENCY, 2009 U.S. GREENHOUSE GAS INVENTORY REPORT: INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2007, at ES-6 (2009), *available at* http://www.epa.gov/climatechange/emissions/downloads09/InventoryUSGhG1990-2007.pdf.

30 Complaint for Damages at 7, Native Village of Kivalina v. ExxonMobil Corp., 2009 WL 3326113 (N.D. Cal. 2009) (No. 08-CV-01138 SBA) (citing Chevron Corp., Climate Change (May 2009), http://www.chevron.com/globalissues/climatechange/actionplan/#), *available at* http://www.climatelaw.org/cases/country/us/kivalina/Kivalina%20Complaint.pdf.

31 *Id.* (citing CARBON DISCLOSURE PROJECT, CHEVRON CORPORATION RESPONSE TO THE CARBON DISCLOSURE PROJECT 5TH QUESTIONNAIRE 11 (2007), *available at* http://search.cdproject.net/responses2/attachedfiles/Responses/40936/876/CDP5_Chevron_AQ.pdf).

32 *Id.* at 6 (citing CARBON DISCLOSURE PROJECT, BP PLC 2007 SUBMISSION TO THE CARBON DISCLOSURE PROJECT (CDP5) 8 (2007), *available at* http://www.search.cdproject.net/responses2/attachedfiles/Responses/40910/1422/CDP5_BP_AQ.doc).

33 *Id.* at 8 (citing CARBON DISCLOSURE PROJECT, GREENHOUSE GAS EMISSIONS QUESTIONNAIRE: CONOCOPHILLIPS CORPORATION 5 (2007), *available at* http://www.conocophillips.com/EN/newsroom/other_resources/documents/CDP5_ConocoPhillips2007_AQ.pdf).

use of the oil products produced by these companies, the numbers would be much higher. These mammoth corporations in the energy sector are the largest contributors to greenhouse gas emissions based on the use of their oil products, and, therefore, their standard operations can be directly linked to climate change.[34]

The energy sector corporations, however, are not the only contributors to greenhouse gas emissions and climate change. Nearly all private and public entities spanning across industry sectors and geographical borders emit some form and quantity of greenhouse gases. These entities leave a "carbon footprint" that can be linked to global climate change.[35] This carbon footprint includes both direct emissions from mobile combustion sources (e.g., vehicles), stationary combustion sources (e.g., water heaters, air conditioners, furnaces, boilers), process sources (e.g., agricultural processes), and fugitive sources (e.g., pipeline leaks in air conditioning) and indirect emissions from purchased and consumed electricity, steam, or direct heating and cooling.[36] For example, the University of California, Santa Barbara campus directly and indirectly emitted approximately 58,550 tons of carbon dioxide in 2007.[37] The largest contributors of these emissions were purchased electricity—sixty-four percent of total emissions—and stationary combustion—thirty-four percent of total emissions.[38]

34 *See* Steven Ferrey, *Gate Keeping Global Warming: The International Role of Environmental Assessments and Regulation in Controlling Choice for Future Power Development*, 19 FORDHAM ENVTL. L. REV. 101, 157 (2009).

35 CAL. AIR RES. BD. ET AL., LOCAL GOVERNMENT OPERATIONS PROTOCOL FOR THE QUANTIFICATION AND REPORTING OF GREENHOUSE GAS EMISSIONS INVENTORIES: VERSION 1.0, at 10 (2008), *available at* http://www.climateregistry.org/resources/docs/protocols/industry/local-gov/lgo_protocol_september2008.pdf.

36 *Id.* at 23–24.

37 CAL. CLIMATE ACTION REGISTRY, ANNUAL EMISSIONS REPORT: UNIVERSITY OF CALIFORNIA, SANTA BARBARA 1 (2009), *available at* http://facilities.ucsb.edu/_client/pdf/sustainability/climate_registry/CREntityEmissionReport2006.pdf.

38 *Id.* (Direct emissions included in metric tons of carbon dioxide emissions are from mobile combustion (1359.26), stationary combustion (19,858.05), process emissions (0.00), and fugitive emissions (0.00). Indirect emissions included in metric tons of carbon dioxide emissions are from purchased electricity (37,454.18), purchased steam (0.00), and purchased heating and cooling (0.00)).

C. Climate Change Responsibility: Recognizing the Financial and Moral Risks of Greenhouse Gas Emissions

As the links between specific corporations, their greenhouse gas emissions, and the corresponding increases in global temperature become more concrete, business executives and investors alike will likely be taking increased financial and moral interest in achieving climate change responsibility.[39] Greenhouse gas emissions and climate change effects will have physical, regulatory, and behavioral impacts on a business based on the long-term system view inherently associated with this environmental change.[40] Despite the current lack of a greenhouse gas emissions standard formulated by the EPA under the CAA, the impact of climate change on corporations is already being felt today. For example, financial risk as a result of greenhouse gas emissions is a very real and current concern of ExxonMobil, BP America, Chevron, ConocoPhillips, Shell Oil Company, and other large power corporations—the largest greenhouse gas emitters, as discussed above—due to pending litigation for the harms resulting from climate change, such as increased sea level, storm intensity, permafrost melting, and erosion.[41]

The financial risk extends beyond these large corporations to all greenhouse gas emitters as President Obama calls for an "economy-wide" cap-and-trade program to reduce greenhouse gas emissions by eighty percent by 2050.[42] "Economy-wide" indicates that all large-

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39 *See* Lenny T. Mendonca & Jeremy Oppenheim, *Investing in Sustainability: An Interview with Al Gore and David Blood*, MCKINSEY Q., May 2007, at 10, http://www.mckinsey.com/clientservice/ccsi/pdf/Investing_in_Sustainability.pdf.

40 A long-term system view accounts for the harmful effects of climate change on all businesses over their lifetime. *Id.* at 3.

41 *See, e.g.*, Native Village of Kivalina v. ExxonMobil Corp., 2009 WL 3326113 (N.D. Cal. 2009) (considering suit brought by a federally recognized, native Alaskan Inupiat Tribe facing the destruction of their Arctic Circle settlement due to the melting of sea ice and resulting massive erosion against multiple U.S. industrial corporations that contributed to the emission of large quantities of greenhouse gases); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (examining plaintiff's request that the court cap the greenhouse gas emissions of multiple large power companies to abate the public nuisance of climate change), *vacated*, 582 F.3d 309 (2009); *see also* California v. Gen. Motors Corp., No. C06-05755 MJJ (EMC), 2007 WL 2726871 (N.D. Cal. Sept. 17, 2007) (analyzing a public nuisance claim brought by the State of California against several large automobile manufacturers for their effect on climate change).

42 OBAMA FOR AM., BARACK OBAMA AND JOE BIDEN: NEW ENERGY FOR AMERICA, http://www.barackobama.com/pdf/factsheet_energy_speech_080308.pdf (last visited Jan. 1, 2010). A cap-and-trade program is an administrative tool used to control climate change by providing economic incentives to companies in exchange for the companies' reduction of their greenhouse gas emissions. *See* CTR. FOR AM. PROGRESS, CAP AND

scale emitters, not just the large emitters in the energy sector, will both have an explicit maximum limit on the quantity of greenhouse gases they can emit and be forced to purchase allowances or face financial consequences if they exceed this limit.[43] In addition to the regulatory costs associated with these standards, mitigation and adaptation costs will also be high as corporations become better suited to a new climate. A University of California, Berkeley study estimates that the damages posed to U.S. businesses from forced mitigation and adaptation, assuming current greenhouse gas emissions levels are not substantially reduced, are tens of billions of dollars per year in direct costs, uncalculated indirect costs, and additional exposure of "trillions of dollars of assets to collateral risk."[44] In addition, climate change has ethical implications due to rising temperatures, drinking water shortages, and rising sea levels that will morally and financially affect businesses and investors alike.[45] Climate change damages the quality and viability of life, especially for the poor who face climate change without the financial resources to seek relief.[46]

These financial and moral concerns resulting from greenhouse gas emissions have led many shareholders to consider sustainability criteria when making investment decisions.[47] Sustainability criteria address the practice of conserving the Earth's resources, so these resources can be naturally replaced before they are depleted through

TRADE 101 (2008), http://www.americanprogress.org/issues/2008/01/pdf/capandtrade101.pdf. In brief, the government sets a cap or limit on the quantity of greenhouse gas emissions allowed for each large-scale emitter. *Id.* Corporations significantly below this cap can sell credits or allowances for profit to other companies that are unable or unwilling to meet this cap. *Id.*

43 CTR. FOR AM. PROGRESS, *supra* note 42.

44 FREDRICH KAHRL & DAVID ROLAND-HOLST, CALIFORNIA CLIMATE RISK AND RESPONSE 5 (Dep't of Agric. & Res. Econ., Univ. of Cal., Research Paper No. 08102801, 2008), *available at* http://are.berkeley.edu/~dwrh/CERES_Web/Docs/California Climate Risk and Response.pdf.

