

Climate-Related Disclosure Obligations and Increasing Enforcement

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State attorneys general are pursuing lawsuits and investigations of alleged inadequate disclosures of climate-related risks. In May, President Biden issued Executive Order 14030, which called for “a comprehensive, government-wide strategy” on climate-related financial risk, as discussed in our [earlier alert](#).^[1] The SEC is projecting an October 2021 proposed rulemaking.^[2] This appears likely to mandate certain climate change and other ESG^[3] disclosures. But government enforcers are not waiting for such regulations. Enforcement initiatives are underway, and cases challenging climate claims and disclosures have already been filed. More will come, with **technology** and **agricultural** companies seemingly next on the list.

State Attorneys General Climate Disclosure Litigation

In response to the SEC’s request for comment regarding climate-related financial risk, a group of state attorneys general recently [expressed](#), “[M]any companies either have not studied the issue and therefore may not know what, if any, climate-related disclosures they need to make, or have not disclosed what they know.”^[4] This is not mere rhetorical flourish to support their push for broad ESG disclosures on climate-related financial risk. Many of these states are already pursuing investigations and cases.

Massachusetts. On June 22, a Massachusetts state judge rejected ExxonMobil Corp.’s motion to dismiss a case filed by the Massachusetts Attorney General in 2019.^[5] This case alleges that Exxon deceived consumers and investors about the risks that climate change poses to its business.^[6] The Massachusetts case was filed while Exxon was waiting for a verdict in a case filed by the New York Attorney General asserting similar claims.^[7]

The New York case was based on allegations that Exxon had deceived investors by using two proxy costs of carbon when calculating future climate risk.^[8] Exxon won the New York suit.^[9] After Exxon’s win, Massachusetts Attorney General Healy amended her complaint to remove a claim related to investor deception, which was similar to the claim that had been unsuccessful in New York.^[10] The Massachusetts suit also includes additional claims, including one under the Massachusetts consumer protection statute Chapter 93A.^[11]

There are other climate-related disclosure cases currently being litigated by state attorneys general, including by:

- **Connecticut.** Attorney General William Tong sued Exxon under the Connecticut Unfair Trade Practices Act. This suit alleges: “ExxonMobil knew that continuing to burn fossil fuels would have a significant impact on the environment, public health and our economy,” yet ExxonMobil did not disclose that to the public.^[12]
- **Delaware.** Attorney General Kathleen Jennings filed a lawsuit against BP America Inc. and many other companies. The state asserts common law claims and a claim under Delaware’s Consumer Fraud Act. It alleges the defendants’ failures to disclose “their products’ known dangers—and simultaneous promotion of their unrestrained use—drove consumption, and thus greenhouse gas pollution, and thus the climate crisis.”^[13]
- **District of Columbia.** Attorney General Karl Racine filed a lawsuit against BP plc, Chevron, Royal Dutch Shell, and others. The suit similarly alleges these entities failed to disclose to consumers the role their products play in causing climate change.^[14]
- **Minnesota.** Attorney General Keith Ellison filed a complaint against ExxonMobil, the American Petroleum Institute, Koch Industries, and Exxon and Koch subsidiaries. It similarly accuses the defendants of insufficient disclosure and acts associated with climate change.^[15]

State AGs May Be Looking at the Technology and Agriculture Sectors

Most enforcement actions to date have been against oil and gas, petrochemical, and pipeline companies. Yet these and other state attorneys general have expressed their belief that “a majority” of U.S. companies are insufficiently considering and disclosing climate-related financial risk.^[16] They specifically identify companies in the “agriculture sector” and “technology companies” as having significant “exposure to climate risks.”^[17]

In particular, in comments to the SEC, these attorneys general emphasized, “Data centers are one of the most energy intensive building types, consuming 10 to 50 times the energy per floor space of a typical commercial office building,” and they “account for approximately 2% of the total U.S. electricity use,” while the “cryptocurrency industry consumes approximately 130 terawatt-hours annually, which is equivalent to Argentina’s annual consumption.”^[18] They noted, “As companies work—or fail—to manage physical and transition risks [of climate change], they also face **litigation risk from consumer protection authorities**, shareholders, and other economic stakeholders.”^[19]

Other Possible Enforcement Based on Existing Law

Various federal agencies are taking action to step up their climate-related enforcement based on existing law. The SEC has created the Climate and ESG Task Force in the Division of Enforcement.^[20] On July 7, a SEC subcommittee further recommended the agency encourage issuers to adopt already existing third-party frameworks for environmental, social, and governance disclosures until the SEC formally sets the requirements. The Commodity Futures Trading Commission created a Climate Risk Unit “to support the agency’s mission by focusing on the role of derivatives in understanding, pricing, and addressing climate-related risk and transitioning to a low-carbon economy.”^[21] Even the Federal Acquisition Regulatory Council is looking at requiring major federal suppliers to “publicly disclose greenhouse gas emissions, and climate-related financial risk, and to set science-based reduction targets.”^[22]

In addition, private litigants are pursuing companies for alleged “greenwashing” of their businesses and conduct. Recently, Greenpeace and other environmental groups filed a “first of its kind FTC complaint” alleging deception of consumers related to climate action.

