

MEMO

Subject: Massey Energy – Grounds for a Yes vote on shareholder resolution concerning CO₂ emissions

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RESOLVED: *Shareholders request a report [reviewed by a board committee of independent directors] on how the company is responding to rising regulatory and public pressure to significantly reduce the social and environmental harm associated with carbon dioxide emissions from the company's operations and from the use of its primary products. The report should be provided by November 1, 2009 at a reasonable cost and omit proprietary information.*

Rationale for a Yes vote – Massey provides inadequate disclosure of:

- 1) Its greenhouse gas (GHG) emissions;
- 2) The rapidly growing physical, regulatory and competitive risks from climate change; and
- 3) Its strategy to address these risks.

MASSEY DOES NOT DISCLOSE ITS GREENHOUSE GAS EMISSIONS

In August 2008, Massey released a corporate social responsibility report, which highlighted environmental protection as a key objective and recognized “the increased focus on carbon dioxide and climate change.”¹ However, Massey has failed to provide *any* disclosure of GHG emissions from its operations or from the use of its products.

This contrasts with competitors such as BHP Billiton,² Rio Tinto,³ Peabody Energy,⁴ and

¹ Massey Energy, *Inaugural Corporate Social Responsibility Report*, 2008, page 25. Available at http://library.corporate-ir.net/library/10/102/102864/items/305025/Massey_CSR_sm.pdf

² BHP is the world's largest mining company, combining BHP Billiton Plc, a London listed public company headquartered in the UK, and BHP Billiton Limited, which is listed on the Australian Stock Exchange and headquartered in Melbourne. It owns two coal mines in the United States.

³ Rio Tinto is a leading international mining group, combining Rio Tinto plc, a London listed public company headquartered in the UK, and Rio Tinto Limited, which is listed on the Australian Stock Exchange, headquartered in Melbourne. Its activities span the world, including five coal mines in the United States.

Xstrata,⁵ which participate in the Carbon Disclosure Project (CDP) as well as other climate-related initiatives.⁶ In fact, in 2008, CDP recognized BHP Billiton, Rio Tinto, and Xstrata as global leaders in providing GHG emissions disclosure.⁷

Moreover, the U.S. Environmental Protection Agency (EPA) has recently released a proposed rule which would require disclosure of GHG emissions by a broad range of industries, including coal mining.⁸ Massey's lack of emissions disclosure reveals how far behind its peers Massey has fallen in addressing an issue of growing importance to regulators and investors.

MASSEY'S DISCLOSURE OF CLIMATE-RELATED FINANCIAL RISKS IS INADEQUATE

Physical risk – Climate change is raising the likelihood of more severe storms, droughts, floods, and heat waves, which could significantly impact Massey's operations. Rio Tinto has identified weather as a “critical risk to its coal business – one requiring constant management and action planning (to secure opportunity or prevent loss).”⁹ For example, coal companies rely on water for mining to control dust and to remove rocks and other impurities from coal, making droughts a real concern. Indeed, Rio Tinto has recognized that “decreasing water security” could “close mine(s) or impact production.”¹⁰ At the other extreme, severe rain storms can cause problems with controlling run-off from mines, tailings piles, and slurry ponds.

Severe weather also increases the physical risks to Massey's customers, and was likely a significant factor in the recent Tennessee Valley Authority coal ash disaster,¹¹ which is expected to result in clean-up costs of \$825 million, plus fines and litigation costs.¹² The physical effects of climate change could thus decrease the attractiveness of coal relative to other fuel sources. However, Massey limits its discussion of severe weather to a single

⁴ Peabody Energy is the world's largest private-sector coal company, with over twenty coal mines in the United States. It is listed on the New York Stock Exchange.

⁵ Xstrata is a leading global diversified mining group, headquartered in Zug, Switzerland, and listed on the London and Swiss Stock Exchanges. It is the world's largest exporter of thermal coal and the fifth largest producer of hard coking coal, with interests in over thirty coal mines around the world.

