

MEMO

Subject: Mirant – Grounds for a Yes vote on shareholder resolution requesting adoption of GHG reduction goals and a report on plans to achieve the goals.

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RESOLVED: *Shareholders request that the Board of Directors adopt quantitative goals, based on current technologies, for reducing total greenhouse gas emissions from the Company's products and operations; and that the Company report to shareholders by September 30, 2010, on its plans to achieve these goals. Such report will omit proprietary information and be prepared at reasonable cost.*

SUPPORTING STATEMENT: *We believe that management best serves shareholders by carefully assessing and disclosing all pertinent information on the societal impacts of the company's operations, including its greenhouse gas emissions. We believe taking early action to reduce emissions and prepare for anticipated standards could provide competitive advantages, while inaction and opposition to climate change mitigation efforts could leave companies unprepared to compete in a carbon constrained economy.*

Introduction

As more investors act on climate change as an important investment theme, Mirant's shares may look less appealing relative to competitors who are better positioned for a low carbon future. As UBS noted in February: "Longer term, we see Mirant's coal fleet as particularly poorly positioned with respect to carbon legislation given its location in a gas-oriented power market."¹

Little has changed in Mirant's strategy to address climate change risks over the last year. Mirant remains a member of the Chicago Climate Exchange (CCX) (a voluntary greenhouse gas registry, reduction and trading system); it has disclosed (in the 10-K for 2009) its greenhouse gas (GHG) emissions from generating facilities for 2009 as well as expected emissions for 2010, and has acknowledged a series of regulatory risks that could have a material adverse effect on its operations.

However, relative to its peers, the information that Mirant provides amounts to partial disclosure: It does not participate in the Carbon Disclosure Project (CDP), a survey backed by investors managing \$64 trillion in assets, and it has not explained how its risk assessment is affected by different greenhouse gas emissions pricing scenarios.

¹ UBS Investment Research: Independent Power Producers, February 2010, P. 3, www.ubs.com/investmentresearch

Moreover, **Mirant’s strategy for reducing CO₂ emissions seems to rely on decreasing electricity production, rather than developing a long-term, financially viable approach.** What shareholders need to know now is that Mirant’s managers have a plan to address material climate-related risks to its business model. **A report detailing goals, based on current technologies for reducing total greenhouse gas emissions from products and operations is necessary to demonstrate to investors that Mirant is taking timely action on this issue that is of critical importance to the company’s future.**

Rationale for a Yes vote:

1. **Mirant’s shareholders bear significant financial and competitive risk** if the company is unprepared to meet existing and impending requirements to reduce GHG emissions. Company-wide quantitative reduction goals (linked to initiatives beyond simply selling less power) provide the clearest signal to investors that Mirant is prepared for a low carbon future.
2. Mirant discloses inadequate strategies and practices for reducing GHG emissions.
3. Mirant’s climate risk preparedness lags behind its peers.

1. Mirant’s shareholders bear significant financial and competitive risk related to climate change and GHG regulation.

Mirant’s shareholders are likely to bear significant financial, competitive, and reputational risks as a result of climate and GHG regulations. Mirant recognizes that dramatic changes are underway in the regulatory environment.² However, in contrast to many of its peers, Mirant’s website and 10-K make no mention of any viable strategies or practices to address and avoid such risks, and Mirant continues to decline to participate in the CDP.³

Mirant’s latest 10-K filing reveals that the company is aware of a range of climate-related financial risks, such as:

- Significant legislative and regulatory efforts at the state and federal level to limit emissions;
- Government programs to reduce the demand for electricity;
- Cap-and-trade programs and similar laws that may significantly increase operating costs;
- Rising costs of constructing new generation facilities; and,
- Environmental opposition that may slow or halt the building of coal-fired or nuclear plants

Mirant also identifies several climate-related initiatives that could have a “material adverse effect” on the company’s operations and operating costs:

- Implementation of the Regional Greenhouse Gas Initiative (RGGI) in Maryland, Massachusetts, and New York;
- Implementation of the Global Warming Solutions Act (“AB 32”) in California;
- Implementation of the Global Warming Solutions Act (the “Climate Protection Act”) in Massachusetts;
- Implementation of the Greenhouse Gas Reduction Act of 2009 (“Maryland Act”) in Maryland;

² Mirant’s Form 10-K Annual Report (filed March 5, 2009), available at <http://investors.mirant.com/sec.cfm>.

