

# Do Shareholders Have the Power? Climate Change as a Material Risk

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## I. INTRODUCTION

As the effects of climate change continue to wreak havoc on communities across the United States and abroad, public activists, shareholders, and political leaders have urged the financial sector to take action. Earlier this year, BlackRock's chief executive, Larry Fink, expressed in an annual letter to shareholders that "climate change has become a defining factor in companies' long term prospects."<sup>1</sup> BlackRock also announced that it would cease investments with high environmental risks, including thermal coal.<sup>2</sup> On January 9, 2020, BlackRock became the latest signatory to the Climate Action 100+.<sup>3</sup> Goldman Sachs has also taken a strong position on environmental issues.<sup>4</sup> In late 2019, the bank said it would no longer finance any transaction that supports upstream Arctic oil exploration or development, including in the Arctic National Wildlife Refuge.<sup>5</sup> Under its current Environmental Policy Framework, Goldman Sachs promises to minimize operational impact on climate change, improve resilience, and seek smart, sustainable solutions.<sup>6</sup>

While companies seek to please shareholders by making lofty environmental promises, they continue to disappoint. Shareholders may be disappointed in their corporations' failures to disclose material information. For example, the Massachusetts Attorney General brought a suit on behalf of shareholders for ExxonMobil's failure to disclose material information about climate change.<sup>7</sup> Shareholders may also be disappointed as they become victims of greenwashing.<sup>8</sup> This Comment

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1. Steven Mufson & Rachel Siegel, *BlackRock Makes Climate Change Central to Its Investment Strategy*, WASH. POST (Jan. 14, 2020, 10:37 AM), <https://www.washingtonpost.com/business/2020/01/14/blackrock-letter-climate-change/> [<https://perma.cc/SL3A-AJFS?type=image>].

2. *Id.*

3. *Id.*; see also CLIMATE ACTION 100+, <https://climateaction100.wordpress.com/about-us/> [<https://perma.cc/RND4-T8MT?type=image>]. Climate Action 100+ is an investor initiative to ensure that the largest corporate greenhouse gas (GHG) emitters take action on climate change. More than 450 investors engage companies in curbing emissions, improve governance and strengthen climate related financial disclosures.

4. *Environmental Policy Framework*, GOLDMAN SACHS, <https://www.goldmansachs.com/s/environmental-policy-framework/#climateChangeGuidelines> [<https://perma.cc/77AV-ZQSC?type=image>].

5. *Id.*

6. *Id.*

7. Complaint at 1, *Massachusetts v. Exxon Mobil Corp.*, Civ. Action No. 19-3333 (Oct. 24, 2019), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20191024\\_docket-1984CV03333\\_complaint.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20191024_docket-1984CV03333_complaint.pdf) [<https://perma.cc/RU9A-UR26?type=image>].

8. See Devika Kewalramani & Richard J. Sobelsohn, *Are You Being Greenwashed?*, 84 N.Y. STATE BAR J. 10, 10 (2012) (explaining that greenwashing describes the deceptive use of

presents shareholder power as a driving force in creating significant changes to corporate environmental policy. This Comment first examines the complex relationship between a corporation and its shareholders and assesses the role of shareholders in holding corporations accountable to their environmental commitments. This Comment then considers whether companies' environmental policies and their potential impact is sufficiently material to shareholders to require disclosure. This Comment then analyzes recent shareholder suits that consider the potential legal consequences of a companies' failure to disclose its environmental impacts. Lastly, this Comment explores legislative changes to create mandatory disclosure requirements of climate change risk.

## II. THE RELATIONSHIP BETWEEN A CORPORATION AND ITS SHAREHOLDERS

### A. *Corporate Social Responsibility*

As green technology increases in popularity and consumers start to demand more sustainable products and services, companies have made environmental considerations a major aspect of their public relations strategies. Corporate social responsibility (CSR) provides shareholders a method of holding companies accountable and is regarded by some scholars as the third environmental movement.<sup>9</sup> The term corporate social responsibility refers to addressing environmental and social, as well as financial, concerns.<sup>10</sup> Throughout the 1970s, the United States enacted a series of ambitious environmental laws.<sup>11</sup> These laws implemented specific statutory commands on pollution causing activities.<sup>12</sup> For instance, the Clean Water Act prohibits the discharge of toxic pollutants.<sup>13</sup> During this era, companies focused on developing corporate programs and policies to assure compliance.<sup>14</sup> With the enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund) in

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“green marketing” to misleadingly publicize that a company’s business, products or policies are environmentally friendly).

9. Travis Miller, *The Evolving Regulations and Liabilities Entwined in Corporate Social Responsibility*, 46 TEX. ENV'T L.J. 219, 225 (2017).

10. Jeff Civins & Mary Mendoza, *Corporate Sustainability and Social Responsibility: A Legal Perspective*, 71 TEX. BAR J. 368, 369 (2008).

11. Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENV'T L.J. 75, 75 (2001).

12. *Id.* at 78.

13. 33 U.S.C. § 1251 (a)(3).

14. Civins, *supra* note 10, at 369.

1980, under which liability is premised not on violations but rather on a nexus to contamination, companies shifted their focus from assuring compliance to preventively managing environmental risk.<sup>15</sup> By managing risk according to the standards of the nation's environmental laws, companies engage in pro-social behavior.<sup>16</sup> Some companies go beyond this behavior by making CSR part of their business model.<sup>17</sup>

### B. *The Problem of Greenwashing*

Greenwashing presents the biggest threat to achieving meaningful corporate social responsibility.<sup>18</sup> Greenwashing occurs when a corporation relies on environmental rhetoric and advertising to boost its public image or increase sales, but fails to follow through on its environmental promises.<sup>19</sup> Greenwashing is used to describe misleading claims about environmental impacts.<sup>20</sup> Companies may advertise that their products are “eco-friendly” or “sustainable” without explaining to consumers how the product is in fact “eco-friendly.”

