Climate Change Disclosure: Ensuring the Viability of the Insurance Industry While Protecting the Investor

Kevin W. Weigand

Repository Citation
Kevin W. Weigand, Climate Change Disclosure: Ensuring the Viability of the Insurance Industry While Protecting the Investor, 34 Wm. & Mary Envtl. L. & Pol'y Rev. 281 (2009), http://scholarship.law.wm.edu/wmelpr/vol34/iss1/9
CLIMATE CHANGE DISCLOSURE: ENSURING THE VIABILITY OF THE INSURANCE INDUSTRY WHILE PROTECTING THE INVESTOR

KEVIN W. WEIGAND*

INTRODUCTION

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

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

\textsuperscript{7} See Fed Chief Angered by AIG Rescue, ORLANDO SENTINEL, Mar. 4, 2009, at A8.


\textsuperscript{14} Matthew H. Ahrens, Should We Tell Our Shareholders about Climate Change?, IN-HOUSE COUN. COMMITTEE NEWSL. (A.B.A. SEC. ENV'T, ENERGY, & RESOURCES), June 2009, at 10, 12, available at http://www.abanet.org/environment/companies/counsel/newsletter/jun09/InHouseCounsel_June09.pdf.
Insurance companies are particularly concerned about climate change. A 2008 study conducted by Ernst & Young examined the top ten strategic business risks facing the insurance industry and found that climate change is the biggest threat to the industry.\(^\text{15}\) This is largely due to the wide range of potential consequences faced, such as "windstorms, flood and heat waves . . . increases in mortality and health problems, the spread of environmentally related litigation, political risk linked to conflicts for control of resources, and effects on capital markets."\(^\text{16}\) Not surprisingly, many consumer groups are advocating increased disclosure by the insurance industry by demanding that companies detail the risks they face as a result of climate change.\(^\text{17}\)

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

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


\(^{16}\) Id. at 6.

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

\(^{18}\) See infra Part II.B.1.

\(^{19}\) See infra Part II.B.1.

\(^{20}\) See infra text accompanying notes 152–57.

\(^{21}\) See infra text accompanying notes 143–47.
conclude by discussing mitigation techniques that insurance companies can utilize in order to reduce financial risks of climate change, as well as what steps other companies can take to provide greater information to shareholders. This note will provide a recommendation that balances the concerns of the insurance industry by creating carefully tailored disclosure requirements that preserve proprietary information while providing adequate information for both consumers and investors to properly guide their business decisions.

I. DISCLOSURE AND REGULATORY REQUIREMENTS

A. Current SEC Regulations

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

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

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

---

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

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

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

\textsuperscript{27} 17 C.F.R. § 229.103 (2008) (emphasis added).
\textsuperscript{29} Id. at 14, 17.
\textsuperscript{30} Id. at 14.
\textsuperscript{32} 17 C.F.R. § 229.303(a) (2) (ii) (2008) (emphasis added).
\textsuperscript{34} Id. at 449.
all the circumstances, the omitted fact would have assumed actual signifi-
cance in the deliberations of the reasonable shareholder."

Legislators have sought to include disclosure of financial risks from
climate change on Form 10-K quarterly reports as a requirement within
the disclosure requirements of Regulation S-K 303. For example, two pieces
of legislation were introduced in Congress in 2007 to accomplish this goal.
Introduced by Senator Bernie Standards of Vermont, the Global Warming
Pollution Reduction Act would have compelled the SEC to promulgate
requirements for "corporate environmental disclosure of climate change
risks." The Act included regulations directing issuers of stock to "inform
securities investors of . . . 1) the financial exposure of the issuer because
of the net global warming emissions of the issuer; and 2) the potential eco-
nomic impacts of global warming on the interests of the issuer." To make
it clear that this disclosure would fall within the requirements of S-K 303
and must therefore be provided on Form 10-K, the Act specifically stated
that "global warming constitutes a known trend." Two weeks after the Global Warming Pollution Reduction Act
was introduced, Senators John Kerry and Olympia Snowe introduced the
Global Warming Reduction Act of 2007. The language of Section 302 of
the bill, related to corporate disclosure, is very similar to the Global Warm-
ing Pollution Reduction Act. The Kerry-Snowe bill also contains language
declaring climate change to be a "known trend." Both bills were referred
to Senate committees but saw no movement to the floor for a vote.