45 Many poor nations are struggling with the cost of relocating these poor "climate refugees." The expense has led to some novel cases, including *Gbemre v. Shell Petroleum Development Co. of Nigeria*, where the claimant argued successfully that the flaring of gases in Nigeria was a "gross violation" of the Nigerian constitutional right to life and dignity. Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd., [2005] No. FHC/B/CS/53/05, at 29–30 (F.H.C.) (Nigeria). For information on climate change litigation strategies on an international front, see Climate Justice Programme, Climate Justice: Enforcing Climate Change Law, http://www.climatelaw.org (last visited Jan. 1, 2010).

46 KAHRL & ROLAND-HOLST, *supra* note 44, at 111.

47 Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment,* 57 BUS. L. 681, 681 (2002).

the balancing of the economic, environmental, and social vitality of a business.[48]

Under the climate change perspective presented above, this Comment argues that business sustainability must also include a concept termed within this Comment as "climate change responsibility." Climate change responsibility, from an individual business perspective, is achieved through the recognition of a corporation's social and environmental impact through its impact on climate change. Climate change is attributable to anthropogenic greenhouse gas emissions. Therefore, through the quantification, disclosure, and mitigation of greenhouse gas emissions, this Comment argues that a business can achieve climate change responsibility. Disclosure is a key piece of the climate change responsibility puzzle, as it allows investors and customers to make their own decisions accounting for climate change as they invest their money and purchase goods and services by comparing competing businesses.[49]

D. Litigation Risks of Disclosing and Mitigating Greenhouse Gas Emissions

The technology needed to disclose and mitigate greenhouse gas emissions requires extensive time and money. Corporations have a legitimate fear that by investing this money and time today there will be a decreased profit in the short term. The legal system in the United States largely divides businesses into for-profit and not-for-profit structures.[50] Therefore, organizations that follow the triple-bottom-line business model, which consists of the consideration of profit, people, and the planet,[51] do not have explicit legal structures and fall

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48 Or. Envtl. Council, A Sustainable Economy, http://www.oeconline.org/our-work/economy (last visited Jan. 4, 2010).

49 *See* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1199 (1999) (describing the importance of disclosure for possible investments based on social and environmental impacts).

50 Michael D. Gottesman, Comment, *From Cobblestones to Pavement: The Legal Road Forward for the Creation of Hybrid Social Organizations*, 26 YALE L. & POL'Y REV. 345, 345 (2007).

51 The triple-bottom-line business model, sometimes shortened as "planet, people, profit," means "'using, developing and protecting resources in a manner that enables people to meet current needs and provides that future generations can also meet future needs, from the joint perspective of environmental, economic and community objectives.'" Barry Woods, *Advancing the New Economy: Oregon Lawyers Embrace Sustainability*, OR. ST. B. BULL., Oct. 2009, at 19 (quoting OR. REV. STAT. § 184.421 (2009)), *available at* http://www.osbar.org/publications/bulletin/09oct/newecon.html.

into a legally unstable middle ground. Without explicit state business law or SEC guidelines, the board of directors in these corporations find themselves debating whether to disclose climate change responsibility factors and, if so, what to include and what format those disclosures should take.

These boards rely on the business judgment rule to survive dissenting shareholder lawsuits. The business judgment rule "'is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'"[52] In short, the business judgment rule ensures that a court will not substitute its judgment for that of the board of directors if the latter's decision can be "attributed to any rational business purpose."[53] Thus, when applicable, the business judgment rule "insulates directors from liability, and imposes upon the party challenging the decision [namely the dissenting shareholders] the burden of rebutting the presumption."[54] In theory and practice, this burden should be nearly impossible to overcome.

While climate change reform and sustainability gain in popularity among citizens and investors alike, boards of directors are driven to make decisions that consider climate change implications.[55] These decisions, if different than a more profitable alternative, would hopefully be protected by the business judgment rule since the courts will presume that the board of directors is acting with some rational business purpose, thus creating a heavy, if not insurmountable, burden for any potential dissenting shareholder to overcome. However, the business judgment rule, while well developed in Delaware, New York, and California,[56] has not been fully developed in every state due to sparse case law. In addition, there is still a common misconception that maximizing shareholder wealth is the only legal

52 Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)); *see also* OR. REV. STAT. § 60.357(1) (2009); FDIC v. Castetter, 184 F.3d 1040, 1044 (9th Cir. 1999) (explaining that the business judgment rule protects corporate officials from liability for breach of the duty of care if they act in good faith and without corrupt motives).

53 Navellier v. Sletten, 262 F.3d 923, 946 n.12 (9th Cir. 2001) (internal quotation marks omitted).

54 *Id.*

55 *See* Soc. Inv. Forum, *supra* note 18.

56 *See generally* John C. Coffee, Jr., *New Myths and Old Realities: The American Law Institute Faces the Derivative Action*, 48 BUS. LAW. 1407 (1993).

obligation for corporate decisions.[57] To overcome this misconception, corporations can write objectives for their companies into their articles of incorporation, like an explicit commitment to climate change responsibility that extends beyond wealth maximization.[58] There is little case law, however, that indicates whether these objectives would be legally protected in a shareholder derivative suit.[59]

E. State Legislative Modifications and SEC Guidelines to Protect Climate Change Responsibility

Because of the uncertainty surrounding the application of the business judgment rule in this context, the business community is left with investors and companies sharing a drive to obtain climate change responsibility, but lacking the knowledge of whether the decisions motivated by that drive will be protected or what form those decisions should take. Reform of the state corporate laws requiring greenhouse gas disclosure and mitigation can reduce this uncertainty and provide the needed security and affirmative support for corporations to make these decisions regarding climate change responsibility. The first option is for state legislatures to specifically authorize profit-sacrificing objectives in the state laws governing corporations to protect and even encourage climate change responsibility. However, mandatory and explicit business regulations often cannot be passed legislatively due to the strong, regulation-wary business lobby. Thus, the second option is for legislatures to pass general, ambiguous, and optional statutes to support environmentally and socially responsible decisions. This Comment explores these first two options and then consider a third: federal SEC guidelines. SEC guidelines provide guidance to businesses on how to comply with current laws and are written by the SEC, not a legislature, as a service to businesses to ensure successful compliance and avoid SEC enforcement.[60] By interpreting current disclosure laws in light of the financial risks posed by climate change, the SEC can issue guidelines to businesses on a federal scale, creating a uniform framework for industry to

57 Judd F. Sneirson, *Green is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 989 (2009).

58 Gottesman, *supra* note 50, at 356–57.

59 *Id.* at 357.

60 Colleen P. Mahoney et al., *SEC Enforcement Trends*, SP018 A.L.I.–A.B.A. 427 (2008).

achieve climate change responsibility, for investors to gain knowledge about the climate change impact of potential investment opportunities, and for businesses to obtain security against dissenting shareholders for their environmentally responsible decisions.

