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Moving at a Glacial Pace: What Can State Attorneys General Do about SEC Inattention to Nondisclosure of Financially Material Risks arising from Climate Change?

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I. Introduction

In recent years, two certainties have created a mass of uncertainty for public companies. First, companies must disclose material financial information in their annual statements, known as 10-Ks, to the SEC. Second, climate change poses financial risks to the way businesses operate. Together, these principles have generated significant uncertainty within the regulatory and law enforcement arenas. Specifically, companies and law enforcement officials are uncertain about what risks stemming from climate change must be disclosed in 10-Ks, and how that information should be presented.

The actor primarily responsible for clarifying disclosure requirements is the Securities & Exchange Commission (SEC). This Note will argue that the SEC's most recent attempt to address this uncertainty—a 2010 interpretive release—is inadequate, and that the SEC should issue additional guidance. As the SEC has not been active on this issue in the past four years despite promising further action on climate change disclosure, the Note will then argue that state attorneys general, particularly the New York Attorney General, should attempt to address this inaction through use of state securities laws and other advocacy tools.

Before addressing the proposed solution, Part II of this Note will detail the federal securities disclosure regime currently in place, and discuss the SEC's approval of its 2010 interpretive release. Part II will also outline the events leading to the interpretive release, specifically the actions taken by then-Attorney General Andrew Cuomo (D–New York). Part III will then argue that further guidance from the SEC is necessary, and that current New York Attorney General Eric Schneiderman is best positioned to force SEC action and otherwise provide companies and law enforcement with a framework for disclosure requirements. Part III will also discuss ways in which other state attorneys general could contribute to New York's efforts.

II. Securities Regulation and Climate Change

A. Federal disclosure requirements imposed by the SEC

Securities regulation at the federal level began with the passage of the Securities Exchange Act of 1933.[1] The Act created the SEC and imposed a number of procedural requirements on companies intending to sell securities, including the obligation to file 10-K statements.[2] In 1934, Congress passed a second Securities Exchange Act, which refined the periodic reporting requirements, and authorized the SEC to issue rules and regulations related to disclosure requirements.[3] The four regulations most relevant to disclosure of risks arising from climate change were promulgated using this authority.[4]

The first of these relevant regulations, Item 101, requires a description of all material information related to an entity's business operations.[5] For instance, companies must disclose information about the financial impacts of complying with existing environmental laws.[6] Second, Item 102 requires that companies disclose pending legal proceedings that could have a material impact on business operations, including proceedings involving environmental claims.[7] In order to provide companies with guidance in this area, Instruction 5 clarifies that "ordinary routine litigation incidental to the business" does not have to be reported, and sets forth the

[1] 15 U.S.C.A. § 77a–77aa (2014).
[2] *See generally id*.
[3] 15 U.S.C.A. §§ 78a–78pp (2014).
[4] 15 U.S.C.A. § 78m(a)(2) (2014).
[5] 17 C.F.R. § 229.101 (2014).
[6] 17 C.F.R. § 229.101(c)(1)(xii) and §229.101(h)(4)(xi) (2014).
[7] 17 C.F.R. § 229.102 (2014).

criteria for what is not considered "ordinary routine litigation."[8] Item 303, known as Management Discussion and Analysis (MD&A), requires companies to discuss trends and uncertainties facing their business.[9] Under Item 303, management has great flexibility to decide what constitutes a material trend or uncertainty; for instance there is no time frame set for the analysis.[10] The last requirement is Item 503, in which a company must provide information about investments that might be considered particularly risky or speculative.[11]

To determine what is generally considered "material" both the courts and the SEC have offered clarification. Supreme Court doctrine, subsequently adopted by the SEC, has held that information is material "if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[12] The SEC has also attempted to provide greater certainty about materiality by stating that something that affects less than 5% of a company's income may be immaterial, but the 5% threshold should not be viewed as dispositive.[13]

i. SEC interpretive release on disclosure of climate change risks

In recent years, a major challenge for companies has been determining what risks from climate change constitute "material information" that must be disclosed in their 10-K

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[8] *Id*. Instruction 5.
[9] 17 C.F.R. § 229.303 (2014).
[10] Management's Discussion & Analysis of Financial Condition & Results of Operations; Certain Investment Company Disclosures, Release Nos. 33-6835, 34-26831, IC-16961, 43 S.E.C. Docket 1330 (May 18, 1989) (reiterating that "[t]he MD&A requirements are intentionally flexible and general"); *see also* Michael Gollub, *Reducing Uncertainty in Environmental Disclosure: Why the Securities and Exchange Commission Should Return to the Basics*, 4 ENVTL. LAW. 311, 366 (1998) (discussing Item 303, which requires disclosure of "known trends," but noting that "the line between known, uncertain events and those that are unknown is cloudy"). Item 303 presents the least likely basis for enforcement challenges, even those based on nondisclosure, as the SEC's position is that the provision of most information defined as "forward-looking" is voluntary. Suzanne J. Romajas, *The Duty to Disclose Forward-Looking Information: A Look at the Future of MD&A*, 61 Fordham L. Rev. S245, S253 (1993).
[11] 17 C.F.R. § 229.503 (2014).
[12] Sec. & Exch. Comm'n Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 12, 1999) (quoting *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).
[13] *Id*.

statements.[14] The acknowledgment that certain environmental risks must be reported is itself not novel; the SEC first issued a number of regulations and interpretive releases on environmental risks in the 1970s and 1980s.[15] However, the SEC did not attempt to refine or update these documents to deal specifically with climate change until 2010.[16] The 2010 interpretive release first emphasizes that it should not be interpreted to impose any new reporting requirements, but provides clarification of obligations under "existing disclosure requirements."[17] It also highlights the fact that a number of companies have voluntarily disclosed more in-depth information related to climate change to non-governmental organizations, and warns that some of that information may be responsive to SEC requirements (although which information is responsive is not identified).[18] With respect to how climate change may affect a company's financial position, the SEC noted that climate change might have significant impacts on "personnel, physical assets, supply chain and distribution chain."[19] The most useful portion of the interpretive release is a list of what may have a material effect on a company: 1) impact of legislation and regulation; 2) international accords; 3) indirect consequences of regulation and business trends; and 4) physical impacts of climate change.[20]

B. Events leading to the SEC's 2010 interpretive release on climate change disclosure

The impetus for the 2010 interpretive release came not from the SEC, but from the efforts of outside groups, most notably the Attorney General of New York. Between 2007 and 2010,

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[14] *See, e.g.*, Rick Hansen, *Climate Change Disclosure by SEC Registrants: Revisiting the SEC's 2010 Interpretive release*, 6 BROOK. J. CORP. FIN. & COM. L. 487, 490 (2012) ("A particular challenge for registrants is determining what they should be saying in their SEC filings about the effects of climate change on their businesses.").
[15] *See* Sec. & Exch. Comm'n, *Commission Guidance Regarding Disclosure Related to Climate Change* (Feb. 8, 2010), 10–11, http://www.sec.gov/rules/interp/2010/33-9106.pdf (discussion on 1970s-1980s promulgation of current rules related to disclosure of environmental risks) [hereinafter "*Commission Guidance*"].
[16] *See generally id*.
[17] *Id*. at 3.
[18] *See id*. at 8–10.
[19] *Id*.
[20] *Id*. at 22–27.

then-Attorney General Andrew Cuomo undertook a series of investigations and submitted petitions to the SEC to obtain the interpretive release.

i. 2007 Efforts

a. Petitioning the SEC

In 2007, General Cuomo joined a group of institutional investors and environmental groups to petition the SEC for interpretive guidance about what information must be disclosed with respect to risks arising from climate change.[21] The petition stressed that the parties sought only clarification of requirements "under existing law" and not the imposition of new disclosure requirements.[22] Due to what the parties considered to be a widespread problem of nondisclosure of information related to climate change, the petition primarily sought a clear statement from the SEC that such disclosure may be material and therefore subject to federal disclosure requirements.[23] Further, the petition asked the SEC to demand that registrants make calculations, where feasible, in order to assess the materiality of such information.[24] The demand for such calculations and information was considered reasonable despite the complex science behind climate change because the SEC had required similar information from companies in fields including biotechnology and pharmaceuticals.[25]

Much of the petition was devoted to detailing the increased awareness, by both investors and corporations, of financial risks posed by climate change.[26] For instance, the petition described a number of studies on rates and quality of disclosure to highlight the inconsistency of disclosure

[21] *Request for Interpretive Guidance on Climate Risk Disclosure*, File No. 4-547, Sept. 18, 2007, *available at* http://www.sec.gov/rules/petitions.shtml.
[22] *Id*. at 2.
[23] *Id*. at 9.
[24] *Id*.
[25] *Id*. at 12.
[26] *See generally id*.

across the corporate sector.[27] The petition also acknowledged that there were private entities offering to perform analyses of companies' climate change risks, but rejected the idea that the existence of these entities was sufficient to provide interested investors with such information.[28] The petition asserted that this kind of material information was responsive to federal disclosure requirements and must be made available to the public at large without cost to the investors.[29] Moreover, reliance on private entities created a risk of biased analyses in that analysts might provide more favorable evaluations for fear of otherwise being denied business or information from their clients.[30]

In addition to the petition, the signatories submitted a separate letter to the SEC requesting immediate action on the enforcement side.[31] Specifically, the letter requested that the SEC "devote close attention to the adequacy of disclosures concerning climate risk, particularly by registrants in industry sectors that emit high levels of greenhouse gases and those that are subject to regulation of greenhouse gas emissions."[32]

b. Investigations of energy companies

At the same time the petition was filed, Cuomo turned to the state Martin Act, New York's securities law, to investigate five energy companies that conducted business in New York.[33] Under the Martin Act, the Attorney General is empowered to investigate any suspected deception or fraud in relation to securities, and combined with the Executive Act, the General may investigate fraud in the context of any business activity.[34] In this instance, Cuomo argued

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[27] *Id*. at 45–48.
[28] *Id*. at 34–39.
[29] *Id*. at 38.
[30] *Id*. at 38–39 (citing Sec. & Exch. Comm'n, *Selective Disclosure and Insider Trading*, 65 Fed. Reg. 51,716, 51,731 (Aug. 24, 2000) (codified at 17 C.F.R. pt. 243 (2007)), *available at* http://www.sec.gov/rules/final/33-7881.htm.
[31] *Id*. at 10.
[32] *Id*.
[33] NY CLS Gen. Bus. §§ 352–59 (2013); Press release, *Energy Company Subpoenas*, New York Attorney General (Sept. 17, 2007), http://www.ag.ny.gov/press-release/energy-companies-subpoenas.
[34] Andrew Lorin, *The Investment Protection Bureau: An Overview of Financial Markets Regulation and Enforcement in New York*, Initiative for Policy Dialogue, 2 (2006), *available at*

that the companies failed to disclose material information related to climate change risks in their SEC filings, and that "[s]elective disclosure of favorable information or omission of unfavorable information concerning climate change is misleading."[35] To investigate these allegations, Cuomo issued subpoenas "seeking information regarding [the companies'] analyses of [their] climate risks and disclosures of such risks to investors."[36]

The use of the Martin Act to investigate nondisclosure related to climate change was unprecedented. Numerous media and legal periodicals stressed that the application of the Martin Act to environmental issues was unusual, but also noted that aggressive use of the Martin Act was not.[37] Specifically, the aggressive use of the Martin Act to investigate corporations was largely pioneered by Cuomo's predecessor, Eliot Spitzer, and then continued by Cuomo.[38] Prior to Spitzer's term in office, the Martin Act had been left unused except in regard to "uranium boiler rooms and promoters of shady Canadian mining stock."[39] Once Spitzer took office, he broke the "unspoken gentleman's agreement" that the Martin Act would not be wielded against

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http://policydialogue.org/events/meetings/financial_markets_reform_task_force_meeting_manchester_2006/materials/.

[35] *See* Subpoenas issued to AES Corp., Dominion Resources, Inc., Xcel Energy, Dynegy, Inc., and Peabody Energy, *available at* http://www.ag.ny.gov/press-release/energy-companies-subpoenas.

[36] *Id*.

