

September 8, 2009

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-6628

Re: Release No. 34-60332; File No. S7-15-09,
Proposed Amendment to Municipal Securities Disclosure

Dear Ms. Murphy:

We, the undersigned, represent corporate accountability advocates, financial consultants and counsel who provide technical assistance and public policy research on issues related to financing coal-fired power plants. We respectfully submit our comments on the Securities and Exchange Commission's (the "Commission") proposed amendments to 17 CFR Parts 240 and 241¹ which would among other changes modify Rule 15c2-12² (the "Rule" or "Rule 15c2-12") specifying materiality requirements relating to municipal bond disclosures published in Release No. 34-60332; File No. S7-15-09 Proposed Amendments to Municipal Securities Disclosure.

I. Summary

We commend the Commission for providing these proposed amendments and interpretative guidance as an essential step forward in expanding the quality, level, and timeliness of information in the municipal bond market. Enhanced disclosure benefits all market participants by protecting investors from misleading and incomplete information and by informing brokers, dealers, municipal securities dealers, including participating underwriters of their obligations under the antifraud provisions.

However, we respectfully ask that the Commission supplement its expanded disclosure rules with interpretative guidance addressing climate risk for the municipal bond market. Letters and petitions before the Commission have described the need for comprehensive climate risk disclosure in the annual filings of publicly traded companies. Growing evidence supports the conclusions of state officials, fiscal managers, and investor advocates that the litigation, financial and regulatory responses to carbon mitigation efforts will materially impact the fiscal soundness of publicly traded companies and must be disclosed to investors.

Yet despite clear evidence of materiality for publicly traded companies, these proposed rules are silent concerning the need for climate risk disclosure in municipal bond documents. Some of the largest contributors to greenhouse gas emissions are coal-fired power plants operated and supported by tax-exempt rural electric cooperatives, municipal utilities, and finance authorities

¹ The legal basis for the proposed rule is 15 U.S.C. 78b, 78c(b), 78j, 78g(c), 78g-4, 78q and 78w(a)(1), the Commission is proposing amendments to § 240.15c2-12 of Title 17 of the Code of Federal Regulations.

² 17 CFR 240.15c2-12.

(hereinafter “Publicly Owned Utilities” or “POUs”) which utilize the municipal bond market and are exempt from the registration requirements of the Securities Act of 1933 (“the Securities Act”) and the periodic filing requirements of the Securities and Exchange Act of 1934 (the “Exchange Act”). These entities are equally as likely, and in many cases even more likely, as their publicly-traded counterparts to bear increasing regulatory and fiscal impacts in response to climate change and related state and regional carbon mitigation efforts.

We respectfully ask that the Commission provide interpretative guidance under Rule 15c2-12 clarifying the substance and scope of climate risk disclosure as material information which would be included in the official statement in a primary offering and among the annual financing pursuant to a continuing disclosure agreement. Such guidance would (1) clarify climate risk as material information that must be disclosed to municipal bond holders and (2) clarify the obligations of municipal bond participants, including participating underwriters, concerning their obligations under the antifraud provisions. Without such guidance, we believe there will be significant disparities in the reporting of climate risk disclosure among power industry peers thereby creating confusion among municipal bond market participants. We believe the absence of guidance will also leave municipal securities investors at a marked disadvantage in comparison to similarly situated corporate securities holders.

As the Commission furthers its efforts to protect investors by improving the adequacy and consistency of climate risk disclosure in the filings of publicly traded entities, we encourage the Commission to adopt climate risk disclosure principles analogous to the principles currently contemplated for publicly traded companies. We believe that it is essential that municipal market participants be afforded the same standards and access to material information concerning climate risk to achieve parity among corporate and municipal securities investors.

