

# Climate Liability

## The New York attorney general's investigation of Exxon Mobil

In September 2015 InsideClimate News alleged that in 1978, Exxon's researchers informed senior managers of the likely catastrophic climate change implications of fossil fuel consumption but in the decades that followed Exxon chose to work "at the forefront of climate denial".<sup>1</sup> In October, 2015 the Los Angeles Times claimed there was evidence that while Exxon "sought to downplay the certainty of global warming", it was "closely studying the impact of climate change on the company's operations".<sup>2</sup> Further reports claimed that internal communications suggest Exxon made business decisions based on climate risk without disclosing this to investors.<sup>3</sup>

On 5 November 2015 journalistic expose shifted to legal investigation with reports that the New York attorney general was investigating Exxon to determine "whether statements the company made to investors about climate risks as recently as this year were consistent with the company's own long-running scientific research."<sup>4</sup>

These developments generated extensive media coverage, comparisons with the legal actions against tobacco companies, comment from leading US political figures with Secretary of State John Kerry labelling the cover-up allegations, if proven, "a betrayal",<sup>5</sup> and

calls for further investigations by other states and by the US Department of Justice.<sup>6</sup> On 20 January it was reported that the California attorney general is also investigating Exxon's climate risk disclosures.<sup>7</sup>

This briefing outlines the New York A.G. investigation, the possible consequences, and the potential vulnerability of other fossil fuel companies to similar scrutiny. We suggest questions to help investors assess whether external climate risk disclosures are consistent with internal assessments and whether corporate public policy positions and links with lobby groups are aligned with shareholder interests.

### Major risk for investors

- Inadequacy of corporate disclosures of climate risks to business
- Vulnerability of investee companies to regulatory investigations & litigation
- Association with climate denial organisations and loss of social licence

## The New York A.G.'s Investigation

As the investigation is to date confidential official public statements have not been forthcoming. However, it has been widely reported that the attorney general's investigation is pursuant to a New York statute called The Martin Act.<sup>8</sup> Labeled by one lawyer "the legal equivalent of a weapon of mass destruction",<sup>9</sup> the act empowers the attorney general to investigate and take civil and/or criminal enforcement action against securities fraud. The act grants the attorney general sweeping powers to compel the disclosure of documents and provision of testimony under oath. The attorney general has reportedly issued a subpoena to Exxon for financial records, emails,<sup>10</sup> and communications with trade associations and industry groups spanning a period from the 1970s to 2015.<sup>11</sup> It is likely that the investigation will run for several years.

The Martin Act does not provide a definition of 'fraud'. However case law has determined that, in order to prove securities fraud under the Martin Act, there is no need for the attorney general to prove an intention to defraud; reliance by anyone on the misrepresentation or omission;<sup>12</sup> or the suffering of damage.<sup>13</sup> It appears therefore that a violation occurs where there is a misrepresentation or omission that is material.<sup>14</sup>

### Materiality and climate change disclosures

Federal and state case law and Securities and Exchange Commission (SEC) guidance regards information as material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision, or, put another way, if the information would significantly alter the total mix of available information.<sup>15</sup> It should be noted however that current<sup>16</sup> US accounting principles provide that information is material if its misstatement or omission could influence decisions that users make on the basis of the financial information of a specific reporting entity.

In 2010, the SEC issued guidance on climate change disclosures.<sup>17</sup> The guidance covers disclosure obligations arising from enacted or pending legislation, international accords, physical impacts of climate change, and indirect consequences including reputational impact.

#### • Enacted regulation or legislation

If enacted climate change regulation or legislation is likely to have a material effect on the the company, its financial condition or results of operation, its likely impact should be disclosed.

#### • Pending regulations or legislation

First the company must evaluate whether the pending legislation or regulation is reasonably likely to be enacted. Unless management determines that it is not reasonably likely to be enacted, it must proceed on the assumption that the legislation or regulation will be enacted. Second, management must determine whether the legislation or regulation, if enacted, is reasonably likely to have a material

effect on the company, its financial condition or results of operations.

Unless management determines that a material effect is not reasonably likely, disclosure is required.

- **International Accords**

The same obligations apply with respect to assessing the need to disclose the likely impacts of international accords such as the Paris climate agreement.