II
STATE-MANDATED CORPORATE CLIMATE CHANGE RESPONSIBILITY AND THE LIKELY OPPOSITION BY THE BUSINESS BAR

A. Proposed Model: A Mandatory Corporate Social Responsibility Report

One approach to ensure the climate change responsibility of businesses is being pursued by Professor Nicholas Robinson of the Pace University School of Law.[61] Professor Robinson is currently drafting a new legislative bill for various states, starting with Delaware. This bill, if passed, would change state corporate laws to require that all companies file an annual social responsibility report.[62] This mandatory report would detail the company's carbon footprint, including greenhouse gas emissions and mitigation practices being considered or adopted to minimize the footprint.[63]

B. The "Race to the Bottom": The Possibility of Opposition from the Business Bar

The power of business lobbyists and the "race to the bottom" is not to be underestimated, as both of these forces may undermine the ability of any single state to enact regulations that are stricter than those in another state.[64] Since a business can easily change its state of incorporation, and thus the recipient of its state taxes, states often lower regulatory standards to encourage businesses to stay in or to move to that state in what is known as a "race to the bottom."[65] The business section of a state's legal bar is often instrumental in lobbying within this race, ensuring that state corporate laws, while facially

61 E-mail from Nicholas A. Robinson, Professor, Pace Univ. Sch. of Law, to Richard Hildreth, Professor, Univ. of Or. Sch. of Law (Dec. 23, 2008, 02:56:21 PST) (on file with author).

62 *Id.*

63 *Id.*

64 ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 101–03 (4th ed. 2003).

65 *See id.* at 101–02.

appealing, are greatly inefficient at actually regulating.[66] The laws resulting from the "charter competition"[67] among states to enact the least regulation necessary to win the "race to the bottom" appeal to businesses that want to spend less money on compliance.[68] Delaware is currently the winner in this charter competition, as it is the leading state for incorporation among businesses as a result of its inexpensive regulations that are believed to be efficient.[69] Due to this race, the chances of mandatory regulations being passed through a state legislature are slim, especially in regulation-wary Delaware.

C. California's Assembly Bill 2944: Evidence of the "Race to the Bottom"

Evidence of this fear of regulation and the corresponding inability to pass legislation in the midst of opposition from the business bar can be found just this past year in liberal California. Assembly Bill 2944 was a proposed revision to Section 309 of the California Corporations Code to allow a director of a company to consider

> the long- and short-term effects that the corporation's actions may have: (1) on the corporation's prospects for potential growth, development, productivity, and profitability; (2) on its employees, suppliers, customers, and creditors; (3) on the economy of the state and the nation; (4) on the community and societal considerations; and (5) on the environment.[70]

This bill was promoted as a means of filling the gap left by the lack of any constituency provision in California.[71] The bill would create a so-called "other constituency provision," which allows directors of a corporation to consider explicit interests, beyond those of shareholders, when making decisions that will greatly impact the course of business; the specific interests to be considered range from

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66 *See* Lynn M. LoPucki & Sara D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom,"* 54 VAND. L. REV. 231, 271 (2001).

67 *See id.* at 232.

68 *See* Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1082 (2009).

69 *See* LoPucki & Kalin, *supra* note 66, at 232.

70 S. JUDICIARY COMM., ANALYSIS OF ASSEMBLY BILL 2944, 2007–2008 Leg., Reg. Sess., at 1 (Cal. 2008) [hereinafter BILL ANALYSIS], *available at* http://info.sen.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_cfa_20080611_123248_sen_comm.html.

71 *Id.* at 7.

state to state.[72] Like the business judgment rule, an other constituency provision's purpose is to shield directors from dissenting shareholder liability when decisions are made based on more than profit alone.[73]

California's Business Corporation Act, however, has no such provision and, thus, no explicit statutory protection for directors who consider constituency interests beyond their shareholders' interests, like employees, suppliers, and creditors.[74] This limitation is especially apparent "in a sale situation, in which the sole duty of a director is to maximize immediate shareholder value."[75] For example, the proponents of Assembly Bill 2944 cite to corporations that have specifically decided not to incorporate in California due to the lack of an other constituency provision.[76] Yet the business bar of California took official opposition to the bill, claiming that the provision would actually expand the standard of care for corporate directors, which would (1) leave directors less accountable for their decisions due to the expanded discretion they would enjoy under the bill, (2) create a system of entrenched directors who could escape the consequences of a successful takeover, and (3) create additional burdens for conscientious directors to define what the economic, social, and environmental factors entail and how much weight to give them.[77] These apprehensions culminated in a veto by Governor Schwarzenegger in response to a letter from the business bar in California detailing the concerns listed above.[78] Similar other constituency provisions have passed in thirty-three states without any of these concerns coming to fruition,[79] yet California was unable to pass this legislation due to the business bar's opposition.

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72 Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1087 (2000); *see also* Judd F. Sneirson, *Race to the Left: A Legislator's Guide to Greening a Corporate Code*, 88 OR. L. REV. 491 (2009).

73 Adams & Matheson, *supra* note 72, at 1088.

74 BILL ANALYSIS, *supra* note 70, at 2, 7.

75 *Id.* at 9.

76 *Id.*

77 Memorandum from W. Derrick Britt, Vice Chair of Legislation, Bus. Law Section, State Bar of Cal., to the Office of Governmental Affairs 3–4 (Apr. 14, 2008), *available at* http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/ab-2944-statement-of-position-final.pdf.

78 *See* Letter from Arnold Schwarzenegger, Governor, State of Cal., to the Members of the Cal. State Assembly (Sept. 30, 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_vt_20080930.html.

79 Sneirson, *supra* note 72, at 499.

D. The Potential for Climate Change Responsibility Through Mandatory State Legislation

While a mandatory greenhouse gas disclosure and mitigation strategy is superficially appealing, it is unfortunately impractical to believe such explicit and expensive state legislation will become a reality. If Delaware or another state were to pass such legislation, it is likely that the affected corporations would simply switch their state of incorporation to avoid the new laws altogether. As a result, while this legislation is extremely attractive as a means of giving businesses the support necessary to make responsible decisions addressing climate change, giving investors the uniform greenhouse gas disclosure information they desire, and allowing for climate change mitigation sooner rather than later, the legislation is unlikely to make it past the state legislature.

III

GENERAL, OPTIONAL MODELS ALLOWING BUSINESSES TO TAKE CLIMATE CHANGE RESPONSIBILITY FOR GREENHOUSE GAS EMISSIONS

A second option is to pass general, optional state legislation suggesting and encouraging corporations to take climate change responsibility. By incorporating broad, general language about environmental and social responsibility instead of controversial climate change language and allowing for optional implementation, thereby permitting individual businesses to include or disregard the new statute, it is possible to pass this kind of legislation despite the "race to the bottom." Oregon House Bill 2826 and House Bill 2829 provide excellent models for the basis of a discussion of how this legislation can be drafted and promoted.

A. Oregon House Bill 2826: An Optional Provision Urging Environmental and Social Responsibility

An environmentally and socially responsible model of an authorizing provision—the section of state legislation that legally allows a company to incorporate within a state—was adopted by the Oregon legislature and took effect January 1, 2008, as Oregon House Bill 2826,[80] which was later codified as Oregon Revised Statute

[80] Or. State Legislature, 2007 House Measure History, House Bill 2826, http://www.leg.state.or.us/07reg/pubs/hsemh.html (last visited Jan. 4, 2010).

