

## **Securities Regulation Daily Wrap Up, SHAREHOLDER ACTIVISM NEWS—N.D. Tex.: ExxonMobil goes to court to exclude GHG proposal, (Jan 22, 2024)**

By [Anne Sherry, J.D.](#)

The oil company is skipping the SEC's no-action process and going directly to court for approval to exclude a shareholder proposal.

Unusually, a company is asking a Texas district court for a declaratory judgment allowing it to exclude a shareholder proposal, rather than proceeding through the SEC's no-action process. Several activist investors submitted a proposal that would have ExxonMobil come up with a more aggressive timetable for reducing greenhouse gas emissions.

SEC staff have previously denied no-action requests seeking to exclude similar proposals ([Exxon Mobil Corporation v. Arjuna Capital, LLC](#), January 21, 2024).

Arjuna Capital and Follow This submitted a proposal for consideration at ExxonMobil's upcoming annual meeting. The proposal reads: "Resolved: Shareholders support the Company, by an advisory vote, to go beyond current plans, further accelerating the pace of emission reductions in the medium-term for its greenhouse gas (GHG) emissions across Scope 1, 2, and 3, and to summarize new plans, targets, and timetables."

ExxonMobil says that the proposal addresses substantially the same subject matter as Follow This's proposals for the 2022 and 2023 meetings—the latter of which was rejected by 89.5 percent of voting shareholders. ExxonMobil argues that Arjuna's mission is to shrink energy companies and that Follow This's [website](#) states, "We buy shares in order to work on our mission to stop climate change, not to make a financial profit." Their proposals "are frequently at odds with the interests of investors who are seeking to obtain returns," ExxonMobil writes.

**Legal bases for exclusion.** ExxonMobil argues that the proponents are asking the company to change its day-to-day business by altering the mix of the products it sells, or even eliminating some products entirely. The company says it should be able to exclude the proposal under Exchange Act Rule 14a-8(i)(7) because the proposal deals with a matter relating to the company's ordinary business operations. Reducing GHG emissions is a classic ordinary business operation for an energy company and requires "a detailed and balanced understanding of ExxonMobil's business, global supply and demand, technical intricacies of emissions reductions, the selection of products and services the company offers, and other matters understood by management and the board." This is particularly true for Scope 3 emissions, ExxonMobil says, because these emissions are controlled not by the company but by the users of its products.

Furthermore, ExxonMobil argues that the proposal does not meet the resubmission criteria of Rule 14a-8(i)(12). Proposals addressing the same subject matter saw only 27.1 percent support in 2022 and 10.5 percent in 2023. The resubmission provision permits exclusion if the second submission had the support of less than 15 percent of votes cast. ExxonMobil allows that the wording and details of the proposals vary slightly, but says that they address substantially the same subject matter and seek the same result—a "textbook example of a resubmission that can be excluded."

**Use of the court.** According to ExxonMobil, while the plain language of Rule 14a-8 supports exclusion, SEC staff guidance is at odds with the rule itself. As a result, proposals—particularly those focused on environmental and social issues—have increased in the past few years even though there has been no change to the language of the statute or rules. "Congress did not intend for the proxy rules to be used in this way," and all shareholders bear the costs of dealing with the proposals, even though most shareholders' goals are opposed to those of the proponents.



While it does not say so directly, ExxonMobil is likely going to court because it knows the SEC would not grant no-action relief. The complaint cites the SEC's most recent [staff legal bulletin](#), which in turn uses the example of a similar proposal relating to GHG emission reductions. Ahead of the 2021 proxy season, ConocoPhillips unsuccessfully [sought to exclude](#) a proposal submitted by Follow This. The SEC [replied](#) that it could not agree that the proposal was excludable under Rule 14a-8(i)(7) because it "only asks the Company to set emission reduction targets; it does not impose a specific method for doing so."

Because ExxonMobil must finalize its proxy statement by March 20, it asks for a speedy hearing.

The case is [No. 24-cv-00069](#).

Attorneys: Mark Waldemar Rasmussen (Jones Day) and Gregg Costa (Gibson, Dunn & Crutcher LLP) for Exxon Mobil Corp.

Companies: Exxon Mobil Corp.; Arjuna Capital, LLC; Follow This

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