II. The Commission Should Apply the Same Climate Risk Analysis to Corporate and Municipal Securities Disclosure Documents

Material Climate Risk Disclosure for Publicly Traded Companies

For the last several years, corporate leaders and policy advocates have offered the Commission mounting evidence that the financial and regulatory consequences of climate risk will impact the financial position of publicly traded companies. The hundreds of shareholders resolutions seeking climate risk disclosure that have been presented to the board of directors of hundreds of publicly traded corporations reflects a demand for corporate commitments to measure and disclose climate risk to investors.³ In September of 2007, a coalition of state officials, shareholder advocates and environmental groups, led by Ceres petitioned⁴ the Commission seeking interpretative guidance to clarify climate risk disclosure as material information that if

³ See Ceres, Investors Achieve Major Company Commitments on Climate Change, August 24, 2009 .(available at <http://www.ceres.org/Page.aspx?pid=1121>).

⁴ See Petition for Interpretive Guidance on Climate Risk Disclosure, SEC file No. 4-547 (September 18, 2007), [hereinafter Ceres Petition] (available at <http://www.sec.gov/rules/petitions/2007/petn4-547.pdf>). Petitioners have asked the Commission to provide interpretive guidance concerning climate risk disclosure in the annual filings of corporations under Regulation S-K Items 101, 103 and 303.

undisclosed could impact an investor's ability to make informed decisions.⁵ The conclusions of the petition suggested that in the absence of Commission guidance, current disclosures were voluntary, inconsistent and inadequate. These conclusions were further supported by expert testimony before Senator Jack Reed, Chairman of the Subcommittee of Securities Insurance and Investment. Among those testifying, Russell Read, then-Chief Investment Officer of the California Public Employees Retirement System (CalPERS) emphasized that environmental risks and opportunities can affect the performance of investment portfolios and that where a company is well positioned to avoid the financial risks associated with climate risk, it can capitalize on new opportunities including alternative energy technologies.⁶

Current state and regional efforts⁷ to reach carbon reduction targets reveal a real and present commitment to actively develop agreements and implement steps to reduce greenhouse gas emissions. Critics of mandated climate risk disclosure once argued that not only is there no link between CO2 emissions and climate change but that the impacts on business were too speculative to disclose.⁸ Now commercial entities throughout the country must comply with state and regional regulatory regimes that impact current and future earnings. In June 2009, the American Clean Energy and Security Act of 2009 ("ACES"), one of the most comprehensive energy bills to address the impacts of climate change, passed the House of Representatives and is currently before the Senate. This bill followed the introduction of over 235 bills, resolutions and amendments addressing climate change and greenhouse gas emissions introduced during the 110th Congress.

In addition to public sector initiatives, private organizations are addressing climate risk to assess and mitigate potential losses. For example, the National Association of Insurance Commissioners began requiring insurance companies to make certain climate change related disclosures to state insurance commissions.⁹ The Commissioners concluded that climate risk is critical to insurer solvency and insurance availability and will aid regulators as they assess an insurer's risk assessment. Whether these regulations require new reporting standards for carbon dioxide emissions¹⁰, new vehicle emission standards¹¹, or compliance with a regional cap-and-

⁵ See Testimony Senate Banking, Housing and Urban Affairs, "Climate Disclosure: Measuring Financial Risks and Opportunities." October 31, 2007.

⁶ See Testimony of Russell Read (available at <http://incr.com/Document.Doc?id=204>). On December 6, 2007, Senator Chris Dodd, Chairman of the Senate Committee on Banking, Housing, and Urban Affairs and Senator Jack Reed urged then-Chairman Cox to issue guidance on climate disclosure to ensure greater consistency and completeness in disclosure of material information related to climate change and current and probable future governmental regulation of greenhouse gas emissions. (available at http://dodd.senate.gov/multimedia/2007/120607_CoxLetter.pdf).

⁷ See Midwest Greenhouse Gas Reduction Accord, (available at <http://www.midwesternaccord.org/>), Western Climate Initiative, <http://www.westernclimateinitiative.org/>, and Regional Greenhouse Gas Initiative, <http://www.rggi.org/home>).

⁸ See e.g., Letter from Steven J. Milloy, Free Enterprise Action Fund, to Florence Harmon, Secretary, Commission (July 21, 2008)(available at <http://www.sec.gov/rules/petitions/2008/petn4-563.pdf>).