⁶ CDP is a U.K.-based charity affiliated with the Rockefeller Philanthropy Advisers. Through annual climate change Information Requests issued on behalf of institutional investors and others, it encourages corporations to measure, manage and reduce emissions and climate change impacts. For more information, please see <http://www.cdproject.net/about-cdp.asp>

⁷ CDP included these companies in the Carbon Disclosure Leadership Index (CDLI), an honor bestowed on 67 FT500 companies that show distinction in the disclosure they provide to CDP. See Carbon Disclosure Project, *Report 2008, Global 500*. Available at <http://www.cdproject.net/reports.asp>

⁸ Kate Galbraith, *E.P.A Proposes Tracking Emissions*, New York Times (March 10, 2009)

⁹ Rio Tinto Coal Australia, *Climate Change Action Plan*, October, 2006, page 4.

¹⁰ *Id.*

¹¹ Anne Paine and Colby Sledge, *Flood of Sludge Breaks TVA Dike*, The Tennessean, December 23, 2008. Available at <http://www.truthout.org/122408N> (Quoting Tennessee Valley Authority's CEO as saying "I fully suspect that the amount of rain we've had in the last eight to 10 days, plus the freezing weather ... might have had something to do with this," and highlighting the fact that the area received almost twice the normal amount rain and endured both freeze and thaw cycles in the month prior to the spill).

¹² Duncan Mansfield, *TVA chief says coal ash spill was 'catastrophe'*, San Jose Mercury News, February 14, 2009, Available at http://www.mercurynews.com/business/ci_11705971

sentence in its annual report, fails to acknowledge that risks of severe weather are increasing, and fails to acknowledge the impact that severe weather could have on demand for coal.¹³

Regulatory risk – In its 2008 annual report, Massey states that it anticipates approximately \$42.8 million and \$34.8 million in non-capital expenditures to comply with environmental laws and regulation in 2009 and 2010, respectively.¹⁴ However, it does not explain the basis for these approximations or how it plans to manage these costs.

The risks of regulatory initiatives related to GHG emissions having a material adverse effect on Massey's business are significant and growing. Seventeen states have developed statewide targets for CO₂ emissions¹⁵ and several other states have put in place climate change commissions and climate change plans in order to work towards that goal.¹⁶ Ten Northeastern states are already engaged in a cap-and-trade program for power generators.¹⁷ Seven Western states and nine Midwestern states are planning their own cap-and-trade programs in cooperation with Canadian provinces.¹⁸

At the federal level, over thirty companies, including Rio Tinto, have joined the U.S. Climate Action Partnership calling for legislation to significantly reduce GHG emissions,¹⁹ and President Obama has committed to implementing an economy-wide cap-and-trade program in order to reduce GHG emissions eighty percent by 2050.²⁰ In April 2007, the U.S. Supreme Court ruled that CO₂ is a pollutant that can be regulated under the Clean Air Act and that the EPA has a duty to determine whether CO₂ emissions endanger public health or welfare.²¹ The EPA has not yet made this determination, but its proposed rule requiring disclosure of GHG emissions could establish a basis for further federal CO₂ emissions regulation.²²

Such initiatives could significantly reduce demand for coal. However, Massey does not discuss the risk of carbon pricing in its annual report and its discussion of the impact that further emission constraints would have on its business is vague, at best.²³

¹³ Massey Energy, *10K-1 filing for 2008*, p. 26 (stating that severe weather, including flooding and excessive ice or snowfall, when it occurs, can adversely affect our ability to produce, load and transport coal, which may negatively impact our cash flows, results of operations or financial condition).

¹⁴ Massey Energy, *10K-1 filing for 2008*, p. 15. The report asserts that \$31.4 million and \$23.1 million of these amounts, respectively, are anticipated to be for “final reclamation.”

¹⁵ www.pewclimate.org/what_s_being_done/targets

¹⁶ www.pewclimate.org/what_s_being_done/in_the_states/state_legislation.cfm

¹⁷ www.rggi.org

¹⁸ www.westernclimateinitiative.org; www.midwestengovernors.org.

¹⁹ See, U.S. Climate Action Partnership. Available at <http://www.us-cap.org/>

²⁰ Obama-Biden Campaign, *New Energy for America*. Available at

<http://my.barackobama.com/page/content/newenergy>

²¹ *Massachusetts v. EPA*, 549 U.S. 497 (2007)

²² Kate Galbraith, *E.P.A Proposes Tracking Emissions*, New York Times (March 10, 2009)

²³ See Massey Energy, *10K-1 filing for 2008*, p.18 (providing the same limited disclosure on global climate change as the previous year) and p. 27 (stating simply that further limits on GHG emissions could have a material adverse effect on cash flows, results of operations or financial condition).

