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Influencing Energy Company Climate Disclosure Practices:

Cautionary Words for State Attorneys General

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State attorneys general have long played a significant role in shaping the law and influencing policy around issues of national concern. Their increased willingness over the years to coordinate efforts across multiple states makes them a significant force not only in checking federal powers relative to states but also in forming groups along political lines to challenge opposing administration policies. AGs regularly take on companies when they don't comply with environmental laws and for consumer protection and securities fraud.

Corporate treatment of climate risks in financial disclosures, particularly by oil and gas companies, has garnered increased attention among AGs. However, these efforts run parallel to investor-led efforts to expand and improve such disclosures. AGs must walk a thin line to insure companies do not mislead investors and consumers while also not jeopardizing existing investor efforts to encourage more detailed climate-related disclosures from energy companies.

In this paper I first provide a brief explanation of relevant SEC disclosure law and enforcement, followed by a description of investor engagement, and an outline of AG activity to date on climate disclosures. Finally, I argue that in light of this history, AGs are well-equipped to influence corporate disclosure practices but should proceed cautiously so as not to undercut investor-led efforts. For a more detailed legal analysis of this subject, see my recently published article in the Vermont Law Review.

A History of Lackluster Engagement by the SEC

Under U.S. securities law, companies must disclose certain material information (including material environmental information) with investors (via the SEC) and face liability for misleading investors.[1] Securities law defines material information as that which a "reasonable investor" is "substantially likely" to view as "significantly altering the total

1 SEC disclosure requirements most relevant to climate disclosures include requirements to disclose: material capital expenditures and the material effects of complying with environmental regulation (Item 101); material legal proceedings (Item 103); "known trends or uncertainties" reasonably expected to have a "material favorable or unfavorable impact" on the business and "events that will cause a material change in the relationship between costs and revenues"—in particular "material events or uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition" (Item 303); "the most significant factors that make the offering speculative or risky" (Item 503). 17 C.F.R § 229.101(c)(xii); § 229.103; § 229.303(a)(2)(ii); Instruction 3 for § 229.303(a); 17 C.F.R. § 229.503.

mix of information made available" to her.[2] False or misleading statements or omissions can lead to enforcement by the SEC, state AGs, and shareholders. SEC Rule 408 compels companies to provide additional material information not specifically requested by the SEC if it is "necessary to make the required statement, in the light of the circumstances . . . not misleading."[3] Rule 10b-5 extends liability for misstatements made outside of SEC filings (such as in voluntary sustainability or climate reports).[4]

> "Management and boards decide what to disclose to the SEC as 'material', but the definition of materiality requires them to consider the shareholder viewpoint."

Management and boards decide what to disclose to the SEC as "material", but the definition of materiality requires them to consider the shareholder viewpoint. In this way, descriptions of "material" information as that which the company deems important to its financial wellbeing and "salient" information as that which external stakeholders deem important fail to capture the nuance of a legal materiality threshold that recognizes investors as stakeholders separate and apart from corporate decision-makers. This dance between corporate management and shareholders regarding what information fits the U.S. securities law definition of material is crucial to understanding corporate reticence to respond to external demands for disclosure of climate risks.

Adding to the confusion, the definition of material information is limited to that which a *reasonable* investor would deem material. Courts' approach to who is a reasonable investor seems closer to a "know it when you see it" definition than a precisely-drawn figure.[5] How the definition of a reasonable investor interacts with an emerging issue like climate is key to

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2 TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976).

3 17 C.F.R. § 230.408(a).