While ethical companies will stand by their CSR commitments, some companies may claim sustainability yet choose the most profitable option.<sup>21</sup> However, if a business is skillful, it can increase profits and decrease its environmental impact. Proponents of CSR are quick to point out the growing number of corporations that have done well by doing good.<sup>22</sup> For instance, United Airlines has saved more than \$2 billion on fuel costs by making planes lighter through redesigning airplane bathrooms and switching out beverage carts.<sup>23</sup> While greenwashing may

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15. *Id.*

16. Miriam Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 287 (2014); *see also* Hofstra University, *Joseph Grundfest: Social Responsibility and Business in the 21st Century*, YOUTUBE (Dec. 20, 2010), [http://www.youtube.com/watch?v=CGjAOaD5RmQ&ab\\_channel=HofstraUniversity](http://www.youtube.com/watch?v=CGjAOaD5RmQ&ab_channel=HofstraUniversity).

17. Cherry, *supra* note 16, at 287.

18. *Id.* at 282.

19. *Id.*

20. *Id.* at 284.

21. *See, e.g.*, Mary Catherine O'Connor, *Five Sustainable Boondoggles: Greenwashing All the Way to the Bank*, THE GUARDIAN (Aug. 25, 2014, 7:00 AM), <https://www.theguardian.com/sustainable-business/2014/aug/25/5-sustainability-greenwash-products-ecofriendly-boondoggles-design> [<https://perma.cc/NJ2Y-HB69?type=image>]. In 2013, Sea World, in partnership with Coca-Cola, launched the Cup That Cares a souvenir cup that displays how much CO<sub>2</sub> is saved with each refill of the cup. The cup costs \$9.99 and can be embellished with accessories. *Id.*

22. Chris Martin & Millicent Dent, *How Nestle, Google and Other Businesses Make Money by Going Green*, L.A. TIMES (Sept. 20, 2019, 1:40 PM), <https://www.latimes.com/business/story/2019-09-20/how-businesses-profit-from-environmentalism>.

23. *Id.*

seem appealing, misleading shareholders and consumers about achieving CSR goals may have a significant negative impact on financial performance.<sup>24</sup> For example, in 2015 Volkswagen was found to have installed software designed to cheat nitrous oxide emissions tests in its diesel cars.<sup>25</sup> The financial repercussions of the scandal exceeded more than \$30 billion and included a \$15 billion settlement agreement that required Volkswagen to repurchase diesel vehicles sold in the United States.<sup>26</sup> Prior to the scandal, Volkswagen topped the Dow Jones Sustainability Index as the most sustainable car maker.<sup>27</sup>

When companies like Volkswagen engage in greenwashing, they risk losing public and shareholder trust. CSR gives the public a method of holding companies responsible for violating their environmental promises.<sup>28</sup> Consumers have the power to choose which companies to support and can make purchasing decisions based on a company's adherence to its CSR goals. Consumers may also be successful in holding companies accountable through state consumer fraud actions.<sup>29</sup> Currently, however, there is not an official statutory definition nor are there established common law elements for the tort of greenwashing.<sup>30</sup> Because there is a lack of statutory guidance on the tort of greenwashing, shareholder suits have limited potential to create corporate change. Company engagement in CSR is largely voluntary, so shareholders lack power to hold their corporations accountable for failure to achieve CSR goals.

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24. Paul B. Brown, *Bottom Line on Doing Good*, N.Y. TIMES (Jan. 19, 2008), <https://www.nytimes.com/2008/01/19/business/19offline.html> [<https://perma.cc/?type=image>].

25. Laura Paddison, *From VW to Brazil's Mining Disaster: 5 Scandals that Defined 2015*, THE GUARDIAN (Dec. 30, 2015, 6:43 AM), <https://www.theguardian.com/sustainable-business/2015/dec/30/vw-exxon-lobbying-brazil-mining-tragedy-toshiba-corporate-scandals-greenwashing-climate-change> [<https://perma.cc/4HPR-DPJ3?type=image>].

26. Charles Riley, *Volkswagen's Diesel Scandal Costs Hit \$30 Billion*, CNN BUS. (Sept. 19, 2017), <https://money.cnn.com/2017/09/29/investing/volkswagen-diesel-cost-30-billion/index.html> [<https://perma.cc/AMZ7-D7QX?type=image>].

27. Paddison, *supra* note 25.

28. Cherry, *supra* note 16, at 287.

29. *See, e.g.*, Paduano v. Am. Honda Motor Co., 88 Cal. Rptr. 3d 90 (Cal. Ct. App. 2009) (holding that although a car's failure to achieve the mileage estimate advertised in the car's brochure did not make the car defective under a warranty claim, the plaintiff could bring a claim against Honda under state law for unfairly and deceptively advertising the car as a hybrid vehicle).