³ See CDP, Mirant’s company home page, available at <http://www.cdproject.net/company-homepage2.asp?id=632>.

- Congressional or Environmental Protection Agency (EPA) action to regulate CO₂ within the next several years; and,
- In December 2009, the EPA issued an “endangerment and cause or contribute finding” for greenhouse gases under the Clean Air Act, which allows EPA to craft rules that directly regulate greenhouse gas emissions. Mirant states the potential effect of the finding is simply, “not clear” at this time.

Most of these regulatory risks are no longer speculative or remote: significant regulatory changes through the legislature (and / or EPA) are looming on the horizon. In order to give shareholders confidence in the security of their investment, Mirant’s risk disclosure must be coupled with a more transparent strategy to address these risks through GHG emissions reduction.

Furthermore, there are a number of significant risks that Mirant does not adequately disclose – risks which may considerably affect the company’s investment outlook. For instance:

Regulatory risk

- As a result of UN climate negotiations in Copenhagen in December 2009, the United States pledged in January to cut its greenhouse gas emissions by 17 percent by 2020 from 2005 levels, in conformity with anticipated U.S. energy and climate legislation.
- On June 26, 2009 the House passed a climate bill that, for the first time, would place mandatory limits in the U.S. on the emissions of the greenhouse gases, including CO₂. A similar bill was introduced in the Senate in the fall of 2009, which, if enacted, will limit and reduce greenhouse gas emissions through a “cap and trade” system of allowances and credits, among other provisions. A cap-and-trade program will lead to a price being assigned to carbon emissions, which will impact expenses of independent power producers, particularly those that operate coal-fired power plants.

Competitive risk

- As stated earlier, Mirant’s shares may look less appealing relative to competitors who are better positioned for a low carbon future. As UBS noted in February: “Longer term, we see Mirant’s coal fleet as particularly poorly positioned with respect to carbon legislation given its location in a gas-oriented power market.”⁴
- The new availability of GHG data required to be filed by the Mandatory Reporting of Greenhouse Gases Rule⁵ will allow businesses to track their own emissions and compare their performance to competitors’ similar facilities,⁶ which will likely present Mirant with reputational and competitive risk if the data is publicly available.
- In 2008, six leading banks signed The Carbon Principles, which will make it more difficult for utilities to obtain financing for new coal plants.
- Mirant predicts that it will be able to recover most of its cost of emissions allowances through increasing market prices for electricity following any new regulation⁷—which

⁴ UBS Investment Research: Independent Power Producers, February 2010, P. 3, www.ubs.com/investmentresearch

⁵ <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>

⁶ Cathy Milbourn, EPA Finalizes the Nation’s First Greenhouse Gas Reporting System/Monitoring to begin in 2010, Sept. 22, 2009,

<http://yosemite.epa.gov/opa/admpress.nsf/d985312f6895893b852574ac005f1e40/194e412153fcffea8525763900530d75!OpenDocument>

⁷ Mirant, 10-K filing, p. 23.

assumes, in part, that its competitors will also raise prices, since Mirant sells electricity as a merchant power producer in a competitive commodity marketplace. But what if competitors are able to maintain their costs through technological innovation, use of renewables, or fuel switching?

Legal risk

- Companies that ignore climate-related risks may be subject to high-cost litigation and legal fines. For example, American Electric Power Company and five other electric power companies were sued in 2004 by eight states. The plaintiffs asked the court to order the reductions in GHG emissions. On September 21, 2009, the US Court of Appeals found: the case was suitable for the courts; that the states had legal standing; and that the federal common law of nuisance applied.
- Another recent ruling found that private land trusts can also sue for climate change damages. This potentially exposes Mirant to lawsuits from “broad classes of people and entities beyond the states.”⁸
- Companies face direct legal risks from shareholder litigation against officers and directors who fail to respond to climate change.⁹
- Climate risk litigation appears to be following a similar trajectory to tobacco litigation, which increased gradually until it became a significant threat to the industry. Around 100 climate-related lawsuits were filed in the U.S. through August 2008, with a significant annual upward trend (from 6 in 2004 to 38 in 2007).¹⁰ Litigation has focused on companies responsible for substantial emissions. For more details see “The New Tobacco?” article in Environmental Finance’s December-January issue.