⁹ See Insurer Climate Risk Disclosure Survey. (available at http://www.naic.org/documents/committees_ex_climate_climate_risk_disclosure_survey.pdf).

¹⁰ See the Western Climate Initiative's Essential Requirements of Mandatory Reporting (ERM) in connection with a collaboration by several western states and Canada to monitor greenhouse gas emissions.(available

trade¹² regime, the costs of compliance under national, state and regional carbon mitigation efforts will, if not already, impacts the balance sheet of every commercial and industrial entity in the country. In response to a carbon-constrained market, private entities across every sector of the economy have already begun to analyze and report current exposure to climate risk.¹³ While carbon reduction measures impact multiple sectors, the power generation sector may be most heavily impacted.

Power Generation and Climate Risk Disclosure for Publicly Traded Companies

Power generation entities, many of which operate coal-fired power plants are among the principal contributors to carbon dioxide emissions and the most vulnerable to material environmental risks under carbon reduction regulations. Investor groups like Ceres have documented the competitive disadvantage power generating entities may face, as a result of (1) heightened exposure to the physical risks from climate change, (2) the regulatory risks related to proposed greenhouse gas emission limits, (3) the indirect regulatory risks and the opportunities related to products or services from high emitting companies and (4) litigation risks for emitters of greenhouse gases.¹⁴ Even in a sector where climate risk will have and is having a direct and significant impact on the fiscal stability of operations, the reporting of these risks has been essentially voluntary and at times so incomplete as to be misleading to investors.

In the fall of 2007, the New York State Attorney General raised concerns about the adequacy of climate risk disclosure in the annual filings of five energy companies to determine whether construction of new coal-fired power plants posed undisclosed financial risks to investors.¹⁵ The subpoenas issued to Xcel, Inc., Dynegy and three other power companies ultimately yielded the first binding agreement between a publicly traded company and the New York Attorney General. Under the terms of the agreement announced in August 2008, Xcel agreed to disclose material climate risk including analyses of financial risks from current and probable future laws, from

at <http://www.westernclimateinitiative.org/news-and-updates/58-final-essential-requirements-of-mandatory-reporting-and-response-to-stakeholder-comments-released>).

¹¹ See e.g. Florida's Adoption of California Motor Vehicle Emissions Standards as a project adopted alongside the Heavy-Duty Vehicle Idling Reduction project and proposed rulemaking. (available at <http://www.dep.state.fl.us/air/rules/recently.htm>).

¹² The Regional Greenhouse Gas Emissions Initiative is supported by 10 Northeast and Mid-Atlantic states that will implement a cap and trade system to achieve carbon reduction targets. (available at <http://www.rggi.org/home>).

¹³ See Appendix C of the Petition, *supra* note 4. See also Supplemental petition of June 12, 2008 for a comprehensive list of state and regional actions. (available at <http://www.sec.gov/rules/petitions/2008/petn4-547-supp.pdf>).

¹⁴ See Ceres Petition *supra* note 4; See also, Climate Risk Disclosure in SEC Filings, An Analysis of 10-K Reporting by Oil and Gas, Insurance, Coal, Transportation and Electric Power Companies.(available at <http://www.ceres.org/Document.Doc?id=473>).

¹⁵ See Letter from Katherine Kennedy, Special Deputy Attorney General, Environmental Protection Bureau, Office of the Attorney General Of the State of New York to Richard C. Kelly, Chairman, President and Chief Executive Officer, Xcel Energy, September 14, 2007 (available at http://www.oag.state.ny.us/media_center/2007/sep/xcel%20energy.pdf).

litigation and from physical impacts of climate change, and strategic analysis of climate change risk and emissions management in its annual 10-K.¹⁶

Additionally, several of the nation's financial institutions have also addressed climate risk as material information that impacts both an investor's ability to make informed investment decisions and a financial institution's ability to assess project economics within the parameters of carbon risk and financing arrangements. JPMorgan Chase, Citi, and Morgan Stanley, in partnership with power companies and other environmental shareholders authored and publicly pledged a commitment to the Carbon Principles in February 2008.¹⁷ The Carbon Principles include the "Enhanced Environmental" due diligence recommendations, which provide a process for evaluating carbon mitigation strategies among the range of financing considerations for the construction of fossil fuel generation facilities, including coal-fired power plants.¹⁸