30. Cherry, *supra* note 16, at 285.

## III. THE ISSUE OF MATERIALITY AND DISCLOSURE

A. *When Is Disclosure Required?*

While CSR programs are largely voluntary, disclosure of the cost of environmental risk is not. The U.S. Securities and Exchange Commission (SEC) rules require disclosure of trends, events, or uncertainties that will be reasonably likely to have a material effect on the company.<sup>31</sup> Regulation S-K Item 1010, which deals with the disclosure of capital expenditures, requires the disclosure of any material effect that environmental compliance costs could have on earnings.<sup>32</sup> Similarly, Regulation S-K Item 103 requires the disclosure of pending material litigation incidental to the business.<sup>33</sup>

B. *What Is Material?*

Federal securities law rests on the meaning of a single word: “material.”<sup>34</sup> Facts or information must be material in order for disclosure to become a legal obligation.<sup>35</sup> The term “material” comes from the common law definition of actionable fraud, as only false material facts support a finding of common law fraud.<sup>36</sup> Despite the importance of the word “material” in securities law, the term has yet to be clearly defined, and the SEC has instead taken a strategic approach to defining the term.<sup>37</sup> The agency has written hundreds of pages explaining the disclosure requirements of all material information but fails to explicitly define material.<sup>38</sup> While general fraud provisions are found throughout the earliest version of the statutes and rules of federal securities laws, the material qualifier first appeared in the Securities Act of 1933.<sup>39</sup> Section 17(a) of the Securities Act of 1933 states:

it shall be unlawful for any person in the offer or sale of any securities . . .  
(1) to employ any device, scheme or artifice to defraud, (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements

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31. 17 C.F.R. § 229.1011 (2017).

32. 17 C.F.R. § 229.1010 (2018).

33. 17 C.F.R. § 229.103 (2017).

34. Dale A. Oesterle, *The Overused and Under-Defined Notion of “Material” in Securities Law*, 14 U. PENN. J. BUS. L. 167, 167 (2011).

35. *Id.*

36. RESTATEMENT (SECOND) OF TORTS § 538 (AM. LAW INST. 1977).

37. Oesterle, *supra* note 34, at 168.

38. *Id.*

39. *Id.* at 170.

made, in light of the circumstances under which they were made, not misleading; or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.<sup>40</sup>

Thirty-seven years after the passage of the Federal Securities Act, the Supreme Court first sought to give its interpretation of the meaning of “material” in *Mills v. Electric Auto-Lite Co.*<sup>41</sup> In *Mills*, the Supreme Court dealt with the proxy solicitations on a merger approval vote.<sup>42</sup> Writing for a unanimous court, Justice Harlan determined that the plaintiff did not prove that a defective proxy statement had a decisive effect on the vote.<sup>43</sup> *Mills* was largely influential because it eliminated causation and reliance as independent tests of materiality in shareholder voting cases.<sup>44</sup> Rather, materiality became the super-test.<sup>45</sup> Justice Harlan explained that a defect in disclosure is material if the “defect was of such character that it might have been considered by a reasonable shareholder who was in the process of deciding how to vote.”<sup>46</sup> Alternatively, the materiality standard is not met if a defect was “trivial or . . . unrelated to the transaction.”<sup>47</sup> The test established in *Mills* created a very low bar for plaintiffs’ attorneys but proved to be unworkably broad.<sup>48</sup>

In *TSC Industry, Inc. v. Northway, Inc.*, the Supreme Court took a second look at the meaning of materiality after lower courts’ decisions reflected significant confusion on the issue.<sup>49</sup> *TSC Industry* also dealt with proxy solicitations on a merger vote.<sup>50</sup> Justice Marshall defined the test for materiality as “a showing of substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.”<sup>51</sup> Further, the Court determined that there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as

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40. Securities Act of 1933 § 17(a), 15 U.S.C. § 77q(a).

41. 396 U.S. 375 (1970).

42. *Id.* at 378.

43. *Id.* at 385.

44. Oesterle, *supra* note 34, at 171.

45. *Id.*

46. *Mills*, 396 U.S. at 384.

47. *Id.*

48. Oesterle, *supra* note 34, at 172; *see, e.g.*, *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013) (holding that the materiality standard is objective and is not a prerequisite to class certification in securities fraud actions).

49. 426 U.S. 438 (1976); *see, e.g.*, *Gould v. Am. Haw. Co. S.S. Co.*, 331 F. Supp. 981, 986 (D. Del. 1971).

50. *TSC Industry*, 426 U.S. at 440-42.

51. *Id.* at 449.

having significantly altered the “total mix of information” available.<sup>52</sup> The *TSC Industry* Court once again failed to create a workable standard and instead left courts to interpret an abstract and over-inclusive rule.<sup>53</sup>

The Supreme Court has decided two other cases that further refined the materiality standard. In *Basic Inc. v. Levinson*, which involved acquisition negotiations, the Court held that the probability of an event, sliding backward in light of its magnitude, would determine when merger discussions were material.<sup>54</sup> Similarly, in *Virginia Bank Shares v. Sandberg*, the Court rejected an old common law limitation on fraud actions that exempted statements of opinions from liability and constrained liability to misleading statements of fact.<sup>55</sup> In both cases, the Supreme Court declined the opportunity to clarify the materiality test. Because states rely on Supreme Court precedent to interpret their own Blue Sky Laws, the ambiguity of “material” impacts potential federal and state shareholder suits.<sup>56</sup>

#### IV. AN ANALYSIS OF THE MOST RECENT SHAREHOLDER SUITS

Since the Supreme Court expanded state standing in climate change litigation in *Massachusetts v. Environmental Protection Agency*, some states have commenced ambitious securities focused lawsuits against the United States’ biggest oil and gas companies.<sup>57</sup> As the largest publicly traded oil company, ExxonMobil became the first of the industry’s defendants.<sup>58</sup> Investigative reporting by *Inside Climate News* and the *Los Angeles Times* revealed that the oil company understood the science of global warming, predicted its potential impact, and spent millions to spread misinformation.<sup>59</sup> A study conducted by Harvard University

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52. *Id.*

53. Oesterle, *supra* note 34, at 171; *see, e.g.*, Radol v. Thomas, 772 F.2d 244 (6th Cir. 1985) (holding that outside appraisal reports were not material to shareholders considering merger).