Note also that Tennessee Valley Authority's recent catastrophic coal ash spill is likely to lead to more rigorous regulation of coal ash disposal (perhaps even as hazardous waste).²⁴ This would increase the total cost of using coal as fuel source, which could decrease demand. Massey does not disclose any risks related to coal ash disposal in its 2008 annual report.

Competitive risk – Increasing pressure for electric utilities to sequester CO₂ is likely to reduce the demand for coal with certain chemical composition, energy content, and moisture content, due to technical matters related to coal gasification.²⁵ MIT's interdisciplinary report estimates that approximately 60% of coal usage will employ such methods by 2050.²⁶ This could significantly affect demand for Massey's coal and the risk should be disclosed to shareholders.

In addition, Massey should provide information about research and development related to climate. Its competitors, such as BHP Billiton, are investing significantly in research and development on carbon sequestration and other emissions-related technologies.²⁷ Massey is at risk of falling behind its competitors in terms of innovation.

MASSEY HAS A POOR RECORD OF MANAGING ENVIRONMENTAL RISKS

In early 2008, Massey agreed to a \$20 million settlement with the U.S. Environmental Protection Agency (EPA) to resolve thousands of violations of the Clean Water Act with associated fines on the order of \$2.4 billion.²⁸ This represented the largest Clean Water Act settlement to date.²⁹ In addition, Massey must set aside 200 acres of riverfront land in West Virginia for conservation and invest approximately \$10 million to prevent future violations.³⁰ Similarly, Massey incurred \$58 million in cleanup costs for a year 2000 sludge spill that the EPA called the worst ever environmental disaster in the southeastern United States.³¹ These incidents demonstrate the need for more proactive environmental risk management at Massey.

²⁴ See e.g., Shaila Dewan, *Coal Ash Spill Revives Issue of its Hazards*, New York Times, December 24, 2008. Available at http://www.nytimes.com/2008/12/25/us/25sludge.html?_r=1

²⁵ Massachusetts Institute of Technology, *The Future of Coal – Options For A Carbon Constrained World*, page 36.

²⁶ *Id.*

²⁷ See e.g., BHP Billiton, *Climate Change*. Available at

<http://www.wmc.com/bb/sustainableDevelopment/environmentalCommitment/climateChange.jsp> (discussing a \$300 million investment in R & D as part of the company's climate change policy). See also, CONSOL, *Current Projects*. Available at <http://consolresearch.com/pollution/pollution-control.html> (discussing R&D into enhanced coal bed methane production and sequestration of CO₂ in unmineable coal seams and other projects). See also,

²⁸ See, EPA, *Massey Energy Company Inc., Clean Water Act Settlement*, January 17, 2008. Available at <http://www.epa.gov/compliance/resources/cases/civil/cwa/massey.html>

²⁹ *Id.*

³⁰ *Id.*

³¹ See e.g., Ken Ward, *Massey avoids major financial hit for spill*, The Charleston Gazette, October 12, 2003. Available at <http://www.wvgazette.com/News/Mining+the+Mountains/200310120007?page=2&build=cache>

MASSEY HAS NOT DISCLOSED A PLAN TO ADDRESS CLIMATE CHANGE

In a November 2008 speech, Massey's CEO, Don Blankenship, proclaimed, "I do not believe that climate change is real."³² He associated energy conservation efforts with communism,³³ called House Speaker Nancy Pelosi, Senator Harry Reid and former Vice President Al Gore "crazies" and "greeniacs"; and asserted that any effort to reduce carbon emissions in the United States is futile.³⁴ Recognizing that public concern about climate change and associated negative sentiment towards coal could mean that the industry is "in trouble," he suggested that the solution was for Massey and other companies to come up with "soundbites" that resonate with the public.³⁵

Consistent with this strategy, Massey's 2008 Inaugural Corporate Social Responsibility Report asserted that Massey was "supporting efforts to improve the control and capture of carbon dioxide and other emissions."³⁶ In fact, the only climate-related effort that has been disclosed by Massey is a joint marketing venture with Cansolv Technologies, which appears to now be terminated.³⁷

Climate change and GHG emissions were noticeably absent from the critical environmental challenges that Massey identified for itself in the Report.³⁸ Similarly, there is no mention of climate change in the "Environment" section of Massey's website,³⁹ and the 2008 Annual Report does not provide any evidence of a plan to address climate change.