(ORS) 60.047(2)(e).[81] This newly adopted statute added an option to Oregon's Business Corporation Act allowing Oregon corporations to add "[a] provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible" to their articles of incorporation.[82] The statute provides that any new corporation formed in Oregon may include a provision in its articles of incorporation "authorizing or directing the corporation to be operated in a sustainable manner."[83] "Moreover, any existing Oregon corporation can take that [same] step by amending its articles of incorporation, which will then govern operations after the date of the amendment."[84] With this statute, "Oregon's Business Corporation Act became the first state corporate code to expressly acknowledge the goal of sustainable business practices."[85]

The statute was drafted by Oregon Lawyers for a Sustainable Future, a group of Oregon State Bar members "who seek to create a sustainable society and to encourage the legal profession and individual lawyers to increase their involvement in this endeavor."[86] One of the drafters, business lawyer James M. Kennedy, praised "this landmark legislation [as] in line with both Oregon's national reputation as a leader in the sustainability movement and the theme of sustainability selected by the 2007 Oregon Business Summit. It will be followed with great interest by other states and corporate law professors across the nation."[87]

As discussed above, an environmentally and socially responsible, sustainable business can and should include the implicit goal of climate change responsibility, including greenhouse gas emissions disclosure and mitigation, in its operation. However, explicit language defining what environmentally and socially responsible practices are, like climate change disclosure, limits the ability of state

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81 OR. REV. STAT. § 60.047(2)(e) (2009).

82 *Id.*

83 Press Release, Or. Lawyers for a Sustainable Future, New Law Embeds "Sustainability" in Oregon Business Corporation Act (June 1, 2007), http://www.earthleaders.org/olsf/hb2826.

84 *Id.*

85 *Id.*

86 Ctr. for Earth Leadership, Oregon Lawyers for a Sustainable Future, http://www.earthleaders.org/olsf (last visited Jan. 4, 2010).

87 Press Release, *supra* note 83.

legislatures to pass statutes similar to the one passed in Oregon.[88] Under the mantra of "no more regulation," fear runs strong that states with corporate laws that are too far out of line with the norm will watch helplessly as corporations leave their state to incorporate in another state with less regulation.[89] To avoid this scenario and gain acceptance of the bill, the drafters of House Bill 2826 made it permissive rather than mandatory.[90] Additionally, they did not attempt to define "socially or environmentally responsible corporate behavior," leaving the definition to the interpretation of the unique business entities that adopt it.[91]

This statute was promoted to the Oregon legislature as a means for a corporation to provide directors with some protection in making environmentally and socially responsible decisions, such as the decision to disclose and mitigate greenhouse gas emissions, without the fear of derivative shareholder suits resulting from the sparse case law in Oregon regarding the business judgment rule.[92] The lack of judicial decisions on the business judgment rule may create a hesitation within a corporation that it will be subject to shareholder derivative suits if it chooses a socially or environmentally responsible alternative that does not aim to maximize shareholder profits.[93] As evidence of the sparse case law on the business judgment rule in Oregon, the Oregon Supreme Court has not decided a case relying on the business judgment rule since 1967.[94] Increasing the fear of liability is a case from the U.S. District Court of Oregon in 2007 that recited the business judgment rule but then decided to rule against the decision of the corporation's managers anyway, substituting the court's own judgment for that of the corporation's managers in direct violation of the business judgment rule.[95] Due to the lack of Oregon case law on the business judgment rule and, therefore, the lack of confidence by boards of directors to make environmentally and socially responsible decisions that may not necessarily be profit

88 Telephone Interview with Dick Roy, Managing Dir., Ctr. for Earth Leadership (Feb. 24, 2009).

89 *Id.*

90 *Id.*

91 *Id.*

92 Sneirson, *supra* note 57, at 1019.

93 *Id.*

94 *See* McMunn v. ML & H Lumber, Inc., 429 P.2d 798, 800–01 (Or. 1967).

95 *See* Colvin v. Colvin, No. 05-409-AA, 2007 WL 2248160, at *11–15 (D. Or. Aug. 1, 2007).

maximizing, members of the Oregon legislature were worried that Oregon businesses may be "chilled . . . especially as [their decisions] relate . . . to environmentally and socially responsible conduct."[96]

Other reasons presented to the House Judiciary Committee in promoting this statute included: the recognition of a "shareholder democracy" where a contract could be formed between a corporation and its shareholders to require the business to be environmentally and socially responsible; a focus on the need for transparency of corporate objectives between shareholders and the board of directors; and a recognition that this provision is optional, not mandatory, for Oregon businesses.[97] This need for transparency between shareholders and boards of directors is especially applicable in the climate change context when an environmentally responsible board chooses to implement costly greenhouse gas emission-mitigation techniques. While not necessarily in the best interests of immediate profit, a board may decide it is the correct decision to take climate change responsibility, prepare for imminent EPA regulations under the CAA, or both. This long-term insight into the social and environmental impacts of a business is exactly what the Oregon legislature was hoping for and what environmentally conscious investors would like to be aware of. It was also emphasized that Oregon businesses that choose not to adopt this provision could still consider environmentally and socially responsible factors in their business decisions and receive the protection of the available, but sparsely supported, business judgment rule.[98]

Nau, Inc., was presented to the Oregon legislature during the contemplation of House Bill 2826 as an example of an Oregon business that has expressly authorized its board to consider environmental and social responsibility.[99] Nau's Rules of Corporate Responsibility state:

> The Corporation shall endeavor to conduct all aspects of its business in an environmentally and socially responsible manner, including the promotion of peaceful conflict resolution, the fair and humane management of factory working conditions, the equitable

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[96] *See Hearing on H.R. 2826 Before the H. Judiciary Comm.*, 74th Legis. Assem., Reg. Sess., tape 77A, at 21:52 (Mar. 13, 2007) [hereinafter *House Hearing on H.R. 2826*] (statement of James Kennedy, Partner, Kennedy & Kennedy LLP). All legislative materials cited in this Comment are located in the Oregon State Archives, Salem, Oregon.

[97] *Id.*

[98] *Id.*

[99] *Id.*

> treatment of its employees, the implementation of a sustainable process of product creation, waste minimization and recycling, and philanthropy . . . . In this regard, the officers and directors will use their discretion and business judgment to determine how best to implement this policy consistent with their fiduciary duties to the stockholders of the Corporation.[100]

Directors and officers of the company are therefore authorized both to take into consideration and to balance environmental aspects, human rights, human health and safety, and the dignity of employees when making decisions.[101] As a result of these considerations, the company has put in place a program requiring that five percent of the purchase price of all products sold is contributed to a charitable organization, an assurance that a fair and reasonable living wage will be paid to all employees, an official grant of "spousal" benefits to domestic partners of the same or opposite sex, the requirement that no partner will receive a cash salary more than twelve times that of the lowest-paid, full-time employee, and, finally, an incorporation provision that the charter, including these rules, can only be changed with a seventy-five percent shareholder vote.[102] One of the charitable organizations receiving funds from product purchases is the Breakthrough Institute, "a small think tank with big ideas" about creating new progressive politics focusing on new "thought movements" to help deal with climate change and its inequitable social implications, including the promotion of "large public investments to make clean energy cheap."[103] The "socially and environmentally responsible" charter of Nau, Inc., created before the passage of House Bill 2826, was promoted as an example of what socially and environmentally beneficial progress can be made in Oregon as a result of this law.

Focusing on these objectives and the example of Nau's charter quoted above, House Bill 2826 was approved by the House thirty-eight to eighteen and by the Senate seventeen to eleven.[104] It was

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100 Nau, Rules of Corporate Responsibility, http://www.nau.com/nau/LIGHTBOX-CORP_RESPONSIBILITY/ (last visited Jan. 4, 2010).

101 *House Hearing on H.R. 2826*, *supra* note 96, tape 77A, at 34:32 (statement of Jeffrey Wolfstone, Partner, Lane Powell PC).