Key Takeaways

- State and federal investigations and enforcement of disclosure requirements for climate-related financial risk are happening now. These investigations and actions will neither await nor be dependent on formal rulemaking changes.
- **Technology** companies and the **agricultural** sector appear to be top-of-mind with certain climate-minded enforcers concerned, for example, about the companies’ extensive use of electricity in both the production and use of their products.

- We can expect whistleblowers to employ the *qui tam* provisions of the False Claims Act and similar state statutes to bring actions on behalf of the government against companies doing business with the government, alleging false statements related to climate-related risks. Such whistleblower solicitations are already found on the web, highlighting the potential for whistleblowers to share in any government recovery.^[2]
- Companies should be consulting with legal and technical experts now to audit and ensure substantiation for existing climate-related financial, marketing, and advertising claims, anticipate and meet compliance and disclosure obligations, and secure carbon credits or other forms of mitigation, if necessary, to back up those representations.

For further information and answers to questions on potential environmental disclosure obligations and their implications, including the expected creation of new requirements and other corresponding federal policy changes and related compliance and litigation risks, please contact **Jonathan D. Brightbill** (Partner, White Collar, Regulatory Defense & Investigations) **Suzanne Jaffe Bloom** (Co-Chair, White Collar, Regulatory Defense & Investigations), or your Winston relationship attorney.

View all of our Government Program Fraud, FCA, & *Qui Tam* Litigation Playbook perspectives [here](#).

We note that government orders on the federal, state, and local levels are changing every day, and the information contained herein is accurate only as of the date set forth above.

^[1] Executive Order 14030, 86 Fed. Reg. 27,968 (May 25, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf>.

^[2] Office of Information and Regulatory Affairs Office of Management and Budget – SEC Climate Change Disclosure (June 17, 2021), available at <https://www.wsj.com/articles/climate-fight-breeds-as-sec-moves-toward-mandate-for-risk-disclosure-11624267803>.

^[3] Environmental, social, and governance.

^[4] Request for Public Input on Climate Change Disclosures (“AG Letter”) at 6 (June 14, 2021), available at <https://oag.ca.gov/system/files/attachments/press-docs/Final%20SEC%20Climate%20Disclosure%20Comment%20Letter%20-%20061421.pdf>.

^[5] *Commonwealth of Massachusetts v. ExxonMobil Corp.*, Docket No. 1984CV03333 (Mass. Super. Ct. Oct. 24, 2019).

^[6] *Id.*

^[7] *People of the State of New York v. Exxon Mobil Corp.*, Docket No. 452044/2018 (N.Y. Sup. Ct. Oct. 24, 2019).

^[8] *Id.*

^[9] *Id.*

^[10] *Commonwealth of Massachusetts v. ExxonMobil Corp.*, Docket No. 1984CV03333 (Mass. Super. Ct. Oct. 24, 2019).

^[11] *Id.*

^[12] *State of Connecticut v. Exxon Mobil Corp.*, Docket No. HHDCV206132568S (Conn. Super. Ct. Sept. 14, 2020); *Connecticut Sues Exxon for Decades of Deceit Regarding Climate Change* (Sept. 14, 2020), available at <https://portal.ct.gov/AG/Press-Releases/2020-Press-Releases/CONNECTICUT-SUES-EXXON-FOR-DECADES-OF-DECEIT-REGARDING-CLIMATE-CHANGE>.

^[13] *State of Delaware v. BP Am., Inc. et al.*, Docket No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020).

^[14] *Dist. of Columbia v. Exxon Mobil Corps., et al.*, 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020).

^[15] *State of Minnesota v. Am. Petroleum Institute et al.*, Docket No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020).

^[16] AG Letter at 12.

¹⁷⁷ *Id.* at 16.

¹⁸⁸ AG Letter at 16, n. 82.

¹⁸⁹ *Id.* at 6 (emphasis added).

²⁰⁰ *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (March 4, 2021), available at <https://www.sec.gov/news/press-release/2021-42>.

²²¹ *CFTC Acting Chairman Behnam Establishes New Climate Risk Unit* (March 17, 2021), available at <https://www.cftc.gov/PressRoom/PressReleases/8368-21>.

²²² *Executive Order 14030*, 86 Fed. Reg. 27,968 (May 25, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-05-25/pdf/2021-11168.pdf>.

²²³ *Climate Change Whistleblower Laws*, National Whistleblower Center, available at <https://www.whistleblowers.org/climate-change-whistleblower-laws/>.

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