[37] *See, e.g.*, Felicity Barringer & Danny Hakim, *New York Subpoenas 5 Energy Companies*, N.Y. TIMES (Sept. 16, 2007), http://www.nytimes.com/2007/09/16/nyregion/16greenhouse.html?_r=0 ("It is rare, if not unique, for a securities law to be used for an environmental purpose"); Steve Raabe, *Xcel Pueblo Site among Targets in N.Y. AG Probe*, DENVER POST, Sept. 17, 2007, at C1, *available at* 2007 WLNR 18204565 (noting that some might view the investigation "as an unusual attempt to use securities law to advance an environmental agenda").

[38] *See, e.g.*, Sarah Kelly-Kilgore, *Ninety and Kicking? How New York's Martin Act is only Getting Stronger with Age*, AM. CRIM. L. REV. (Feb. 7, 2011), http://www.americancriminallawreview.com/Drupal/blogs/blog-entry/ninety-and-kicking-how-new-york%E2%80%99s-martin-act-only-getting-stronger-age-02-07-2011 (nothing that Spitzer began using the Martin Act to combat fraud in the banking, hedge fund, and mutual fund industries); Ashby Jones, *Cuomo to E&Y: Let Me Introduce You to my Good Friend, Martin*, WALL ST. J. (Dec. 21, 2010), http://blogs.wsj.com/law/2010/12/21/cuomo-to-ey-let-me-introduce-you-to-my-good-friend-martin/ (indicating that Cuomo used the Martin Act as aggressively as Spitzer to prosecute large financial entities such as Bank of America in relation to the subprime mortgage crisis); Nicholas Thompson, *The Sword of Spitzer*, LEGAL AFFAIRS (May/June 2004), http://www.legalaffairs.org/issues/May-June-2004/feature_thompson_mayjun04.msp (stating that "Spitzer grasped its potential in a way that his predecessors hadn't," leading him to undertake "merciless investigations" targeting Wall Street).

[39] Thompson, *supra* note 38.

"the moneymen of Wall Street."[40] Instead, Spitzer obtained large settlements against Merrill Lynch and other large financial institutions after investigating them for fraud.[41]

After Cuomo assumed the role of Attorney General, his Office continued Spitzer's legacy in the context of financial fraud. For instance, his office investigated Bank of America and numerous other entities in relation to the subprime mortgage crisis.[42] He also brought a case against Bank of America for failing to disclose losses at Merrill Lynch, which Bank of America had acquired in 2008.[43] Thus, while using the Martin Act to force companies to disclose climate change information was novel in terms of subject matter, the underlying strategy was not.

ii. 2008 Efforts

a. Supplemental petition to the SEC

After nearly one year of inaction on the September 2007 request for guidance, the signatories submitted a supplemental petition to show their continued interest in obtaining an interpretive release on climate change disclosure.[44] The document reported on federal and state hearings, regulations, and initiatives undertaken since the initial petition was filed, and again pointed to numerous reports about investor interest in climate change disclosure.[45] Even after receiving this filing, the SEC did not take action.[46]

b. Initial settlements with energy companies

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40 *Id.*
41 *Id.*
42 Kate Kelly, Amir Efrati & Ruth Simon, *State Subprime Probe Takes a New Tack*, WALL ST. J. (Jan. 31, 2008), http://online.wsj.com/news/articles/SB120173938230430417.
43 Michael Corkery, *Andrew Cuomo and the Real Power of the Martin Act*, WALL ST. J. DEAL JOURNAL (Feb. 4, 2010), http://blogs.wsj.com/deals/2010/02/04/ndrew-cuomo-and-the-real-power-of-the-martin-act/.
44 Supplemental Petition to File No. 4-547, June 12, 2008, *available at* http://www.sec.gov/rules/petitions.shtml.
45 *Id.*
46 *See* Supplemental Petition to File No. 4-547, Nov. 25, 2009, 2–4, *available at* http://www.sec.gov/rules/petitions.shtml (discussing the purpose of filing a second supplement petition and the lack of SEC action on the 2007 petition).

In August 2008, Cuomo's office reached a settlement with Xcel Energy, one of the five energy companies subpoenaed in 2007 for allegedly failing to disclose climate change risks.[47] This settlement represented the "first-ever binding and enforceable agreement requiring a major national energy company to disclose" financial risks related to climate change in subsequent 10-K filings.[48] Xcel Energy, an electricity and natural gas provider, allegedly failed to disclose information related to a coal-fired electric generating unit that it was building.[49] Specifically, Xcel did not disclose how the new unit would impact its "financial, regulatory, and litigation risks" with regards to increased emissions.[50]

Under the terms of the settlement, Xcel Energy was required to disclose material risks stemming from three categories: present and probable future climate change regulation and legislation; climate-change related litigation; and physical impacts of climate change.[51] Additionally, Xcel Energy committed to providing specific data related to four topics. First, Xcel Energy must provide its current carbon emissions.[52] Second, the company must report any projected increases in carbon emissions from planned coal-fired power plants.[53] Third, the 10-K must include all company strategies for reducing, offsetting, limiting, or otherwise managing its global warming pollution emissions and expected global warming emissions reductions from these actions.[54] Last, Xcel Energy must report all corporate governance actions related to

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[47] Press release, *Cuomo Announces Entergy to Back-Off on Plan that Would Have Cost NYS $ 432 Million Dollars*, New York Attorney General (Aug. 27, 2008), http://www.ag.ny.gov/press-release/cuomo-announces-entergy-back-plan-would-have-cost-nys-432-million-dollars.
[48] *Id.*
[49] *See* Subpoena issued to Xcel Energy (Sept. 14, 2007), *available at* http://www.ag.ny.gov/press-release/energy-companies-subpoenas.
[50] *Id.*
[51] Press release, *Cuomo Announces Entergy to Back-Off on Plan that Would Have Cost NYS $ 432 Million Dollars*, *supra* note 47.
[52] *Id.*
[53] *Id.*
[54] *Id.*

climate change, including whether environmental performance is incorporated into officer compensation.[55]

Two months after reaching a settlement with Xcel Energy, Cuomo announced a second agreement with Dynegy, Inc., a producer and seller of electric energy.[56] The Attorney General's Office used its settlement with Xcel Energy as a template for what Dynegy must disclose in its future SEC filings.[57] At the time, Cuomo indicated that his investigations of the remaining three energy companies were ongoing.[58]

iii. 2009 Efforts

a. Second supplemental petition to the SEC

In November 2009, the parties to the September 2007 petition persisted in their efforts to obtain SEC guidance by filing a second supplemental petition.[59] This supplement not only provided updates about the regulatory climate, but also reiterated many of the conclusions in the initial petition, particularly the fact that there was a consensus in the business community that climate change posed financial risks to companies.[60] Also highlighted were Cuomo's investigations of the five energy companies and details of the settlements reached with Xcel Energy and Dynegy, Inc.[61]

b. Additional settlement with AES Corp.

Around the time that the second supplemental petition was filed, Cuomo's Office announced that it had reached a third settlement from its investigations into nondisclosure of

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[55] *Id*.
[56] Press release, *Attorney General Cuomo, Joined by Vice President Gore, Announces Agreement with Major Energy Company, Dynegy, Inc.*, New York Attorney General (Oct. 23, 2008), http://www.ag.ny.gov/press-release/attorney-general-cuomo-joined-vice-president-gore-announces-agreement-major-energy.
[57] *Id*.
[58] *Id*.
[59] Supplemental Petition to File No. 4-547, Nov. 25, 2009, *available at* http://www.sec.gov/rules/petitions.shtml.
[60] *See id*.
[61] *Id*. at 24–25.

risks related to climate change. AES Corp. agreed to the same settlement terms imposed on Xcel Energy and Dynegy, Inc.[62] Cuomo hailed these three settlements as evidence that "[s]electively revealing favorable facts or intentionally concealing unfavorable information about climate change is misleading" to investors.[63] By undertaking these investigations and continuing to pursue companies for nondisclosure the Office was "rais[ing] the bar in the industry and ensur[ing] transparency and disclosure in the marketplace."[64] Of the two companies still under investigation, Cuomo indicated that the Office was continuing its efforts to reach agreements.[65] To date, however, no public agreements have been disclosed.

c. Resulting SEC action

On February 8, 2010, the SEC finally issued its response to the 2007 petition submitted by Cuomo and other organizations.[66] The 2010 interpretive release, as described *supra* in Part II.A.i., represented the first interpretive release specifically about climate change since investors and other organizations had begun petitioning for clarification in 2007.[67] The petition filed by Cuomo and the other parties was the first such petition to be filed.[68] Perhaps encouraged by Cuomo's filing, additional petitions were submitted in 2007 by other entities including the Free Enterprise Fund.[69]

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[62] Press release, *Attorney General Cuomo Announces Agreement with AES to Disclose Climate Change Risks to Investors*, New York Attorney General (Nov. 19, 2009), http://www.ag.ny.gov/press-release/attorney-general-cuomo-announces-agreement-aes-disclose-climate-change-risks-investors.
[63] Press release, *Cuomo Announces Entergy to Back-Off On Plan that Would Have Cost NYS $ 432 Million Dollars*, *supra* note 47.
[64] Press release, *Attorney General Cuomo, Joined By Vice President Gore, Announces Agreement With Major Energy Company, Dynegy, Inc.*, *supra* note 56.
[65] Press release, *Attorney General Cuomo Announces Agreement with AES to Disclose Climate Change Risks to Investors*, *supra* note 62.
[66] *Commission Guidance*, *supra* note 15.
[67] *See id.* at 7 n.20.
[68] *Id.*
[69] *Id.*

III. Why and How to Obtain Clarification of Federal Disclosure Requirements

Now that the SEC has issued an interpretation of disclosure requirements that is specific to climate change, what, if anything, remains to be done? This Part will first set out why additional guidance is necessary. Based on this need for regulatory action, and the fact that, as a general matter, an agency cannot be forced to act where it possesses the discretion to exercise its regulatory authority,[70] it is clear that any attempt to force the agency to issue further guidance must go beyond direct in-court action (i.e. suing the SEC for failure to issue an interpretive release). This Part will argue that the best solution is to have New York resume the efforts begun under General Cuomo (discussed *supra* in Part II.B.). Last, this Part will also suggest ways in which other state attorneys general can assist New York and otherwise play an active role in obtaining SEC guidance.

A. Why is additional guidance on disclosure necessary?

i. Both rates and quality of disclosure are inconsistent even between companies within the same industry

Disclosure rates and the quality of disclosure were inconsistent prior to the issuance of the SEC's 2010 interpretive release, and remain so today. This section will address studies conducted from both before and after the issuance of the 2010 interpretive release to assess whether and how the SEC's action influenced companies' reporting practices.

a. Disclosure prior to the 2010 interpretive release

[70] Heckler v. Chaney, 470 U.S. 821, 832 (1985) (stating that "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2) [of the APA]"); *cf.* Massachusetts v. EPA, 549 U.S. 497 (2007).

Prior to the issuance of the SEC's 2010 interpretive release, disclosure between companies varied dramatically even between companies in the same industry.[71] For instance, some energy companies, including AES Corp., disclosed quantitative estimates of environmental risks, including the methodology used to arrive at their figures (although AES's disclosure practices are the result of the New York investigation discussed *supra*).[72] Other energy companies, including Blacksands Petroleum, Inc., even after being asked by the SEC to clarify an annual 10-K, provided only the following regarding climate change: "Products produced by the oil and natural gas exploration and production industry are a source of certain GHGs, namely carbon dioxide and methane, and future restrictions on the combustion of fossil fuels or the venting of natural gas could have a significant impact on our future operations."[73] Non-energy companies often did not address environmental risks at all, but when such risks were identified, they were often presented in generic statements such as, "business operations are subject to numerous environmental and other air pollution control laws."[74]

A survey of 10-K filings from 1995 to 2008 concluded that there was "an alarming pattern of non-disclosure by corporations regarding climate change risks."[75] Specifically, a "large majority of S&P 500 companies neglect[ed] to even mention climate risk," and the disclosure provided was often superficial, which "demonstrates the fundamental failure [by the

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[71] *See, e.g.*, Hansen, *supra* note 14, at 508–09 (discussing a GAO study of 20 electric utilities and noting that the quality of disclosure varied between companies); *see generally* Kevin L. Doran & Elias L. Quinn, *Climate Change Risk Disclosure: A Sector by Sector Analysis of SEC 10-K Filings from 1995-2008*, 34 N.C.J. INT'L L. & COM. REG. 721, 763 (2009).
[72] AES Corp., Form 10-K (filed Feb. 26, 2010), http://www.sec.gov/Archives/edgar/data/874761/000119312510041006/d10k.htm; Jim Coburn, Sean H. Donahue, & Suriya Jayanti, *Disclosing Climate Risks & Opportunities in SEC Filings*, CERES, 20 (Feb. 2011) [hereinafter "Ceres 2011 Report"].
[73] Blacksands Petroleum, Inc., Correspondence to the SEC Re: Form 10-K for Fiscal year Ended Oct. 31, 2011 (filed Jan. 15, 2013), http://www.sec.gov/Archives/edgar/data/1308137/000147793213000197/filename1.htm.
[74] Dean Foods Co., Form 10-K (filed Feb. 25, 2010), www.sec.gov/Archives/edgar/data/931336/000119312510039767/d10k.htm.
[75] Doran & Quinn, *supra note* 71, at 763.

