

2014

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Recommended Citation

Marcia Narine, *Climate Change and Business law in the United States: Using Procurement, Pay, and Policy Changes to Influence Corporate Behavior*, 11 *Eur. Company L.* 141 (2014).

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Climate Change and Business Law in the United States: Using Procurement, Pay, and Policy Changes to Influence Corporate Behaviour

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1. BARRIERS TO CLIMATE CHANGE LEGISLATION IN THE UNITED STATES

The United States has a complicated relationship with the notion of climate change, and it is unlikely that the US government will enact comprehensive climate change legislation in general, much less reform company law to force firms to be more sustainable beyond voluntary corporation responsibility programs. Accordingly, I recommend stronger government green procurement regulations that would require executive level, audited attestations on environmental practices, and clawbacks of executive bonuses and board compensation as penalties for false or misleading attestations or for failure to comply with procurement standards or environmental laws.

Although almost 700 companies have signed a declaration¹ pledging to combat climate change and asking the US government for stronger policies, in the 1990s some of the largest corporations in the oil and gas industry spent millions of dollars lobbying the government and communicating to the public that climate change was an exaggerated threat.² In 2007, ExxonMobil, the most influential of these firms, pledged to cease funding organizations that 'divert attention' from climate change discussions,³ but press

reports indicated that the firm continued to fund such organizations up to at least 2011.⁴ That education campaign, which affected not only Congress but every day citizens, led in part to the United States standing alone as the only major economic power out of eighty-four signatories that did not ratify the 1997 Kyoto Protocol.⁵

Americans base their attitudes on climate change in part on what they hear in the news and in part on what they feel, literally in terms of temperature. A recent study published by Yale University revealed that 63% of Americans believe that global warming is occurring.⁶ Only 49% of Americans who believe that climate change is happening and attribute it to human behaviour. Nonetheless, regardless of the cause, 70% stated that the government should prioritize global warming.⁷

But Congress, perhaps beholden to limitless campaign funding from corporations that fear restrictive regulations, has been slow to act. In many instances Congress has been hostile to the Environmental Protection Agency (EPA) charged with promulgating and implementing the regulations passed by legislators in the past. Even when the EPA enacts a standard, almost every standard faces a court challenge, which can lead to years of delay of implementation of such standard by industry.

1 BICEP, 'Climate Declaration' www.ceres.org/bicep/climate-declaration (accessed 11 Nov. 2013).

2 Editorial, *Steve Coll: How Exxon Shaped the Climate Debate*, PBS (23 Oct. 2012) www.pbs.org/wgbh/pages/frontline/environment/climate-of-doubt/steve-coll-how-exxon-shaped-the-climate-debate (accessed 12 Jan. 2014). Coll explains that although ExxonMobil could have survived the Kyoto Protocol and legislation, its CEO chose to fund attacks on the science and noting, 'ExxonMobil drove a wedge into that debate, exploited the dissent that is an aid to science and used this to create doubts in the public mind about whether the science was legitimate'.

3 Exxon Mobile, '2007 Corporate Citizenship Report' (2007) 41 www.exxonmobil.com/Corporate/files/Corporate/community_ccr_2007.pdf (accessed 12 Jan. 2014).

4 Leslie Kaufman, *Exxon Cut Financing to Climate Skeptics, Group Says*, *The New York Times* (1 Jul. 2011) green.blogs.nytimes.com/2011/07/01/exxon-is-financing-fewer-climate-skeptics-group-says/?src=tpw (accessed 11 Nov. 2013).

5 United Nations, 'Kyoto Protocol' unfccc.int/kyoto_protocol/items/2830.php (accessed 11 Nov. 2013).

6 Anthony Leiserowitz et al., 'Climate Change in the American Mind: Americans' Global Warming Beliefs and Attitudes in April, 2013' (2013) Yale Project on Climate Change Communication, Yale University and George Mason University environment.yale.edu/climate-communication/files/Climate-Beliefs-April-2013.pdf (accessed 11 Nov. 2013).

7 Anthony Leiserowitz et al., 'Public support for climate and energy policies in April 2013' (2013) Yale Project on Climate Change Communication, Yale University and George Mason University environment.yale.edu/climate-communication/files/Climate-Beliefs-April-2013.pdf (accessed 11 Nov. 2013).

Despite a 2007 United States Supreme Court decision ruling that the Agency has the power to regulate Greenhouse Gas Emissions (GHG),⁸ Congress has also either delayed or cut appropriations to the Agency or introduced legislation designed to revoke certain EPA regulations. Efforts to implement new legislation on climate change in the US continue to meet opposition from some states and business groups as well. The resistance to legislation and a string of unprecedented natural disasters made it necessary for President Obama to issue an Executive Order on 1 November 2013 (thereby bypassing Congress), building on earlier initiatives and directing federal agencies to make it easier for states and communities to prepare for weather extremes by encouraging greater attention to future climate conditions.⁹

This confluence of factors leads to a slim likelihood of comprehensive climate change legislation or change in corporate law at the federal level that would force companies to become more sustainable.