4 17 C.F.R. § 240.10b-5. "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

5 Courts contend the reasonable investor standard is objective; a standard measured by the views of the mainstream market as a whole in which the reasonable investor sits not as the "worst informed" nor the best. United States v. Litvak, 889 F.3d 56, 65 (2nd Cir. 2018) ("[T]here must be evidence of a nexus between a particular trader's viewpoint and that of the mainstream thinking of investors in that market. Materiality cannot be proven by the mistaken beliefs of the worst informed trader in the market."). A reasonable investor is one of "ordinary intelligence," not a "scientific expert," who reads prospectuses, reports, and other information relevant to their investments. Alaska Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342, 347 (3d Cir. 2009). She should "exercise due care" in considering information, "is presumed to have information available in the public domain," and "takes into account the customs and practices of the relevant industry." FindWhat Inv'r Grp., 658 F.3d 1282, 1305 (11th Cir. 2011).

determining when it crosses the materiality threshold. Investors' focus on climate concerns may represent a shift in what a reasonable investor considers important to the total mix of information.[6]

The SEC's failure to encourage disclosure of climate-related risks through effective enforcement of materiality requirements increases this complexity. In 2010, the SEC issued guidance on climate disclosure.[7] It emphasized that existing reporting requirements require disclosure of climate risks when they are *material*. The SEC noted items considered financially material to the company is a narrower category than that which is considered when making a materiality determination.[8] The SEC emphasized "registrants are expected to consider all relevant information even if that information is not required to be disclosed."[9] Yet the 2010 guidance made no attempt to further define materiality in the context of climate-related information.

After issuing this guidance, the SEC provided minimal enforcement: sending a handful of comment letters to companies about their climate-related disclosures (25 letters from 2010-2013 out of more than 45,000 comment letters and 14 letters out of over 41,000 letters issued from 2014-2017).[10] This minor prodding did not substantially improve the quality of corporate climate disclosures—SEC staff noticed little change in climate-related disclosures after the 2010 guidance.[11] A 2014 CERES review of disclosures found little discussion of specific material information or quantification of impacts.[12]

The SEC acknowledged in 2016 that "[t]he role of sustainability and public policy information in investors' voting and investment decisions may be evolving as some investors are increasingly engaging on certain ESG matters"[13] but made no assertions about whether this evolution warrants more specific requirements for disclosure on climate and has made no new proposals.[14]

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6 Objective does not mean invariable. Defining the reasonable investor in relation to the whole of investors engaged in the market guarantees variability over time as "[t]he standard may vary . . . with the nature of the traders involved in the particular market." United States v. Litvak, at 64.

7 SEC, Commission Guidance Regarding Disclosure Related to Climate Change (2010).

8 For example, in disclosing "known trends, events or uncertainties" in Item 303 (MD&A disclosure) companies should remember that "[w]hile these materiality determinations may limit what is actually disclosed, they should not limit the information that management considers in making its determinations." Id. at 18.

9 Id. at 18-19.

10 GAO, Climate-Related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements, GAO-13-188 at 14 (Feb. 2018).

11 Id. at 15 (discussing 2012 and 2014 reports by SEC staff to the Senate Committee on Appropriations and interviews with SEC staff).

12 Cf. Jim Coburn & Jackie Cook, Cool response: The SEC & Corporate Climate Change Reporting (2014).

13 SEC Concept Release No. 33-10064, at 210, April 22, 2016.

14 In 2017 the SEC did release proposed amendments to Regulation S-K, primarily as a response to a mandate in the FAST Act but also reflecting

Lax enforcement and minimal guidance by the SEC has allowed for significant variability and lack of precision in disclosure. There is also a dearth of case law clearly establishing where the "reasonable investor" sits on the spectrum of concern for climate information. Companies are left without much guidance as to how new demands for more detailed climate-related disclosure fit into the materiality determination.

The Recognized Need for Better Climate-Related Disclosure: Investor Actions

Stakeholders and shareholders increasingly pressure companies to disclose information about their strategies for handling the physical and transitional risks of climate change. The United Nation's Principles of Responsible Investment organization, started in 2006 to help incorporate ESG factors into investment and ownership decisions, has grown from 63 signatories to over 1900, covering $80 trillion in assets under management.[15] In 2015, the G-20's Financial Stability Board (FSB) established the Task Force on Climate-Related Financial Disclosures (the TCFD) and Mark Carney, Governor of the Bank of England, spoke of "Breaking the Tragedy of the Horizon" to Lloyd's of London.[16] At that time, the U.S. was already enacting climate policy designed to make significant strides towards achieving its commitments.[17] In June 2016, BlackRock published a document calling for "a consistent global framework that enables stakeholders and market participants to develop detailed ESG standards and best practice guidelines."[18]