B. Roadblocks to Regulation

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

35 Id.

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

37 S. 309 § 9.

38 Id. § 9(a).

39 Id. § 9(c) (1) (B).

40 S. 485 § 302.

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

42 S. 485 § 302(c) (1) (B).

.gov/cgi-bin/bdquery/z?d110:s.00309: (last visited Nov. 11, 2009); THOMAS, Library of
Congress, Legislative History of Senate Bill 485, http://thomas.loc.gov/cgi-bin/bdquery/
z?d110:s.00485: (last visited Nov. 11, 2009).
factors a company should consider when calculating risk.\textsuperscript{44} S-K 303, and the Supreme Court interpretations of standards for materiality, provide general guidance, but there remains a lack of clear standards that specify exactly what information companies must disclose.\textsuperscript{45} Part of this is due to disagreement over the nature and severity of climate change,\textsuperscript{46} thereby creating variances in opinion as to whether or not climate change itself constitutes a material effect on a company's operations.

1. The Politics of Climate Change

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

\textsuperscript{44} Bell, supra note 12, at 3.

\textsuperscript{45} Id.


may have also led to reluctance on the part of courts to address climate change issues thus far.\(^{52}\)

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

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


2. Uncertainties Regarding Disclosure Obligations

Lack of consensus on the magnitude and severity of climate change could be making it difficult for companies to predict its financial effects on their operations. Courts, however, have not been silent on how companies should address uncertainties in disclosure. In 1992, the SEC examined disclosure of financial uncertainties and forward-looking statements in *In re Caterpillar*. In *Caterpillar*, the company's management team faced difficulties predicting future performance due to unexpected profits from the previous year and concerns regarding whether it would be able to achieve the same success. Due to these uncertainties, Caterpillar's forward-looking financial information was not disclosed in Form 10-K, leading the SEC to investigate whether such disclosure was optional, or whether the reporting failure violated Regulation S-K 303. The SEC concluded that this lack of disclosure "left investors with an incomplete picture of Caterpillar's financial condition and results of operations."
The Commission found Caterpillar violated the Exchange Act and ordered the company to develop and maintain procedures in accordance with the requirements of S-K 303.63

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

C. Increased Pressure to Disclose

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

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

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

Id. 63 Id. at 913.


67 See id.

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

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

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


\textsuperscript{70} Id. (citing specific energy companies).


\textsuperscript{72} Id.


\textsuperscript{74} Id.

\textsuperscript{75} Daniel Edward Rosen, \textit{Power Company to Cue Investors}, NEWSDAY, Oct. 24, 2008, \textit{available at} http://www.newsday.com/business/technology/power-company-to-cue-investors-1.765391. Significant aspects of the agreement included the following: an analysis of financial risks associated with future greenhouse gas legislation and regulations; descriptions of litigation and court decisions that may impact the company; levels of emissions of greenhouse gases and strategies to reduce emissions; the extent, if any, to which “environmental performance factors” are incorporated into officer compensation; and “the impact of an increase in sea level and changes in weather conditions.” John Horan, \textit{Dynegy Inc. Agrees with New York Attorney General Andrew Cuomo to Disclose Material Risks Related to Climate Change}, GLOBAL CLIMATE L. BLOG (Oct. 27, 2008), http://www.globalclimatelaw.com/2008/10/articles/securities-disclosure/dynegy-inc-agrees-with-new-york-attorney-general-andrew-cuomo-to-disclose-material-risks-related-to-climate-change/.
speculate that this pressure to disclose will soon expand to other industries facing similar pressure.\footnote{Seth Kerschner, \textit{Power Companies Agree to Expanded Disclosure of Climate Change Risk in Landmark Settlements with New York Attorney General}, ENVTL. DISCLOSURE COMMITTEE NEWSL. (A.B.A. SEC. ENV'T, ENERGY, & RESOURCES), Mar. 2009, at 2, 4--5, \textit{available at} http://www.abanet.org/environ/committees/environdisclosures/newsletter/mar09/EnvDiscl_Mar09.pdf (suggesting that the Xcel settlements could provide a precedent for many other public companies).