SEC] to implement securities law and protect investors."[76] For instance, in 2008, less than 25% of the companies listed on the S&P Index made any reference to climate change.[77] In one of the sectors comprising the largest percent of the S&P Index (6.2%), utilities, disclosure was highest with all but one company making some mention of climate change.[78] However, the utilities' disclosure quality varied, and despite increasing in length from previous years, most 10-K statements were "cursory in their discussion and insubstantial in their analysis of risk."[79] Based on these sector-by-sector analyses and the fact that, overall, 76.3% of the S&P 500 companies failed to mention climate change, the study determined that both industrial and non-industrial companies would benefit from additional guidance to appropriately deal with direct and indirect risks.[80]

b. Disclosure after the 2010 interpretive release

After the 2010 interpretive release was issued, disclosure rates increased, although the quality remains suspect in many cases.[81] For instance, Ceres studied disclosure rates among the S&P 500 companies between 2009 and 2013, and concluded that, after the 2010 interpretive release, disclosure rates increased from 45% of all S&P 500 companies to 59%, but the overall quality and specificity of the disclosures dropped.[82] Rather than "fulfill the SEC's expectation," set out in its 2010 interpretive release, that companies would discuss material risks related to four

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[76] *Id*. at 764.
[77] *Id*. at 733.
[78] *Id*. at 735–36.
[79] *Id*. at 742.
[80] *Id*. at 764.
[81] *See, e.g.*, Ceres 2011 Report, *supra* note 72, at 5 (citing ISS Corporate Services Study); Press release, *New ISS Corporate Services Report Highlights Need for Improved Company Disclosure Per New SEC Climate Risk Disclosure Guidelines*, ISS Corporate Services (Oct. 12, 2010), http://www.isscorporateservices.com/node/140; Jim Coburn & Jackie Cook, *Cool Response: The SEC & Corporate Climate Change Reporting*, CERES, 12–13 (Feb. 2014), [hereinafter "Ceres 2014 Report"].
[82] Ceres 2014 Report, *supra* note 81, at 12–13.

categories[83] in a "meaningful" way, the companies are treating climate change risks with brevity and superficiality.[84]

ISS Corporate Services also reviewed disclosure of the 100 largest companies in the United States, and determined that of the 51 companies including any reference to financial risks related to climate change, only 24 mentioned physical risks to their assets and 22 noted future business opportunities that could arise from climate change.[85] Additionally, the National Association of Corporate Directors (NACD) has noted that although the 2010 interpretive release seems to have instigated somewhat higher disclosure rates, a sizeable portion of companies did not report anything and disclosure rates remain less "widespread or as extensive as some would like."[86]

ii. Various stakeholders, including investors and executives, have recognized that improved disclosure is desirable to protect and assist shareholders in making informed investment decisions

The SEC has acknowledged that "[t]here have been increasing calls for climate-related disclosures by shareholders" as "reflected in the several petitions for interpretive advice submitted by large institutional investors and other investor groups."[87] For instance, the petition that ultimately led to the 2010 interpretive release was submitted by 41 parties, including "some of the nation's largest public pension funds, state treasurers, controllers and comptrollers, asset managers, foundations and other institutional investors with approximately $1.4 trillion in assets

[83] The four categories are 1) impact of legislation and regulation; 2) international accords; 3) indirect consequences of regulation and business trends; and 4) physical impacts of climate change. *Commission Guidance*, *supra* note 15, at 22–27.
[84] Ceres 2014 Report, *supra* note 81, at 14.
[85] *Id*. at 5 (citing ISS Corporate Services Study).
[86] Stuart Hammer & Lauren M. Boccardi, *Climate Change Disclosure*, National Association of Corporate Directors (July 26, 2011), http://www.directorship.com/climate-change-disclosure-in-sec-filings/.
[87] *Commission Guidance*, *supra* note 15, at 7.

under management."[88] In sum, the SEC's response to the petition is itself an acknowledgement that, in particular, "carbon-intensive industries have an obligation to inform investors of the material risks that climate change may pose to their companies."[89]

Moreover, as the petition stressed, investors are not interested based purely on "moral or policy interest," but also for financial reasons.[90] Specifically, investors may be seeking out companies "best positioned to avoid the financial risks associated with climate change and to capitalize on the new opportunities that greenhouse gas regulation will provide."[91] Corporate executives also acknowledge that climate change poses a risk to share value. In a 2006 survey of 4,000 international executives, climate change was identified as the third most commonly cited risk to companies.[92]

iii. Providing more precise guidance is not an impossible request, and the SEC has given more concrete instruction with respect to other securities regulations

While it is true that some variance in disclosure is inevitable due to the fact-specific nature of the analysis, the SEC could provide more "best practice" guidance about when companies should attempt to provide quantitative information and provide the methodology used in such an analysis. Specific examples or illustrations have been provided in other contexts to assist companies with compliance. For instance, Rule 14a-9, which addresses false and misleading statements made in proxy statements, includes official notes that give examples of

[88] Environmental Leader, *Investors Call on SEC to Enforce Climate Change Disclosures* (June 16, 2009), http://www.environmentalleader.com/2009/06/16/investors-call-on-sec-to-enforce-climate-change-disclosures/.
[89] Press release, *Statement from the New York State Attorney General Andrew M. Cuomo on the SEC's Action Regarding the Disclosure of Financial Risks Related to Climate Change*, New York Attorney General (Jan. 27, 2010), http://www.ag.ny.gov/press-release/statement-new-york-state-attorney-general-andrew-m-cuomo-secs-action-regarding.
[90] *Request for Interpretive Guidance on Climate Risk Disclosure*, *supra* note 21, at 7–8.
[91] *Id*. at 7.
[92] McKinsey & Company, *The McKinsey Global Survey of Business Executives: Business and Society*, 2 MCKINSEY Q. 33 (2006).

such statements.[93] The Rule itself states only that "[n]o solicitation . . . shall be made . . . containing any statement which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading."[94] This text is arguably imprecise with regards to which types of statements might be considered misleading. However, the SEC followed the Rule with a clarifying note. "[S]ome examples of what . . .may be misleading" include "[p]redictions as to specific future market values" and "[m]aterial which directly or indirectly impugns character, integrity or personal reputation . . . without factual foundation."[95] Similarly, as noted in Part II, the SEC has stated that, in order to help companies assess what is material information, the 5% threshold, while not determinative, may be a useful guideline.[96]

Along these lines, examples or baselines of what should be disclosed could be issued with respect to disclosure of climate change. For instance, the SEC could issue an interpretation that included hypothetical illustrations and suggest when a company ought to calculate, if reasonably possible, costs related to compliance with pending regulations that are either likely to be passed or scheduled to take effect in the coming fiscal year.[97] Or, the SEC could provide an example of how a company might decide whether a trend is certain enough that it will materially affect its financial position.[98] Further, setting out instances where quantitative information

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[93] 17 C.F.R. 240.14a-9 (2014).
[94] *Id*.
[95] Note to 17 C.F.R. 240.14a-9 (2014).
[96] Sec. & Exch. Comm'n Staff Accounting Bulletin No. 99, *supra* note 12.
[97] As a note, although it is true that companies cannot always obtain quantitative data, there is no reason to accept that objection as a reason to impose no or very limited quantification standards. As noted by the SEC in its 2010 interpretive release, a number of companies have voluntarily disclosed quantified climate change information to non-governmental groups (NGOs). *See Commission Guidance*, *supra* note 15, at 8-9. The fact that such information is often not supplied to the SEC may also indicate that further clarification of reporting requirements is needed.
[98] The SEC has provided such illustrations with respect to disclosure in other contexts, such as Item 303. *See* Management's Discussion & Analysis of Financial Condition & Results of Operations; Certain Investment Company Disclosures, *supra* note 10.

should be provided, if possible, would be helpful, and the SEC has often requested such information from registrants in other contexts.[99]

This information would improve the quality of 10-K statements by making the information more accessible and meaningful to investors and authorities that are struggling to interpret the information that is disclosed and determine whether to take action against companies for misleading information or nondisclosure. Additionally, any potential increase in compliance costs to the companies may be less than what the companies gain from added certainty about what they should be disclosing.[100] Even without setting a particular method of assessing materiality, such guidelines would set a baseline from which state and federal authorities could begin enforcement proceedings and on which companies could model their approach to disclosure. On a related issue, institutional investors have frequently indicated through shareholder proposals that they are concerned with and would like to change the substantive environmental practices of companies.[101] Increased disclosure may be one method for determining whether or not those changes are warranted or effective as such information may not otherwise be available to interested investors.

It may seem obvious that certain information should be disclosed (e.g. impact of environmental legislation on physical assets). As the quality of disclosure indicates, however, companies appear to disagree about where environmental impacts (particularly potential, rather

[99] *See, e.g.*, Correspondence with Post Holdings, Inc., Re: Registration Statement on Form 10 (Nov. 22, 2011) (SEC stating, "If possible, please provide quantitative disclosure to clarify how much your leverage is anticipated to increase."), http://www.sec.gov/Archives/edgar/data/1530950/000095012311100084/filename1.htm.

[100] Dru Stevenson, *Special Solicitude for State Standing:* Massachusetts v. EPA, 112 PENN ST. L. REV. 1, 64 (2007) ("the decreased uncertainty resulting from more regulation can provide a benefit that offsets—even outweighs—the greater compliance costs that those regulations impose on the regulated industry").

[101] Ernst & Young, *Shareholder Proposal Topics Shift and Agreements for Withdrawals Reached* (last visited Dec. 19, 2013), http://www.ey.com/US/en/Issues/Governance-and-reporting/Proxy-season-2012---3 (indicating that between 2007 and 2012 environmental proposals comprised the largest, either alone or equal to another category, type of shareholder proposal submitted to corporations); Emily Pickrell, *Climate Change Becoming Top Shareholder Concern*, FUEL FIX (June 25, 2013), http://fuelfix.com/blog/2013/06/25/climate-change-becoming-top-priority-for-shareholders/ (stating that in the first half of 2013 alone, 40% of the shareholder proposals related to climate change).

than certain, impacts – e.g. pending regulations and trends in energy usage or production) become material.[102] Thus, although the SEC may think it simple to determine what should be included in 10-K statements, offering more concrete guidance to companies would transfer the Commission's assumptions to the public sphere and reduce the potential for uncertainty.

iv. The SEC has promised further engagement with the issue of climate change-related disclosure, but has largely failed to follow through on this promise

After issuing its 2010 interpretive release, the SEC promised to take further steps to address climate change disclosure. Despite this promise, which is consistent with its practice of "refin[ing] its interpretive guidance over a period of years to better define what it expects of registrants,"[103] very little action has occurred. NACD has characterized the SEC's enforcement and monitoring responses as "muted" and "not particularly proactive."[104] For instance, in the 2010 interpretive release, the SEC announced that it would hold a public roundtable discussion related to climate change,[105] but never followed through with its promise.[106] Further, the SEC resolved to monitor climate change disclosure through its Investor Advisory Committee,[107] but the Committee was subsequently dissolved.[108] Although a new advisory committee was established in 2012, "it has not yet provided any recommendations related to climate change disclosure."[109]

Last, in the enforcement arena, the SEC has issued a total of 52 letters to companies and asset managers (out of a total of over 45,000 such letters) requesting information related to

[102] *See* Part III.B.i. *supra*.
[103] Ceres 2011 Report, *supra* note 72, at 10.
[104] Hammer & Boccardi, *supra* note 86.
[105] *Commission Guidance*, *supra* note 15, at 28.
[106] Hammer & Boccardi, *supra* note 86.
[107] *Commission Guidance*, *supra* note 15, at 27–28.
[108] Hammer & Boccardi, *supra* note 86.
[109] Ceres 2014 Report, *supra* note 81, at 10.

climate change.[110] Of these letters, 38 were issued in 2010, and the rate of issuance has consistently declined since then, with no letters related to climate change issued in 2013.[111] Not only is the quantity of letters small, but also the requests to the companies primarily asked only what, if any, consideration they gave to the 2010 interpretive release in making their securities filings.[112] Based on these requests, 12 companies made revisions or promised to change practices in the future; and of those that made revisions, half indicated either that climate change did not pose a material risk or committed to discussing it in the future.[113] Overall, the small quantity of letters and generic requests from the SEC indicates "minimal attention" to disclosure of climate change risks, and suggests that there is no "ongoing SEC commitment to implement" the interpretive release.[114]

B. How can state attorneys general address the need for further SEC guidance?

In light of the fact that further clarification of climate change disclosure requirements is needed, this section will propose that the New York Attorney General's Office reassert its leadership on this issue through the two-part solution undertaken by General Cuomo. Under General Schneiderman, this issue has not been actively pursued, except for one instance in 2011 (detailed *infra*). This section proposes that the Office reconsider making it a priority, and will argue that this is consistent with Schneiderman's agenda and conception of the Office's mission. In particular, the Office should continue working with coalitions to petition the SEC for further guidance, outlining continued inconsistencies in quality of disclosure (see Part II *supra*). The Office should also continue raising the political salience of the issue as a means of pressuring the SEC. This can be accomplished by using the Martin Act, when deemed appropriate, to

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[110] *Id*. at 20.
[111] *Id*. at 21.
[112] *Id*. at 23.
[113] *Id*. at 25.
[114] *Id*.

investigate companies for failure to disclose risks related to climate change, and issuing press releases or holding press conferences related to these efforts.