Growing scientific evidence, regulatory measures and corporate due diligence recommendations all confirm the conclusions of experts and advocates, that climate risk is material information that must be disclosed by publicly traded companies.¹⁹ We commend the Commission's current efforts to seek input from a variety of stakeholders and corporate leaders to contemplate the scope and substance of material climate risk disclosure under the registration requirements of the Securities Act and the periodic filings requirements of the Exchange Act.²⁰ We believe that these efforts will eliminate confusion among market participants regarding the adequacy and consistency of climate risk disclosure and protect investors from incomplete and potentially fraudulent disclosures in the annual filings of publicly traded companies.

Power Generation and Climate Risk Disclosure for Municipal Bond Market Participants

Investor Owned Utilities (IOUs) and POU's own and operate facilities that generate and supply power using a variety of technologies including coal-fired power plants. IOUs are subject to the registration requirements of the Securities Act and the periodic filing requirements under the Exchange Act and are therefore likely to be subject to the climate risk disclosure guidelines that the Commission is currently contemplating.

¹⁶ See *In the Matter of Xcel Energy, Assurance of Discontinuance Pursuant to Executive Law §63(15) for settlement terms.* (available at <http://www.oag.state.ny.us/bureaus/environmental/pdfs/Attachment%20E%20--%20Xcel%20AOD.pdf>).

¹⁷ See Carbon Principles (available at: <http://www.jpmorgan.com/pages/jpmc/community/env/carbon>).

¹⁸ *Id.*

¹⁹ The current state and regional efforts to address climate risk are complemented by several national and international advocacy groups that actively measure carbon emissions as an integral processes of managing and reducing climate change impacts. The Carbon Disclosure Project (CDP) distributes questionnaires and annually compiles the responses representing 57 trillion the world's largest companies to measure and report their carbon emissions, integrating the long term value and cost of climate change into their assessment of the financial health and future prospects of their business. (available at <http://www.cdproject.net/>).

²⁰ See *Evan Lehmann, SEC Turnaround Sparks Sudden Look at Climate Disclosure*, NYTimes, July 13, 2009. (available at <http://www.nytimes.com/cwire/2009/07/13/13climatewire-sec-turnaround-sparks-sudden-look-at-climate-65102.html>) ; See also comments from SEC Spokesman John Nester, " The SEC is committed to robust disclosures by companies of material environmental issues. The key requirement for triggering disclosure is that the impact or potential impact will be material to a company and is therefore material to investors."

A rural electric cooperative is an example of a POU that may be organized under Internal Revenue Code (IRC) 501(c)(12)²¹ and utilize the tax-exempt municipal bond market to finance operations. Under the Tower Amendments, Congress exempted municipal bond offerings from the registration requirements of the Securities Act and the periodic filings of the Exchange Act. Should the Commission adopt rules governing climate risk disclosure for publicly traded companies, POUs that operate coal-fired power plants would not have to disclose climate risk despite substantial exposure to environmental liabilities, and would ultimately elude the Commission's efforts to create parity and ensure investor access to material climate risk.