2. THE ROLE OF GOVERNMENT: GREEN PROCUREMENT PROGRAMS

Governments in developed countries around the world generally have stronger regulation regarding climate change than the US, and some have used green public procurement programs to incentivize corporations to act more sustainably. Although programs differ, they commonly require the 'integration of environmental performance considerations into the procurement process including planning, acquisition, use and disposal'.¹⁰ The EU uses Green Public Procurement to leverage its buying power and focuses on buildings, food and catering services, electricity and timber. Member States are encouraged to incorporate green criteria including setting national action plans and targets.¹¹

The US government is the largest procurer of goods and services in the United States,¹² and can provide incentives without making substantial changes to the law by revising the procurement

standards to make it both easier to become a contractor and less administratively onerous for the US government to suspend or debar contractors. In 2009, President Obama signed an Executive Order, which established sustainability performance goals for federal agencies related to reduction of GHG, increased energy efficiency, waste reduction, and water conservation.¹³ Under another Executive Order, agencies must give preference in procurement and acquisition to a number of products for programs.¹⁴ Long before that Order, the EPA established the Environmentally Preferable Purchasing Program (EPP) to help agencies meet the requirements of obtaining sustainable goods and services.¹⁵ The EPP adds environmental factors to performance, price, health and safety as considerations. There are a number of mandatory federal programs dating back to 1997 when the Federal Acquisition Regulations (FAR) established affirmative procurement programs favouring certain items.¹⁶ The Department of Defence, for example, applies green procurement standards to all acquisitions.¹⁷

Generally, federal government agencies purchase goods and services from the lowest priced qualified responsible bidder.¹⁸ The FAR exclusion process precludes agencies from entering into contracts with irresponsible firms, namely those that have been convicted or found liable of various integrity offences.¹⁹ Firms are protected through due process and the Administrative Procedures Act before losing their ability to do business with the government.²⁰ Agencies cannot do business with firms that have been suspended during an investigation or debarred for a specified period of time. Under current law, the government can suspend or debar firms for either discretionary or mandatory reasons based on statute, but I propose that the process also be used to deter unsustainable firms from contracting with the government.

Practically speaking, however, a number of discretionary and mitigation factors come into play that make debarment and/or suspension difficult. Accordingly, given the renewed level of

8 See *Massachusetts v. EPA* 549 US 497 (2007).

9 The White House 'Executive Order – Preparing the United States for the Impacts of Climate Change' (1 Nov. 2013) www.whitehouse.gov/the-press-office/2013/11/01/executive-order-preparing-united-states-impacts-climate-change (accessed 11 Nov. 2013).

10 See Canada's program, which provides preferences based on a number of factors. Public Works and Government Services Canada, 'Policy on Green Procurement' (2006) <http://www.tpsgc-pwgsc.gc.ca/ecologisation-greening/achats-procurement/politique-policy-eng.html> (accessed 12 Jan. 2014).

11 Commission, *Buying Green! A Handbook on Green Public Procurement* (Eur Commission, Directorate-General for the Environment 2011) <http://ec.europa.eu/environment/gpp/pdf/handbook.pdf> (accessed 12 Nov. 2013).

12 The Federal Executive Branch spends approximately USD 350 billion per year for goods and services. The White House, 'Office of Federal Procurement Policy' <http://www.whitehouse.gov/sites/default/files/omb/procurement/mission.html> (accessed 28 Nov. 2013).

13 Federal Leadership in Environmental, Energy, and Economic Performance, Exec Order No 13514, 74 Fed Reg 194 (5 Oct. 2009) http://www.whitehouse.gov/sites/default/files/omb/procurement/fedreg_100809.pdf (accessed 12 Jan. 2014).

14 Strengthening Federal Environmental, Energy, and Transportation Management, Exec Order No 13423, 72 Fed Reg 3919 (24 Jan. 2007) www.gpo.gov/fdsys/pkg/FR-2007-01-26/pdf/07-374.pdf (accessed 11 Nov. 2013).

15 EPA, 'Environmentally Preferable Purchasing' www.epa.gov/epp/pubs/about/about.htm (accessed 11 Nov. 2013).

16 Federal Acquisition Regulation; Environmentally Sound Products, 62 Fed Reg 163 (22 Aug. 1997) www.epa.gov/epp/pubs/fr62no163.pdf (accessed 11 Nov. 2013).

