

Client Alert

Special Matters & Government Investigations Practice Group

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State AGs Announce Climate Change Investigations

ExxonMobil Challenges Subpoena on Constitutional Grounds

Several state attorneys general (“state AGs”) have recently announced investigations into energy companies’ securities disclosures about the risks climate change poses to their businesses. In November 2015, Peabody Energy settled a two-year investigation by the New York Attorney General into its climate-related disclosures. In the past six months, the attorneys general for New York, California, Massachusetts, and the U.S. Virgin Islands have all initiated investigations into ExxonMobil’s disclosures about its climate change research. On March 29, 2016, a coalition of 18 “AGs United for Clean Power,” joined by former Vice President Al Gore, announced that they would coordinate efforts to investigate whether companies made misleading statements about the dangers of climate change.

The growing focus by state AGs on climate change could present significant challenges for energy companies going forward.

November 2015: New York Investigations into Peabody Energy and ExxonMobil

In November 2015, New York Attorney General Eric Schneiderman generated significant public attention for conducting investigations into the climate change disclosures of two prominent energy companies. On November 4, Schneiderman’s office issued a subpoena to ExxonMobil, requesting documents related to the company’s research into the effect that climate change could have on the company’s business.¹ On November 9, Schneiderman’s office announced that Peabody Energy had settled a similar two-year investigation by agreeing to make more complete disclosures about the risks that climate change poses to its business.²

Although investigations into securities disclosures may sound relatively benign, the ExxonMobil and Peabody investigations are significant because of the broad authority that New York’s Martin Act grants to the state AG in investigations like these. Unlike federal securities statutes, the Martin Act³ and a number of other state anti-fraud statutes do not require the government to prove *scienter* (i.e., intent to defraud), making it considerably easier for the government to prove that a company violated

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the statute if the AG can identify a statement that is arguably inaccurate or misleading in hindsight.

AGs Announce Coalition to Coordinate Climate Change Efforts

In the months since the announcement of New York's ExxonMobil subpoena, several other state AGs have initiated investigations into ExxonMobil's climate-related disclosures. In January 2016, it was reported that California AG Kamala Harris was investigating ExxonMobil to determine whether the company violated securities or environmental laws by misleading investors about the threat that climate change posed to its business.⁴ Several months later, on March 29, Massachusetts AG Maura Healey and U.S. Virgin Islands AG Claude Earl Walker both publicly announced that they had begun similar investigations against ExxonMobil.⁵

On March 29, 2016, at the same press conference where AGs Healey and Walker announced their respective ExxonMobil investigations, New York AG Schneiderman announced that a coalition of "AGs United for Clean Power" had decided to coordinate on climate change enforcement issues going forward.⁶ At the press conference, AGs Schneiderman, Healey, and Walker were joined by AGs (or their representatives) from the following states: California, Connecticut, Delaware, the District of Columbia, Illinois, Iowa, Maine, Maryland, Minnesota, New Mexico, Oregon, Rhode Island, Virginia and Washington.⁷ Suggesting that even more states might launch investigations into ExxonMobil and other fossil fuel producers, Schneiderman stated in a press release after the event that the coalition's members "are seriously examining the potential of working together on high-impact, state-level initiatives, such as investigations into whether fossil fuel companies have misled investors about how climate change impacts their investments and business decisions."⁸ During the press conference, climate activist and former Vice President Al Gore publicly lauded the coalition and compared it to the coordinated effort by state AGs to sue tobacco companies for making misleading statements about the dangers of smoking cigarettes in the 1990s. Vice President Gore explained that "[w]hat the attorneys general are doing is exceptionally important. I remember very well . . . the long struggle against the fraudulent activities of the tobacco companies trying to keep Americans addicted to the deadly habit of smoking cigarettes [I]t was a combined effort in which the state attorneys general played the crucial role in securing an historic victory for public health"⁹

These new investigations are a striking reminder of the increasingly aggressive role that state AGs play in the government investigations arena. In recent years, state AGs have become increasingly involved in high-profile policy issues like climate change that are part of ongoing national debates. In some situations, these investigations look more like prospective policymaking than retrospective enforcement action.