Risk of Substantial Disparities in Disclosure among all Market Participants

- ***Disparities in the quality of information available to investors. Without interpretative guidance, the varying quality of climate risk disclosure in the offering documents and periodic filings of power entities will create inconsistencies that may mislead investors.*** We believe that the loophole created by the potential for drastically varying reporting standards will ultimately frustrate the Commission's efforts to create parity among corporate and municipal securities investors. Municipal bond holders will be at an extreme disadvantage in comparison to corporate securities investors who will likely have access to material information addressing the impact of climate risk.
- ***Disparities in the standards used by power industry peers to disclose climate risk.*** Without the Commission's guidance, POUs will not be held to the same standards of accountability as their publicly traded peers despite exposure to identical climate risks. To have nearly identical power industry participants subject to such vastly different reporting standards creates substantial risk of disparity which will likely lead to confusion in the marketplace.
- ***Disparities in the amount of information available to investors for informed decision making.*** We believe that without the Commission's guidance, the official statements for primary offerings and the annual filings submitted as part of the continuing disclosure documents, drafted in support of a POU's bond offerings will contain substantially less information concerning the analysis and fiscal impacts of climate risk on a POU's operations. We believe that where shareholders and other advocates for expanded disclosure in the annual filings, or 10Ks, of publicly traded companies have deemed exposure to climate risk as material information necessary for informed investing, that this information is just as material to the decision making of municipal bond holders.
- ***Disparities among broker, dealers and municipal securities dealers and their counsel.*** Without guidance to brokers, dealers and municipal securities dealers, including participating underwriters, concerning the procedures for analyzing carbon emission outputs, there will be substantial disparities and multiple interpretations of each participants' obligations under federal securities laws. We believe that the absence of

²¹ 26 U.S.C. §501(c)(12)

guidance from the Commission regarding the scope, substance and timeliness of material climate risk may expose investors to fraud and manipulation.

Furthermore, the potential disparities in disclosure are likely to create an additional layer of risk that may negatively impact an investment's credit rating. Recently, Moody's considered a company's exposure to carbon risk as grounds for assigning a negative outlook on several power companies stating "[t]he negative outlook reflects longer term challenges from increasingly stringent environmental mandates, including carbon, and national renewable portfolio standards, which could increase costs significantly for this mostly coal-fired utility system."²² Most POU offerings rely on favorable ratings from rating agencies to secure credit enhancements in the form of bond insurance to mitigate the risk of default. With the increased vulnerability of IOUs to negative credit ratings, it is likely that POUs may also receive similar downgrades making disclosure even more crucial to protect investors.

IV. The Commission Should Address Climate Risk Disclosure in the Municipal Bond Market as a Preemptive Measure Against Future Enforcement Actions Under the Antifraud Provisions of Federal Securities Laws

Climate Risk Disclosure in the Official Statement

While Congress exempted municipal bond offerings under the provisions of the Securities Act and the Exchange Act, municipal securities offerings are subject to the antifraud provisions under section 17(a) of the Securities Act and under Section 10b, and Rule 10b-5 of the Exchange Act. The Commission has instituted enforcement actions under the antifraud provisions where any person including brokers, dealers, municipal securities dealers, counsel, and financial advisors made false or misleading statements of material fact, omitted material information or knew or had reason to know that statements were misleading or failed to disclose a conflict of interest in the offering of securities.²³ Yet in many instances these measures were after the fact remedies that did not protect investors but rather sanctioned the parties to the deal underlying the offering.

²² See, Jason Lehman, Moody's Changes Southern Co., Subsidiaries' Credit Rating Outlooks to Negative, September 1, 2009. (available at <http://www.snl.com/Interactivex/article.aspx?CdId=A-9996533-9566>).

²³ See Howard v. Everex Systems, Inc., 228 F. 3d 1057, 1063 (9th Cir 2000). The Ninth Circuit defined recklessness as: "an extreme departure from the standards of ordinary care which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.; See also SEC v. Senex Corp., 399 F.Supp 497 (E.D.K.Y 1975).(Conflict of interest between the financial advisor and underwriter.) Also see from the Office of Municipal Securities of the Securities and Exchange Commission September 1999 (available at <http://www.sec.gov/pdf/mbondcs.pdf>). See also, SEC Release Attorney's Conduct in Issuing an Opinion Letter Without Conducting an Inquiry of Underlying Facts Failed to Comport with Applicable Standards of Conduct, Exchange Act, Release No. 17831 (June 1, 1981) quoting SEC v. Spectrum, Ltd., 489 F.2d 535 (2d Cir. 1973), "the preparation of an opinion letter is too essential and the reliance of the public too high to permit due diligence to be cast aside in the name of convenience."