102 *Id.*

103 The Breakthrough Institute, About: Our Mission, http://thebreakthrough.org/about.shtml (last visited Jan. 4, 2010).

104 Andy Giegerich, *Some Biz Lawyers Worry over Sustainability Effort*, PORTLAND BUS. J., Apr. 18, 2008, *available at* http://portland.bizjournals.com/portland/stories/2008/04/21/focus7.html.

signed into law by Oregon Governor Ted Kulongoski on June 1, 2007, who stated:

> I firmly believe that a commitment to sustainability is the best vehicle for creating long-term prosperity in Oregon, while also helping enrich our communities and our environment . . . . With this legislation, Oregon is pioneering efforts to create more sustainable business structures and I am confident that it will assist Oregon businesses in attracting investment and economic opportunities to the state.[105]

However, not everyone was completely behind House Bill 2826.[106] Concerns arose both from those who misunderstood the bill and from those who felt left out of the drafting process. Prior to the vote, the statute's drafters had conducted outreach efforts to the Oregon State Bar's Business Section, but those efforts did not generate a high level of interest.[107] After considering the bill, the Business Section decided to take no position, neither for nor against, in committee hearings.[108] Additional concerns about whose vision or opinion of what is environmentally and socially responsible would be used were presented to the House Judiciary Committee; in other words, who measured the gains or losses to the environment based on different business decisions?[109] Do the stockholders, the judiciary, the legislature, or perhaps all three decide whether a company is being environmentally and socially responsible? What happens when the shareholders disagree on what constitutes the environmentally responsible decision?[110] Could a stockholder potentially challenge a board of directors based on his or her vision of environmental responsibility?[111] One of the law's drafters, James Kennedy, responded to these concerns by indicating that businesses retain a "broad and general authority . . . to enter into these . . . contracts" and that "nothing in [the] bill . . . 'changes [or expands]' the rights of

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105 Press Release, *supra* note 83.

106 This opposition is evidenced by the twenty-nine combined votes against its passage in the House and the Senate. *See* Giegerich, *supra* note 104.

107 Telephone Interview with Dick Roy, *supra* note 88.

108 *Id.*

109 *House Hearing on H.R. 2826*, *supra* note 96, tape 77A, at 29:52 (testimony of Rep. Wayne Krieger, Or. House of Representatives).

110 *Id.*

111 *Id.*

dissenting shareholders. They will have any cause of action that they have currently."[112]

Kennedy's comment addressed the main concern over House Bill 2826. This Comment advocates for a method that allows a board to take climate change responsibility into consideration when making business decisions; however, the Oregon statute does not explicitly mention climate change or greenhouse gases. As mentioned above, the language it does contain is a reference to "social and environmental responsibility" without defining what that phrase means and only indicating that a business *may* incorporate this pledge into its articles of incorporation. Interestingly, this general, optional language was an intentional decision by the drafters to avoid defining an objective standard.[113] The language also likely helped ensure the bill's passage without greater opposition. As a "modest proposal" with no obligation for businesses to opt in,[114] formal opposition from the business bar was avoided. Oregon can boast about its "enlightened" and "ambitious" promotion of social and environmental responsibility[115] since the bill was actually enacted, in contrast to the failed other constituency provision of Assembly Bill 2944 in California, as described above.

While Oregon's provision is a permissive addition to the Oregon Business Corporation Act allowing corporations to include a socially and environmentally responsible objective in their charter,[116] it serves as official state encouragement for environmentally conscious boards of directors to make environmentally conscious decisions. This encouragement will hopefully embolden some Oregon businesses to make environmental and social responsibility a priority. House Bill 2826 puts the "world on notice," as Chairman Macpherson stated to the Oregon House Judiciary Committee, that a company *can* consider the socially and environmentally responsible alternatives—a power they already enjoyed, in theory, under the business judgment rule and

112 *House Hearing on H.R. 2826*, *supra* note 96, tape 77A, at 31:39 (testimony of James Kennedy, Partner, Kennedy & Kennedy LLP).

113 Telephone Interview with Dick Roy, *supra* note 88.

114 *Hearing on H.R. 2826 Before the S. Judiciary Comm.*, 74th Legis. Assem., Reg. Sess., tape 127A, at 27:26 [hereinafter *Senate Hearing on H.R. 2826*] (statement of Jeffrey Wolfstone, Partner, Lane Powell PC).

115 *House Hearing on H.R. 2826*, *supra* note 96, tape 77A, at 37:34 (statement of Jeffrey Wolfstone, Partner, Lane Powell PC).

116 *House Hearing on H.R. 2826*, *supra* note 96, tape 77A, at 12:10 (statement of Rep. Gregory Macpherson, Or. House of Representatives).

other doctrines permitting profit-sacrificing decisions but may not have been exercising.[117]

As discussed above, companies are given a broad allowance to write their own definition of social and environmental responsibility. Representative Linda Flores acknowledged this limitation and voiced her concern that nothing will be changing overnight, yet she still hopes this bill will ensure a "gradual recognition" that some Oregon companies want environmental and social responsibility to be a priority.[118] Expressing a contrary view, Senator Beyer argued that this is not a recognition of social and environmental responsibility among Oregon businesses, but is instead simply adding "fluffy PC words" to the statute.[119] Also, the statute does not offer clarity to businesses on *how* or *whether* to publicly report their environmental and social responsibility. Are greenhouse gas emissions to be included? If so, are direct and indirect emissions included? Are emissions nationwide or worldwide included? Due to this lack of clarification on how to report environmental and social responsibility, directors are likely to be concerned that their visions of how to be responsible will be unfairly compared to those of their competitors.

As a practical matter, few businesses have chosen to adopt this optional provision.[120] Carolyn Vogt, a shareholder at Lane Powell PC and a member of the firm's Sustainability and Climate Change practice group, surveyed twenty-five corporate lawyers in Oregon and found that few corporate clients, if any, have added or even requested the provision.[121] Fears resulting from both the general wording of the statute and the uncertainties in corporate implementation of the provision continue to leave businesses frozen when it comes to environmentally and socially responsible decision making.[122] Perkins

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[117] *Senate Hearing on H.R. 2826, supra* note 114, Exhibit C, at 1–2 (written testimony of James Kennedy, Partner, Kennedy & Kennedy LLP, & Jeffrey Wolfstone, Partner, Lane Powell PC); *see also Senate Hearing on H.R. 2826*, *supra* note 114, tape 127A, at 25:00 (statement of Dick Roy, Managing Dir., Ctr. for Earth Leadership) (explaining that House Bill 2826 "simply states an option").

[118] *House Hearing on H.R. 2826*, *supra* note 96, tape 77A, at 20:05 (statement of Rep. Linda Flores, Or. House of Representatives).

[119] *Senate Hearing on H.R. 2826*, *supra* note 114, tape 127A, at 34:53 (statement of Sen. Floyd Prozanski, Or. Senate).

[120] Carolyn M. Vogt, *Law that Allows Incorporating Sustainability into Charters Allows Protection, Visibility*, OR. BUS., Sept. 2008, *available at* http://www.lanepowell.com/wp-content/uploads/2009/05/vogtc_001.pdf.

[121] *Id.*

[122] *Id.*

Coie LLP, an international law firm specializing in business law, actually urges their Oregon corporation clients to

> decline to adopt provisions expressly permitted by [House Bill 2826] without carefully considering and precisely defining what kind of environmentally and socially responsible business conduct the provisions will authorize or direct the company to pursue. Any general authorization or directive would likely add uncertainty to corporate decision making and could conflict with the company's fundamental business operations or goals.[123]

It appears that the same fear involved in making the environmentally or socially responsible choice that drove the Oregon legislature to pass House Bill 2826 is still alive and well. Nevertheless, House Bill 2826 does provide unique support and encouragement for businesses to choose responsible options where none existed before. While this is merely a small step toward achieving climate change responsibility, the bill was successfully enacted and, thus, it does acknowledge a potential shift in the state of Oregon's priorities. This official state encouragement will hopefully lead some corporations to voluntarily disclose their greenhouse gas emissions—a step in the right direction.

B. Oregon's House Bill 2829: Upcoming Legislation Revising the Other Constituency Provision

Expanding on House Bill 2826, the Oregon legislature is now considering House Bill 2829, a provision creating an other constituency provision for Oregon businesses that has a similar, yet more explicit, environmental and social responsibility focus. As described above, other constituency provisions allow directors of a corporation to consider explicit interests beyond those of shareholders when making decisions that impact the business.[124] Like the business judgment rule, an other constituency provision's purpose is to shield directors from liability to dissenting shareholders when business decisions are made based on more than profit alone.[125] Oregon's current other constituency provision, ORS 60.357(5), allows a board of directors to consider the best interests of the corporation in hostile

[123] Perkins Coie, News/Publications: Recent Oregon Legislation Addresses Corporate Social Responsibility (Jan. 8, 2008), http://www.perkinscoie.com/news/pubs_detail.aspx?publication=1553&op=updates.com.