On the federal level, the SEC has come under heavy criticism for its role in the economic collapse and its failure to pursue regulatory enforcement actions adequately, leading critics to believe that "the agency is in as much turmoil as the markets it polices."\footnote{\textit{The Securities and Exchange Commission: Growing Insecurities}, ECONOMIST, Jan. 17, 2009, at 73 ("[T]he SEC is fighting to justify its existence. It is unlikely to be unscathed by the planned regulatory overhaul under Barack Obama.")}. Most notably, the SEC faced a crushing blow to its reputation when it failed to discover a Ponzi scheme run by billionaire Bernard Madoff that defrauded investors of approximately $50 billion, despite numerous tips and investigations.\footnote{Zachary A. Goldfarb, \textit{New SEC Chief Moves to Toughen Enforcement}, WASH. POST, Feb. 7, 2009, at D2, \textit{available at} http://www.washingtonpost.com/wp-dyn/content/article/2009/02/06/AR2009020602876.html.}

Upon assuming her position as the Commission's new chairman in 2009, Mary Schapiro promised increased enforcement measures and less bureaucratic red tape, stating that "[t]hose who break the law and take advantage of investors need to know that they will face an unrelenting law enforcement agency in the SEC. . . . [Enforcement] is, and always will remain, a foundation of our mission."\footnote{\textit{Id.}}

Regulatory and law enforcement agencies are not the only groups pressing for increased disclosure. Investors are equally, if not more, concerned, and continue to push for more transparency. In 2008, sixty-seven shareholder proposals related to climate change were filed with U.S. and Canadian companies.\footnote{\textit{CERES CLIMATE RISK DISCLOSURE REPORT}, supra note 11, at 7.} This record number of proposals resulted in nearly half of those companies making positive commitments to address the climate change issue, leading to a withdrawal of the shareholder proposal.\footnote{\textit{Id.}} Those allowing the proposals to go to a shareholder vote also saw substantial support.\footnote{\textit{Id.} ("The average vote for resolutions . . . increased from 18.4\% in 2006 to 22\% in 2007. In 2008 . . . reports averaged 30.6\% support.").} Groups like Ceres, a network of investors, environmental organizations, and other public interest groups, have also been outspoken...
in their efforts to promote greater transparency, calling for the SEC to require all companies to disclose "[s]trategic analyses of climate risks and emissions management plans . . . [a]ssessments of physical risks related to climate change . . . [and] [a]nalyses of regulatory risks related to climate change."\textsuperscript{83}

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

\section{Climate Change's Impact on the Insurance Industry}

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

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


\textsuperscript{86} Id.

\textsuperscript{87} Id.

\textsuperscript{88} GAO Insurer Report, supra note 84, at 33.
claims as a result of climate change. In contrast to nearly all other types of business, insurers are unable to precisely discern most of the expenses for their policies when providing coverage. As a result, it is difficult to accurately assess vulnerability in order to evaluate how to properly spread the risk.

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

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

---

89 IMPACTS OF CLIMATE CHANGE, supra note 85, at 14.
91 Id. at 6 (stating that “[f]uture insurance losses must be estimated.”).
92 Id. at 10–11.
93 GAO INSURER REPORT, supra note 84, at 8 (noting that climate change may affect the weather-related events). If the historical data is no longer predictable, it may cause problems for insurance companies. CATASTROPHE EXPOSURES, supra note 90, at 11 (discussing the flaws with using historical data to predict future policy periods).
94 CATASTROPHE EXPOSURES, supra note 90, at 13.
95 Id. at 20.
97 Id.
represent particularly high-risk areas, are expected to increase in the near future, with a projected growth of eighteen million people "over the next 25 years... in the coastal states of Florida, California, Texas, and Washington" alone.99

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

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

Florida coastal counties despite higher insurance premiums).