Even after the 2016 election's resulting shift in climate policy, investors continue to highlight the relevance of climate change in their assessment of companies. In June 2017, the TCFD released

"amendments developed as part of a broader review of the Commission's disclosure system." These amendments focused on "reducing the costs and burdens" to companies, implementing staff recommendations included in a November 2016 report of recommendations, but did not address any of the potential issues raised regarding ESG reporting in the concept release. SEC Press Release, SEC Proposes Rules to Implement FAST Act Mandate to Modernize and Simplify Disclosure (Oct. 11, 2017); see also SEC Release No. 33-10425, FAST Act Modernization and Simplification of Regulation S-K, Proposed Rule (Oct. 1, 2017) and Report on Modernization and Simplification of Regulation S-K (Nov. 23, 2016).

15 Barbara Novick, BlackRock, Remarks at the World Economic Forum, "Building Sustainable Markets: What Is Needed For A Transformation To A Sustainable Market Place?" (Sept. 24, 2018).

16 Mark Carney, Speech at Lloyd's of London, Breaking the tragedy of the horizon – climate change and financial stability (Sept. 29, 2015).

17 For example, the Clean Power Plan and the regulatory measures designed to limit emissions of methane from oil and gas production.

18 Barbara Novick, supra Note 15 (referring to BlackRock's ViewPoint document, titled Exploring ESG: A Practitioner's Perspective).

recommendations for climate-related disclosure.[19] The TCFD encouraged companies to incorporate as much information as possible into mandatory financial reporting but acknowledged the materiality threshold limitation in a company's home jurisdiction. Mainstream investors and voluntary reporting and rating organizations have signaled support for the TCFD recommendations. No longer appeased by general sustainability reports, they seek detailed and expansive information backed up by data. Major asset managers voted in support of efforts to improve corporate governance on climate.[20]

In the face of such pressure, energy companies have made changes to their disclosure practices. The TCFD's September 2018 Status Report announced that over 500 firms had committed to supporting them,[21] that number jumped to 785 in TCFD's most recent Status Report released in June 2019.[22] Top oil and gas companies have released special climate reports in addition to their Annual and Sustainability reports, many designed to align with TCFD's disclosure recommendations.[23] However, many U.S. based companies in particular remain wary of how much information to incorporate into their SEC filings.

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19 Task-Force on Climate-related Financial Disclosures, Final Report: Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017) (TCFD Recommendations).

20 In December 2017, BlackRock sent letters to corporate-governance teams urging them to report in accordance with the TCFD recommendations, arguing it will help achieve "the comparability and consistency of reporting" important to investors. Emily Chasan, "BlackRock Wields Its $6 Trillion Club to Combat Climate Risks," Bloomberg, Dec. 8, 2017. BlackRock voted in support of shareholder proposals asking companies to disclose more on climate in 2017 and released a document outlining how it engages on climate risk. Larry Fink, How BlackRock Investment Stewardship engages on climate risk (March 2017). State Street's January 2017 letter to company boards noted it would be "increasingly focused on board oversight of environmental and social sustainability in areas such as climate change…" and highlighted 2016 votes in support of shareholder climate resolutions. Ronald O'Hanley, State Street letter to board members (Jan. 26, 2017). Vanguard announced in September 2017 its willingness to take public positions on climate disclosures even if it requires voting against management. Madeleine Cuff, "Vanguard names climate risk as defining investment theme," GreenBiz (Sept. 7, 2017). BlackRock's Investment Stewardship Engagement Priorities for 2018 highlighted climate risk disclosure as a top five priority, specifically identifying the TCFD recommendations as the "relevant roadmap". BlackRock Investment Stewardship Engagement Priorities (March 2018). BlackRock has also published two documents on climate issues in investing – "The Price of Climate Change – Global Warming's Impact on Portfolios" in 2015 and "Adapting Portfolios to Climate Change" in 2016. Over 2018, "six in 10 institutional investors have changed their approach to voting or have incorporated environmental, social and governance criteria." Huw Van Steenis, Opinion, Defective data is a big problem for sustainable investing, Financial Times, Jan. 21, 2019 (referencing a report by marketing company Edelman). New York City's pension fund announced it would double fund investments in climate change solutions over three years. New York City Press Release, Mayor and Comptroller Announce Pension Fund Goal to Invest $4 Billion in Climate Change Solutions by 2021, Sept. 13, 2018.