Equally concerning for investors is Massey's refusal to address challenges that it does recognize. Massey has acknowledged that climate-related regulation could "sharply

³² *The Big Lies of Big Coal*, videotape of speech by Don Blankenship on November 20, 2008. Available at http://www.youtube.com/watch?v=0M_XbeXDnM

³³ *Id.* ("Conserve? I have spent quite a bit of time in Russia and China, and that's the first stage. You go from having your own car to carpooling to riding the bus to mass transit. You eventually get to where you're walking. You go from your own apartment and bathroom to sharing kitchens with four families. That's what socialism and the elimination of capitalism and free enterprise is all about.")

³⁴ *Id.* ("If you are really believe that the world is going to overheat from the use of carbon, then whatever you do in the United States to reduce carbon emissions is wrong, because all that it will do is increase CO2 emissions in China.")

³⁵ *Id.*

³⁶ Massey Energy, *Inaugural Corporate Social Responsibility Report*, 2008, page 25. Available at http://library.corporate-ir.net/library/10/102/102864/items/305025/Massey_CSR_sm.pdf

³⁷ Cansolv was purchased by Shell in December 2008 and we could not find any evidence that the joint venture, Coalsolv, persists or that any sales have ever been made by the entity. See e.g., *Shell Acquires Gas Emissions Treating Specialists Cansolv Technologies Inc.*, Shell Global Solutions Press Release, Dec. 1, 2008. Available at http://www.shell.com/home/content/global_solutions/aboutshell/media_centre/news_releases/2008/2008_news_media/news_shell_acquires_cansolv_011208.html. But see Massey Energy, *10K-1 filing for 2008*, p. 15 (stating that Massey owns a majority interest in Coalsolv, which holds the United States marketing rights for Cansolv technologies, and that Massey has contributed funds for a pilot plant that has been utilized for the testing and piloting of Cansolv technology).

³⁸ See, Massey Energy, *Inaugural Corporate Social Responsibility Report*, 2008, page 18. Available at http://library.corporate-ir.net/library/10/102/102864/items/305025/Massey_CSR_sm.pdf (identifying developing new technologies to meet Clean Water Act requirements; ensuring environmental compliance at all mines and facilities; and ensuring sustainable development in Appalachia as the company's key challenges)

³⁹ See, <http://www.masseyenergyco.com/environment/index.shtml>

decrease demand for coal,⁴⁰ yet the company has not provided *any* disclosure on how it plans to proactively mitigate this risk or how it would respond to such regulation.

Rio Tinto, in comparison, provides detailed plans for addressing climate-related risks and opportunities. For example, its website outlines its climate change position, its three-year Climate Change Plan, its Hydrogen Energy joint-venture with British Petroleum, how it manages GHG emissions, and long-term targets.⁴¹ It also provides access to a number of climate change and sustainable development reports, which discuss the impact of alternative carbon pricing scenarios and other environmental variables on the company's business plans.⁴²

Similarly, BHP Billiton's website discusses its climate change position, its GHG emissions targets, its climate-related research and development, its approach to managing climate change risk (including its Carbon Pricing Protocol), and its growing expertise in emissions trading.⁴³

To summarize, while global warming and related regulation can be expected to cause profound changes to the coal industry, Massey provides shareholders with very limited information, relative to competitors, about whether or how the company will adapt. A Yes vote on this resolution will encourage management to consider the critical risks that climate change poses to the future of the coal industry.

⁴⁰ See e.g., Massey Energy, *10K-1 filing for 2007*, page 16.

⁴¹ See, Rio Tinto, *Climate Change and Energy*.

Available at http://www.riotinto.com/ourapproach/7193_climate_change_and_energy.asp

⁴² See, Rio Tinto, *Sustainable Development Reports*.

Available at http://www.riotinto.com/resources/3608_s_e_reports.asp

⁴³ See, BHP Billiton, *Climate Change*. Available at <http://www.wmc.com/bb/sustainableDevelopment/environmentalCommitment/climateChange.jsp>