54. 485 U.S. 224, 238 (1988); *see also* S.E.C. v. Geon Indust. Inc., 531 F.2d 39, 47-48 (2d Cir. 1976) (“Since a merger . . . is the most important event that can occur in a small corporation’s life . . . we think that inside information, as regards a merger of this sort, can become material at an earlier stage than would be the case as regards lesser transactions.”)

55. 501 U.S. 1083 (1991).

56. B. Rogers, Annotation, 87 A.L.R. 42 (1933). Blue Sky Laws are enacted in every state and are intended to protect the investing public. *Id.*

57. 549 U.S. 497, 516 (2007) (holding that Massachusetts had standing to petition for review order of the EPA refusing to regulate GHG emissions).

58. James Leggate, *5 Things to Know About ExxonMobil, the World’s Largest Public Oil Company*, FOX BUS. (Oct. 1, 2019), <http://foxbusiness.com/money/exxon-mobil-worlds-largest-public-oil-company-5-things-to-know> [<https://perma.cc/2FFP-5NEZ?type=image>].

59. David Hasemyer, *Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today*, INSIDE CLIMATE NEWS (Jan. 17, 2020), <https://insideclimatenews.org/news/0404>

researchers demonstrated that the allegations of the lawsuits were not unfounded.<sup>60</sup> From 1977 to 2014, almost eighty percent of the company's research and internal communications on the topic acknowledged that the threat of climate change was real and caused by human activity.<sup>61</sup> However, eighty percent of ExxonMobil's statements to the broader public expressed doubt about the threat and causes of climate change.<sup>62</sup> In 2015, two Harvard researchers reviewed nearly 200 documents that represented ExxonMobil's research and its public statements about climate change.<sup>63</sup> The study concluded that the company "misled the public" about climate change as its scientists recognized greenhouse gas (GHG) emissions were a threat to the planet.<sup>64</sup> In an article for the *New York Times*, Dr. Oreskes and Dr. Supran explained that the "question for the study was not whether ExxonMobil suppressed climate change research, but rather how they communicated about it."<sup>65</sup> ExxonMobil contributed quietly to the science, while loudly raising doubts about it.<sup>66</sup>

#### A. Commonwealth of Massachusetts v. Exxon Mobil Corp.

In 2019, Massachusetts brought suit against ExxonMobil for deceptive advertising to consumers and for misleading investors about the risk of climate change.<sup>67</sup> Massachusetts Attorney General Maura Healey first served ExxonMobil with a civil investigation demand in April 2016 after several media reports exposed ExxonMobil's pattern of deception.<sup>68</sup>

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2018/climate-change-fossil-fuel-company-lawsuits-timeline-exxon-children-california-cities-attorney-general [https://perma.cc/RJ98-43HR?type=image]; see also Sara Jerving et al., *What Exxon Knew About the Earth's Melting Arctic*, L.A. TIMES (Oct. 9, 2015), https://graphics.latimes.com/exxon-arctic/ [https://perma.cc/F34J-V8P2?type=image] ("As Chief Executive Lee Raymond explained at an annual meeting in 199, future climate 'projections are based on completely unproven climate models, or, more often, on sheer speculation.'").

60. John Schwartz, *Exxon Misled the Public on Climate Change, Study Says*, N.Y. TIMES (Aug. 23, 2017), https://www.nytimes.com/2017/08/23/climate/exxon-global-warming-science-study.html [https://perma.cc/JV9V-6QMZ?type=image].

61. *Id.*

62. *Id.*

63. Geoffrey Supran & Naomi Oreskes, *Assessing ExxonMobil's Climate Change Communication*, ENV'T RSCH. LETTERS (Aug. 23, 2017), https://iopscience.iop.org/article/10.1088/1748-9326/aa815f [https://perma.cc/3QM5-QSB4?type=image].

64. *Id.* at 1.

65. Schwartz, *supra* note 60.

66. *Id.*

67. Press Release, Office of Attorney General Maura Healey, AG Healey Sues Exxon for Deceiving Massachusetts Consumers and Investors (Oct. 24, 2019), https://www.mass.gov/news/ag-healey-sues-exxon-for-deceiving-massachusetts-consumers-and-investors [https://perma.cc/YCM4-4HTR?type=image].

68. *Id.*; see, e.g., Hasemyer, *supra* note 59.

After more than three years of investigations, the Attorney General filed a complaint against ExxonMobil in October 2019.<sup>69</sup> The Complaint alleged that ExxonMobil repeatedly violated the state's consumer and investor protection laws and related regulations.<sup>70</sup> It also asserted that the company "systemically and intentionally . . . misled Massachusetts investors and consumers about climate change."<sup>71</sup> The Attorney General brought the action pursuant to the Massachusetts Consumer Protection Act (Chapter 93A) and explained that ExxonMobil's Chapter 93A violations "took the form of significant factual misstatements and failure to make disclosures to investors and consumers that would have been material to decisions made by investors."<sup>72</sup> The Complaint requested that the court: (1) declare that ExxonMobil violated and continued to violate the Massachusetts Consumer Protection Act, (2) grant injunctive relief, and (3) award the state penalties against ExxonMobil in the amount of \$5,000 for each separate violation of the Consumer Protection Act.<sup>73</sup>

