

Exxon ESG Proxy Statement Suit May Chill Investor Proposals

By **Domenico Minerva and James Fee** (February 14, 2024)

On Jan. 21, Exxon Mobil Corp. filed a complaint in the U.S. District Court for Northern District of Texas, seeking to exclude a shareholder proposal from its 2024 proxy statement pursuant to Rule 14a-8 of the Securities Exchange Act.[1]

In this article, we first provide a brief background on the dispute. We then offer our view on the growing controversies surrounding shareholder proposals, especially in the ESG arena, and on corporations' growing willingness to push back against these proposals in court, rather than through the traditional channels at the SEC. We then analyze this trend's impact on shareholders.

In December 2023, Exxon investors Arjuna Capital LLC and Follow This had submitted the following proposal for inclusion in Exxon's 2024 proxy statement.

Resolved: Shareholders support the Company, by an advisory vote, to go beyond current plans, further accelerating the pace of emission reductions in the medium-term for its greenhouse gas (GHG) emissions across Scope 1, 2, and 3, and to summarize new plans, targets, and timetables.[2]



Domenico Minerva



James Fee

In seeking permission to exclude this proposal, Exxon is also seeking to avoid a shareholder vote on the proposal at its annual shareholder meeting on May 29.[3]

Exxon filed a motion to set an expedited summary judgment briefing schedule on Jan. 25.[4] Less than one week later, on Feb. 1, Exxon filed a notice withdrawing the expedited motion and informed the court that the shareholders were withdrawing the 2024 proposal.[5] Notably, however, the notice did not dismiss the lawsuit.

On Feb. 2, U.S. District Judge Mark Pittman issued an order directing the company to file a status update on or before Feb. 5 to explain "what outstanding claims or issues are before the Court in this action" since "it is the Court's understanding that this action was brought to litigate the very issue that Plaintiff now says is resolved: Defendants['] proposal for the annual shareholder meeting." [6] Judge Pittman added, "As it stands now, the Court struggles to see what the ongoing case or controversy is in this matter." [7]

Following the judge's order, Exxon said through a spokesperson, "There are still important issues for the court to resolve ... there is no change to our plans, the suit is continuing and we're evaluating our options." [8]

Then, on Feb. 5, Exxon filed the status report Judge Pittman had ordered. [9] In the report, Exxon argued that, despite the shareholders' withdrawal of the proposal and promise not to submit it again, "there is no good reason to believe they will stop." [10] Exxon blamed the U.S. Securities and Exchange Commission for

permit[ing] this type of conduct under its current application of the rules [which Exxon contends is] in a way that is inconsistent with the [relevant securities]

regulations and encourages Defendants and other activist organizations to submit shareholder proposals designed to disrupt the ordinary business operations of public companies and harm their shareholders.[11]

Exxon then contended that it seeks "a declaration from this Court that the 2024 Proposal is properly excluded from Exxon Mobil's proxy statement" because the defendants "have not conceded that the 2024 Proposal is properly excluded" through withdrawing it.[12]

Exxon's high-profile lawsuit captured investors' interest both within the U.S. and around the world. Specifically, the suit has caused investors to wonder what the challenge may portend for the future of shareholder proposals, especially those that concern environmental, social and governance topics.

Background on the Dispute

Exxon received the proposal on Dec, 14, 2023.[13] On Dec. 22, it sent an acknowledgment of receipt and a notice of certain deficiencies in the proposal to Arjuna and Follow This.[14] Arjuna responded to the deficiency notice on Jan. 3, but Follow This did not respond.[15]

After considering Arjuna's response, on Jan. 21, 2024, Exxon filed suit and notified the SEC of its intent to exclude the proposal.[16]

The 2024 proposal was not the first time Arjuna and Follow This submitted a proposal related to greenhouse gas emissions reductions to be included in Exxon's proxy statement.[17] In fact, they submitted similar proposals before both the 2022 and 2023 Exxon general meetings.[18] Unlike the withdrawn 2024 proposal, the 2022 and 2023 proposals received shareholder votes, though they garnered only 27.1% and 10.5% of the votes, respectively.[19]

With Follow This and Arjuna's well-documented prior history of submitting failed shareholder proposals, in combination with the 2024 proposal related to Exxon's core business of providing energy and petrochemical products and services, Exxon was able to latch on to two purported bases for exclusion pursuant to the federal securities laws in its complaint.

First, SEC Rule 14a-8(i)(7), the ordinary business exclusion, permits exclusion of a shareholder proposal if it relates to a company's ordinary business operations.[20] Second, SEC Rule 14a-8(i)(12), the resubmission exclusion, permits excluding a shareholder's proposal when it

addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was ... less than 15 percent of votes cast if previously voted on twice.[21]

Indeed, given these facts and how they implicate the permitted exclusions for shareholder proposals, the 2024 proposal may have been uniquely positioned for Exxon to file a lawsuit to exclude it, rather than use the exclusion process through the SEC's Division of Corporation Finance.[22]

Our Takeaways

While the main thrust of the company's lawsuit for a declaratory judgment to exclude the proposal seemed to have fallen away after the proposal was withdrawn, Exxon is poised to press on, according to the report it filed on Feb. 5.