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

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

A. **Lack of Disclosure Thus Far**

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

---

106 Id. § 313(c) (2).
108 H.R. 2609 § 313(c) (1) (D).
110 Id. § 101(b) (2).
111 Id. § 102(a) (1).
112 Id. § 201(c) (1).
national member groups, reviewed the 2004 SEC filings of all one hundred six publicly-traded insurance companies and found that just five companies discussed the impacts of climate change in their annual reports. Compared to other sectors, the insurance industry lags far behind in the level of disclosure provided to investors. However, a 2009 survey of twenty-seven insurers, conducted by Ceres, found that nine had some level of climate change disclosure in their SEC filings, signifying slow, but gradual improvement.

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

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

115 CERES CLIMATE RISK DISCLOSURE REPORT, supra note 11, at v.
116 Id. at 32.
118 GAO INSURER REPORT, supra note 84, at 5.
119 CATASTROPHE EXPOSURES, supra note 90, at 8–9, C-1 to C-3.
120 GAO INSURER REPORT, supra note 84, at 30 n.34.
looking models are more accurate than the traditional approach, which assesses rates based on historical loss.\textsuperscript{122}

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

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

\textbf{B. NAIC’s Progress in Increasing Disclosure: Balancing Competing Views}

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

\textsuperscript{122} Id. at 75.
\textsuperscript{123} Id.
\textsuperscript{126} Id.
\textsuperscript{128} National Association of Insurance Commissioners, Climate Change and Global Warming
of insurance industry representatives, the task force adopted a white paper in June 2008 entitled *The Potential Impact of Climate Change on Insurance Regulation.* The white paper described the potential effects of climate change on the solvency of the insurance industry and called for increased regulation to mitigate its consequences. It also discussed the potential for insolvency that the insurance industry faces as a result of climate change, calling for regulators to work together to "develop new solvency regulatory tools to meet the challenges of climate change." The report concluded with a call for action by stating that "[t]he issue of disclosure deserves immediate attention by insurance regulators."

1. Insurance Industry Concerns

At approximately the same time that the Climate Change and Global Warming Task Force was adopting its white paper, it was also developing a "Climate Risk Disclosure Proposal," which, if passed, would require insurance companies to disclose details to regulators, and to the public, related to their financial risks from climate change. When the (EX) Task Force, http://www.naic.org/committees_ex_climate.htm (last visited Nov. 5, 2009). ClimateandInsurance.org, Disclosure, http://www.climateandinsurance.org/disclosure.html (last visited Nov. 5, 2009).


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

Id. at 1–2.

Id. at 3.

Id. at 15.

See Nat’l Ass’n of Ins. Comm’rs, Climate Risk Disclosure Proposal: Second Draft (Draft May 28, 2008) [hereinafter NAIC PROPOSAL SECOND DRAFT] (on file with author). NAIC later sent out a third draft of the proposal. Nat’l Ass’n of Ins. Comm’rs, Climate Risk Disclosure Proposal: Third Draft (Draft Aug. 15, 2008), available at http://states.naic.org/documents/committees_ex_climate_risk_disclosure_080815_draft.pdf [hereinafter NAIC PROPOSAL THIRD DRAFT]. The two proposals, however, are substantively similar and garnered similar complaints. Compare NAIC PROPOSAL SECOND DRAFT, supra note 135, with NAIC PROPOSAL THIRD DRAFT, supra note 135 (proposals asked companies to disclose information on the same topics). Proposed disclosure requirements included: revealing whether the company has altered its investment strategy after considering the impact of climate change and global warming on its investment portfolio, steps the company has taken to encourage policyholders to mitigate losses due to climate change, a description of the company’s use of computer models to assess climate change impacts, any known climate change trends that might have a material effect on the company’s financial con-
proposal was opened for public comment by insurers and public interest groups, there were significant concerns from both sides.