#### 1. ExxonMobil's Fossil Fuel Business and History of Climate Deception

The Massachusetts Complaint began by illustrating the role of ExxonMobil in the fossil fuel industry. When Exxon and Mobil merged in 1999, ExxonMobil became the world's largest investor-owned oil and gas company.<sup>74</sup> As of December 2018, 4.27 billion shares of ExxonMobil common stock were issued and outstanding.<sup>75</sup> From 2001 through 2016, ExxonMobil sold approximately eight percent of the total barrels of petroleum products consumed globally per day.<sup>76</sup> The Complaint alleged that ExxonMobil's production, refining, and combustion of fossil fuel products are a major source of GHGs, which contribute to raising the Earth's global surface and ocean temperatures.<sup>77</sup> In addition, since the 1970s, ExxonMobil conducted extensive studies on carbon dioxide emissions.<sup>78</sup> From these studies, ExxonMobil discovered that increased

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69. Press Release, *supra* note 67.

70. *Id.*

71. Complaint, *supra* note 7, at 1.

72. Press Release, *supra* note 67.

73. Complaint, *supra* note 7, at 204-05.

74. *Id.* at 16.

75. *Id.*

76. *Id.* at 17.

77. *Id.*

78. *Id.* at 19. ExxonMobil reserved more than \$1 million to measure how quickly the oceans were absorbing CO<sub>2</sub>. Neela Banerjee, Lisa Song & David Hasemyer, *Exxon's Own Research Confirmed Fossil Fuel's Role in Global Warming Decades Ago*, INSIDE CLIMATE NEWS

carbon dioxide emissions would impact the climate and determined that “consequent societal responses would be the primary factor limiting future use of fossil fuels for energy.”<sup>79</sup> The Complaint pointed to presentations from leading ExxonMobil scientists that detailed the causal relationship between increased carbon dioxide and increased global temperatures.<sup>80</sup> Further, the Complaint alleged that ExxonMobil “implemented a tobacco-industry style” campaign to create doubt and confusion among the public.<sup>81</sup> Like tobacco companies, which published advertisements and scientific publications that denied any adverse health effects of smoking, ExxonMobil implemented a multi-million-dollar campaign to sow doubt about the existence and causes of climate change.<sup>82</sup> ExxonMobil formed the Global Climate Science Communications Team to cause such doubt and hired Steven Milloy—a leader in the tobacco industry’s deception campaign—to help lead the campaign.<sup>83</sup>

## 2. ExxonMobil Is Deceiving Investors by Failing to Disclose Risks of Climate Change

The Complaint next explained that ExxonMobil deceived heavily invested shareholders by failing to disclose the risks of climate change.<sup>84</sup> Massachusetts-based institutional investors hold millions of shares of ExxonMobil common stock worth billions of dollars.<sup>85</sup> For instance, the Massachusetts Pension Reserves Investment Trust has a significant investment in ExxonMobil securities.<sup>86</sup> The Complaint alleged that

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(Sept. 16, 2015), <https://insideclimatenews.org/news/15092015/Exxons-own-research-confirmed-fossil-fuels-role-in-global-warming> [<https://perma.cc/L7BD-UPXL?type=image>].

79. Complaint, *supra* note 7, at 18-19.

80. *Id.* at 27. For example, in March 1984, ExxonMobil Research and Engineering gave a presentation titled “CO<sub>2</sub> Greenhouse and Climate Issues.” *Id.*

81. *Id.*

82. *Id.* at 29. For example, in 2002, ExxonMobil published an ad titled “Unsettled Science,” which highlighted a study showing historical temperature decreases in the Sargasso Sea. *Exxon’s Climate Denial History: A Timeline*, GREEN PEACE, <https://www.greenpeace.org/usa/global-warming/exxon-and-the-oil-industry-knew-about-climate-change/exxons-climate-denial-history-a-timeline/#:~:text=1990,reduced%20to%2080%20percent> [<https://perma.cc/4QTV-CP5V?type=image>].

83. Complaint, *supra* note 7, at 36-37. Milloy also popularized the term “junk science” and has authored multiple books, including GREEN HELL: HOW THE ENVIRONMENTALISTS PLAN TO CONTROL YOUR LIFE AND WHAT YOU CAN DO TO STOP THEM (2009).

84. Complaint, *supra* note 7, at 65.

85. *Id.*

86. *Id.* at 67; see MASS. PENSION RESERVES INV. TRUST FUND, COMPREHENSIVE ANNUAL FINANCIAL REPORT 67 (Sept. 14, 2019), <https://archives.lib.state.ma.us/handle/2452/825242> [<https://perma.cc/4Z6E-EE57?type=image>]. On June 30, 2019 the Pension held \$161,063,000 fair value in ExxonMobil.

ExxonMobil publicly stated that it warned current and potential investors of the risk of climate change and that the Company was taking appropriate steps to fully disclose and account for such risk.<sup>87</sup> However, ExxonMobil failed to take meaningful action to manage this risk, such as by sufficiently reducing its carbon emissions. Additionally, the Complaint asserted that current and future governmental action to regulate emissions will reduce market and consumer demands for ExxonMobil's fossil fuel products.<sup>88</sup> As a result, businesses with cleaner energy production will increasingly gain a competitive edge over ExxonMobil.<sup>89</sup>

### 3. Massachusetts' Investors Have a Strong Interest in Accurate Disclosure of the Material Risks of the Corporation's Business Practices

