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Climate Change Regulation, Litigation, and the Impact of ESG

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November 17, 2022

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ESG Topics

NACD, Strategic Oversight of ESG, a Board Primer, January 2022



Environmental	Social	Governance
Climate change	Health and safety	Board structure
Water use and sourcing	Human capital management	Board composition
Natural resources	Cybersecurity & data privacy	Executive and director compensation
Emissions	Human rights	Compliance and reporting

SEC Quest to Standardize Disclosures for Investors

- February 2010, *Commission Guidance Regarding Disclosure Related to Climate Change*
- March 2021, SEC created a *Climate and ESG Task Force* in the Division of Enforcement
- March 2022, SEC proposed rules related to the *Enhancement and Standardization of Climate-Related Disclosures for Investors*
- October 2022, SEC to propose rules on *Human Capital Management Disclosure*
- April 2023, SEC to propose rules on *Corporate Board Diversity*

Climate-Related Disclosures for Investors

SEC climate-related rules would:

- “provide investors with consistent, comparable, and decision-useful information for their investment decisions and would provide consistent and clear reporting obligations for issuers.” (SEC Chair Gary Gensler, April 2022)
- provide information about a company’s climate-related risks that are reasonably likely to have a *material* impact on its business, results of operations, or financial condition
- incorporate “concepts and vocabulary” of (i) a climate-related reporting framework developed by the Task Force on Climate-Related Financial Disclosures (TCFD) and (ii) the Greenhouse Gas Protocol, an accounting and reporting standard for greenhouse gas (“GHG”) emissions
- add a new subpart to Regulation S-K and a new Article 14 of Regulation S-X (Climate-Related Disclosure)

ESG Strategy, Risks and Opportunities – Governance Matters

Proposed SEC rules require a public company to describe the board of director's oversight of climate-related risks and opportunities:

- the identity of any board members or board committee responsible for the oversight of climate-related risks;
- whether any member of the board of directors has expertise in climate-related risks;
- the processes by which the board of directors or board committee discusses climate-related risks, including how the board is informed about climate-related risks, and the frequency of such discussion;
- whether and how the board of directors or board committee considers climate-related risks as part of its business strategy, risk management, and financial oversight; and
- whether and how the board of directors sets climate-related targets or goals, and how it oversees progress against those targets or goals.

ESG Strategy, Risks and Opportunities – Governance Matters, Cont.

Proposed SEC rules also require a public company to disclose management's role in assessing and managing climate-related risks and opportunities:

- whether certain management positions or committees are responsible for assessing and managing climate-related risks and, if so, the identity of such positions or committees and the relevant expertise of the position holders or members;
- the processes by which such positions or committees are informed about and monitor climate-related risks; and
- whether and how frequently such positions or committees report to the board or a committee of the board on climate-related risks.

ENVIRONMENTAL JUSTICE

- “The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”
- Recent Federal Actions:
 - May 2022 – DOJ publishes interim final rule reviving use of SEPs
 - May 2022 – EPA publishes Legal Tools to Advance Environmental Justice
 - August 2022 – EPA publishes Environmental Justice and Civil Rights Permitting FAQ
 - September 2022 – EPA publishes EJ Action Plan for Land Protection and Cleanup Programs
 - September 2022 – EPA announces the creation of the Office of Environmental Justice and External Civil Rights.

Environmental Justice: Observations from the field

- Increased government oversight and enforcement
- Increased use to Supplemental Environmental Programs (SEPs)
- Increased scrutiny of environmental permit applications
- Increased tension between federal and state regulators
- Increased litigation
- Increased civil rights investigations
- Increased state actions

Environmental Justice: Tips for managing new obligations

- **Educate:** Seek counsel on your rights and responsibilities regarding environmental justice issues.
- **Analyze:** Determine whether you operate a facility in an environmental justice community.
- **Prepare:** Take proactive steps to monitor and address community concerns.
- **Engage:** Engage and understand the communities in which your facilities operate.
- **Plan:** Conduct permitting analyses early in the planning process.
- **Track:** Continue to follow local, state, and federal legislative and regulatory developments.

U.S. Climate Change Litigation: A (Very) Brief Survey

Broad Categories of U.S. Climate Change Litigation

- I. Actions Against the U.S. Government for Sanctioning Oil and Gas Industry Development.
- II. Actions by States and Local Governments Against Oil and Gas Industry for Climate Change Damages.
- III. Actions Against Oil and Gas Industry for Climate Change Related Investor Disclosures.
- IV. Recent Developments and Ever-Expanding Climate Change-Related Claims?

Actions Against U.S. and State Governments

- ***Juliana v. United States***

- Filed in 2015 by group of children plaintiffs.
 - Claims U.S. enables GHG emissions which endangers substantive due process rights of 5th Amendment and public-trust doctrine.
 - 9th Cir. held plaintiffs' lacked standing in Jan. 2020 and denied rehearing.
- Similar state actions have been filed throughout the country.



Actions by States and Local Governments - The Coming Litigation Storm -

- Several cities and states throughout the country have filed civil lawsuits against several oil and gas companies:
 - E.g. New York City, San Francisco, Boulder County (CO), and Baltimore.
- Suits filed under various common law theories – public nuisance or negligence.
- Seek damages for climate change mitigation measures - e.g. sea walls.
- Current status - jurisdictional battles between federal and state courts. Some cases have been dismissed.
 - May 2021 – Supreme Court sent back to 4th Cir. (*BP v. Baltimore*, 141 S. Ct. 1532 (2021) then 4th Cir. remanded to state court (No. 19-1644, April 7, 2022).
 - June 2022 – Energy defendants petitioned Supreme Court for cert. from 10th Cir. remand to state court (currently pending). *Suncor Energy (U.S.A.) Inc. v. Board of County Commissioners of Boulder County*, 21-1550.



Investor Disclosure Actions

- **State Consumer Protection Actions**
 - *New York v. ExxonMobil Corp. (NY County)*
 - Claims that different GHG “proxy costs” used internally and disclosed were violations of the NY Martin Act and common law.
 - Trial ct. held insufficient evidence that Exxon mislead investors.
 - *Mass. v. ExxonMobil Corp. (Suffolk County)*
 - Filed October 24, 2019 during NY trial
 - Motion to dismiss denied – appeal affirmed (2022).
- **Investors Class-Action**
 - *Ramirez v. Exxon Mobil Corp. (N.D. Texas)*
 - Claims under federal securities acts that climate change risks on assets were not disclosed.
 - Judge denied motion to dismiss



Recent Developments and Ever-Expanding Climate Change-Related Claims

- *West Virginia et al. v. Environmental Protection Agency et al.*, 213 L. Ed. 2d 896, 142 S. Ct. 2587 (June 2022).
 - Obama Administration's Clean Power Plan
 - Clean Air Act Section 111(d) – Best system for emission reduction for coal plants was to cause a generation shift to lower carbon emitting energy sources.
 - Supreme Court – Congress did not delegate such wide-ranging authority to EPA in Section 111(d) of the CAA.
- *Conservation Law Foundation, Inc. v. Shell Oil Company, et al.*, 21cv00933 (D. Conn. Sept. 16, 2022).
 - Citizen enforcement action against fuel terminal.
 - Claim violations of Clean Water Act and Resource Conservation and Recovery Act (RCRA).
 - Court denied motion to dismiss.
 - Sufficiently alleged that containment structures not designed for climate change risks.



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