Most insurance companies were adverse to the NAIC's proposal for increased disclosure requirements. Some argued that it is unreasonable to ask an insurance provider to produce quantifiable information related to the impact of climate change on their operations when scientific information on the subject continues to evolve. Others shared concerns over uncertainty related to how an insurer would translate long-term climate change trends into predictions about risk from extreme weather and adverse health conditions. Skepticism also remains regarding how valuable the information provided would even be. Even though the aforementioned energy companies recently reached an agreement with New York Attorney General Andrew Cuomo to disclose financial risks due to climate change, some believe that the disclosures are likely to be vague "because it's impossible to know exactly what will happen in the future—not just what laws and regulations might be enacted but how the earth's climate might actually change."
Some insurers were particularly concerned with how investors would react if financial risk information were to be released.\textsuperscript{140} The insurance companies feared that the sensitive material may be misused, because there are no governing rules directed at protecting the company’s interests.\textsuperscript{141} Specifically, some companies were concerned that “[p]ublicly traded companies disclosing forward-looking information in their SEC filings are given statutory immunity from private lawsuits for good-faith, forward-looking disclosures, but it is not clear that the individual states have comparable laws to immunize the insurance industry for the forward-looking statements the Proposal would require.”\textsuperscript{142}

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

\textsuperscript{140} \textit{See id.}
\textsuperscript{141} Letter from Insurance Groups, \textit{supra} note 138.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} Letter from Gary L. Smith, Sr. Vice President of Gov’t Relations, The Travelers Companies, Inc., to Sean Dilweg, Chairman, Climate Change and Global Warming (EX) Task Force (Sept. 15, 2008) (on file with author).
\textsuperscript{144} Letter from David Snyder, Vice President and Assistant General Counsel, Am. Ins. Ass’n, to Mr. Eric Nordman, Director of Research, Nat’l Ass’n of Ins. Commissioners (Sept. 15, 2008) [hereinafter Letter from David Synder] (on file with author); Letter from Andrew Melnyk, \textit{supra} note 136.
\textsuperscript{145} Letter from Insurance Groups, \textit{supra} note 138.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
If investors become aware of the risk insurers are taking on, they may decide to invest elsewhere. To prevent this, insurers may opt to reduce their liability exposure, ultimately leading to a lack of coverage available to consumers.\textsuperscript{148} State pools offering insurance policies to those unable to obtain coverage in the private market—designed to be a last resort for consumers unable to obtain private insurance—needed a $715 million bailout from the legislature in order to cover their losses from the 2004 and 2005 hurricane seasons.\textsuperscript{149} A prolonged lack of coverage would place an even greater burden on the residual markets.\textsuperscript{150} Ironically, states might then have an incentive to favor very limited disclosure of financial risk. Meanwhile, if insurance becomes too cost prohibitive, many property owners may ultimately choose to take the risk and suffer severe consequences if a catastrophe occurs. If the government then steps in to bail them out, this may create a moral hazard as well.\textsuperscript{151}

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

\textsuperscript{150} See, e.g., Holbrook Mohr, \textit{Dale Mulls 397.8 Percent Insurance Hike for Coastal Residents—'Wind Pool' Says it Needs Funds to Re-insure Members}, MEMPHIS COM. APPEAL, June 6, 2006 (discussing Mississippi’s program that provides insurance for property that traditional companies won’t cover).
\textsuperscript{152} See, e.g., Leslie Eaton & Joseph Treaster, \textit{Insurance Woes for Hurricane Katrina Victims}, INT’L HERALD TRIB. (Sept. 2, 2007), http://www.nytimes.com/2007/09/02/business/world business/02iht-orleans.4.7353442.html (discussing the fact that despite insurance companies paying out $11 billion in claims to Louisiana residents in the two years following Hurricane Katrina, there were sixty-six hundred insurance-related lawsuits that were filed in federal district courts).
\textsuperscript{153} ABRAHAM, \textit{supra} note 127, at 588.
\textsuperscript{154} Hecht, \textit{supra} note 148, at 1597.
sure to litigation. The insurance industry already handles the largest annual amount of lawsuits amongst all sectors in the United States, averaging approximately seventeen hundred per year. In 2005 alone, the average insurer in the United States incurred defense costs of approximately $36 million. Increased exposure to litigation related to climate change will likely increase total liabilities. Consequently, speculative, and potentially inaccurate, disclosures may result in increased litigation and financial harm to insurers.