For a variety of reasons discussed *infra*, the New York Attorney General is best positioned to lead the states on this issue. These reasons include particular facets of the Martin Act; the presence of political will in New York to address both climate change and SEC inaction; and an inability of private plaintiffs to obtain similar results under both federal and state law.

i. Can a state attorney general provoke SEC action?

Before addressing the specific details of this Note's proposal, the power of a state attorney general to provoke federal agency action must be addressed. Although it is difficult to prove absolutely that Cuomo's efforts factored into the SEC's decision to issue the 2010 interpretive release, there is evidence to suggest that his Office's investigations combined with the 2007 petition influenced the SEC. This subsection will first address potential reasons for SEC inaction on disclosure of climate change risks, and then will argue that Cuomo's efforts influenced the SEC's decision to issue the 2010 interpretive release.

a. Prior SEC inaction

As noted *supra*, prior to the 2010 interpretive release, the SEC had not issued any climate change-specific regulations or releases in recent years. The political nature of climate change may explain why the SEC has been hesitant to offer advice to companies in this area. Specifically, climate change and environmental law more generally is a highly partisan issue.[115] Thus, the SEC may have wished to avoid "taking sides" in the debate, particularly since the Commission itself is split along party lines with three Democratic Commissioners and two

[115] Pew Research Center, *Climate Change: Key Data Points from Pew Research* (Nov. 5, 2013), http://www.pewresearch.org/key-data-points/climate-change-key-data-points-from-pew-research/ (stating that "[t]here are sharp partisan divides about whether there is solid evidence of global warming," and noting that 50% of Republicans and 88% of Democrats believe there is such evidence).

Republicans.[116] Bearing out this theory is the fact that the 2010 Guidance itself was approved by a 3-2 party-line vote.[117] Further, the Commission attempted to distance itself from the appearance that it was weighing in on the debate by stating that it "is *not* making any kind of statement regarding the *facts* as they relate to the topic of 'climate change' or 'global warming'" (emphasis in original).[118] If the SEC needed additional proof that issuing guidance related to climate change would be politically controversial, then Congress willingly provided it. Soon after the 2010 interpretive release was issued, over 20 representatives wrote to the SEC expressing their opposition to it.[119] Another contingent of the Senate and House introduced legislation to repeal it, but the bills were unsuccessful.[120]

The second reason that the SEC may have failed to enforce or otherwise issue interpretive guidance in this area is "agency capture." Some scholars have posited that regulatory vacuums within the SEC are due to the fact that it has fallen victim to "capture by the very special interests it was ostensibly regulating."[121] In this case, the companies that might suffer the most from more strictly enforced disclosure requirements are those who have often been favored historically by the SEC.[122] Agency capture can occur indirectly as well.[123] As a former SEC

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[116] *See* Sec. & Exch. Comm'n, "Current SEC Commissioners" (last visited Jan. 24, 2014), http://www.sec.gov/about/commissioner.shtml; John M. Broder, *S.E.C. Adds Climate Risk to Disclosure List*, N.Y. TIMES (Jan. 28, 2010), http://www.nytimes.com/2010/01/28/business/28sec.html.
[117] Broder, *supra* note 116.
[118] Mary Schapiro, Chairman, SEC, Statement before the Open Committee Meeting on Disclosure Related to Business or Legislative Events on the Issue of Climate Change (Jan. 27, 2010), http://www.sec.gov/news/speech/2010/spch012710mls-climate.htm.
[119] Gary Shorter, *SEC Climate Change Disclosure Guidance: An Overview and Congressional Concerns*, CONGRESSIONAL RESEARCH SERVICE (Aug. 26, 2013), 5, https://www.fas.org/sgp/crs/misc/R42544.pdf.
[120] *Id*.
[121] Jonathan R. Macey, *The SEC at 70: Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act*, 80 NOTRE DAME L. REV. 951, 958 (2005).
[122] *See* Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909, 922 (1994) (arguing that the defining characteristic of the SEC in recent years is that its "major litigation efforts and regulatory initiatives have been designed to protect the Commission's regulatory turf, rather than to further important areas of public policy" that will protect investors rather than the entities it regulates); John R. Coffee, *A Course of Inaction*, LEGAL AFFAIRS (Mar./Apr. 2001), http://www.legalaffairs.org/issues/March-April-2004/review_coffee_marapr04.msp (discussing the SEC's capture by the mutual fund industry, leaving a regulatory vacuum later filled by Eliot Spitzer); David Skeel, *Unleashing a*

Chairman noted, because regulated entities are well financed and well positioned to lobby Congress, the Commission has, at times, been "constantly threatened with budget cuts by . . . congressional overseers if it pursued aggressive regulations," and therefore refrained for acting.[124]

Another reason that the SEC may not have addressed climate change earlier is a lack of resources.[125] In other contexts, the SEC has defended its actions or lack thereof by stating that its budget forces prioritization, and that it cannot even aggressively pursue all the investigations that it does choose to undertake (resulting in settlements criticized by outsiders and federal judges alike).[126] In the face of competing priorities, it is possible that disclosure of risks arising from climate change fell toward the bottom of the SEC's agenda. However, whether lack of resources, agency capture, or an unwillingness to engage in a partisan debate (or a combination of these factors) better explains the SEC's prior inaction on disclosure, these theories strongly suggest that without outside pressure, in this case, Cuomo's actions, the SEC would not have issued its 2010 interpretive release at all.

b. Strategies for combatting federal agency inaction

Wall Street Watchdog, PACIFIC STANDARD (Apr. 23, 2012), http://www.psmag.com/navigation/business-economics/unleashing-a-wall-street-watchdog-40545/ (criticizing the SEC for failing to strongly enforce financial laws by not even requiring admissions of wrongdoing when it managed to obtain settlements); Aaron M. Tidman, *Securities Law Enforcement in the Twenty-First Century: Why States Are Better Equipped than the Securities and Exchange Commission to Enforce Securities Law*, 57 SYRACUSE L. REV. 379, 401–02 (2007).

[123] *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 TEX. L. REV. 15, 22–23 (2010) (suggesting that industry groups may lobby Congress as a way to control agencies); J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1446 (2003) ("Agencies may be very much in the control of a different legislative principal, namely members of oversight committees.").

[124] Barkow, *supra* note 123, at 23 (quoting Arthur Levitt, Chairman of the SEC from 1993–2001).

[125] Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107, 126 (2004–2005) ("Because the SEC lacks adequate resources to effectively police the national securities market, supplemental enforcement is essential to achieve an appropriate level of deterrence.").

[126] *See* Skeel, *supra* note 122.

There are two major challenges facing states and other actors attempting to force state action. First, there is the principle of federal preemption. In the context of securities disclosure and registration, states are largely preempted in that they may not impose additional or separate requirements on federally registered companies.[127] Second, agency inaction is largely immune to judicial review,[128] and "lawsuits targeting agency performance more generally have found little judicial receptivity."[129] Combined, these principles can "create a vast unregulated domain when federal agencies do not enforce their regulations."[130] Thus, states must be creative in their approach to persuading the SEC to issue interpretive releases or otherwise take enforcement action.

One approach to filling the regulatory void, and which provided the basis for Cuomo's strategy, was pioneered by his predecessor, Eliot Spitzer. While Spitzer's approach was not aimed at forcing SEC action in the same way as Cuomo's, but rather to act in place of the SEC, it remains relevant to the problem addressed here. Specifically, it serves as an example of the competitive dynamic that can exist when state and federal governments have concurrent authority to enforce federal law. When the state and federal governments disagree about enforcement levels, each actor may independently make its own judgment and use its own

[127] 15 U.S.C.A. § 77r(a)(2)(B) (2014) (stating that "no law, rule, regulation, or order, or other administrative action of any State . . . shall directly or indirectly prohibit, limit, or impose any conditions upon the use of . . . any . . . disclosure document relating to a covered security or the issuer thereof that is required to be and is filed with the Commission"); *see also* Sec. & Exch. Comm'n, *Report on the Uniformity of State Regulatory Requirements for Offerings of Securities that Are Not "Covered Securities"* (Oct. 11, 1997), http://www.sec.gov/news/studies/uniformy.htm#secii (noting that the National Securities Market Improvement Act of 1996 preempted states from using blue sky laws to impose additional registration requirements on companies registered with the SEC).
[128] Heckler, 470 U.S. at 832 (1985).
[129] Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 6 (2011).
[130] Amy Widman, *Advancing Federalism Concerns in Administrative Law through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 166 (2010).

resources to pursue actions as it sees fit.[131] Thus, where states perceive a regulatory void, as Spitzer did, they may seek to increase their own enforcement efforts, and thereby act as a substitute for the federal agency.[132]

In the early and mid-2000s, faced with what Spitzer considered to be the SEC's failure to act in the face of financial wrongdoing, his Office turned to the Martin Act to combat financial crimes.[133] Specifically, at the time Spitzer took office, there had been a number of market scandals involving conflicts of interest and other fraudulent practices such as the filing of false analyst reports.[134] Despite these scandals, the SEC had "been slow in pursuing" actions against the perpetrators.[135] Critics alleged the agency was in a "deep slumber . . . [along with] other important financial regulators."[136] Using the state Martin Act, Spitzer began what has been characterized as a "'hostile takeover' of the SEC."[137] Through his Office's investigations of the financial entities involved in these scandals, Spitzer made the issues "politically salient, much to the embarrassment and discomfort of the SEC."[138] Although it could be argued that Spitzer was simply attempting to fill the void left by the SEC, he acknowledged that one goal of these investigations was to "be a catalyst for reform."[139] To an extent, he was successful. For instance, after his Office began investigating Putnam, a hedge fund, for illegal trading transactions, and publicly exposed the wrongdoing, both Massachusetts and the SEC began

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[131] Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U.L. REV. 698, 719 (2011) ("[F]ederal enforcers cannot prevent the states from acting in ways that conflict with the federal enforcement strategy. Similarly, while state enforcers can and do coordinate with their federal counterparts and with each other, cooperation is voluntary.).
[132] *Id*.
[133] *See* Macey, *The SEC at 70*, *supra* note 121, at 952 (stating that Spitzer claimed "to be doing the job the Commission was supposed to be doing, only better, and with fewer people").
[134] Jake Zamansky, *Calling the Ghost of Eliot Spitzer*, FORBES (Oct. 12, 2012), http://www.forbes.com/sites/jakezamansky/2012/10/12/calling-the-ghost-of-eliot-spitzer/.
[135] *Id*.
[136] Thompson, *supra* note 38.
[137] Macey, *The SEC at 70*, *supra* note 121, at 952.
[138] *Id*. at 957.
[139] Charles Gasparino, *Wall Street Has Unlikely New Cop in New York State's Eliot Spitzer*, WALL ST. J. (Apr. 25, 2002), http://online.wsj.com/news/articles/SB101968249615728680.

separate investigations.[140] Prior to Spitzer's investigation, the SEC had been tipped off to the abusive practices but not undertaken any inquiry.[141] Thus, Spitzer's efforts likely contributed to the SEC's own investigation.[142]

In contrast to Spitzer's approach, Cuomo's strategy actively sought a direct response from the SEC in its role as a "lawmaker" rather than just as an enforcer.[143] Due to this goal, Cuomo could not rely solely on Spitzer's example of aggressively using the Martin Act; rather, he had to make a direct request to the SEC for guidance.[144] Thus, the adoption of the two-step approach discussed in detail *supra* (Part II.B.). The first step, filing a petition, was necessary to engage the attention of the SEC in its capacity as a policymaker. Once engaged, retaining attention, even in the face of continued inaction, was critical to emphasize the importance of the issue; thus, the filing of the two supplemental petitions.[145] Without clear direction as to what Cuomo wanted from the SEC, it is possible that the SEC could have more easily continued its silence on climate change disclosure.