2. Mirant does not disclose adequate strategies and practices to reduce CO₂ emissions.

Odd as it may sound, Mirant’s current strategy to reduce GHG emissions appears to be to **simply produce and sell less power**. In September 2008 Mirant joined the Chicago Climate Exchange (CCX). According its 10-K filing for 2009: “As part of the agreement for membership in CCX, Mirant and its subsidiaries have committed to meet annual emissions reduction targets and, by the end of 2010, to reduce greenhouse gas emissions by 6% below the average of 1998 to 2001 levels. Mirant Americas Generation and Mirant North America expect to satisfy the reduction targets primarily through **previously implemented generating unit retirements and capacity factor reductions**.”¹¹

This strategy does not appear to be financially viable for an independent power producer. Mirant is not a utility that can recover significant costs for selling transmission, distribution or energy

⁸ Michael Gerrard, “The New Tobacco,” Environmental Finance, December-January, 2010, p. 16

⁹ Smith, Jeffrey A. and Mathew Morreale (Cravath, Swaine & Moore LLC), “Boardroom Climate Change,” *New York Law Journal*, Vol. 238, no. 10, July 16, 2007.

¹⁰ Gronewold, N. 2008. “Lawyers see ‘growing legal storm’ over emissions trading.” ClimateWire. August 12, 2008.

<http://www.eenews.net/climatewire/2008/08/12/2/>

¹¹ Mirant 10-K filed February 26th, 2010, p. 13.

efficiency services to its customers. Its primary business is to generate and sell power to utilities. If it sells less power, it will most likely generate less revenue, which does not bode well for shareholder value. Meanwhile, Mirant has made large investments in several existing coal plants to control SO₂, NO_x and mercury, even though these plants may soon become much more expensive to operate due to possible GHG regulation.¹²

Though management discloses a number of regulatory risks related to GHG emissions, Mirant has not disclosed its strategies for reducing its GHG emissions, other than to sell less power.

Investors are left wondering what Mirant considers its options in the increasingly likely event that a cost is assigned to carbon emissions. The kinds of questions that need answering include:

- Are Mirant's coal plants viable under a high cost of carbon emissions scenario, or will they become too expensive to operate? What about at medium and low costs of carbon emissions scenarios?
- Is fuel switching to natural gas an option at any Mirant coal plants? How much would switching these plants cost?
- Is carbon capture and storage (CCS) an option for any of Mirant's existing coal plants? What is the range (and most likely estimate) of costs for capturing carbon at Mirant's existing plants?
- Is CCS being considered for any new coal plants? How would the carbon capture system in these plants work? Should the coal be gasified to separate the carbon, or can it be captured in the flue gas? What type of coal is best for gasification? What is the range (and most likely estimate) of costs for implementing carbon capture for CCS in new plants?
- What role might renewable energy, such as wind, geothermal, and solar, play in Mirant's plans to produce more energy?
- Is Mirant conducting research and development on CCS or renewables? If not, why not?

3. Mirant's climate risk preparedness lags behind its peers.

The fact that Mirant has disclosed some of the material regulatory risks associated with its operations and GHG emissions is a welcome new step toward greater transparency. However, Mirant still lags behind its peers both in terms of its level of disclosure and its strategy.

In the electric power sector, Mirant is far behind the curve in terms of its risk disclosure and strategies. According to the CDP Report, utilities ranked highest in terms of the emissions disclosure among both the carbon-intensive and non-carbon-intensive sectors surveyed in 2009.¹³

Unlike some of its peers, Mirant has not issued a sustainability report, a climate change report, or taken any steps to disclose a viable corporate strategy for addressing climate risk or reducing

¹² E.g. Mirant will invest \$1.674 billion on emissions reduction controls for SO₂, NO_x and mercury (but not CO₂) for three of its largest coal-fired units in order to comply with the Maryland Healthy Air Act. (10-K filing, p. 8, 19, 20, 44, 88).

¹³ Responses from 93% of the utilities industry, or 26 companies. Carbon Disclosure Project 2009: S&P 500 report, pg. 7, <https://www.cdproject.net/CDPResults/CDP%202009%20SandP500%20with%20Industry%20Snapshots.pdf>

GHG emissions.