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

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

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

---

155 Id. at 1598.

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

Id.


157 Id.

158 Letter from David Snyder, supra note 144.

159 Id.

160 Letter from Consumer and Envtl. Org., to Sean Dilweg, Chairman, Climate Change and Global Warming (EX) Task Force (Sept. 9, 2008).
chasing coverage.\textsuperscript{161} Furthermore, advocates for disclosure argued that insurers are in the business of calculating the cost and nature of risks and messaging the public about risk concerns,\textsuperscript{162} insisting that information regarding the financial risk companies face due to climate change will send a clear message to those whose locations or activities are very risky, thereby encouraging them to locate in other areas or take steps to mitigate the risk.\textsuperscript{163} Although some consumer groups were initially against the proposal because they felt it didn't mandate enough disclosure, a compromise was ultimately reached after they agreed to the removal of a provision that would have required top executives to attest to the accuracy of such information and include it as part of their annual statements.\textsuperscript{164}

C. Adoption of Climate Risk Disclosure Survey

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

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

---

\textsuperscript{161} Id.


\textsuperscript{163} Id.


\textsuperscript{165} Id.

1. Does the company have a plan to assess, reduce or mitigate its emissions in its operations or organizations? If yes, please summarize.

2. Does the company have a climate change policy with respect to risk management and investment management? If yes, please summarize. If no, how do you account for climate change in your risk management?

3. Describe your company's process for identifying climate change-related risks and assessing the degree that they could affect your business, including financial implications.

4. Summarize the current or anticipated risks that climate change poses to your company. Explain the ways that these risks could affect your business. Include identification of the geographical areas affected by these risks.

5. Has the company considered the impact of climate change on its investment portfolio? Has it altered its investment strategy in response to these considerations? If so, please summarize steps you have taken.

6. Summarize steps the company has taken to encourage policyholders to reduce the losses caused by climate change-influenced events.

7. Discuss steps, if any, the company has taken to engage key constituencies on the topic of climate change.

8. Describe actions your company is taking to manage the risks climate change poses to your business including, in general terms, the use of computer modeling.\footnote{Gusman, supra note 166, at 16.}

Designed “to provide regulators, shareholders and the public with substantive information about the risks posed by climate change to insurers and the actions insurers are taking in response to their under-
standing of climate change risks," the survey requires insurers with annual premiums greater than or equal to $500 million to annually submit the Insurer Climate Risk Disclosure Survey to the company's domicile state. On March 17, 2009, the survey was officially adopted by the NAIC executive committee. Given the fact that the NAIC is a third-party non-governmental organization lacking the power to adopt binding rules, however, the survey is subject to approval by the states on an individual basis, and it is unclear how many states will opt to require their insurance companies to submit the survey.

D. Benefits of Disclosure

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

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

---

168 Id.
170 Id.
171 Gusman, supra note 166, at 17.
173 Id.
175 Id.
Swiss Re also emphasizes its "long-standing tradition of sharing the results of its research with the public and other stakeholders affected by climate change. By doing so, [it] intend[s] to help society reduce risk and improve resilience, for instance through introducing smart regional planning and stringent building codes." By the end of 2007, Swiss Re had invested over 600 million Swiss Francs, approximately 596 million USD, in "green assets" and became the first insurer ever to provide carbon insurance.

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

1. Insurance Companies Can Mitigate Loss Resulting from Climate Change

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

---

176 Id.
177 Id. at 9.
179 SWISS RE, supra note 174, at 11–12.
181 Id.
182 Id.
183 Id.
Some state legislatures have been very active in encouraging mitigation from climate change. Florida, for example, created the MySafe Florida Home Grant Program in 2006 to encourage hurricane safety inspections and raise public awareness of the financial benefits of hurricane awareness measures. The program provides a financial incentive by offering grant awards of up to $10,000 for home mitigation projects, including up to $5,000 from the state in matching funds. Meanwhile, South Carolina's Omnibus Coastal Property Insurance Reform Act of 2007 created a hurricane loss mitigation grant program similar to that of Florida. Designed to provide financial assistance to homeowners for structural improvements that would mitigate loss from major climatic events, the South Carolina Safe Home Grant ("SCSH") program also provides up to $10,000 in grant funds for specified mitigation improvements, $5,000 of which the state can "match." The SCSH program has awarded over six hundred grants since its establishment; most funding was targeted toward the regions of the state most vulnerable to the effects of climate change. Additionally, the state allocates grants to municipalities for the development of mitigation strategies and enforcement of building code regulations.