While placing pressure on the SEC by calling for guidance was a necessary step, the second step of undertaking investigations under state law was at least as important in ultimately obtaining the 2010 interpretive release. Specifically, there is some evidence to suggest that Cuomo's highly publicized investigations provided the necessary catalyst for agency action. For instance, when the SEC finally responded to the petitions, it expressly acknowledged Cuomo's

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[140] Jeffrey Krasner & Andrew Caffrey, *SEC Missed a Chance in its Probe of Putnam*, BOSTON GLOBE (Nov. 16, 2003), http://www.boston.com/business/globe/articles/2003/11/16/sec_missed_a_chance_in_its_probe_of_putnam/.
[141] *Id.*
[142] *See also* Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L .REV. 863, 872–79, 885–85 (2006) (discussing effect of Spitzer's enforcement actions against the financial sector on the SEC).
[143] *See Request for Interpretive Guidance on Climate Risk Disclosure*, *supra* note 21.
[144] If Cuomo had only begun investigations, the SEC may simply have increased its own enforcement actions, which may have been a welcome change, but perhaps would not provide the clarity that an interpretive release could. At least in theory, interpretive guidance would provide clearer advice to companies and state actors than individual enforcement actions that might not set out a pattern of expectations regarding disclosure.
[145] Supplemental Petition to File No. 4-547, June 12, 2008, *available at* http://www.sec.gov/rules/petitions.shtml; Supplemental Petition to File No. 4-547, Nov. 25, 2009, *available at* http://www.sec.gov/rules/petitions.shtml.

investigations, stating that "[t]he New York Attorney General's Office has entered into settlement agreements with three energy companies," and then detailed the disclosure requirements placed on those companies.[146] This statement, and the response of the energy companies to Cuomo's investigations, suggests that the SEC decided to act to protect its own role as the ultimate source and determiner of federal disclosure guidelines. For instance, the energy companies likely did not disclose out of fear of SEC enforcement (as the agency had not signaled any intent to investigate), but rather because of Cuomo's direct involvement.[147] Further, a study of 10-Ks in 2008 concluded that the entire utility sector led all industries in terms of at least mentioning climate change risks, but emphasized that this sector "had reason to be particularly careful" due to Cuomo's subpoenas to five energy companies.[148]

Viewed through the lens of cooperative federalism, which suggests that concurrent enforcement presents states with the opportunity to impose "novel interpretations of federal law" on regulated entities,[149] the SEC's response seems to be an example of an agency attempting to prevent just such an opportunity. As Cuomo himself made clear, the investigations were not undertaken just to publicize the issue of climate change disclosure, but also to begin establishing a baseline for other companies in the absence of SEC guidance. Specifically, after filing the lawsuits, he emphasized that increasing disclosure is "a priority for us."[150] Even after reaching three landmark settlements, Cuomo signaled his intent to continue pursuing companies for similar violations, stating, "my office's initiative to make sure companies are up front with

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[146] *Commission Guidance*, *supra* note 15, at 7–8.
[147] *See* Barringer & Hakim, *supra* note 37.
(indicating that "[i]t is rare, if not unique, for a securities law to be used for an environmental purpose").
[148] Doran & Quinn, *supra* note 71, at 737.
[149] Lemos, *supra* note 131, at 737. *See also* Macey, *The SEC at 70*, *supra* note 121, at 959 (arguing that due to SEC inaction, Spitzer's aggressive reaction was both "natural and inevitable").
[150] Barringer & Hakim, *supra* note 37.

investors continues."[151] Moreover, his Office strategically chose to pursue companies in the same line of business and imposed the same settlement terms on all of them.[152]

The regulatory scheme governing securities laws and the historic behavior of the SEC also makes it more likely that the SEC would feel threatened in its role as a lawmaking body by Cuomo's investigations. Specifically, under the existing regulatory regime, although the states may not impose separate disclosure requirements on companies, they may bring actions independent of and parallel to the SEC's own investigations for nondisclosure.[153] Furthermore, "the SEC has no right to intervene in state proceedings."[154] Thus, where the result of a state action, as here, will be to provide concrete content to existing disclosure requirements, the SEC will either have to accept the consequences or intervene in its lawmaking capacity.

Although it may be argued that the regulatory void is not the same as when Spitzer was the Attorney General,[155] and assuming that the SEC responded in 2010 because it felt the state was encroaching on its authority, then it is likely that the SEC will continue to be wary of state action in this area. The key fact, which is that the states are preempted from imposing additional filing or disclosure requirements on entities registered with the SEC, remains firmly in place.[156] This feature differentiates the SEC's relationship with the states from that of some other consumer-oriented agencies; for instance, the Office of the Comptroller of the Currency (OCC)

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[151] Press release, *Attorney General Cuomo Announces Agreement with AES to Disclose Climate Change Risks to Investors*, *supra* note 62. As a note, Cuomo did not undertake any further investigations in this area, possibly because he left office just over one year after reaching the last agreement with AES Corp. in Nov. 2009.
[152] *See id.*; Press release, *Cuomo Announces Entergy to Back-Off On Plan that Would Have Cost NYS $ 432 Million Dollars*, *supra* note 47; Press release, *Attorney General Cuomo, Joined By Vice President Gore, Announces Agreement With Major Energy Company, Dynegy, Inc.*, *supra* note 56.
[153] Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1383 (2013).
[154] *Id.*
[155] Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 570–71 (2011) (stating that "federal agencies have pulled back from more aggressive preemption practices and . . . [are] at times actively soliciting state partnerships").
[156] Sec. & Exch. Comm'n, *Report on the Uniformity of State Regulatory Requirements for Offerings of Securities that Are Not "Covered Securities,"* *supra* note 127.

may not prohibit states from imposing additional consumer protection rules on national banks unless the state rules are inconsistent with the federal laws.[157] Thus, unlike the OCC, which may be less likely to respond to state action due to its inability to interfere unless such actions are inconsistent with federal statutes, the SEC has a greater incentive to intervene and protect its authority to control the content of 10-Ks.

ii. Why is New York best positioned to force SEC action?

a. The Martin Act contains features that render it more powerful than the securities laws in other states

New York's Martin Act, just one of the numerous blue sky laws in effect, is often characterized as the most powerful in the nation.[158] There are a number of reasons for this, not the least of which is the generous interpretation of "fraud" that the New York courts have fashioned from the text of the statute.[159] Specifically, the statute gives the attorney general the power to investigate and prosecute "all deceitful practices contrary to the plain rules of common honesty," or "acts tending to deceive or mislead the public."[160] Thus, unlike in federal fraud cases, the state need not prove intent or scienter.[161] Moreover, the Act applies to all suspected

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157 Metzger, *Federalism Under Obama*, *supra* note 155, at 583 (stating that Dodd-Frank "takes a restrictive approach toward preemption, providing that only inconsistent state law is preempted; providing that state laws offering greater protection to consumers are not inconsistent for that reason; and requiring that a state consumer financial law must be preempted only if the state law discriminates against national banks or "prevents or significantly interferes with the exercise by a national bank of its powers" as determined by a court or by the OCC 'on a case-by-case basis.'").

158 *See, e.g.*, David J. Kaufmann, Practice Commentaries, McKinney's Cons Laws of New York, Book 19, General Business Law, Article 23-A at 9 (stating that the Martin Act is "the broadest and most easily triggered investigative and prosecutorial powers of any securities regulator, state or federal.") (1998 WL 35298553).

159 *See, e.g.*, State v. Sonifer Realty Corp., 622 N.Y.S.2d 516, 517 (1995) (stating that "the fraudulent practices targeted by the statute need not constitute fraud in the classic common law sense, and reliance need not be shown in order for the Attorney General to obtain relief"); People v. Cadplaz Sponsors, 69 Misc. 2d 417, 419 (N.Y. Sup. Ct. 1972) (stating that all acts are covered regardless of "whether or not the product of scienter or intent to defraud").

160 Cadplaz Sponsors, 69 Misc. 2d at 419.

161 *See supra* note 159; Frank C. Razzano, *The Martin Act: An Overview*, 1 J. BUS. & TECH. L. 125, 129 (2006) (stating that neither intent nor scienter need be proved as the Act was meant to reach more than intentional fraud). *Cf.* Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336 (2005) (describing all elements that must be proved, including scienter); Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) (sets scienter standard as

wrongdoing that an entity "shall have employed, or employs, or is about to employ."[162] All of these factors point to what the courts have confirmed: the attorney general possesses "wide discretion" to determine whether to begin an inquiry under the Martin Act.[163] Reinforcing this broad power is the fact that the courts do not have "the authority to judicially review" the attorney general's "exercise of discretion" regarding whether or not to investigate an entity.[164]

Also of relevance to nondisclosure actions are the broad investigatory powers given to the attorney general.[165] Prior to trial, the state may subpoena any documents deemed "relevant or material to the inquiry."[166] Additionally, the state may subpoena witnesses to give oral or written statements even before deciding to take a case to a grand jury for indictment, and these witnesses are not given a right to counsel or a right against self-incrimination.[167] If the Office permits counsel (which is the typical practice), then counsel may be denied the ability to object to questions and to take notes during the interview.[168] Witnesses who fail to respond to a subpoena "without reasonable cause" may be prosecuted for a misdemeanor.[169] Significantly, unlike in federal cases, the attorney general's subpoena power continues even after he or she decides to commence a legal proceeding.[170] All of these steps may be taken in complete secrecy, and any state official or witness involved who discloses information about the investigation may

whether "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts").

[162] N.Y. CLS Gen. Bus. § 352(1) (2013).

[163] Charles H. Greenthal & Co. v. Lefkowitz, 41 A.D. 2d 818, 818 (1972).

[164] People v. Bunge Corp., 25 N.Y. 2d 91, 98 (1969).

[165] Rose, *State Enforcement of National Policy*, *supra* note 153, at 1382–83 (stating that the "Martin Act also confers on the NYAG powerful tools of pre-suit discovery"); *see also id*. at 1383 n.134.

[166] N.Y. CLS Gen. Bus. § 352(2) (2013); People v. Thain, 874 N.Y.S.2d 896, 899 (2009).

[167] Matter of Abrams, 611 N.Y.S.2d 422, 426 (1994); Robert J. Anello, *White Collar Crime; IV. New York State Commercial Crimes*, *in* New York Practice Series – Commercial Litigation in New York State Courts (Robert L. Haig ed., 3d ed. 2013).

[168] Kanterman v. Att'y Gen., 76 Misc. 2d 743, 745–46 (N.Y. Sup. Ct. 1973).

[169] N.Y. CLS Gen. Bus. § 352(4) (2013).

[170] N.Y. CLS Gen. Bus. § 352(2) (2013); Razzano, *supra* note 161, at 128 & n.18.

be prosecuted for a misdemeanor.[171] Alternatively, the investigation may be conducted publicly, and the resulting "shock value and potential business damage of having a criminal investigation conducted in public" has been said to give the Office "awesome power" and leverage against defendants.[172]

This investigatory power is a large part of why other state attorneys general are unable to replicate the investigations regarding nondisclosure that Cuomo undertook.[173] Specifically, the other state attorneys general that have often been active in the area of climate change have less or no jurisdiction in this area. For instance, the state securities laws in Connecticut and Massachusetts give the attorney general no jurisdiction over nondisclosure.[174] In Rhode Island and Vermont, the attorneys general possess only criminal jurisdiction,[175] which is not a likely avenue for pursuing nondisclosure cases.