The Complaint next contended that the state's investors had an interest in accurate disclosure of material risks and that climate change is such a material risk. ExxonMobil's omissions and misrepresentations, the Complaint argued, are material because they influence investment decisions by Massachusetts shareholders.<sup>90</sup> Climate risk disclosures had become an increasing focus for investors, particularly for those focused on environmental, social, and governance (ESG) factors.<sup>91</sup> Some of Massachusetts' largest investment firms, such as Arjuna Capita, are at the forefront of ESG investing.<sup>92</sup> Other Massachusetts investors have begun integrating ESG factors to guide client investors.<sup>93</sup> The Complaint also reminded ExxonMobil that it is one of more than 2,000 institutional signatories to the United Nations Principles for Responsible Investment (PRI).<sup>94</sup> The materiality of ESG factors is evidenced by a growing body of peer-reviewed analysis, such as the Sustainability Accounting Standards Board, which stated that the "research and market evidence continues to

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87. Complaint, *supra* note 7, at 62. For example, in its 2014 publication, *Energy and Carbon—Managing the Risks*, ExxonMobil stated that it "took the risk of climate change seriously" and is taking steps to address the risk. *Id.*

88. *Id.* at 74.

89. *Id.*

90. *Id.* at 87.

91. *Id.*

92. *Id.*

93. *Id.* at 88; see, e.g., Robbin Wigglesworth, *State Street Vows to Turn up the Heat on ESG Standards*, FIN. TIMES (Jan. 28, 2020), <https://www.ft.com/content/cb1e2684-4152-11ea-a047-eae9bd51ceba> [<https://perma.cc/EN9X-3TY6?type=image>] ("Street Global Advisors . . . last year introduced what it calls a 'responsibility factor'—a scoring system that measures how well companies do on various ESG metrics.").

94. Complaint, *supra* note 7, at 88-89.

show the connection between sustainable business practices and market performance.”<sup>95</sup> The Board has also explained the importance of ESG factors in long-term investment strategies. ESG-related issues can severely impact the return on a bond.<sup>96</sup> Long-term bonds specifically can become high-risk investments if ESG factors are not mitigated or properly managed.<sup>97</sup> Disclosures of climate risk, the Complaint asserted, can also impact public and industry perception of a company.<sup>98</sup> For instance, public disclosures affect the value of short-term securities because market responses to such disclosures contribute to lower market capitalization, changes in bond ratings, and modified perceptions of a corporation’s creditworthiness.<sup>99</sup>

#### 4. ExxonMobil Misleads Consumers Through Deceptive Advertisements and Greenwashing

In addition to its allegations on behalf of the state’s shareholders, the Complaint finally alleged that ExxonMobil misled consumers through the use of deceptive advertisements that failed to disclose material information about the dangers of fossil fuel.<sup>100</sup> For instance, ExxonMobil failed to disclose in advertisements and promotional materials that the use of fossil fuel products emits large volumes of GHGs, which result in substantial increases in deadly weather events and large-scale environmental disruption.<sup>101</sup> The Complaint also alleged that ExxonMobil misleadingly represented itself to Massachusetts as an “environmentally responsible corporate citizen concerned about climate change and leading innovate efforts.”<sup>102</sup> Such representations, the Complaint explained, constitute greenwashing because, contrary to its environmental messaging, ExxonMobil continued to focus on increasing fossil fuel production and fighting against fuel economy and emission standards for passenger vehicles.<sup>103</sup>

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95. *Id.* at 89; see also *Why Is Financial Materiality Important?*, SUSTAINABILITY ACCT. STANDARDS BD., <https://www.sasb.org/standards-overview/materiality-map/> [<https://perma.cc/WG3U-3KGL?type=image>].

96. Complaint, *supra* note 7, at 93.

97. *Id.*

98. *Id.* at 94.

99. *Id.*

100. *Id.* at 153.

101. *Id.*

102. *Id.* at 154.

103. *Id.* at 154-55; see also Hiroko Tabuchi, *The Oil Industry’s Covert Campaign to Rewrite American Car Emissions Rules*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/climate/cafe-emissions-rollback-oil-industry.html> [<https://perma.cc/EMX4-JZ4J?type=image>]

## 5. ExxonMobil's Response to the Lawsuit and Recent Developments

In response to the lawsuit, ExxonMobil filed a notice of removal to federal court on November 29, 2019.<sup>104</sup> In its notice, ExxonMobil argued that the Massachusetts suit is the culmination of a multi-year plan concocted by plaintiffs' attorneys, climate activists, and special interests to force a regulatory agenda that has been unsuccessful through the legislative process.<sup>105</sup> ExxonMobil also claimed that the Massachusetts Attorney General engaged in use of its enforcement law powers to bar ExxonMobil from participating in public discourse about climate change and force a change toward a "clean energy future."<sup>106</sup> In the notice, ExxonMobil requested that the suit be heard and promptly dismissed by a federal court.<sup>107</sup> In response, Massachusetts filed a memorandum of law in support of its motion for remand, arguing that the Complaint does not raise any federal claims and that state court is the appropriate forum for adjudicating the state law claims.<sup>108</sup> Although the lawsuit is far from over, ExxonMobil had a setback in late March 2020, when a federal judge ruled that the lawsuit should go back to state court.<sup>109</sup> U.S. District Judge William G. Young rejected ExxonMobil's argument that the case should stay in federal court because the claims touched on important federal issues.<sup>110</sup>

### B. The People of New York v. Exxon Mobil Corp.

Like the Commonwealth of Massachusetts, the New York Attorney General's Office also opened an investigation against ExxonMobil in

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(explaining that an industry lobby campaign representing ExxonMobil used Facebook ads urging people to write to regulators in support of the rollback of oil emissions standards implemented under President Obama).

