

Goodmans^{LLP} Update

The Importance of Public Disclosures of Climate Change-Related Risks

The Supreme Court of New York recently dismissed a claim brought by the Office of the Attorney General of New York State against ExxonMobil Corporation, which alleged that Exxon misled investors about the risks posed to its business by potential climate change regulation. The case illustrates the increasing scrutiny that public companies face in Canada and the United States regarding public disclosures related to the impacts of climate change and the importance of accurately reporting climate change-related risks.

The Allegations

In 2018, following a lengthy investigation, the Attorney General commenced a claim against Exxon under provisions of New York statutes that prohibit deceitful practices that mislead the public. The claim alleged that Exxon participated in a “longstanding fraudulent scheme” designed to “create the illusion that it had fully considered the risks of future climate change regulation and had factored those risks into its business operations”.

At issue were several public representations made by Exxon related to how it reported the business risks of potential climate change regulation. In particular, the allegations related to how Exxon publicly reported potential increases in the costs of carbon when making investment decisions for future projects. Among other things, the Attorney General alleged several of Exxon’s internal analyses and corporate guidance documents estimated a cost of carbon that was lower than its publicly disclosed estimates. The suit claimed that Exxon was “exposed to far greater risk from climate change regulations than investors were led to believe”.

Exxon denied it had engaged in any wrongdoing. A twelve-day trial resulted, which included evidence focused on Exxon’s operations in Alberta, Canada. The Supreme Court of New York released its decision on December 10, 2019.

The Supreme Court of New York’s Decision

The New York Court dismissed the case in its entirety, finding that the Attorney General “failed to prove... that ExxonMobil made any material misstatements or omissions about its practices and procedures that misled any reasonable investor.” The New York Court also found that the Attorney General failed to prove that the alleged misrepresentations had any market impact or resulted in any investors being misled.

The Court noted that Exxon’s public disclosures provided conceptual information about how it managed the risks of climate change in its business planning, including potential increases in the costs of carbon related to government regulations and policies. The Court concluded that those public disclosures were not intended to enable investors to conduct meaningful economic analyses of Exxon’s internal planning assumptions. In addition, Exxon’s public statements related to long-term projections of potential costs in the 2030s and 2040s and the Court found that “[n]o reasonable investor during the period from 2013 to 2016 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”.

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Analysis

The New York Court's decision highlights the importance of disclosures by public companies related to the potential impacts of climate change. It is likely that Canadian issuers will face increased scrutiny related to their public disclosures on these risks.

In August 2019, the Canadian Securities Administrators issued Staff Notice 51-358 *Reporting on Climate Change-related Risks*, which provides guidance for issuers on how they should identify and disclose material climate change-related risks. Further details on the Staff Notice can be found in our August 2019 Update, [CSA Provides Guidance Aimed at Improving Disclosure of Material Climate Change-Related Risks](#).

Material misrepresentations similar to those alleged against Exxon could give rise to lawsuits in Canada, as Canadian public companies are required to report on material risks related to climate change. At its heart, the Attorney General's case against Exxon involved allegations of securities misrepresentations, which are not dissimilar to claims that could be brought in Canada. For example, section 138.3 of the Ontario *Securities Act* permits claims for damages where a company makes a material misrepresentation that is subsequently publicly corrected. Accordingly, a Canadian issuer that misrepresents (including by omission) material risks to its business related to climate change, and then publicly corrects those misrepresentations, could be subject to a lawsuit for the misrepresentations.

Although assessing climate change-related risks is a complex task, climate change reporting must address the material climate change-related risks faced by a reporting issuer and the potential impact of such risks. As issuers may face liability if material climate change-related risk are not accurately disclosed, they should pay close attention to this disclosure in their public filings.

For further information on these issues, please contact any member of our [Litigation Group](#).