One state whose attorney general may be able to partner with New York in investigating companies for nondisclosure is California.[176] Although the state securities law vests investigative and enforcement power with a corporations commissioner, the law authorizes the commissioner to work with the attorney general.[177] Further, a separate statute expressly gives the attorney general concurrent investigative and enforcement powers.[178] The investigative

[171] N.Y. CLS Gen. Bus. § 352(5) (2013); Razzano, *supra* note 161, at 130.
[172] Anello, *supra* note 167.
[173] *Id*. (the "state statute is unique in the broad investigative and prosecutorial powers it confers on the Attorney General").
[174] Connecticut Uniform Securities Act, Conn. Gen. Stat. § 36b-25 (2014); Massachusetts Uniform Securities Act, Mass. Gen. Laws ch. 110A, § 406 (2013).
[175] Rhode Island Uniform Securities Act, R.I. Gen. Laws § 7-11-604 (2013); Vermont Securities Act, Vt. Stat. Ann. Tit. 9, § 5508 (2013).
[176] *See* Cal. Corp. Code § 25531 (West 2013) (describing Commissioner's investigative powers); *Id*. § 25606 (West 2013) (stating that the Attorney General "upon the commissioner's request shall act as the attorney for the commissioner in actions and proceedings brought by or against the commissioner under or pursuant to any provision of any law under the commissioner's jurisdiction").
[177] *Id*.
[178] Cal. Gov't. Code § 12659 (West 2013).

powers of both the commissioner and attorney general are similar to those in New York.[179] For instance, the California Code permits the attorney general and commissioner to undertake private and public investigations.[180] Both officers also have the power to subpoena witnesses for testimony and documents that are "relevant or material to the inquiry."[181] Individuals who fail to comply with the subpoenas may be held in contempt.[182] The broad reach of New York's law to already committed, ongoing, and future acts also exists in California.[183] The one factor that may hinder the efforts of the California attorney general in aligning himself or herself with New York's efforts is that the investigations by the attorney general and commissioner may not be duplicative.[184] Thus, if the two officers do not agree on what and how to pursue corporate entities, it may prove difficult to provide the consistent support New York needs.

b. New York possesses the political willingness to address environmental and climate change issues

As evidenced by the efforts of New York's most recent Attorneys General, the Office is more than willing to take on initiatives related to the environment and climate change. General Cuomo headed a number of initiatives related to climate change in areas other than securities disclosure. For example, Cuomo took an active role in several multistate actions against federal agencies in which the states sought additional emissions regulations from the EPA.[185] Since

[179] *Compare* Cal. Corp. Code § 25531 (West 2013), *with* N.Y. CLS Gen. Bus. § 352 (2013).
[180] Cal. Corp. Code § 25531(a) (West 2013); Cal. Gov't Code § 12659(a) (West 2013).
[181] Cal. Corp. Code § 25531(c) (West 2013); Cal. Gov't Code § 12659(c) (West 2013).
[182] Cal. Corp. Code § 25531(d) (West 2013); Cal. Gov't Code § 12659(d) (West 2013).
[183] Cal. Corp. Code § 25531(a) (West 2013) (stating that the commissioner may open an investigation "in his discretion . . . to determine whether any person has violated or is about to violate any provision of this law or any rule or order hereunder); Cal. Gov't Code § 12659(a) (West 2013) (using identical language as in § 25531(a) to allow the attorney general to open investigations).
[184] C. Hugh Friedman & James F. Fotenos, Cal. Prac. Guide: Corp. Ch. 5-C (Evridiki Dallas ed., The Rutter Group 2013).
[185] *See, e.g.*, Press release, *Attorney General Andrew Cuomo Issues Statement on Historic Global Warming Decision; U.S. Supreme Court Rejects EPA's Refusal to Regulate Carbon Dioxide Emissions*, New York Attorney General (Apr. 2, 2007), http://www.ag.ny.gov/press-release/attorney-general-andrew-cuomo-issues-statement-historic-global-warming-decision-us (discussing *Massachusetts v. EPA*, a case in which the Supreme Court ruled

taking office in 2011, General Schneiderman has similarly been active in efforts to address environmental issues. The following sections will detail his Office's record on the environment and argue that, although his Office has largely not pursued Cuomo's initiative on securities disclosure, resuming that issue is consistent with his agenda.

1. General Schneiderman and disclosure of environment-related risks in federal securities filings

Soon after taking office, Schneiderman indicated his willingness to involve his Office in environmental issues by invoking the Martin Act to subpoena five shale gas companies and three energy companies.[186] His Office alleged that the companies disclosed misleading and inaccurate information to investors related to the use of oil and natural gas wells.[187] The subpoenas sought information about the methods used to calculate how much the wells would produce in future years.[188] Although it appears that no legal consequences resulted from these subpoenas (no public information related to further steps or even the subpoenas have been released by the Office[189]), this attempt to use the Martin Act to address nondisclosure of environmental risks could still be seen as a somewhat successful effort to force federal action, and as a sign that his Office is well equipped to continue pursuing this issue.

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that the EPA improperly refused to consider a multistate petition for rulemaking related to carbon dioxide emissions; as a note, Cuomo took office while the lawsuit was pending, but continued to be a party to it); Press release, *Cuomo Leads Coalition of 15 States against EPA in Battle for States' Right to Fight Global Warming*, New York Attorney General (Jan. 2, 2008), http://www.ag.ny.gov/press-release/cuomo-leads-coalition-15-states-against-epa-battle-states-right-fight-global-warming (lawsuit against the EPA to preserve states' rights to regulate emissions from automobiles); Press release, *Attorney General Cuomo Leads 13-State Coalition to Defend the First-Ever Limits on Global Warming Pollution from Facilities Like Power Plants and Oil Refineries*, New York Attorney General (July 22, 2010), http://www.ag.ny.gov/press-release/attorney-general-cuomo-leads-13-state-coalition-defend-first-ever-limits-global (discussing multistate effort to intervene in litigation to defend a federal rule regulating emissions from power plants).

[186] *See* Ian Urbina, *Lawmakers Seek Inquiry of Natural Gas Industry*, N.Y. TIMES (June 28, 2011), http://www.nytimes.com/2011/06/29/us/politics/29naturalgas.html; Ian Urbina, *New York Subpoenas Energy Firms*, N.Y. TIMES (Aug. 18, 2011), http://www.nytimes.com/2011/08/19/us/19gas.html?dlbk.

[187] Urbina, *New York Subpoenas Energy Firms*, *supra* note 186.

[188] *Id*.

[189] No information was released on the New York Attorney General's website (http://www.ag.ny.gov) at the time that the subpoenas were issued, and no further information has since appeared.

About one month after Schneiderman subpoenaed the five shale gas companies, members of Congress took notice. These members submitted letters to the SEC requesting that it open a parallel investigation.[190] Within a month, the SEC had issued subpoenas to an undisclosed number of natural gas companies seeking the requested information.[191] To date, no further enforcement action in these cases has been announced or otherwise been made publicly available, although one company announced that the SEC had concluded its investigation.[192] Thus, although it appears that the SEC did not ultimately take enforcement steps or request amended disclosure forms, the events suggest that the agency can be pressured through state and federal actors to pay attention to nondisclosure issues.[193]

2. General Schneiderman's Office has been active on climate change policy, and working on disclosure of risks related to climate change is consistent with his agenda

Despite Schneiderman's lack of subsequent action regarding disclosure of environmental risks, his Office has remained highly involved with other climate change initiatives, indicating that resuming efforts to improve climate change-related disclosure would be consistent with his agenda. These initiatives, which are discussed *infra*, include litigation or the threat of litigation against federal agencies and submitting official comments to agencies.

Schneiderman's Office has threatened litigation in several instances. For example, in December 2012, Schneiderman and six other states notified the EPA that they intended to sue the agency for failing to issue regulations, as required under the Clean Air Act, to control methane

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[190] Urbina, *Lawmakers Seek Inquiry of Natural Gas Industry*, *supra* note 186.
[191] Ian Urbina, *Regulators Seek Records on Claims for Gas Wells*, N.Y. TIMES (July 29, 2011), http://www.nytimes.com/2011/07/30/us/30gas.html.
[192] *See, e.g.*, *SEC Ends Probe into Shale Gas Reserves*, MARKETWATCH (Sept. 24, 2012), http://www.marketwatch.com/story/sec-ends-probe-into-shale-gas-reserves-gdp-chk-xom-bhp-rrc-cog-2012-09-24.
[193] *See also* Part II.B. *supra* on the SEC's response to Cuomo's petition for interpretive guidance.

emissions from the oil and gas industries.[194] Further, after the EPA missed the deadline to finalize a rule limiting greenhouse gas emissions from new power plants, Schneiderman and 11 other states and cities notified the EPA of their intent to sue if the EPA did not expedite its finalization process.[195] Another major effort involved defending the state's participation in a multi-state climate change effort known as the "Regional Greenhouse Gas Initiative" (RGGI).[196] As Schneiderman stated after a New York court dismissed *Thrun v. Cuomo*,[197] the lawsuit to block state participation in RGGI, "[t]his is a significant victory . . . [and] I will continue to use the full force of my office to vigorously defend sensible efforts that reduce climate change pollution."[198]

In addition to litigation, Schneiderman has utilized the public comment system that federal agencies must use when considering policy initiatives. In April 2013, his Office submitted comments criticizing the U.S. State Department for failing to accurately assess the environmental effects of the Keystone Pipeline, and arguing that the Environmental Impact Statement (EIS) did not adequately consider emissions from the pipeline.[199] Along with 11 other

[194] Press release, *A.G. Schneiderman Leads Multi-State Coalition in Action to Curb Climate Change Pollution from Oil and Gas Industry*, New York Attorney General (Dec. 11, 2012), http://www.ag.ny.gov/press-release/ag-schneiderman-leads-multi-state-coalition-action-curb-climate-change-pollution-oil.

[195] Neela Banerjee, *States, Cities, Environmental Groups Demand EPA Emission Rules*, L.A. TIMES (Apr. 17, 2013), http://articles.latimes.com/2013/apr/17/news/la-pn-epa-emission-rules-demand-20130417.

[196] Press release, *A.G. Schneiderman Victorious in Defense of State Effort to Combat Climate Change*, New York Attorney General (June 13, 2012), http://www.ag.ny.gov/press-release/ag-schneiderman-victorious-defense-state-effort-combat-climate-change. *See also* Press release, *A.G. Schneiderman Wins Court Victory Defending Critical State Effort to Combat Climate Change*, New York Attorney General (Dec. 5, 2013), http://www.ag.ny.gov/press-release/ag-schneiderman-wins-court-victory-defending-critical-state-effort-combat-climate (describing the Appellate Division's affirmation of the 2012 State Supreme Court ruling on RGGI).

[197] Thrun v. Cuomo, No. 4358-11 (N.Y. Sup. Ct. dismissed June 12, 2012), *aff'd*, 976 N.Y.S.2d 320 (N.Y. App. Div. 2013).

[198] Press release, *A.G. Schneiderman Victorious in Defense of State Effort to Combat Climate Change*, *supra note* 196.

[199] Press release, *A.G. Schneiderman Faults U.S. State Department for Failing to Fully Analyze Climate Change Impact of Keystone XI and Related Pipelines on New York State*, New York Attorney General (Apr. 24, 2013), http://www.ag.ny.gov/press-release/ag-schneiderman-faults-us-state-department-failing-fully-analyze-climate-change-impact.

states, Schneiderman also submitted comments to the EPA regarding proposed rules on emissions from power plants.[200]

c. General Schneiderman's Office has aggressively used the Martin Act to address financial crimes generally

Like the two attorneys general who came before him, Schneiderman has actively made use of the Martin Act to combat financial crimes.[201] This fact, combined with his role in climate change initiatives, suggests that resuming Cuomo's disclosure efforts is consistent with his view that the Attorney General's Office should play a role in issues affecting both New York residents and the nation.[202] For example, in 2011, his Office sued the Bank of New York Mellon, a national financial entity, for allegedly "overcharg[ing] customers for processing foreign currency transactions" and cheating the state out of fees associated with the transactions.[203] In 2012, the Office filed a lawsuit against JPMorgan for allegedly defrauding consumers who purchased mortgage-backed securities.[204] In early 2014, Schneiderman also reached an agreement with

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[200] Press release, *A.G. Schneiderman & Coalition States: Clean Air Act Mandates Federal Action to Cut Climate-Change Pollution from Power Plants*, New York Attorney General (Dec. 16, 2013), http://www.ag.ny.gov/press-release/ag-schneiderman-coalition-states-clean-air-act-mandates-federal-action-cut-climate.