104. Notice of Removal at 1, *Mass. v. Exxon Mobil Corp.*, Civ. Action No. 19-3333 (Nov. 29, 2019), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20191129\\_docket-119-cv-12430\\_notice-1.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20191129_docket-119-cv-12430_notice-1.pdf) [<https://perma.cc/M6KJ-89QW?type=image>].

105. *Id.* at 2.

106. *Id.*

107. *Id.*

108. Memorandum of Law in Support of Motion for Remand at 7, *Mass v. Exxon Mobil Corp.*, Civ. Action No. 19-3333 (Dec. 26, 2019), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20191226\\_docket-119-cv-12430\\_motion.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20191226_docket-119-cv-12430_motion.pdf) [<https://perma.cc/AH8K-8QV9?type=image>].

109. Erik Larson, *Exxon Loses Jurisdiction Fight in Massachusetts Climate Suit*, BLOOMBERG (Mar. 17, 2020, 3:03 PM), <https://www.bloomberg.com/news/articles/2020-03-17/massachusetts-can-keep-exxon-suit-in-state-court-judge-says> [<https://perma.cc/25BN-SPNG?type=image>].

110. *Id.*

2015.<sup>111</sup> The New York Complaint first focused on climate change regulation and investor concerns.<sup>112</sup> When emitted into the atmosphere, the Complaint explained, GHGs trap heat and energy that would otherwise escape the Earth.<sup>113</sup> Increasing GHGs emissions result in significant adverse global impacts.<sup>114</sup> While both complaints provided a brief overview of climate change, the New York Complaint differed in its examination of ExxonMobil's role as a company operating in the United States. Rather than describe ExxonMobil's operations in the United States, the Complaint gave a brief description of the international framework governing ExxonMobil. For instance, United Nations Framework Convention on Climate Change went into effect in 1994 and currently has 197 member states.<sup>115</sup> More recently, the 2015 Paris Agreement required that each participating nation formulate a plan to reduce GHG emissions.<sup>116</sup> As of the filing of the Complaint, 181 nations as well as the European Union—representing more than eighty-eight percent of global GHG emissions—ratified or acceded to the Paris Agreement.<sup>117</sup> Even though, at the time of filing, the United States was not a signatory to the Paris Climate Agreement, the Complaint implied that as an international operator ExxonMobil was still required to comply with the Paris Climate Agreement.<sup>118</sup> Additionally, the United States Environmental Protection Agency has determined that GHG emissions endanger public health and welfare.<sup>119</sup>

Unlike the Massachusetts Complaint, which focused on ExxonMobil's fraudulent statements to shareholders and consumers, the New York Complaint focused solely on ExxonMobil's representations to shareholders.<sup>120</sup> As of May 2018, the New York City Pension Funds held ExxonMobil shares valuing \$700 million.<sup>121</sup> The Complaint also alleged that climate change risk is material for long-term investments.<sup>122</sup> The New

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111. Hasemyer, *supra* note 59.

112. Complaint at 1, *N.Y. v. Exxon Mobil Corp.*, Index No. 452044 (Oct. 24, 2018), [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181024\\_docket-4520442018\\_complaint.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20181024_docket-4520442018_complaint.pdf) [<https://perma.cc/9JC4-X3VR?type=image>].

113. *Id.* at 10.

114. *Id.*

115. *Id.*

116. *Id.* at 10-11.

117. *Id.* at 11.

118. *Id.*

119. *Id.*

120. *Id.* at 13.

121. *Id.*

122. *Id.* at 14.

York Complaint pointed to various proposals submitted by shareholders requesting that ExxonMobil take meaningful corporate action to address climate change.<sup>123</sup> ExxonMobil has consistently opposed such resolutions.<sup>124</sup>

After cooperating with the New York Attorney General's Office for almost a year, ExxonMobil brought a countersuit against the state to block the state's broad subpoena, which sought to obtain records dealing with the company's climate research from the past forty years.<sup>125</sup> In October 2016, ExxonMobil also filed a motion in Texas federal court asking to amend its lawsuit against Massachusetts Attorney General Maura Healey to include New York Attorney General Eric Schneiderman.<sup>126</sup> The motion also sought to halt the state's investigations into ExxonMobil's corporate practices. ExxonMobil discussed the motion in a press release, calling the investigations "biased attempts to further a political agenda for financial gain."<sup>127</sup> The press release also claimed that the lawsuits alleged securities fraud with no basis whatsoever and sought to invalidate the lawsuits claiming that the "SEC is the appropriate entity to examine issues related to reserves and other communications important to investors."<sup>128</sup>

In addition to discrediting the lawsuits, the press release allowed ExxonMobil to clarify its climate position.<sup>129</sup> While the press release confirmed that ExxonMobil recognized the risk of climate change and its potential impacts, the press release failed to offer any meaningful rebuttal to the allegations of the lawsuit, including the allegations that ExxonMobil has known and understood the risks of climate change since the 1970s. The press release also failed to offer any meaningful guidance into ExxonMobil's current climate change strategies. Ultimately, a New York Judge found in favor of ExxonMobil on December 10, 2019.<sup>130</sup> Although the Judge determined that ExxonMobil was not liable for investor fraud,

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123. *Id.* at 19.

124. *Id.*

125. David Hasemyer, *Exxon Now Seeks to Block New York Attorney General's Climate Probe*, INSIDE CLIMATE NEWS (Oct. 18, 2016), <https://insideclimatenews.org/news/17102016/exxonmobil-climate-change-research-seeks-block-new-york-attorney-general-investigation-subpeona-eric-schneiderman> [<https://perma.cc/8TWDTKY5?type=image>].