The public remarks and events surrounding the March 29 announcement strongly suggest that the participating AGs view the coalition as an opportunity to leverage their authority and influence the policy debate about climate change. According to news reports and a collection of emails released by the Vermont Attorney General's Office pursuant to a public records request, the AGs and staff who were gathered in New York met with and were briefed by prominent environmentalists before their public announcement. According to the released emails and news reports, attorney Matt Pawa, who has previously litigated against ExxonMobil on climate change issues, spoke to the assembled group about climate change litigation, while Peter Frumhoff from the Union of Concerned Scientists gave a presentation discussing the "imperative of taking action now on climate change."¹⁰ Further demonstrating the coalition's policy goals, AG Schneiderman explicitly stated in his March 29 press release that the coalition is a state-level response to policy inertia at the federal level: "[I]n the face of [] gridlock in Washington, we are assembling a group of state actors to send the message that we are prepared to step into this breach. . . [W]e're sending a message that, at least some of us . . . in state government are prepared to step into this battle with an unprecedented level of commitment and coordination."¹¹

ExxonMobil Challenges Climate Change Subpoena on Constitutional Grounds

On April 13, ExxonMobil publicly challenged the recent AG investigations, filing suit to contest a subpoena issued by Virgin Islands AG Claude Walker requesting the company's climate-related records.¹² The subpoena, signed March 15, states that ExxonMobil may have violated the territory's Criminally Influenced and Corrupt Organizations Act ("CICO")—the territorial analogue to the federal racketeering statute, RICO—by misrepresenting its knowledge about whether its activities contributed to climate change.¹³ The subpoena directs ExxonMobil to produce documents, research, public statements, and communications about climate change dating back to January 1, 1977.¹⁴

In its petition for declaratory relief, filed in a Texas state district court, ExxonMobil asserts that the Virgin Islands AG lacks jurisdiction over the company because it has engaged in no conduct and has maintained no property or assets in the Virgin Islands during the relevant limitations period.¹⁵ Furthermore, ExxonMobil argues that the subpoena violates its rights under the United States and Texas Constitutions and amounts to an abuse of process,¹⁶ arguing that the subpoena impermissibly chills protected political speech in violation of the First Amendment, and constitutes an unreasonable, overly broad request for documents in violation of the Fourth Amendment.¹⁷ ExxonMobil's petition also argues that the AG's contingency-fee arrangement with a Texas plaintiff's firm that is already engaged in contentious civil litigation against the company on an unrelated matter is unconstitutional.¹⁸ For all those reasons, ExxonMobil requests the court to declare the subpoena unconstitutional and unenforceable against the company.¹⁹

Conclusion

It remains unclear how the current investigations into ExxonMobil will unfold, whether the company's challenge to the Virgin Islands subpoena will prevail, whether additional state AGs will start investigations, or whether the current probe will expand to include other energy companies. However, these recent public developments confirm that energy companies are likely to face increasing pressure from state AGs.

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."

¹ Justin Gillis and Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES, Nov. 5, 2015, http://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html?_r=0

² Clifford Krauss, *Peabody Energy Agrees to Greater Disclosures of Financial Risks*, N.Y. TIMES, Nov. 8, 2015, http://www.nytimes.com/2015/11/09/business/energy-environment/peabody-energy-agrees-to-greater-disclosures-of-financial-risks.html?_r=0.

³ N.Y. GEN BUS. LAW §§ 352–59-H (McKinney 2015).

⁴ Ivan Penn, *California to investigate whether Exxon Mobil lied about climate-change risk*, L.A. TIMES, Jan. 20, 2016, <http://www.latimes.com/business/la-fi-exxon-global-warming-20160120-story.html>.

⁵ John Schwartz, *ExxonMobil Climate Change Inquiry in New York Gains Allies*, N.Y. TIMES, March 29, 2016, <http://www.nytimes.com/2016/03/30/science/new-york-climate-change-inquiry-into-exxon-adds-prosecutors.html>.

⁶ Press Release, A.G. Schneiderman, *Former Vice President Al Gore and a Coalition of Attorneys General from Across the Country Announce Historic State-Based Effort to Combat Climate Change*, March 29, 2016, <http://www.ag.ny.gov/press-release/ag-schneiderman-former-vice-president-al-gore-and-coalition-attorneys-general-across>.

⁷ *Id.* (remarks in embedded press conference video).

⁸ *Id.*

⁹ *Id.* (remarks in embedded press conference video).

¹⁰ Terry Wade, *U.S. state prosecutors met with climate groups as Exxon probes expanded*, REUTERS, April 15, 2016, available at <http://mobile.reuters.com/article/idUSKCN0XC2U2>; Energy & Environmental Legal Institute, Press Release, *Emails Reveal Schneiderman, Other AG's Colluding with Al Gore and Greens to Investigate Climate Skeptics*, April 15, 2016 (linked emails released through open records request).

¹¹ *Id.*

¹² Pl.'s Original Pet. for Decl. Relief, *Exxon Mobil Corp. v. Claude Earl Walker et al.*, No. 017-284890-16 (Tex. Dist. Ct. April 13, 2016.)

¹³ *Id.* at Exhibit A (Subpoena).

¹⁴ *Id.*

¹⁵ *Id.* ¶¶ 7–8, 41.

¹⁶ *Id.* ¶ 12.

¹⁷ *Id.* ¶¶ 64–70.

¹⁸ *Id.* ¶¶ 11, 46–63, 58, 71–73.

¹⁹ *Id.* ¶¶ 76–77.