21 Task Force on Climate-Related Disclosures, 2018 Status Report (Sept. 2018) (TCFD 2018 Status Report).

22 Task Force on Climate-Related Disclosures, 2019 Status Report (June 2019) (TCFD 2019 Status Report).

23 Hana Vizcarra, "Shifting Perspectives: E&P Companies Talking Climate and the Energy Transition," March 26, 2019.

Attorneys General Actions on Climate Disclosure

The gap between the court-defined reasonable investor and what many significant, mainstream investors say they want to know about climate provides an opportunity for state AGs to help define the expectations for climate-related disclosure. State AGs have increasingly used litigation to engage with and influence national policy decisions.[24] Concerns about climate change are no exception and AGs already have a history of influencing corporate climate disclosure.

AGs have broad powers to enforce securities law as well as assert state consumer protection claims against companies they deem as not properly disclosing climate-related information. New York has largely led state efforts to pursue energy companies for their climate risk disclosures, or lack thereof, due to the strength of its Martin Act.[25] The Martin Act is the strongest of the country's "blue sky"[26] laws – lacking an intent to deceive requirement, allowing for both civil and criminal charges, using an expansive definition of "fraud," and granting the attorney general broad investigatory and subpoena powers.[27] However, New York is not alone in its ability to investigate. Other states' have varying degrees of investigatory and prosecutorial powers in these areas.

Former NY AG Andrew Cuomo initiated investigations in 2007 into the disclosures of four power producers and a coal producer in an effort to pressure the SEC to update its guidance on environmental disclosures.[28] (The AG who proceeded Cuomo, Eliot Spitzer, aggressively pursued financial firms for financial fraud via the Martin Act but it was Cuomo who made the leap to energy company climate disclosures.[29]) Cuomo settled with two companies in 2008 (Xcel and Dynegy) in agreements that required them to disclose material financial risks of climate

24 Cf. Paul Nolette, Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America (2015) (tracing the rise of AG involvement in national policymaking through multi-state litigation and its impact on a number of significant policy areas, including environmental law).

25 N.Y. GEN. BUS. LAW §§ 352–359-H. In place for nearly a century (it is a 1921 law, predating the securities and exchange acts and creation of the SEC), the Martin Act grants broad authority to the New York AG to investigate and prosecute securities fraud.

26 "Blue sky" laws refer to state statutes passed to deter and prosecute securities fraud, responding to early sales of worthless shares in non-existent or valueless entities.

27 For a more comprehensive explanation of the New York attorney general's powers under the Martin Act, see Columbia Law Student, Nina Hart's description in her 2015 law review note. See Nina Hart, Moving at a Glacial Pace: What Can State Attorneys General Do About SEC Inattention to Nondisclosure of Financially Material Risks Arising from Climate Change?, 40 COLUM. J. ENVTL. L. 99, 127-130 (2015).

28 Nina Hart, Columbia Law Student, Moving at a Glacial Pace: What Can State Attorneys General Do About SEC Inattention to Nondisclosure of Financially Material Risks Arising from Climate Change?, 40 COLUM. J. ENVTL. L. 99, 105 (2015).