[124] Adams & Matheson, *supra* note 72, at 1087.

[125] *See id.* at 1088.

takeover situations, including

> the social, legal and economic effects on employees, customers and suppliers of the corporation and on the communities and geographical areas in which the corporation and its subsidiaries operate, the economy of the state and nation, the long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation, and other relevant factors.[126]

House Bill 2829, if enacted, would reorganize the statute and alter it in two major respects: (1) it would allow other constituency considerations to apply to all business decisions, not just hostile takeover situations and (2) it would add an explicit provision allowing for consideration of the social, environmental, and ethical impacts of decisions.[127]

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[126] The full text of the statute is as follows:

> When evaluating any offer of another party to make a tender or exchange offer for any equity security of the corporation, or any proposal to merge or consolidate the corporation with another corporation or to purchase or otherwise acquire all or substantially all the properties and assets of the corporation, the directors of the corporation may, in determining what they believe to be in the best interests of the corporation, give due consideration to the social, legal and economic effects on employees, customers and suppliers of the corporation and on the communities and geographical areas in which the corporation and its subsidiaries operate, the economy of the state and nation, the long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation, and other relevant factors.

OR. REV. STAT. § 60.357(5) (2009).

[127] H.R. 2829, 75th Legis. Assem., Reg. Sess. (Or. 2009). The relevant amended language of the bill states:

> (5) In determining what a director believes is in the best interests of the corporation, the director may consider: (a) [t]he corporation's interests in the short term and over the long term; (b) [e]conomic, environmental, social, legal or ethical interests the director may reasonably regard as appropriate for responsibly conducting the corporation's business; (c) [t]he interests of the corporation's employees, customers and suppliers and other persons who have business relationships with the corporation; (d) [e]ffects the corporation has on the communities or geographical areas in which the corporation operates; (e) [t]he possibility that the corporation's interests may be best served by the corporation's independence, if the director is evaluating another party's tender or exchange offer for an equity security of the corporation, proposal to merge or consolidate the corporation with another business entity or proposal to purchase or otherwise acquire all or substantially all of the corporation's properties and assets; and (f) [o]ther relevant interests.

Id. (internal emphases omitted).

This revision will have a larger impact than House Bill 2826 as it will automatically apply to all corporations and, therefore, any board of directors, not only those who actively decide to include provisions addressing social and environmental responsibility within their articles of incorporation.[128] Also, this revision will apply immediately to both pre-existing and new Oregon corporations.[129] However, the explicit considerations listed are still not mandatory: "the directors of the corporation *may* . . . give due consideration" to the listed factors.[130]

To assure this bill was subjected to scrutiny by seasoned corporate lawyers and to avoid opposition from the Business Section of the Oregon State Bar, the other constituency provision bill was drafted by a task force of seven corporate lawyers, including the following: attorneys from the large Portland law firms of Stoel Rives LLP, Tonkon Torp LLP, Lane Powell PC, and Ater Wynne LLP; Dick Roy, a former corporate law partner at Stoel Rives LLP; and University of Oregon School of Law Professor Judd Sneirson.[131] While the business bar and many of the same large corporate law firms were also involved in House Bill 2826, the business lawyers were involved on this occasion before House Bill 2829 was even submitted to the legislature.[132] In addition to involving the large firms in the drafting, the House Bill 2829 task force formally presented the bill to the Business Section.[133] By involving business attorneys in the drafting process, it was hoped either that opposition from the Business Section would be avoided or, at least, that the business bar would be well informed as to the true scope of the revision.[134] Unfortunately, House Bill 2829 died in committee in March of 2009 despite these efforts.[135] The bill is scheduled to be reintroduced next year, possibly as a bar bill.[136]

128 Telephone Interview with Dick Roy, *supra* note 88.

129 *Id.*

130 § 60.357(5) (emphasis added).

131 Telephone Interview with Dick Roy, *supra* note 88.

132 Interview with Judd Sneirson, Professor, Univ. of Or. Sch. of Law, in Eugene, Or. (Mar. 17, 2009).

133 Telephone Interview with Dick Roy, *supra* note 88.

134 *Id.*

135 E-mail from Judd Sneirson, Professor, University of Oregon School of Law, to Alison Torbitt (June 5, 2009, 12:27:00 PST) (on file with author).

136 *Id.*

C. Potential for Climate Change Responsibility Through Optional State Legislation

All fifty states have a business incorporation statute, but only Oregon's statute currently includes explicit language allowing, and maybe suggesting, a corporation to include environmental and social responsibility in its articles of incorporation.[137] Thirty-three states have adopted an other constituency provision.[138] Twelve of these states' provisions, like Oregon's current statute, apply only in hostile takeover situations.[139] Four of these states, Oregon, Florida, Missouri, and Louisiana, have provisions that explicitly allow corporate boards to consider the social impacts of their decisions.[140] But none of these provisions explicitly allow for consideration of environmental or climate change impacts. Every state should follow Oregon's lead and revise the laws governing corporations to allow directors to take greater climate change responsibility without fear of liability from dissenting shareholders who believe that profit should be the only consideration.

As the very small step in the form of House Bill 2826 indicates, state legislatures are not inclined to dictate how corporations should conduct business in their corporate laws. The business lobby continues to urge less regulation, and corporations continue to wield the power of incorporating overnight in a new state should their current state's regulations not follow the norm. Thus, when amending the corporation-authorizing statutes, states are left with the sole option of passing general statutes with undefined terms such as "environmental and social responsibility." It is simply not possible to include the controversial topic of climate change in this regulation-wary environment. In addition, it is impossible to include mandatory language requiring climate change responsibility in the guise of greenhouse gas disclosure and mitigation within corporation-authorizing or other constituency statutes.

As a result of this inability to include stronger provisions on environmental and social responsibility, state laws governing corporations are unable to mitigate climate change on their own. The attempt of these laws to create a change is insufficient to meet the immense challenges faced by human-induced climate change.

137 Press Release, *supra* note 83.

138 Sneirson, *supra* note 57, at 998.

139 *See* Adams & Matheson, *supra* note 72, app. at 1123–35.

140 *Id.* app. at 1125, 1128, 1129, 1132.

Luckily, many corporations already know they can pursue environmentally responsible objectives without such laws, and many businesses do so already, as a result of public pressure from environmentally driven shareholders and customers.[141] Unfortunately, due to the lack of explicit state direction or guidelines, those companies that voluntarily decide to tackle climate change responsibility do so in their own unique ways. The results of these voluntary efforts are then disclosed to investors and customers in varying formats, leaving environmentally conscious shareholders unable to readily compare corporations in light of their claims of climate change responsibility.[142]

While Oregon's House Bill 2826, House Bill 2829 (if resubmitted), and other, similar state statutes encourage corporations to make commitments to disclosing and implementing plans to reduce greenhouse gas emissions, the form and scope this disclosed information will take is still unclear. It is also unclear whether climate change factors should even be considered for a corporation to claim environmental responsibility. In addition, corporations are left both without direction or security on how to evaluate and make these climate change-conscious decisions and with the fear of how their disclosure decisions will be compared to those decisions of their competitors.

IV

A FEDERAL APPROACH: REQUIREMENT OF ENVIRONMENTAL AND SOCIAL DISCLOSURE BY THE SECURITIES EXCHANGE COMMISSION UNDER REGULATION S-K

A. Current Environmental Disclosure Requirements

The option with the greatest potential for immediate and uniform disclosure of climate change impacts to shareholders is a reconsideration of the disclosure requirements under the Securities Exchange Acts of 1933 and 1934. The 1933 Act controls disclosure during the registration and sale of securities, while the 1934 Act

141 For example, Google.org is a legally for-profit foundation that makes grants to nonprofit organizations in response to social and environmental problems, including climate change. *See* Gottesman, *supra* note 50, at 345–46.

