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Energy & Sustainability Litigation Updates — July 2024

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Regulatory Updates

On June 4, 2024, a number of Congressional Democrats (10 Senators; 28 Congressmen) sent a letter to SEC Chairman Gensler, urging that the SEC "enforce existing SEC climate disclosure-related guidance" while the legal challenge to the SEC's mandatory climate disclosure rule is pending. In particular, the letter suggested action based on the SEC's 2010 guidance on climate-change developments. This letter increases the pressure on the SEC from liberal policymakers to fully defend the mandatory climate disclosure rule in the courts, as well as to pursue other actions to advance a climate agenda in regulatory matters.

On May 28, 2024, the Treasury Department and other federal agencies (including the Agriculture Department and Energy Department) issued a joint statement identifying seven principles that should be applied in the voluntary carbon markets—i.e., to carbon credits. (Put simply, a carbon credit reflects a payment to a provider in exchange for a guarantee that a certain amount of carbon has been removed from the atmosphere—a key action to counter climate change.) Most of these principles revolve around improved quality for carbon credits and increased disclosure concerning the usage of carbon credits; however, it is notable that the statement of principles de-emphasizes the use of carbon credits, stating that companies should instead "prioritize measurable emissions reductions within their own value chains," including "work[ing] collaboratively with their suppliers on efforts to undertake decarbonization activities." This principle appears designed to counteract one common criticism of carbon credits, in that they can function as an excuse for not undertaking meaningful action by a company. Moreover, this statement of principles is also noteworthy for demonstrating the significant amount of attention devoted by regulators to the voluntary carbon markets.

Litigation Updates

A notable ESG-related litigation continues to advance apace. On May 22, 2024, Judge O'Connor (N.D. Tex.) certified a class of plaintiffs in *Spence* v. *American Airlines Inc., et al.*, an ERISA case featuring allegations that investment managers breached their fiduciary duty due to their ESG-focused investing. And, on June 20, 2024, the court denied the defendants' motion for summary judgment, enabling a case based upon a "theory [] of mismanagement due to ESG activism" to proceed to trial. The developments in this case could impact future litigation based on similar theories concerning the alleged fault of investment managers in relying upon ESG factors when investing.

A coalition of Republican state attorneys-general representing nineteen states (Alabama, Alaska, Florida, Georgia, Idaho, Iowa, Kansas, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming) has petitioned the US Supreme Court under a theory of original jurisdiction (i.e., disputes between states) to block the lawsuits filed by five liberal states (California, Connecticut, Minnesota, New Jersey, and Rhode Island) against fossil fuel companies. The premise of the lawsuit, as stated in the petition, is that the defendant states are "dictat[ing] the future of the American energy industry . . . by imposing ruinous liability and coercive remedies on energy companies through state tort actions governed by state law in state court." This is a highly unusual lawsuit; original jurisdiction—which is rarely invoked—often features boundary disputes or a controversy over water rights. Here, the plaintiff states are attempting to disrupt civil enforcement lawsuits against private parties. The reaction of the Supreme Court to this effort will be interesting, to say the least.

Authors

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Jacob H. Hupart is Co-Chair of the ESG Practice Group and a Member in the firm's Litigation Section. He has a multifaceted litigation practice that encompasses complex commercial litigation, securities litigation — including class action claims — as well as white collar criminal defense and regulatory investigations. His clients sit in a variety of industries, including energy, financial services, education, health care, and the media.

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