[201] Urbina, *New York Subpoenas Energy Firms*, *supra* note 186 ("Since he took office in January, Mr. Schneiderman has used the Martin Act to investigate major Wall Street banks involved in the mortgage-backed securities crisis and other accusations of financial impropriety.").

[202] *See* Remarks by Eric T. Schneiderman, Attorney General, to the 2013 Bloomberg Markets 50 Summit, Sept. 24, 2013, http://www.ag.ny.gov/press-release/remarks-attorney-general-eric-t-schneiderman-2013-bloomberg-markets-50-summit (while discussing ways to combat financial crimes by nationwide firms on Wall Street, Schneiderman discussed the power of the Martin Act to investigate companies, stating, "we can bring a lot of weight of the law to bear" on the entities suspected of wrongdoing).

[203] Eric Dash & Peter Lattman, *U.S. and New York Sue Bank of New York Mellon Over Foreign Exchange Fees*, N.Y. TIMES (Oct. 4, 2011), http://www.nytimes.com/2011/10/05/business/new-york-state-says-bank-of-new-york-mellon-cheated-pension-funds.html?dlbk.

[204] De La Merced, *In JPMorgan Case, the Martin Act Rides Again*, N.Y. TIMES DEALBOOK (Oct. 2, 2012), http://dealbook.nytimes.com/2012/10/02/in-jpmorgan-case-the-martin-act-rides-again/; Gretchen Morgenson, *JPMorgan Unit is Sued over Mortgage Securities Pools*, N.Y. TIMES (Oct. 1, 2012), http://www.nytimes.com/2012/10/02/business/suit-accuses-jpmorgan-unit-of-broad-misconduct-on-mortgage-securities.html?dlbk.

BlackRock, the world's largest money manager, wherein the company agreed to end an analyst survey program that allegedly facilitated insider trading.[205]

d. The attorney general will more likely be able to pressure the SEC than private plaintiffs

Although it may be thought that private plaintiffs could play a role in forcing the SEC to act, there are a number of institutional barriers to this strategy. First, there is no right of action for private parties under the state Martin Act; thus, the state Attorney General is the sole enforcer.[206] Second, while private parties do have an implied right of action under federal securities laws, subsequent legislation on the issue makes it difficult for plaintiffs to bring successful cases.[207] For instance, plaintiffs must state "with particularity" the facts giving rise to the alleged wrong, but are not entitled to even limited discovery before a court rules on whether the lawsuit states a cause of action.[208] Moreover, under existing regulations and Supreme Court precedent, plaintiffs must have already suffered actual economic loss (unlike the state of New York under the Martin Act, discussed *supra*) to file a claim.[209]

In addition to the practical difficulties facing private plaintiffs in bringing lawsuits, they also are disadvantaged vis-à-vis state attorneys general with respect to the media. Specifically, actions brought by the state often have "added credibility and weight" due to the status of the

[205] Alex Leondis, Chris Dolmetsch & Joel Rosenblatt, *BlackRock Agrees with N.Y. to End Analyst Survey Program*, BLOOMBERG (Jan. 9, 2014), http://www.bloomberg.com/news/2014-01-09/blackrock-agrees-with-n-y-to-end-analyst-survey-program.html.
[206] CPC Internat'l, Inc. v. McKesson Corp., 70 N.Y.2d 268, 275 (1987).
[207] Skeel, *Unleashing a Wall Street Watchdog*, PACIFIC STANDARD (Apr. 23, 2012), http://www.psmag.com/navigation/business-economics/unleashing-a-wall-street-watchdog-40545/.
[208] *See id*. (describing the requirements imposed by the Private Securities Litigation Reform Act of 1995).
[209] 15 U.S.C.A. § 78r(a) (2014) (establishing liability for misleading statements only if the plaintiff, "in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for *damages* caused by such reliance); 15 U.S.C.A. § 78u-4(b)(4) (2014) (stating that private plaintiffs "shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the *loss* for which the plaintiff seeks to recover damages); Dura Pharmaceuticals, 544 U.S. at 344 (describing the elements of a 10b-5 action, including "actual economic loss" or "actual damages").

plaintiff as a government official.[210] Thus, to bring sufficient publicity to securities disclosure cases such that the political salience of the issue forces a reaction from the SEC, relying on a state attorney general is a more promising strategy.[211]

iii. Despite the lack of similar blue sky laws, other states can use non-litigation methods to contribute to New York's efforts

State attorneys general have frequently been involved in efforts to force the federal government to take action on climate change.[212] Although in the context of securities disclosure they are often unable to initiate their own investigations, there are other ways in which they may contribute to efforts to obtain further disclosure guidance. In the past, the two main ways in which attorneys general have worked together to challenge federal agencies have been 1) multistate litigation[213] and 2) multistate coalitions that submit comments or petitions to agencies regarding proposed policies (discussed *infra*). Of these two strategies, the latter is of most relevance with respect to securities disclosure.

In a number of contexts, state attorneys general have submitted letters and official comments to federal agencies urging them to adopt certain policies. For instance, in 2013, 21

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[210] Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 917 (1998) (also indicating that "[t]he press is more accustomed to covering news releases and activities of state government officials than the statements and court hearings of private lawyers); *see also* Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of Statement Enforcement Powers*, *supra* note 130, at 194 (noting the impact that media campaigns can have in attempts to hold federal agencies accountable).

[211] *See* Lainie Rutkow & Stephen P. Teret, *The Potential for State Attorneys General to Promote the Public's Health: Theory, Evidence, and Practice*, 30 ST. LOUIS U. PUB. L. REV. 267, 276–77 (2011) (discussing the ways in which attorneys general can use their "bully pulpit" to engage in advocacy on an issue); Donald C. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 915 (2008) ("the state attorney general often wields disproportionate bargaining power in negotiations arising in *parens patriae* litigation").

[212] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007); Am. Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527 (2011).

[213] *See, e.g.*, Massachusetts, 549 U.S. 497 (2007) (13 states sued the EPA after it refused to consider a petition to regulate carbon dioxide emissions from motor vehicles); Am. Elec. Power Co., Inc., 131 S. Ct. 2527 (2011) (eight states sued American Electric Power Co., arguing that it was creating a public nuisance by contributing to global warming); Florida v. U.S. Dep't of Health & Hum. Servs., 648 F. 3d 1245 (11th Cir. 2011) (26 states sued HHS to prevent enforcement of the Affordable Care Act).

state attorneys general petitioned the U.S. State Department to extend the Keystone Pipeline.[214] Also in 2013, a coalition of 13 attorneys general submitted a letter to the EPA urging the agency to finalize a rule related to emissions standards for motor vehicles.[215] Within the area of securities disclosure, Cuomo's 2007 petition to the SEC included 40 other groups representing both state and non-state entities.[216] Consistent with past practice, other state attorneys general could lend their names and the weight of their offices to any additional petitions for interpretive guidance submitted to the SEC.

Another avenue of potential importance is filing amicus briefs in court challenges to the New York Attorney General's authority under the Martin Act. Over the years, the New York courts have been asked to rule on a number of issues stemming from the Martin Act, some of which have challenged the ability of the attorney general to pursue action under the statute.[217] In the most recent challenge, *People v. Greenberg*, the states of Vermont and Connecticut filed an amicus brief in support of the state's use of the Martin Act and the state's substantive argument, which was that the lower courts properly denied summary judgment to defendants in a case against an insurance company.[218] Although state investigations for nondisclosure may not reach the trial stage, preserving the attorney general's authority to investigate and prosecute under the

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[214] Bryan Cohen, *Multi-state Coalition Petitions Kerry to Expand Keystone Pipeline*, LEGAL NEWSLINE (Aug. 13, 2013), http://legalnewsline.com/news/federal-government/243541-multi-state-coalition-petitions-kerry-to-expand-keystone-pipeline.

[215] Bryan Cohen, *Multi-state Coalition Urges EPA to Adopt Air Pollution Controls for Vehicles*, LEGAL NEWSLINE (July 3, 2013), http://legalnewsline.com/news/federal-government/242659-multi-state-coalition-urges-epa-to-adopt-air-pollution-controls-for-vehicles.

[216] *Request for Interpretive Guidance on Climate Risk Disclosure*, *supra* note 21 (state actors included officials from California, Florida, North Carolina, Oregon, Rhode Island, and Vermont).

[217] *See, e.g.*, Dunham v. Ottinger, 243 N.Y. 423 (1926) (challenge to the constitutionality of the law); Bishop v. Commodity Exchange, Inc., 564 F. Supp. 1557 (S.D.N.Y. 1983) (whether the Martin Act is preempted by Commodity Exchange Act); People v. Greenberg, 95 A.D.3d 474, 479 (N.Y. App. Div. 2012) (whether federal laws preempted attorney general's authority under the Martin Act).

[218] *See* People v. Greenberg, 21 N.Y.3d 439, 445 (2013).

Martin Act remains important and controversial.[219] Thus, as in the *Greenberg* case, it may be important in the future for other states to file amicus briefs to support New York's authority to prosecute or investigate companies under the Martin Act.[220]

iv. Criticism of state attorneys general as national policymakers

As the number of state attorneys general involved in national policy issues has grown,[221] so has the criticism of their actions.[222] Most of the criticism revolves around the basic reality that state attorneys general are elected or appointed by individuals in only one state, but their "enforcement efforts may have nationwide consequences" and can prompt both federal agencies and potential defendants to permanently alter their behavior.[223] This last section of the Note will argue that, despite these criticisms, there is no inherent reason to keep attorneys general from using their offices to address national issues such as climate change. In fact, Congress has, in

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[219] *See, e.g.*, Sarah Kelly-Kilgore, *supra* note 38 (noting that the law's broad investigatory powers remain "[e]xtremely controversial," and that many are uncomfortable with its "almost unlimited power"); Walter Olsen, *Devil's Bargain: Wall St. & the Martin Act*, N.Y. POST (Aug. 30, 2011), http://nypost.com/2011/08/30/devils-bargain-wall-st-the-martin-act/ (stating that many individuals oppose the attorney general's aggressive use of the Martin Act, and explaining that the "trouble is with the state of the Martin Act itself").

[220] The federal preemption issue raised at trial was not appealed, thus the amicus brief filed by Vermont and Rhode Island did not address this issue, but if such an issue were appealed in future cases, amicus briefs from other states could similarly be submitted in support of the state.

[221] *See* Lemos, *supra* note 131, at 726–27 (listing the numerous areas in which state attorneys general have involved themselves, including "campaigns against the tobacco industry, makes of lead-based paint, prescription drug marketing programs, student lending practices, handgun manufacturers, and . . . the mortgage-service industry).

[222] *See, e.g.*, Gifford, *supra* note 211, at 968 (stating that some court decisions indicate that "the attorney general's filing of *parens patriae* litigation against manufacturers of products already regulated through the legislative process distorts our constitutional structure"); Hal Stratton, Att'y Gen. of New Mexico, *Attorneys General in State of Collusion*, WALL ST. J. (June 10, 1988) (criticizing efforts by the National Association of Attorneys General to set national policies in the area of business regulation); William H. Pryor, Jr., Att'y Gen. of Alabama, *Novel Government Lawsuits against Industries: An Assault on the Rule of Law*, Federalism & Separation of Powers Practice Group Newsletter (Spring 1999), http://www.fed-soc.org/publications/detail/novel-government-lawsuits-against-industries-an-assault-on-the-rule-of-law (arguing that the use of lawsuits by state attorneys general to address national issues is a misuse of the court system).