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

185 FLA. STAT. ANN. § 215.5586(2) (b) (West Supp. 2009).
187 § 38-75-485(C).
188 § 38-75-485(C) (b).
191 See Ondera, supra note 186, at 604–05.
adjusted gross income. These financial incentives encourage those who might not otherwise look into mitigation techniques and green building options to further explore these possibilities.

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

III. ASSESSING THE PROPER LEVEL OF DISCLOSURE

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

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

197 MARSH, supra note 195, at 7–8.
198 Id. at 8.
199 U.S. Securities and Exchange Commission, How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whattwedo.shtml (last visited Nov. 11, 2009) ("Companies with more than $10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports.").
200 See supra Part II.
that the Private Securities Litigation Reform Act\textsuperscript{201} applies to any forward-looking statements made by insurers related to climate change. The NAIC has a similar and equally effective means of accomplishing this goal by including specific language in the Climate Risk Disclosure Survey allowing insurers who voluntarily disclose forward-looking information to "disclaim any responsibility for the accuracy of such forward-looking information."\textsuperscript{202} If an insurer provides forward-looking information in good faith, "it may condition its response with a waiver of any claim under any theory of law based on the inaccuracy of such information."\textsuperscript{203} Providing similar language in future SEC regulations will alleviate some of the concerns associated with providing forward-looking predictions that prove to be fallible.

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

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

\textsuperscript{201}See supra notes 65–67 and accompanying text.
\textsuperscript{202}INSURER CLIMATE RISK DISCLOSURE SURVEY, supra note 166, at 1.
\textsuperscript{203}Id.
\textsuperscript{204}See supra notes 152–55 and accompanying text.
\textsuperscript{205}In the instructions for the Climate Risk Disclosure Survey adopted by the NAIC, there is a provision stating that an insurer is “not required to provide quantitative information.” INSURER CLIMATE RISK DISCLOSURE SURVEY, supra note 166, at 1.
\textsuperscript{206}Many insurance companies were initially concerned that proprietary information would be released in the disclosure. See supra notes 143–44 and accompanying text.
to regulators, allowing them to maintain proper oversight while protecting proprietary information.\textsuperscript{207}

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

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

\begin{footnotes}
\item[207] Obviously, it would be essential for the regulators to keep the information confidential to allay the fears of some companies. See supra notes 145–47 and accompanying text.
\end{footnotes}
insurance premiums reflect the risks associated with owning property in an area so susceptible to climate-induced catastrophes. \(^{212}\) Accurate information regarding the risk of such properties, combined with appropriate insurance premiums to reflect that risk, may ultimately reduce the projected population growth in areas most affected by climate change.

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

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

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

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


\(^{214}\) Limiting Liability in the Greenhouse, supra note 156, at 264.

\(^{215}\) See supra Part II.D.1.
willing to write coverage in higher risk areas. Ultimately, this may have the effect of reducing the insurer's financial exposure to the effects of climate change while increasing the willingness on the part of an investor to purchase stock in the company.

CONCLUSION

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

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

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

---

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

217 See supra notes 71-76.

218 See supra Part I.A and accompanying text.

219 See supra notes 169-71.
even solvency. It is vital, nevertheless, that the public become aware of the risks insurers face in order to play an active role in the mitigation of such risk. Through carefully-tailored disclosure requirements that provide enough information for an investor to make an informed decision while encouraging insurers to address climate change in a meaningful and practical way, the public will have greater confidence in the industry, sensitive information will be protected, and insurers will be able to remain solvent.