Mirant's non-participation in the CDP since 2006 is a telling indicator of its position in its industry with respect to climate change. In April 2006, Mirant's Chairman and CEO, Edward R. Muller, explained that the company, having just emerged from bankruptcy, was not in a position to complete the CDP questionnaire. In 2007, Mirant declined to participate without an explanation. In 2008, Mirant provided no response—becoming one of two U.S. power companies, out of thirty surveyed, to refuse participation.¹⁴ For 2009 Mirant still remains silent, providing no response to the CDP questionnaire.

In contrast, the CDP found that Mirant's competitors are recognizing that “increase in emissions disclosure and more aggressive emissions targets provides investors, stakeholders and consumers with an understanding of the direction the...companies are taking in this increasingly carbon-constrained world” when these companies are facing “challenges should carbon regulations be implemented.”¹⁵ Not surprisingly, 27 companies, or 96% of the utilities sector, reported anticipation of exposure to regulatory risks as a result of the nation's fast-moving legislative environment.¹⁶

Many of Mirant's industry peers, including American Electric Power, Entergy, Duke Energy, Exelon, National Grid, and Consolidated Edison, have set absolute GHG reduction targets, while PSEG, NiSource, and Pinnacle West have set intensity targets.

Most power companies, including Allegheny Energy, DTE Energy, FPL Group, Xcel Energy, and Exelon, are “enacting strategies to meet updated portfolio standards that include renewables (such as wind and solar) and new technologies (such as carbon capture and sequestration, cleaner coal-burning technologies, and landfill gas and biomass plants).”¹⁷ Exelon has promised to “provide more low-carbon electricity to its markets by reducing emissions from its fossil generating plants, adding capacity to its existing new nuclear plants, and investing in new renewable, efficient natural gas and potentially nuclear capacity.”¹⁸ Mirant's peers are also actively assessing other climate-related risks, such as physical risks (e.g. damage to power or gas lines from severe weather events, the effects of extreme weather on demand patterns, impacts to the seasonal delivery cycle for natural gas, and scarcity of water needed for cooling generation facilities), while Southern Company is analyzing legal risks from climate-related litigation.

Unlike its peers, Mirant is not:

- Disclosing its long-term strategy to meet emissions reductions goals (beyond decreasing power generation);
- Diversifying its energy mix;
- Shifting operations toward renewables; or,
- Investing in new technologies and R&D to reduce GHG emissions.

¹⁴ The other utility, TECO Energy, provided information to CDP without filling out the survey.

¹⁵ Carbon Disclosure Project 2009: S&P 500 report, pg. 7, <https://www.cdproject.net/CDPResults/CDP%202009%20SandP500%20with%20Industry%20Snapshots.pdf>

¹⁶ Carbon Disclosure Project 2009: S&P 500 report, pg. 8, <https://www.cdproject.net/CDPResults/CDP%202009%20SandP500%20with%20Industry%20Snapshots.pdf>

¹⁷ CDP 2008 S&P

¹⁸ Exelon Generation is pursuing the development of a new state-of-the-art 600 MW combined-cycle natural gas power plant and has entered into 20-year power purchase agreements for solar energy. (See CDP's 2008 S&P Report).

Instead of being proactive, Mirant seems to have adopted a sit-and-wait approach. Mirant justifies its position in two ways: regulatory uncertainty and technological barriers. First, in 2006 Mirant explained that it will “await” final climate regulations before determining how to structure its environmental compliance plan. Second, Mirant showed no interest in addressing financial risk through innovation: citing an alleged lack of technical solutions to reduce CO₂ emissions. Mirant’s latest 10-K filing confirms this. While Mirant seems content to decrease its capacity—and possibly its profitability—its peers are forging ahead by anticipating regulatory changes, developing innovative technological solutions, and diversifying their energy mix.

Conclusion

Mirant has not told investors how it plans to survive and thrive in the lower-carbon future it admits is highly likely. To show that it will be able to keep up with its peers, Mirant needs to demonstrate that it has evaluated and developed feasible strategies for the most likely regulatory scenarios.

Mirant’s disclosure of its 2009 GHG emissions estimates and partial disclosure of material risks is a necessary but insufficient step to address investor concerns that the company remains unprepared to survive in a carbon-constrained economy. In the medium- to long-run, Mirant’s current primary strategy—to decrease production—raises concerns about its ability to respond to the rising regulatory, competitive, and public pressure to significantly reduce GHG emissions from the company's operations. It also sends a troubling signal that the company is falling behind its peers in the utilities sector.