29 Id. at 105-107. The AGs initiated these investigations pursuant to both the Martin Act (General Business Law § 352) and the Executive Law § 63(12).

change in their SEC filings.[30] Cuomo reached a similar agreement with AES Corp. in November of 2009.[31]

AG Cuomo's disclosure investigations served as a lever to pressure the SEC into providing more robust guidance on climate-related disclosures. He joined investor and environmental groups in petitioning the SEC to provide guidance on disclosing climate change risks while simultaneously flexing his enforcement muscle by investigating corporate nondisclosure of such risks.[32] Cuomo's petition also urged the SEC to clarify that registrants base their materiality assessments on data and calculations.[33] Cuomo's 2008 and 2009 power company settlements attempted to establish a baseline for disclosures of climate risks. Although the SEC 2010 guidance did not result in substantial improvements in climate disclosures, AG Cuomo's efforts did have a real impact on policy by helping spur SEC action.

Investigations into Peabody Coal and Dominion Resources, the last two of the five companies Cuomo targeted in 2007, did not result in swift conclusions. In 2013, then-New York AG Eric Schneiderman revived Cuomo's investigation into Peabody Coal with a new round of document requests, settling in 2015.[34] The agreement required Peabody to correct prior disclosures filed with the SEC. Schneiderman argued they misled investors on the impact of climate change on its business. Peabody had stated it could not predict the impact on its business, despite contracting consultants to make such predictions. Schneiderman also argued Peabody presented an overly rosy view of the future by referencing a single IEA scenario in its disclosures, the one most favorable to future coal demand. Schneiderman announced the settlement a few days after issuing a subpoena to ExxonMobil (who the state has since filed litigation against).[35] In addition to the climate disclosure cases, Schneiderman pursued oil and gas producers for their failure to disclose financial risks related to

30 Id. at 108-109; see also, Press Release, Andrew Cuomo, N.Y. Att'y Gen., Cuomo Reaches Landmark Agreement With Major Energy Company, Xcel Energy, To Require Disclosure Of Financial Risks of Climate Change To Investors (August 27, 2008) and Press Release, Andrew Cuomo, N.Y. Att'y Gen., Attorney General Cuomo, Joined By Vice President Gore, Announces Agreement With Major Energy Company, Dynegy Inc. (Oct. 23, 2008). The agreements required disclosure of material information about regulation and legislation, litigation, and the physical impacts of climate change as well as committing them to disclose carbon emissions and projected increases, climate strategies, and corporate governance.

31 Press Release, Andrew Cuomo, N.Y. Att'y Gen., Attorney General Cuomo Announces Agreement With AES To Disclose Climate Change Risk To Investors (Nov. 19, 2009).

32 Nina Hart, Moving at a Glacial Pace: What Can State Attorneys General Do About SEC Inattention to Nondisclosure of Financially Material Risks Arising from Climate Change?, 40 COLUM. J. ENVTL. L. 99, 104-109 (2015) (Cuomo followed up with additional petitions in 2008 and 2009).

33 Id. at 104.

34 Press Release, Eric Schneiderman, N.Y. Att'y Gen., A.G. Schneiderman Secures Unprecedented Agreement with Peabody Energy to End Misleading Statements and Disclose Risks Arising From Climate Change (Nov. 9, 2015).

35 Bob Simison, New York Attorney General Subpoenas Exxon on Climate Research, InsideClimateNews (Nov. 5, 2015).

environmental impacts of hydraulic fracturing.[36]

Schneiderman's 2014 agreements with hydraulic fracturing companies required more detailed disclosure than Cuomo's agreements.[37] They also mandated disclosure of information the company may not consider financially material. This was an expansion of Cuomo's focus on encouraging disclosure within the limits of SEC requirements. Cuomo's efforts could be considered policy-forcing in that they pursue more stringent enforcement than the federal agency in an effort to encourage stricter federal enforcement.[38] Schneiderman's efforts are more akin to policy-creating litigation because they require companies to disclose more than required under current law, changing the baseline expectations for disclosure in the industry. The Peabody agreement went even further by including findings (not admitted to by Peabody) of Peabody's alleged wrongdoing—explicitly pointing out unacceptable behavior in disclosure.[39]