126. *Id.*

127. Press Release, ExxonMobil, ExxonMobil Asks Federal Court to Invalidate New York Attorney General's Subpoena (Oct. 17, 2016), <https://news.exxonmobil.com/press-release/exxon-mobil-asks-federal-court-invalidate-new-york-attorney-generals-subpoena> [<https://perma.cc/42BU-WP4P?type=image>].

128. *Id.*

129. *Id.*

130. Hasemyer, *supra* note 59.

Judge Barry Ostrager noted that “nothing in this opinion is intended to absolve ExxonMobil from responsibility for contributing to climate change through the emission of greenhouse gases in the production of its fossil fuel products.”<sup>131</sup>

## V. LEGISLATIVE ANSWERS

Considering the mixed success of *Commonwealth of Massachusetts v. Exxon Mobil Corp.* and *People of the State of New York v. Exxon Mobil Corp.*, the question remains: Should the risk of climate change be considered a material risk? Although Supreme Court precedent clearly demonstrates the over-inclusiveness of the materiality standard, climate change and environmental risks have not yet been found to be explicitly material. The final outcome of *Massachusetts v. Exxon* is unknown; however, rather than wait for the judicial system to provide answers, climate activists should turn their efforts toward legislative change.

While the SEC regulations provide some guidelines that suggest that companies should report sustainability issues such as climate change, legislative changes could improve the disclosure process.<sup>132</sup> The current legislative framework could be modified to include one of the following solutions: (1) enforceable standards for corporate disclosures or (2) required disclosure of all environmental risk.

First, modifying the current legislative framework could provide companies with better guidance on how to report environmental risks, as well as any corporate sustainability measures. Even though the SEC does not require disclosure of the risks caused by climate change, many companies voluntarily disclose the information to shareholders.<sup>133</sup> Companies should be encouraged by legislation to continue disclosure of both environmental risks and corporate sustainability. Although there is already some legislation in place, the legislation fails to provide explicit enforceable standards. Legislation should be modified to include minimum standards for voluntary disclosure reports. Agencies could also provide greater guidance on how to avoid corporate greenwashing. For instance, the Federal Trade Commission recently issued “Green Guides.”<sup>134</sup> Although the guides are only administrative guidance and not

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131. *N.Y. v. Exxon Mobil Corp.*, Index No. 452044, 1, 3 (Dec. 10, 2019), <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=N/2DxDtAU8Gqsq9IN5w0A=&system=prod> [<https://perma.cc/7GP9-VYF8?type=image>].

132. Civins, *supra* note 10, at 370.

133. *Id.*

134. *Id.* at 371.

independently enforceable, the guides are useful as they explain how to avoid making environmental claims that are unfair or deceptive.<sup>135</sup> The guides seek to “outline general principles that apply to all environmental marketing and then provide guidance regarding specific environmental claims.”<sup>136</sup>

Secondly, legislation could be modified to require companies to disclose all environmental risks and specifically any corporate risks associated with climate change. Some industry participants have already called on the SEC to enact such legislation.<sup>137</sup> In 2007, a group of institutional investors working alongside Ceres filed a petition that called for the SEC to issue interpretive guidance clarifying that material climate change information must be included in corporate disclosures.<sup>138</sup> Although the petition received support from industry leaders, the SEC has failed to act on it.<sup>139</sup>

The SEC may also find guidance in foreign jurisdictions to enact a mandatory disclosure law. For instance, the European Union’s revised Institutions for Occupational Retirement Provision Directive requires European pension funds to disclose how they consider ESG factors in their investment approaches.<sup>140</sup> The initiative aims to provide greater transparency to beneficiaries.<sup>141</sup> Similarly, the Italian Corporate Governance Committee included ESG risks and governance considerations in reviewing its code in 2015.<sup>142</sup> Article 173 of the French Law on Energy Transition, which became effective in January 2016, requires companies to disclose in their annual reports: (a) financial risks related to the effects of climate change, (b) the measures adopted by the company to reduce them, and (c) the consequences of climate change on the company’s activities and the use of goods and services it produces.<sup>143</sup> Article 173 also requires institutional investors to disclose information on how ESG criteria are considered in their investment decisions, as well as

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Lois Guthrie & Luke Blower, *Corporate Climate Disclosure Schemes in G20 Countries After COP 21*, CLIMATE DISCLOSURE STANDARDS BD. (2017), [https://www.jstor.org/stable/resrep15540?seq=2#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/resrep15540?seq=2#metadata_info_tab_contents) [https://perma.cc/3WB2-SGBF?type=image].

141. *Id.*

142. *Id.*

143. *Id.*

how their corporate goals and policies align with the national strategy for the energy and ecological transition.<sup>144</sup>

## VI. CONCLUSION

Although climate activists and political leaders continue to fiercely advocate for the adoption of progressive environmental policy, it is clear that industry action is required to enact a holistic approach to climate change. Shareholders must put pressure on the oil and gas industry to encourage major players to take action. Because climate change presents a material risk to both short- and long-term investments, corporations should disclose mitigation strategies and ESG factors. When pressure from shareholders is not enough to force corporate action, state attorney generals may decide to bring suits on behalf of shareholders. The *Commonwealth of Massachusetts v. Exxon Mobil Corp.* and *People of the State of New York v. Exxon Mobil Corp.* are two examples of such suits. Although these lawsuits set in motion a movement of similar lawsuits, the suits have so far proven unsuccessful. Rather, the answer may lie in improvements to existing legislation and federally mandated disclosure requirements.

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144. *Id.*