142 *See* Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-Based Discourse*, 87 WASH. U. L. REV. 115, 115–16 (2009).

requires disclosure after registration on a periodic basis.[143] These disclosure requirements are specifically designed to allow informed decision making by current and potential investors under the belief that honest markets require honest disclosure of all relevant information.[144] Specifically, section 14(a) of the Securities Exchange Act of 1934 gives the SEC the authority to require disclosure "as necessary or appropriate in the public interest or for the protection of investors."[145] In researching the legislative history of section 14(a), Professor Cynthia A. Williams remarked, "Congress may have intended disclosure generally under the federal securities laws to be used to enhance corporate social accountability."[146] Congress specifically articulated that a major reason for requiring disclosure "was to change the ways in which large public corporations were being managed, and in particular to inculcate a greater sense of public accountability into corporate management."[147] Disclosure acts as a way to strengthen shareholder power, allowing shareholders to become fully informed before voting.[148] Furthermore, Congress deliberately chose disclosure as the means to impact business ethics and to address "legal but unseemly" business activities.[149]

Today, Regulation S-K, a consolidation and recodification of the multiple disclosure requirements in the 1933 and 1934 Acts, governs corporate disclosure.[150] Regulation S-K does not specify how individual items are to be disclosed or accounted for, but rather provides general parameters on what must be disclosed.[151] These disclosure parameters are governed by "materiality," requiring disclosure of information "to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered."[152] The SEC has explicitly directed that materiality should be determined by both

143 Jeffrey A. Smith & Matthew Morreale, *Disclosure Issues*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW 453, 454 (Michael B. Gerrard ed., 2008).

144 *Id.*

145 Securities Exchange Act of 1934 § 14(a), 15 U.S.C. § 78n(a) (2006).

146 Williams, *supra* note 49, at 1204.

147 *Id.* at 1205.

148 *Id.*

149 *Id.* at 1227.

150 Smith & Morreale, *supra* note 144, at 454. For disclosure requirements for small businesses, see Regulation S-B, 17 C.F.R. § 228 (2009).

151 Smith & Morreale, *supra* note 144, at 456.

152 17 C.F.R. § 240.12b-2 (2009).

quantitative and qualitative factors.[153] Two current, general disclosure parameters in Regulation S-K already discuss aspects of environmental law and may be triggered by climate change: (1) Item 101: cost expenditures for environmental compliance projected over a two-year period and compared to competitors and (2) Item 103: environmental legal proceedings,[154] which focuses on material legal proceedings arising under federal and state statutes designed to regulate discharge or protect the environment.[155] This narrow scope of environmental liability disclosure has not changed for the past twenty years and is not specifically reflective of the future environmental liabilities faced relating to climate change.[156]

B. Climate Change Responsibility Disclosure Possibilities

In response to climate change and the Supreme Court's ruling in *Massachusetts v. EPA*, corporations are now aware that federal greenhouse gas emissions regulations are inevitable. This heightened certainty creates disclosure requirements under Item 101 because this regulation requires a corporation to project and then disclose expected costs over the next two years to maintain environmental compliance in relation to climate change. While it is likely that it will take ten years for the EPA to draft and implement greenhouse gas emissions regulations,[157] it is almost certain that these regulations will occur; thus, the expected costs associated with calculating and mitigating these emissions should be estimated now. In addition, international companies with facilities in countries that ratified the Kyoto Protocol are already subject to its mandatory targets to reduce greenhouse gas emissions.[158] The resulting capital expenditures abroad should certainly require disclosure under Item 101, but this worldwide climate change regulatory movement should also trigger anticipated expenditures for U.S. facilities to meet similar greenhouse gas

153 Smith & Morreale, *supra* note 144, at 456.

154 *Id.* at 458–65.

155 Daniel L. Goelzer, *Compliance with the Disclosure Requirements of the Federal Securities Laws: Management's Discussion and Analysis and Environmental Matters*, C110 A.L.I.–A.B.A. 223, 247–50 (1995).

156 Smith & Morreale, *supra* note 144, at 455.

157 *See supra* note 13 and accompanying text.

158 *See* Robert DeLay, *Our Post–Kyoto Treaty Climate Change Framework: Open Market Carbon-Ranching as Smart Development*, 17 PENN. ST. ENVTL. L. REV. 55, 69–70 (2008).

emissions reductions, once the EPA announces national standards under the CAA.[159]

This Comment proposes that these disclosures should detail the current emissions of the corporation, the associated costs in the emissions calculations, and the costs and expected changes in emissions related to possible mitigation strategies. In addition, a comparison to competitors should be included in this disclosure—as it is likely that the EPA will look for an industry standard when implementing greenhouse gas emissions regulations in a similar approach to current pollution standards. The emissions calculations themselves must be included in this disclosure in order for an investor to compare the possible costs that will be incurred once the EPA regulations are enacted. By providing investors with readily comparable greenhouse gas emissions and their associated costs, investors can choose to invest in a corporation that will likely fall at or below the maximum greenhouse gas emissions set by the EPA. To remedy these issues, this Comment sets forth suggested SEC guidelines under Item 101 in the Appendix, detailing both the scope and form for emissions disclosures.[160]

Anticipated climate change expenses related to impending climate change litigation under Item 103 can also no longer be ignored. Item 103 specifies that all pending proceedings, including those "known to be contemplated," should be disclosed.[161] Potential proceedings resulting from harm caused by climate change have now been contemplated, if not initiated. As an illustration, these potential legal proceedings would be especially material to investors in corporations being targeted as possible defendants in climate change litigation as a result of their significant contributions to greenhouse gas emissions. Investors in corporations involved in the energy market would find it even more relevant to know about contemplated liability risk since the energy sector alone contributes ninety percent of the carbon dioxide emissions in developed countries.[162] This Comment sets forth suggested SEC guidelines under Item 103 in the Appendix, detailing

159 *See* Smith & Morreale, *supra* note 144, at 458–65.

160 *See infra* Appendix.

161 17 C.F.R. § 229.103 (2009).

162 *See* Amit Garg & Tinus Pulles, *Energy*, *in* 2 2006 IPCC GUIDELINES FOR NATIONAL GREENHOUSE GAS INVENTORIES 1.5.1 (Simon Eggleston et al. eds., 2006), *available at* http://www.ipcc-nggip.iges.or.jp/public/2006gl/pdf/2_Volume2/V2_1_Ch1Introduction.pdf.

the scope and form for disclosing pending and contemplated climate change proceedings.[163]

In sum, "[f]or disclosure purposes, climate change is ripening from being an 'uncertainty' or a 'trend' to being an 'event;'"[164] therefore, it should be disclosed with all of its likely effects as an opportunity for investors to make informed, transparent decisions. The SEC, motivated by the strong public interest directives of section 14(a) and the framework of Regulation S-K, can effectively and immediately lead this effort for improved disclosure by drafting specific guidance on climate change disclosure. In light of the current press concerning climate change and the causal connection between anthropogenic greenhouse gas emissions and climate change, it is very likely climate change will have a material effect both on corporations that emit greenhouse gases and on a reasonable investor in the particular corporation. Thus, the greenhouse gas emissions and their mitigation practices within a corporation should be disclosed under Regulation S-K.

The detail and quality of this climate change disclosure will likely be highly debated. Many companies are already jumping on this anticipated need and creating voluntary climate change disclosures, which vary greatly in content, form, quality, density, and tone.[165] In addition, investors representing $5.5 trillion in investments have already petitioned, or given supportive comments, in response to petitions filed with the SEC to require disclosure of specific and known trends, events, or uncertainties related to climate change likely to have a material effect on a company's performance.[166] Unless the SEC expands the current environmental disclosure guidelines, this variation will be a major impediment to business efficiency and shareholder knowledge, resulting in the unavailability of comparable climate change information to the market. Environmental data continues to be one of the most difficult areas of corporate information to obtain in a usable, informative form.[167] Even when it is available, it is normally incomplete or out of date.[168] In the interest of uniformity, transparency, and increased information disclosure to

163 *See infra* Appendix.