17 See e.g., FAR 7.105, 11.002, 13.201, 23.202, 23.404, 23.703 72.215 and 72.225. There are some exceptions for GPP when the vendor does not meet cost, quality or availability standards.

18 See generally 48 C.F.R. sections 9.100-9.108-5.

19 48 C.F.R. section 9.406-2(a)(1)-(5).

20 See Kate M Manuel, 'Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments' (CRS Report for Congress, 6 Jan. 2012) <http://www.safegc.hq.af.mil/shared/media/document/AFD-120315-091.pdf> (accessed 11 Nov. 2013).

urgency related to the environment and in order to effect meaningful change on corporate behaviour, the US government should revise the FAR to facilitate quicker suspension or debarment for failure to comply with requisite environmental standards (including standards on GHG reduction implementation programs) during the term of the contract. If revising the FAR would not be possible, an alternative option is to require contractors that they agree to such terms in their contracts with the government.

Specifically, the government should require the chief executive officer and chief financial officer to sign an attestation of compliance, which would be audited by a credible, third party that did not provide any other audit or consulting services for the firm and that had undergone a training and certification process to ensure that it had the appropriate subject matter expertise in sustainability and green procurement. The US government generally relies on self-auditing processes and provides incentives to be compliant, voluntarily disclose and correct noncompliance so that agencies do not need to conduct formal investigations. This proposal would add a layer to that process. If that third party found that the firm had in fact made material misstatements or false attestations, the auditor would report firm to the government and the firm would be subject to suspension or debarment (after a time to resolve the issue if appropriate depending on the circumstances).

The government can provide additional incentives by increasing award opportunities for those firms that have elevated a responsible person to a high level within the organization that is focused on sustainability efforts. While this would not be mandatory for bid eligibility, those firms with sustainability officers would receive extra 'credits' in the bid process, all other things being equal.

3. THE ROLE OF PAY

In addition to requiring changes to the current procurement system, the government can require contractors to agree to claw back the compensation of high level executives and board members if the company fails to live up to its contractual commitment or files false attestations as determined by the independent third-party auditor. Many companies that do business with the government are subject to Dodd-Frank, the financial reform law passed in 2010.²¹ Dodd-Frank requires certain

companies to implement a clawback policy for recoupment of incentive-based compensation for current and former executive officers for a three-year period.²² These clawbacks must recover compensation based on materially inaccurate financial information, regardless of misconduct or fault. Although final rules on this provision had not been issued as of the time of this writing, a number of companies have already disclosed clawback policies and many go beyond Dodd-Frank's requirements and include ethical misconduct triggers.²³ Dodd-Frank does not affect every company, and the law itself does not require clawback of *board* member compensation, but my proposal ensures accountability at both the firm level and the level of those within the firm responsible at a managerial (the executive) and oversight (board) level.

4. CONCLUSION

This proposal addresses a number of concerns. First, the process is completely voluntary. Only those who choose to be government contractors or subcontractors must comply and thus it should not cause years of lengthy litigation in court because it is not mandatory. In addition, socially responsible investors, concerned members of the public and other stakeholders would likely look favourably upon the enhanced level of accountability, which could reduce the number of shareholder resolutions directed at the corporations. Third, if enough organizations complete the attestations and disclose these attestations publicly, and audited attestations evolve into an industry standard, companies can forestall more onerous regulation, which would lead to less litigation to overturn the legislation. Further, this proposal holds individual corporate executives accountable for wilful blindness – if corporate executives and board members do not exercise the appropriate level of oversight, they risk personal financial loss. Individual states can also enact similar rules adding a powerful multiplier effect, which can further impact climate change, and many have done so.²⁴

Those companies that are now signing on to climate pledges and touting their sustainability programs, and who also contract or subcontract with the federal government should be first in line to agree to these new terms. Similarly, the President, who has claimed that climate change policy is a cornerstone of his domestic agenda, should mandate changes in government procurement programs that can last beyond his term and affect generations to come.

21 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sections 922–4, 124 Stat. 1376, 1841–50 (2010).

22 Dodd-Frank Wall Street Reform and Consumer Protection Act section 954, 15 U.S.C. section 78j-4(b).

23 Equilar, 'Clawback Policy Report' (2013) www.equilar.com/images/pdf/2013/2013-equilar-clawback-policy-exec-summary.pdf (accessed 11 Nov. 2013).

24 See New Jersey (mandating statewide reduction of GHG); California (setting goals to green the state's buildings, reduce GHG and improve energy efficiency); Florida (requiring state agencies and local governments to comply with sustainable building rating system or a national green building code for construction projects); Regional Greenhouse Gas Initiative (group of northeastern states including New York, New Jersey, Maryland, Delaware, Pennsylvania and New England states that have joined together to study and implement climate change legislation).