[223] Lemos, *supra* note 131, at 741.

other contexts, acknowledged and accepted the benefits of having state actors play a role in shaping national policy.[224]

To begin with, critics have asserted that concurrent state enforcement creates a climate of overenforcement that is harmful to regulated entities.[225] However, the phenomenon of overenforcement seems unlikely to occur – or at least very rarely if history is any guide.[226] States are unlikely to overenforce because, like any government entity, they "are limited in number and must ration their own scare resources."[227] Due to the existence of finite resources, states "have no inherent incentive to maximize enforcement by taking action on every colorable offense."[228] Additionally, states are more likely than private plaintiffs to consider the public interest or social utility of taking action, further reducing the likelihood of overzealous prosecution.[229] Thus, if what the states are seeking is an optimal enforcement level, then overenforcement is not necessarily a problem; "'good' enforcement is not the same thing as maximum enforcement."[230]

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[224] Metzger, *Federalism Under Obama*, *supra* note 155, at 582–85 (discussing Dodd-Frank's limits on preemption of state consumer protection laws, and noting that the CFPB is required to respond to state petitions for rulemaking if a majority of states sign the petition).

[225] *See* Lemos, *supra* note 131, at 703 (discussing concerns with overenforcement generally); James J. Park, *Rules, Principles and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115, 121 (2012) (stating that the "criticism of decentralized securities enforcement is largely driven by the problem of overenforcement, the tendency of some enforcers to bring more cases than is socially optimal"); Metzger, *Federalism and Federal Agency Reform*, *supra* note 129, at 22 (indicating that the Supreme Court majority opinion in *Altria* "offers a strong caution against states playing too much of a regulatory role" where they have concurrent enforcement power).

[226] *See* Amy Widman & Prentiss Cox, *State Attorneys General Use of Concurrent Public Enforcement Authority in Federal Consumer Protection Laws*, 33 CARDOZO L. REV. 53, 81–82 (2011) (stating that empirical data in the area of consumer protection indicates that excessive enforcement has not occurred). *See also* Part II, *supra*, detailing the regulatory void left by the SEC, which led Spitzer and Cuomo to begin aggressively pursuing cases traditionally left to SEC jurisdiction.

[227] Lemos, *supra* note 131, at 703.

[228] *Id*. at 704.

[229] *Id*. at 703; Park, *supra note* 225 at 122.

[230] Lemos, *supra* note 131, at 705.

Related to the image of attorneys general as overzealous prosecutors is the critique that the generals take on certain cases or issues to further a partisan agenda.[231] There is no question that political will must exist for an attorney general to involve his or her office in a controversial area.[232] That said, the allegation that these attorneys general are motivated solely by partisan politics is exaggerated. First of all, choosing office priorities is more complex than whether an issue is popular amongst Democrats or Republicans, and in many cases, "the public policy consequences are not always clear in advance."[233] Moreover, even if attorneys general work together on an issue, each represents a different constituency with differing priorities, meaning that the attorneys general "are a diverse group with diverse motivations."[234] While political motivations remain a legitimate concern, it should also not be forgotten that their critics are often pushing a regulatory or partisan agenda, and that the political agendas of state attorneys general could be viewed as a needed counterweight to the political views of the agencies.[235] Nor should it be forgotten that any action undertaken by an attorney general could be viewed as politically motivated.[236] Most importantly, if the state action is meritorious aside from being "good politics," then whether the attorney general stands to gain from it is largely beside the point.

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[231] *See, e.g.*, Lawrence G. Wasden & Brian Kane, Massachusetts v. EPA*: A Strategic and Jurisdictional Recipe for State Attorneys General in the Context of Emission Accelerated Global Warming Solutions*, 44 IDAHO L. REV. 703, 732–33 (2008) ("A significant hurdle for state attorneys general when forming partnerships can be the political overtones associated with such partnerships. As indicated previously, attorneys general are elected in forty-three states and such elections necessarily carry with them the political ramifications of party affiliation. *Massachusetts* is an example of how party affiliation can shape the affiliations that are forged in bringing suit.").

[232] *See, e.g.*, Amanda M. Rose & Larry J. LeBlanc, *Policing Public Companies: An Empirical Examination of the Enforcement Landscape and the Role Played by State Securities Regulators*, 65 FLA. L. REV. 395, 399 (2013) (concluding that "states with an elected Democrat serving as the securities regulator brought matters at nearly seven times the rate of other states" indicating that "pursuit of public companies for securities-related misconduct has a partisan political dimension").

[233] Lemos, *supra* note 131, at 722; *see also id.* at 722 n.102 (indicating that "every case has two sides, and state politics can be unpredictable").

[234] *Id*. at 722.

[235] Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of Statement Enforcement Powers*, *supra* note 130, at 212.

[236] For example, the Massachusetts Attorney General was accused of failing to bring public corruption cases in order to avoid prosecuting her fellow Democrats, but after she began bringing such cases, her critics then charged that she only filed the actions to buttress her own political career. Peter Schworm & Frank Phillips, *Cahill to Pay $ 100,000*

Critics also assert that the attorney general of a single state should not be able to impose its policy preferences on the rest of the nation.[237] The securities market overseen by the federal and state governments has both national and international dimensions, so this particular critique of how attorneys general wield their authority carries more weight here than perhaps in other contexts.[238] However, the dominance of state policy does not have to be and, as Cuomo's efforts seemed to indicate, is not the ultimate goal with respect to disclosure of risks from climate change. Relying on state investigations to establish a baseline may be both useful and one method of holding companies accountable in the absence of federal action, but the issuance of a single, uniformly applied SEC interpretation would be preferable and (at least in theory) would provide clearer instructions, which is why Cuomo's Office sought federal guidance.

Assuming that climate change disclosure is less of a priority to the SEC than other issues, and that a failure to issue additional guidance is the result of the agency's decisions on how to manage its finite resources, then state pressure to issue such guidance may be criticized for attempting to divert the agency's resources to less important areas.[239] There are two possible responses to such criticism. First, the SEC is always the target of industry groups and other

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to Settle Case, BOSTON GLOBE (Mar. 1, 2013), http://www.bostonglobe.com/metro/2013/03/01/cahill-will-not-retried-will-instead-pay-fine-lottery-case/KiFpyqJIU0OWJwltRcbkfM/story.html; Noah Bierman, *Effect of Outcome on Coakley's Future a Matter of Debate*, BOSTON GLOBE (Dec. 12, 2012), http://www.boston.com/news/local/massachusetts/2012/12/13/political-cost-for-coakley-question/0b8N6gu3XH8Km6LRIWd4QK/story.html.

[237] *See, e.g.*, Gifford, *Impersonating the Legislature*, *supra* note 211, at 968 (stating that some court decisions indicate that "the attorney general's filing of *parens patriae* litigation against manufacturers of products already regulated through the legislative process distorts our constitutional structure"); Stratton, *supra* note 222 (criticizing efforts by the National Association of Attorneys General to set national policies in the area of business regulation); John W. Suthers, Att'y Gen. of Colorado, *The State Attorney General's Role in Global Climate Change*, 85 Denv. U. L. Rev. 757, 762 (2008) ("I do not believe that state AGs have the authority to act in whatever they believe is the broader national or international interest and to usurp the jurisdictional authority of Congress and federal regulatory agencies in the process.").

[238] *See* Rose, *State Enforcement of National Policy*, *supra* note 153, at 1353 ("Policy distortion can result . . . when different enforcers have different views on what the appropriate policy should be. When this occurs, the more aggressive enforcer's viewpoint will always win out, creating a one-way ratchet as regulated parties adjust their behavior to conform to the demands of the strictest enforcer with jurisdiction over them.").

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lobbying that would likely result in a shift of its resources away from their current distribution.[240] Thus, basing opposition to state action on the idea that the state wants the agency to reprioritize is not conclusive evidence of its harm. Second, assuming that a reprioritization is unwarranted, the SEC and the state are independent actors, and the SEC, therefore, is not obligated to respond at all to state demands.[241] However, that lack of obligation is hardly sufficient to justify prohibiting the state from acting on its own or requesting SEC action.

The motivation of the SEC in not responding also highlights why the intervention of the state attorney general may be reasonable. Assuming that the SEC is not hostile to the idea of clearer disclosure guidelines but feels it lacks the resources to focus on the issue, then the state should step in and pursue its own investigations under the Martin Act in order to set a baseline for disclosure practices. In this context, the choice is between no enforcement and state enforcement, and assuming that there are harms to investors and companies from continued uncertainty in the law, then the benefit of state intervention may outweigh the costs.[242]

Alternatively, assume that the SEC has not issued further guidance because it does not view current disclosure practices as problematic.[243] Pressure from the state attorney general may

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[240] *See* Barkow, *supra* note 123, at 22 (discussion of industry groups lobbying both the SEC and Congress to influence the agency's policies and priorities).

[241] *Cf.* The CFPB must respond to state petitions for rulemaking if a majority of the states sign a petition. 12 U.S.C.A. § 5551(c)(1) (2013) ("The Bureau shall issue a notice of proposed rulemaking whenever a majority of the States has enacted a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau."). There is no similar provision requiring the SEC to respond to state demands for rulemaking.

[242] *See* Joseph E. Stiglitz, *Federalism in Securities Regulation: An Economist's Perspective*, 40 U.S.F. L. Rev. 805, 819–20 (2006) (arguing that duplication of financial regulation efforts is beneficial where the risk of underenforcement presents high costs to consumers, and concluding that state laws such as the Martin Act are useful way to reduce the possibility of costly errors when agencies either make mistakes or do not act). The benefits of concurrent enforcement have also been addressed by the Supreme Court. *See* Metzger, 111 Colum. L. Rev. at 25–32 (proposing that Supreme Court doctrine limiting the extent of state preemption could be viewed, at least in part, as stemming from "the Court's concern that federal agencies may be systematically failing to meet their statutory responsibilities").

[243] For example, at the time the 2010 Commission Guidance was released, one of the two SEC Commissioners who voted against the interpretive release indicated that she did not believe attention to the subject was either substantively necessary or within the SEC's expertise. Kathleen L. Casey, Commissioner, SEC, Statement at Open Meeting—Interpretive release Regarding Disclosure of Climate Change Matters (Jan. 27, 2010), http://www.sec.gov/news/speech/2010/spch012710klc-climate.htm ("I do not believe that this release will result in

still be warranted as a means of promoting agency transparency and accountability. Specifically, rather than allow the SEC to obfuscate the issue by stating in its 2010 interpretive release that it would continue to monitor and seek public comment on the issue[244] and then fail to follow through on its promises, continued state action could force the agency to acknowledge its actual policy position, and thereby increase the level of candor within the disclosure debate.[245]

IV. Conclusion

Disclosure of financial risks arising from climate change poses an ongoing challenge for companies and for law enforcement. To date, there is no consensus on when such risks should be disclosed and how much detail ought to be included in federal securities filings. While the SEC's 2010 interpretive release has been viewed as one step toward resolving the debate, it is also incomplete. The SEC itself recognized that the issuance of the release might not be the Commission's final statement on disclosure. In fact, the Commission promised to monitor the situation, solicit public comment, and consider whether further guidance or rulemaking was necessary.[246] To date, this promise has been unfulfilled—at least in any public manner—and disagreement about how and when to report climate change risks persists.

Whether the SEC's failure to act on climate change disclosure since 2010 is the result of inadvertent inattention or a belief that no further action is needed, the agency's continued silence

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greater availability of material, decision-useful information geared toward the needs of the broad majority of investors . . . I can only conclude that the purpose of this release is to place the imprimatur of the Commission on the agenda of the social and environmental policy lobby, an agenda that falls outside of our expertise and beyond our fundamental mission of investor protection.").

[244] *Commission Guidance*, *supra* note 15, at 27–28.

[245] Where there is express disagreement between the states and the SEC about whether a problem exists, the state may still get a federal response, but from Congress. In particular, if an agency publicly asserts that it does not want state involvement, Congress might decide to end the dispute by either specifying disclosure guidelines itself or preempting the state. Either way, the state actor, while possibly not ending up with the federal response it desires, can force the debate to a larger arena and bring the democratic process to bear on the issue (and thereby also address the criticism that one state is setting policy).

[246] *Commission Guidance*, *supra* note 15, at 27–28.

suggests the need for an outside actor to exert pressure on the SEC for clarification of its policy beliefs. Armed with the Martin Act and the political will to serve as a leader on environmental issues, the New York Attorney General is best positioned to be that actor. Not only can the Attorney General use Cuomo's two-part strategy to request interpretive guidance, but the Office can, in the face of continued SEC inaction, directly pressure corporations to disclose information. While it is uncertain about what the actual results of such efforts will be, without leadership from New York, continued SEC inaction seems certain.