AGs continue to show an interest in engaging on climate change. A coalition of states announced the formation of "AGs United for Clean Power" in 2016, committing to "aggressively protecting the recent progress the US has made in combatting climate change."[40] The group sought to pursue investigations into whether energy companies misled the public about the dangers of climate change as well as efforts to encourage the EPA to limit carbon emissions. New York University's State Energy and Environmental Impact Center formed in the wake of Trump's election to support AG efforts on environmental and climate

36 Ashley Poon, An Examination of New York's Martin Act as a Tool to Combat Climate Change, 44 B.C. Envtl. Aff. L. Rev. 115, 125 (2017); see also Press Release, Eric Schneiderman, A.G. Schneiderman Reaches Agreement With Natural Gas Developers To Increase Disclosure Of Fracking Risks To Investors (Oct. 3, 2014).

37 Schneiderman's unconventional gas agreements outlined much more detailed environmental impacts companies must consider in their materiality determination, listing four specific areas for disclosure: aquifer protection (risks associated with well construction of hydraulically fractured wells, efforts to reduce such risks through well integrity practices); chemical use, handling, and disclosure; water use and wastewater handling and disposal; and air emissions.

38 Paul Nolette, Federalism on Trial: State Attorneys General and National Policymaking in Contemporary America, at 13-14 (2015) (describing AG litigation as either policy-forcing, policy-creating, or policy-blocking).

39 Press Release, Eric Schneiderman, N.Y. Att'y Gen., A.G. Schneiderman Secures Unprecedented Agreement with Peabody Energy to End Misleading Statements and Disclose Risks Arising From Climate Change (Nov. 9, 2015). Peabody Assurance of Discontinuance at 2-3 (2015). Schneiderman found the company made market predictions for various legislative scenarios that predicted serious negative impacts on coal and the company while it stated in its 10-Ks that it could not predict the impact of potential GHG regulation on its business. The AG also found Peabody misrepresented IEA projections on the future demand for coal by referencing only IEA's Current Policy Scenario, which noted a potential worldwide increase in coal demand, but not discussing the drop in coal demand reflected in IEA's other scenarios. These statements not only occurred in the company's filings with the SEC but also in statements in earnings calls, public statements, and statements to investors. In the earnings call, Peabody further misrepresented the meaning of IEA's scenario by stating "IEA and other observers project that coal will surpass oil as the world's largest energy source in the coming years" – fundamentally misunderstanding, or at the least misrepresenting, scenario analysis as a tool what a single scenario represents.

40 Press Release, Climate Reality Project, Al Gore and New York Attorney General Eric Schneiderman Launch AGs United for Clean Power Coalition (March 30, 2016).

issues.[41] New York filed suit against ExxonMobil on October 24, 2018, after three years of investigation, alleging a scheme to defraud investors, among other allegations.[42] Massachusetts invoked its consumer protection statute to launch an investigation of Exxon, and the U.S. Virgin Islands initiated an investigation of the company as well.[43] Former CA AG Kamala Harris was reportedly investigating Exxon in 2016[44] and unconfirmed rumors continued of an investigation under AG Xavier Becerra.[45]

> "Targeted AG efforts can also support successful shareholder engagement."

Recommendations to AGs on Influencing Energy Company Climate Disclosures

Given this context, how can AGs best effect corporate climate-related disclosure? Litigation as policymaking is a blunt instrument with often unintended consequences. It skips the deliberative, collaborative, information-gathering process of regulatory or legislative efforts. Investors have had success in influencing energy company disclosure practices (see e.g. Shifting Perspectives: E&P Companies Talking Climate and the Energy Transition). Aggressive litigation that mixes climate liability with disclosure claims could undermine collaborative processes that have yielded progress. But targeted AG efforts can also support successful shareholder engagement on climate disclosure. Below are five suggestions for AGs when considering such litigation.

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41 Press Release, New York University, NYU Law Launches New Center to Support State Attorneys General in Environmental Litigation (August 17, 2017).

42 Press Release, A.G. Underwood Files Lawsuit Against Exxonmobil For Defrauding Investors Regarding Financial Risk The Company Faces From Climate Change Regulations (Oct. 24, 2018).