164 Smith & Morreale, *supra* note 144, at 466.

165 *See id.* at 472.

166 For up-to-date information on SEC petitions for climate change guidance, see Ceres, About Us: Ceres Annual Reports, www.ceres.org (last visited Jan. 4, 2010).

167 Williams, *supra* note 49, at 1290.

168 *Id.* at 1291.

ensure informed shareholders, the SEC should create a structured, uniform, and detailed greenhouse gas disclosure requirement detailing the current greenhouse gas emissions, the mitigation strategies being implemented to reduce greenhouse gas emissions, the estimated costs of compliance with anticipated climate change regulations, and the foreseen climate change-related litigation liabilities.

The SEC already has the statutory authority and disclosure framework at hand to eliminate the need for additional climate change-specific legislation. While it will take years for the EPA to implement regulations specifying maximum greenhouse gas emissions, the SEC can effectively act now to assure uniform, comparable disclosure. Under the 1933 and 1934 Acts, the statutory authority granted to the SEC to specify and mandate disclosure is broad.[169] To determine whether disclosure should be required, the court has directed the SEC to consider the following: (1) the extent of "ethical investor" interest in social and environmental disclosure and (2) the existence of other options available to ethical investors to remedy socially or environmentally adverse business practices.[170] This authority also contains substantial flexibility to modify disclosure requirements as investor interests change.[171] Investor interests have now changed to incorporate climate change responsibility and thus should be addressed by the SEC.[172]

CONCLUSION

Shareholders and investors are already demanding disclosure of the potential regulatory implications and liability resulting from climate change and greenhouse gas emissions. In response to these demands, corporate climate change responsibility needs to be transparent and uniform, creating informed investors and customers who can readily

169 Williams, *supra* note 49, at 1249 (citing Natural Res. Def. Council, Inc. v. SEC, 389 F. Supp. 689, 695 (D.D.C. 1974)).

170 *Natural Res. Def. Council, Inc.*, 389 F. Supp. at 701.

171 Williams, *supra* note 49, at 1263 (citing Notice of Commission Conclusions and Rule-Making Proposals, Securities Act Release No. 5627, Exchange Act Release No. 11,733, [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,310, at 85,707 (Oct. 14, 1975)).

172 The SEC has issued some interpretive guidance about disclosures relating to climate change as this Article is going to print. *See* Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106, 75 Fed. Reg. 6290 (Feb. 8, 2010), *available at* http://www.sec.gov/rules/interp/2010/33-9106fr.pdf. The additions to the disclosure requirements in the Appendix of this Article have not been addressed by this SEC guidance.

compare businesses. General protection and encouragement of responsible decisions regarding climate change by state corporate law reform is an option. Reforms like Oregon's House Bill 2826 and the proposed House Bill 2829 are likely able to be enacted, while mandatory climate change legislation is unlikely to be enacted due to the race to the bottom and the strong antiregulation mantra among business lobbyists. While these forms of general encouragement are simply emphasizing an ability corporations already have to look beyond the profit-driven bottom line under the business judgment rule, this encouragement also acknowledges the hope that businesses will make environmentally conscious decisions.

Encouragement of this form can be combined with clear, explicit SEC guidelines for climate change disclosure under already existing federal securities laws. By combining generally passable state encouragement with explicit greenhouse gas emissions disclosure requirements, shareholders and customers can make reasoned decisions about where their money is invested in light of climate change responsibility. This solution will enable greenhouse gas emissions information to become public knowledge and for disclosure to be uniform, business to business and state to state, without waiting for the lengthy EPA administrative process to be completed. Through greenhouse gas emissions disclosure, the public can choose to invest in or buy from environmentally responsible companies that truly accept climate change responsibility and, in so doing, bring about climate change mitigation, one shareholder at a time.

APPENDIX
PROPOSED CLIMATE CHANGE DISCLOSURE

Climate Change Responsibility Disclosure Information:[173]

Item 101 additions:[174]

> Climate Change Responsibility Compliance and Mitigation: Report all costs estimated for compliance with anticipated climate change regulations, include detailed disclosure of all greenhouse gas emissions and mitigation strategies and their associated costs to ensure current and impending compliance.

a. Determine the corporation's geographic scope: choose to either report all of the corporation's greenhouse gas emissions worldwide, nationwide, or broken down on a state-by-state basis. These guidelines suggest the most comprehensive reporting possible, with nationwide reporting as the minimum required.
b. Determine if an existing environmental management system already captures greenhouse gas emissions throughout your company and, if so, what its reporting capabilities are.
c. Determine the significant emissions for the corporation as an entirety per calendar year. Optional decision to break down these corporation-wide emissions by source or facility. These guidelines urge calculating emissions on a facility or source basis to both ensure a comprehensive picture of the corporation's profile and better detail mitigation strategies and their success.
    i. One hundred percent of all emissions from all corporate operations, facilities, and sources should be included.
    ii. A percentage of all emissions of any entity, operation, facility, or source in which the corporation owns an equity share is also to be included. The percentage included is based on the share of operational control the reporting corporation has over the facility or source to better reflect the corporation's choice in technology,

[173] *See* discussion *supra* Part IV.

[174] For other ideas and additional details of greenhouse gas emissions calculations, see CAL. CLIMATE ACTION REGISTRY, *supra* note 26.

greenhouse gas mitigation strategies, pollutant reductions, and energy conservation methods.

iii. A percentage of all emissions of any entity, operation, facility, or source that the corporation has a capital lease, a financial lease, or an operating lease with are also to be included. The percentage included is based on the share of operational control the reporting corporation has over the facility or source to better reflect the corporation's choice in technology, greenhouse gas mitigation strategies, pollutant reductions, and energy conservation methods.

iv. Emissions Calculations Guidelines:

1. One hundred percent of all direct emissions, sources owned by the corporation, are to be included in the disclosure, including, but not limited to:
   a. Mobile combustion sources owned or leased by the corporation (e.g., cars, trucks, rail, air, or other transport);
   b. Stationary combustion sources used for producing electricity, steam, or heating and cooling;
   c. Process emissions from the corporation's production methods (e.g., cement making, agricultural processes, etc.); and
   d. Fugitive sources (e.g., leaks from pipelines, air conditioning systems, etc.).
2. One hundred percent of all indirect emissions—produced because of the corporation's decisions, but the source is owned or controlled by another—are to be included in the disclosure, including, but not limited to:
   a. Purchased and consumed electricity;
   b. Purchased and consumed steam; and
   c. Purchased and consumed district heating or cooling.
3. Include an estimate and actual calculation of costs associated with greenhouse gas emissions, including employee time and equipment used to calculate and report all emissions.

d. Reporting mitigation strategy implementation. Once a baseline year of greenhouse gas emissions reporting has been completed, additional reporting years should be set beside each other in tables and graphed with the data from previous years to allow for clear comparison. If emissions reports from 1990 are available, include them within this reporting. Mitigation updates should also be included describing in words and data any mitigation strategies implemented or designed during that year, including:

   i. Expected greenhouse gas emission reduction for each strategy;
   ii. Expected and actual dates of initial equipment purchase or construction and final complete implementation; and
   iii. Expected and actual costs for each mitigation strategy.

Item 103 additions:

(a) Provide cost estimates for the company as a whole, or on a per subsidiary basis, associated with foreseen climate change-related litigation including, but not limited to:
   a. Government-initiated litigation;
   b. Citizen suit litigation; and
   c. International human rights litigation.
(b) Provide ongoing or known climate change-related litigation costs for all competitors, whether or not the reporting corporation is named as a party within the litigation.