- **Indirect consequences**

Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies e.g. increased or decreased demand for particular goods and services which may require to be disclosed. The risk and materiality of reputational impact from data about its greenhouse gas emissions should be evaluated and if necessary disclosed by companies. Peabody Energy Corporation recently disclosed the divestment movement as posing a material risk.<sup>18</sup>

- **Physical impacts**

The SEC guidance states that companies whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events.

It is likely that the attorney general will analyse Exxon's disclosures under each of these categories to determine whether the company disclosed all material information it knew about the effects of climate change on its business as soon as it understood them to shareholders. The New York Times has reported that the attorney general intends to examine Exxon's funding of "outside groups that sought to undermine climate science, even as its in-house scientists were outlining the potential consequences – and uncertainties – to company executives."<sup>19</sup>

### Questions for companies

- Are investee companies in climate vulnerable sectors e.g. fossil fuels, utilities, automobile, food, and insurance disclosing specific detail regarding the potential impact of relevant enacted and pending climate regulations, physical impacts of climate change, emerging legal and technology trends and reputational impacts of climate matters on their businesses? If not, why not?
- Have investee companies made an assessment as to what additional disclosures are required post the Paris climate agreement? In particular, will companies conduct an assessment of the likely business impact of relevant INDCs and of the stated global ambition to limit global temperature increase to 1.5 °. If not, why not?



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## Vulnerability of other companies to investigation

News of the Exxon investigation has been followed by speculation that other oil majors may also find themselves the subject of similar probes.<sup>20</sup> A key issue in assessing vulnerability to a regulatory or legal securities investigation is whether companies hid their knowledge of the potential impacts on their businesses of climate change from the investing public. To this end reports have pointed out that Exxon was not alone in funding both climate research and organisations known for questioning climate science and challenging climate policy.<sup>21</sup> Civil society scrutiny of<sup>22</sup> and investor calls<sup>23</sup> for greater regulatory oversight of corporate reporting on climate risks are likely to increase in the wake of the Exxon investigation to ensure that all material disclosures relating to the business impacts of climate change and climate regulation are being made to the investing public.

### Questions for companies

- Has the company disclosed all internal modelling that has been conducted on the likely impacts of climate change on the company? If not, why not?
- Does the company have any reason to believe that it might become subject to a regulatory investigation regarding the adequacy of its climate change disclosures in a country in which its shares are listed?
- Has the company ever funded and does it continue to fund organisations that denied climate change or sought to spread uncertainty about climate change? In particular, has the company ever funded any of the 164 organisations identified by Justin Farrell, an assistant professor of sociology at the Yale School of Forestry & Environmental Studies, as counter climate movement organisations?<sup>24</sup>
- What steps does the company take to ensure its own public statements on climate change are not undermined by the positions advocated by organisations to which it provides funding? Has the company implemented a clear and specific policy to make sure it is not even inadvertently involved in distorting the public's, investors', regulators', insurers' or policymakers' understanding of the severity of the risks of climate change and the consequential liability risks to your company?
- Will the company commit to disclosing its positions on sector relevant proposed climate change regulations and legislation?

## Potential consequences

The Martin Act empowers the New York attorney general to take civil and criminal enforcement action.<sup>25</sup> Criminal sanctions are harder to achieve and less likely but include prison time of between 15 days to 4 years depending on the severity of the offence. Under the civil part of the law, the Martin Act allows the attorney general to authorise restitution – meaning money earned from investors because of fraud may have to be given back which would in practice likely require proof of reliance by investors on the material misrepresentation. The attorney general can also seek a permanent injunction barring the person or entity charged from selling, offering to sell securities. This could essentially shut Exxon down and so therefore can be considered an unlikely outcome.

Previous investigations under the Martin Act have led to a number of settlement agreements with energy companies and financial institutions with a range of impacts from multi-million dollar fines to agreements for compliance and monitoring reforms and improved corporate reporting. They include:

- A \$100 million settlement and agreement on new monitoring and compliance requirements with Merrill Lynch & Co. in 2002, based on alleged undisclosed analysts' conflicts of interest.<sup>26</sup>
- A \$13 billion settlement with JPMorgan Chase in 2013 arising out of the packaging, marketing, sale and issuance of residential mortgage-backed securities by JPMorgan, Bear Stearns and Washington Mutual prior to 1 January, 2009.<sup>27</sup>
- 2008 settlements with Xcel Energy, Inc. and Dynegy Inc. requiring disclosure of an analysis of the financial and physical impacts of climate change on the company's operations.<sup>28</sup>