In the absence of scienter, or intent, to omit or make false and or misleading statements, market participants have been unclear as to the scope of liability where involvement in drafting the official statement in a primary offering may vary with the size of the issuer, whether the transaction is a competitive or negotiated deal, counsel's level of review given the size of the transaction, and whether disclaimers offered created an appropriate waiver or a potential source of misleading information which may influence an investor's decision making.²⁴ Without clear guidance from the Commission concerning climate risk in municipal bond disclosure documents, there is great potential for confusion among all market participants to define what constitutes material climate risk disclosure, whether brokers, dealers or municipal securities dealers and counsel can reasonably attest to the accuracy of an official statement without a climate risk disclosure. Without the Commission's guidance, an investor could be misled about the risk of an investment without an adequate climate risk disclosure statement.

Climate Risk Disclosure in Continuing Disclosure Documents

We encourage the Commission to provide climate risk disclosure guidelines for the annual statements that an underwriter must reasonably determine that an issuer of municipal securities or an obligated person has undertaken in a written agreement or contract for the benefit of holders of such securities ("continuing disclosure agreement") to provide specified annual information and event notices.

Here, we urge the Commission to offer interpretative guidance to provide clear, plain language disclosure informing investors of the climate and environmental risks that provide the basis for informed investing. We believe that with the media coverage concerning the Commissions' intentions to address carbon risk disclosure in the annual filings of publicly traded companies that in all likelihood, an investor in the power industry will expect enhanced disclosure procedures for a coal-fired power plant but may not be able to make an informed decision if the POU issuing the bonds is not subject to the same disclosure standards.²⁵

²⁴ See 1st Annual Municipal Market Roundtable: Henry T. Nicholas III, Henry Samuelli, William J. Ruehle, and David Dull. (available at <http://www.sec.gov/pdf/omsrnd.pdf>).

²⁵ June 16, 2008, New York City Comptroller William Thompson and California State Treasurer William Lockyer wrote to the Treasury Department out of their concerned about the heightened risk to investors from new coal investments and to raise some fundamental policy issues about support for new coal plants when the climate issues were outstanding. Treasury has not taken action. There concern is the same as ours. The climate issue cuts across many jurisdictions, many ways in which capital is invested. The exposure is real. The diligence is necessary. See http://www.comptroller.nyc.gov/press/2008_releases/pr08-06-088.shtm ;

V. Conclusion

We commend the steps the Commission has taken to improve access to disclosure documents.²⁶ We strongly encourage the Commission to either (1) issue a statement directing municipal bond participants to apply the same guidelines contemplated for publicly traded companies to municipal bond disclosure documents or (2) provide interpretative guidance tailored specifically to the obligations of underwriters and other municipal market participants pursuant to sections of Rule 15c2-12 addressing the official statement in a primary offering and the annual disclosure documents as part of the continuing disclosure agreement for municipal bond offerings in the secondary market.

We believe that the proposed amendments are an essential step for greater disclosure in the municipal bond market. We believe expanded rules complements the Commissions efforts to improve access and quality of municipal bond disclosure. Yet, we believe that without interpretative guidance at this stage of our nation's efforts to reduce carbon emissions, the Commission will leave municipal bond investors at an unusually significant disadvantage as compared to securities holders of investor owned power generation facilities.

We welcome the opportunity to discuss these issues further.

Respectfully submitted,

Tom Sanzillo /s/
Consultant

T.R. Rose Associates

Mark Kresowik /s/
Corporate
Accountability Representative
Sierra Club

Lisa Anne Hamilton /s/
Counsel

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Martha Mahan Haines, Assistant Director and Chief, Office of Municipal Securities
Ms. Meredith Cross, Director, Corporation Finance

Lynette Kelly Hotchkiss, Executive Director, MSRB
Harold Johnson, Deputy General Counsel, MSRB
Ernesto A. Lanza, Senior Associate General Counsel, MSRB

²⁶ The Electronic Municipal Market Access system ("EMMA") will provide also provide transparency system for Auction Rate Securities "ARS" and Variable Rate Demand Obligations ("VRDO") and Short Term obligations.