43 Massachusetts initiated its investigation in April 2016 and maintains a website with related documents to the court fights involved. The U.S. Virgin Islands announced an investigation but ultimately withdrew a subpoena of ExxonMobil records. Phil McKenna, Virgin Islands and Exxon Agree to Uneasy Truce Over Climate Probe, InsideClimateNews (July 7, 2016). For more information on the development of these probes see David Hasemyer, Fossil Fuels on Trial: Where the Major Climate Change Lawsuits Stand Today, InsideClimateNews (Jan. 6, 2019).

44 Ivan Penn, "California to investigate whether Exxon Mobil lied about climate-change risks," Los Angeles Times (Jan. 20, 2016).

45 Jennifer Dorroh, Becerra Will Not Confirm Climate Probe, Is 'Fully Aware of the Exxon Matter', ClimateLiabilityNews (Feb. 28, 2018).

1. Highlight Inadequate Disclosure to Establish New Baselines

AGs have broad investigatory powers and significant platforms from which to focus the public and regulators on issues. Their best use of these powers is to move companies that have not responded to shareholder and stakeholder calls to improve their disclosures on climate. The most responsive companies in the oil and gas sector thus far are those with the most substantial resources and long-term approach to business. They tend to be the most integrated and diversified and expect to outlast the energy transition. Aiming the considerable AG firepower at corporations already responding to investor pressure may do more harm than good. Fear of litigation could stifle efforts to innovate in their climate governance strategies, data collection, scenario planning, and disclosure.

Focusing on the laggards rather than industry leaders in climate disclosure provides an effective way to raise the profile of the issue without jeopardizing progress already made through investor engagement. Investigations into the practices of the less-responsive companies can help set a new baseline for expectations even when it does not result in litigation. AGs can "name and shame" bad actors by publicly discussing their investigations, describing what they expect in climate disclosure from companies, and explaining where targets of investigation fall short.

AGs can also help herd the rung of companies just below the leaders—those who have not yet made significant strides in climate disclosure and planning practices but who have resources to do so—into the realm of leading disclosure practices. Investigation and public focus along with engagement that leads to agreements (similar to the approach that AGs Cuomo and Schneiderman took in their earlier efforts) can expand the range of companies that are rising to the challenge. The approach to these companies should be different to the approach taken with truly bad actors in the laggards group. More collaborative engagement that recognizes corporate concerns but helps companies take concrete steps towards more comprehensive disclosure can help grow the ranks of industry leaders on disclosure.

2. Engage with Companies, Acknowledge their Challenges

Companies remain concerned about how the securities law definition of "material" for the purpose of mandatory financial disclosures aligns (or more accurately at the moment does not align) with what a significant portion of the investment community believes is salient. Companies worry that including non-material information in filings could misrepresent them as financially material, potentially leaving the company vulnerable to shareholder litigation.

Case law on what an investor can reasonably consider material is light on examples of environmental concerns and nearly empty of climate-specific fact patterns. While courts find substantial non-compliance with regulation material to reasonable investors,[46] it is not so clear when information on a company's approach to managing climate risks becomes material (beyond basic compliance with environmental regulation). Whether the spike in investor focus on climate concerns will impact courts' understanding of the expectations of the reasonable investor remains to be seen.

AGs should recognize the legitimacy of this corporate concern and fashion agreements that are mindful of legal uncertainty. AG Schneiderman's distinction between disclosure of financially material information in SEC filings and disclosure of information the company may not yet deem material in other forums could serve as a model for how to achieve more expansive disclosure without directly grappling with the securities law definition of financial materiality. In fact, the trend in reporting among industry leaders to prepare separate climate reports or incorporate significant information around climate risks and strategies in sustainability reports reinforces this approach as a fruitful strategy. As such reporting becomes standard practice, it is more likely to be deemed material under U.S. securities law and thus move into financial filings over time.

