

[Securities Regulation Daily Wrap Up, TOP STORY—N.Y. Sup.: Exxon beats NY AG action on alleged climate risk deception, \(Dec. 11, 2019\)](#)

Securities Regulation Daily Wrap Up

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By [Lene Powell, J.D.](#)

The court noted that the matter was a securities fraud case, not a climate change case, and did not find that Exxon had obscured the true costs to its business by conflating metrics in a deceptive way.

A New York state trial court has dismissed a lawsuit by the New York State Attorney General alleging that Exxon Mobil misled investors on the impact of climate change on its business. After a 12-day trial, the court concluded that the attorney general had not established that Exxon made any material misrepresentations or omissions to investors. The attorney general had sought restitution of up to \$1.6 billion ([People of the State of New York v. Exxon Mobil Corporation](#), December 10, 2019, Ostrager, B.).

In a [statement](#), Exxon said it provided investors with accurate information on the risks of climate change.

New York Attorney General Letitia James [said](#) her office will continue to fight to end climate change and to ensure that companies are held responsible for actions that undermine and jeopardize the financial health and safety of Americans.

Alleged deceptive disclosures. The attorney general [alleged](#) that Exxon engaged in a longstanding fraudulent scheme at the highest levels of the company to conceal the impact of climate change on its business. According to the attorney general, Exxon erected a "Potemkin village" to create the illusion it had fully considered the risks of climate change regulation and factored them into its business operations, but knew that its representations were not supported by the facts and were contrary to its internal business practices.

Before 2013, the main public disclosure Exxon made regarding projected future demand was in *Outlook*, an annual public report that estimates costs in 2030 and 2040 based on the proxy cost of carbon. According to former Exxon CEO Rex Tillerson, the proxy cost is embedded in price bases that are used to evaluate future investment opportunities. Exxon also incorporates the proxy cost of carbon as well as information on greenhouse gas emissions (GHG) in various internal reports that are not made public.

In 2013, Exxon began receiving inquiries from institutional investors asking how Exxon was managing the risks of climate change and increasing regulations. Two investor groups sent proposed shareholder proposals. In December 2013, Exxon hosted a meeting with investors at which a senior member of Exxon's Corporate Strategic Planning Group gave a presentation on this topic, including on the proxy cost of carbon. In 2014, Exxon published two public reports, *Managing the Risks* and *Energy and Climate*.

The attorney general alleged that in the investor meeting, the two 2014 reports, and other public disclosures, Exxon made various material misrepresentations and omissions that misled the public in violation of the Martin Act and Executive Law §63(12).

No material deception. Systematically dismantling the attorney general's allegations, the court found that Exxon had not made any material misrepresentations or omissions. At the core, said the court, the attorney general alleged that Exxon's disclosures led the public to believe that its GHG cost assumptions for future projects had the same values assigned to its proxy cost of carbon. But this was not the case.

Most significantly, the court noted that Exxon's internal economic models did not impact financial statements or other corporate books and records. There were no allegations that anything Exxon was alleged to have done or failed to have done affected Exxon's balance sheet, income statement, or any other financial disclosure. Rather,

what was at issue were projections for the far future, starting in 2030. But this was too remote for the court to find liability.

"No reasonable investor would make investment decisions based on speculative assumptions of costs that may be incurred 20+ or 30+ years in the future with respect to unidentified future projects," the court wrote.

Moreover, in the 2014 reports, Exxon provided only conceptual information about how it managed risks of climate change in its business planning, not dollar figures. The GHG cost metric was provided as a second way for investors to gauge how Exxon addressed climate risk, in addition to the proxy cost of carbon, said the court.

In addition, Exxon's internal economic models were meant to be flexible, not uniformly applied where there was more accurate local info available on regulatory impact. Essentially, when this was adequately taken into account, there were no material discrepancies between internal reports and public disclosures. The court rejected the contention that reasonable investors would attach material significance to the fact that Exxon internally determines when it is appropriate to apply GHG costs with respect to a specific project.

On the issue of reliance, the court observed that the attorney general offered no testimony from any investor who claimed to have been misled. A research analyst testified that at all relevant times, his investment evaluation of Exxon was "outperform"—establishing the exact opposite of what the attorney general was trying to prove.

The court was also not persuaded by the attorney general's expert testimony. An event study by Exxon's expert witness showed no increase in the stock price following publication of the two 2014 reports. Subsequent revelations that the attorney general called "corrective disclosures" all involved news articles describing regulatory investigations, and the announcement of a government investigation, without more, is not enough constitute a corrective disclosure, said the court. Further, an analysis that substituted the proxy cost of carbon for GHG costs demonstrated a misunderstanding of how internal models worked, and it was not shown that the investment community would likely interpret Exxon's disclosures to mean that it was consistently applying the publicly dismissed GHG emission proxy costs.

Dismissed with prejudice. Having found that the attorney general had failed to establish any material misrepresentations or omissions to investors, the court dismissed the case with prejudice.

Acknowledging the political cast of the allegations, the court wrote,

"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. ExxonMobil does not dispute either that its operations produce greenhouse gases or that greenhouse gases contribute to climate change. But ExxonMobil is in the business of producing energy, and this is a securities fraud case, not a climate change case."

The case is [No. 452044/2018](#).

Attorneys: Theodore V. Wells, Jr. (Paul, Weiss, Rifkind, Wharton & Garrison LLP) for Exxon Mobil Corp. Kim Berger, Attorney General's Office, for People of the State of New York

Companies: Exxon Mobil Corp.

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