- A 2009 settlement with AES to disclose climate change risks to investors.<sup>29</sup>
- A 2015 settlement with Peabody Energy Corporation requiring improved climate change disclosure after a two year investigation. The investigation found that Peabody had repeatedly denied in financial filings that it had the ability to predict the impact of potential regulation when in fact it and its consultants had actually made projections detailing severe impacts on the company.<sup>30</sup> There was a clear discrepancy between the company's public disclosures and private knowledge. The attorney general also concluded that Peabody's public disclosures focused on the IEA scenario most favourable to coal demand but which assumes governments will fail to adopt any new policies or regulations with the omission of the IEA's other two scenarios which provide a less favourable view on future coal demand.

### Further litigation

The Martin Act grants the attorney general very broad evidence gathering and investigative powers together with discretion as to whether to make documents public. It is possible therefore that the attorney general's investigation will facilitate the subsequent initiation of private securities fraud actions by investors or actions by the federal government – though such actions would be subject to the common law requirements to demonstrate intent, reliance, and damage – and/or private litigation under state consumer and nuisance laws and/or actions by other state attorneys general. According to a professor at the University of Virginia School of Law the Exxon investigation could “open up years of litigation and settlements”<sup>31</sup> similarly to the way attorney general-led tobacco litigation

did in the past. It is possible therefore that the attorney general's investigation will have long-lasting consequences for Exxon at the very least in terms of legal fees and media coverage.

### Loss of social license

While the New York attorney general investigates whether Exxon misled investors, the company faces trial in the court of public opinion for the wider allegation of suppressing its knowledge of climate science in favour of funding what has been referred to as an "infrastructure of denial."<sup>32</sup> The charge goes that Exxon could have used its scientific knowledge and economic and political clout to end the debate about man-made impacts on climate change and to help chart the transition to a low carbon economy. But instead it chose to fund organisations which challenged the science Exxon itself knew to be true thereby delaying meaningful climate action.<sup>33</sup>

The public's verdict against Exxon may equal or indeed outstrip any formal penalties imposed on the company and in turn present a reputational impact risk that it and other fossil fuel companies may be required to disclose in future filings.

Already, a group of US politicians have written to Exxon and its peers asking what they knew about climate change and when they knew it; civil society groups have been supported by the Democratic Party's presidential candidates in their calls for the Department of Justice to open a federal

racketeering investigation;<sup>34</sup> and media reports of Exxon's pre-Paris statements included reference to the attorney general's investigation undermining Exxon's attempts to establish itself as a credible voice on climate change.<sup>35</sup>

The threat to Exxon's social license as a result of these allegations and resulting events represents another parallel with the fate of tobacco companies. Tobacco is now viewed as a dangerous product whose use should be discouraged, is subject to advertising bans, is universally regarded as an unacceptable sponsor of cultural and sporting events, and its ability to influence public health legislation is curtailed. If, as with the tobacco industry, fossil fuel companies are found to have not only suppressed evidence supporting climate science but also actively worked to challenge it, it is likely public pressure to impose more stringent regulations on the industry will grow.

### Questions for fossil fuel companies

- In the case of Exxon, Chevron, Shell, ConocoPhillips, BP, and Peabody Energy, do the companies intend to respond to the letter from US lawmakers of 7 December asking specific questions on climate change?<sup>36</sup>
- What are those companies' responses to the allegations referred to in that letter by the Union of Concerned Scientists regarding a "coordinated campaign of deception" on climate science?<sup>37</sup>
- What is the company's view on the escalating challenge facing its social licence to operate and the likely impacts thereof?



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## Conclusion

Whatever its eventual outcome, the New York attorney general's decision to investigate a corporate and carbon giant such as Exxon will likely have long-lasting consequences - whether in the form of initiating a wave of other investigations and private litigation against fossil fuel companies, increasing investor and regulatory scrutiny and expectation of corporate disclosures on climate change, and/or in revealing decades old information which further undermines fossil fuel companies' already battered social licence to operate. The investigation, the attendant media coverage, and the potential consequences pose a risk to Exxon shareholders and act as a warning to other fossil fuel companies. Investors should take steps to assess whether its fossil fuel and other climate vulnerable investee companies are adequately assessing and addressing the various risks.

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## Endnotes

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