3. Separate Liability for Climate Impacts from Efforts on Disclosure

AGs should separate efforts to broaden disclosure from claims of corporate liability for climate change impacts on the state. Coupling these types of claims may result in backsliding on corporate disclosure. Oil and gas companies are not likely to give in on claims that they should pay state mitigation and adaptation costs. Such cases fundamentally challenge their existence. Requesting more substantive consideration of climate risks in companies' risk management and planning efforts and more comprehensive disclosure is a reasonable expectation that acknowledges a potential path to survive an energy transition. Tying disclosure claims to climate liability claims may undercut shareholder engagement efforts on disclosure and make companies reticent to share climate strategies and how internal deliberations lead to such strategies.

Targeted, narrow efforts by AGs to encourage disclosure of the sort described above can proceed on a separate track from climate liability claims and provide a "push" to accompany the investor "pull".

4. Pressure Federal Regulatory Bodies

AGs can influence federal regulatory stances on climate disclosure. The SEC under this administration is unlikely to issue new guidance or rules more explicitly requesting climate information. For example, SEC Commissioner Hester Pierce stated in March 2019 that the Commission does not have the time or manpower to take on a new rulemaking on climate

46 Meyer v. Jinkosolar Holdings Co., Ltd., 761 F.3d 245, 252 ("a trier of fact could find that the existence of ongoing and substantial pollution problems—here the omitted facts—was of substantial importance to investors" as "a reasonable investor could conclude that a substantial non-compliance would constitute a substantial threat to earnings").

change or human rights disclosures.[47]

However, this reality may shift in the next election while a transformation in the courts is likely a more distant proposition. Should the next election lead to a different makeup of commissioners, AG investigatory powers used in conjunction with petitions to the SEC could bring new regulatory approaches supporting more detailed disclosure. The extra heft of a state in the SEC petition process carries weight. Cuomo's efforts leading up to the 2010 SEC guidance illustrate as much. This requires keeping investigations and litigation narrowly focused on defining proper disclosure practices.

> "[S]pecific cases with exceptional fact patterns . . . could start to build positive precedent of climate-related information found material."

In addition to the SEC, there may be opportunities to take on climate disclosures through the CFTC and, potentially, via acts of Congress. CFTC Commissioner Rostin Behnam held a public meeting on climate-related financial risks on June 13, 2019.[48] Democratic presidential hopefuls are also starting to discuss potential climate-related disclosure proposals.[49]

5. Create Helpful Case Law Where Possible

AGs should use litigation sparingly, when the fact patterns indicate opportunities for success. Much of the information investors currently seek on climate risk management and governance is not currently likely to cross a court's materiality threshold. Yet, specific cases with exceptional fact patterns (such as the Peabody example which never reached the courts) could start to build positive precedent of climate-related information found material. An aggressive pursuit of climate disclosure cases with a broad definition of "materiality" presents the danger of creating negative precedent full of examples of cases in which courts did not find climate information material. Even after the climate significantly changes the economic environment in which oil and gas companies operate, such legal precedent could hinder courts' movement towards findings of materiality. Specific fact patterns may help courts recognize when the investor class as a whole has shifted its views on the significance of climate. Yet, even at a time of heightened concern it is crucial not to push too hard too soon in the courts.

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47 Alison Noon, "SEC's Peirce Bucks Call For Corporate Responsibility Rules," Law360, March 6, 2019.

48 Betty M. Huber, Governance – CFTC Holds a Public Meeting to Address Climate-Related Financial Risks, Davis Polk Briefing (June 13, 2019); Coral Davenport, Climate Change Poses Major Risks to Financial Markets, Regulator Warns, New York Times (June 11, 2019).

49 Ben Lefebvre and Anthony Adragna, Democrats want companies to disclose their climate risks – and fossil fuel industry is worried, PoliticoPro (June 17, 2019).

Conclusion

AGs' understandable desire to put their full force and weight behind aggressive litigation in the pursuit of positive climate outcomes should be tempered by thoughtful, restrained efforts when it comes to oil and gas industry climate-related disclosure. A failure to do so risks undermining existing efforts by other stakeholders (particularly investors) that have gained recent traction. Barging into this process without circumspect consideration of impacts risks triggering backsliding and halting the spread of progress.

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