Indeed, Exxon's decision to bring a lawsuit in the first place heightened investors' awareness of the growing trend of companies being willing to push back against ESG proposals to intimidate shareholders from advancing proposals — and the company's insistence on continuing the lawsuit even after the shareholders withdrew the proposal raises serious concerns for investors seeking to participate in the corporate governance process.

It is no secret that shareholder proposals related to environmental and social issues have been increasing in recent years. According to proxy advisory firm Institutional Shareholder Services Inc., the number of shareholder proposals focused on these issues was 186 in 2021. This rose to 274 in 2022 and increased again to 340 in 2023.[23]

As the number of proposals increased, the SEC updated its approach to excluding shareholder proposals when it published Staff Legal Bulletin No. 14L in November 2021, which unveiled the SEC's restrictive position toward issuing no-action letters for companies seeking to exclude shareholder proposals. This change in approach led to fewer grants of requests to exclude shareholder proposals, especially regarding ESG.

More proposals, however, did not translate into more success for the shareholders advancing them. As SEC Commissioner Mark Uyeda noted in June 2023, the number of overall proposals adopted by shareholder votes declined from 2021 through 2023.[24]

Exxon's lawsuit seeking a declaratory judgment that would exclude the proposal serves as a harbinger of what is potentially to come for shareholders who advance proposals that a public company disagrees with and is concerned that the SEC will not grant permission to exclude pursuant to the updated guidance in the November 2021 legal bulletin.

The company's high-profile suit raises the costs — both financial and reputational — for investors seeking to advance a shareholder proposal, as the costs of litigating, in addition to the costs of preparing and submitting a proposal, must now be considered. Such heightened costs, combined with the risks inherent in any litigation, are likely to have a chilling effect on shareholders' willingness to advance shareholder proposals. This result is a perversion of the fundamental principles underpinning the relationship between shareholder and corporation.

That being said, it is far from certain that companies will resort to litigation for each and every shareholder proposal, since engaging in litigation brings costs and risks for companies as well. However, given Exxon's success in compelling Arjuna and Follow This to withdraw their proposal, other companies may take note and add this tactic to their quiver of options to use when confronted with a shareholder proposal they wish to exclude from their proxy statement.

Until Judge Pittman responds to the Feb. 5 report that expresses Exxon's intention to continue the lawsuit, it remains to be seen what, if anything, will result from this action beyond the shareholders' withdrawal of the proposal.

However, regardless of whether the lawsuit proceeds, Exxon's aggressive maneuver to

intimidate Follow This and Arjuna into withdrawing their latest proposal is likely reverberating in corporate boardrooms throughout the country, as other public companies assess their options for responding to shareholder proposals.

Domenico "Nico" Minerva is a partner and James Fee is an associate at Labaton Keller Sucharow LLP.

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[1] Complaint, Exxon Mobil Corp. v. Arjuna Cap. LLC et al., No. 4:24-cv-00069-P (N.D. Tex. Jan. 21, 2024) ECF No. 1 at 1.

[2] Id. at ¶¶8-9.

[3] Id. at ¶19.

[4] Pl.'s Motion to Set Expedited Summ. J. Briefing Schedule, Exxon Mobil Corp. v. Arjuna Capital LLC et al., No. 4:24-cv-00069-P (N.D. Tex. Jan. 25, 2024), ECF No. 11; Mem. in Supp. of Pl.'s Motion to Set Expedited Summ. J. Briefing Schedule, Exxon Mobil Corp. v. Arjuna Cap. LLC et al., No. 4:24-cv-00069-P (N.D. Tex. Jan. 25, 2024), ECF No. 12.

[5] Notice of Withdrawal of Pl.'s Motion to Set Expedited Summ. J. Briefing Schedule, Exxon Mobil Corp. v. Arjuna Cap. LLC et al., No. 4:24-cv-00069-P (N.D. Tex. Feb. 1, 2024), ECF No. 16.

[6] Order, Exxon Mobil Corp. v. Arjuna Cap. LLC et al., No. 4:24-cv-00069-P (N.D. Tex. Feb. 2, 2024), ECF No. 18.

[7] Id.

[8] Jessica Corso, Exxon Investors Drop Climate Proposal, But Suit To Continue, Law360 (Feb. 2, 2024).

[9] Pl.'s Status Update, Exxon Mobil Corp. v. Arjuna Cap. LLC et al., No. 4:24-cv-00069-P (N.D. Tex. Feb. 5, 2024), ECF No. 20.

[10] Id. at 1.

[11] Id. at 1-2.

[12] Id. at 2. Specifically, the company seeks a ruling that the 2024 proposal is excludable under the ordinary business exclusion and the resubmission exclusion. SEC Rules 14a-8(i)(7) & 14a-8(i)(12).

[13] Mem. in Supp. of Pl.'s Motion to Set Expedited Summ. J. Briefing Schedule, Exxon Mobil Corp. v. Arjuna Cap. LLC et al., No. 4:24-cv-00069-P (N.D. Tex. Jan. 25, 2024), ECF No. 12., ECF No. 12, at 2.

[14] Id.

[15] Id.

[16] Id.

[17] Complaint, ECF No. 1, at ¶¶101, 103. The 2022 proposal was (¶101):

RESOLVED: Shareholders request the Company to set and publish medium- and long-term targets to reduce the greenhouse gas (GHG) of the Company's operations and energy products (Scope 1, 2, and 3) consistent with the goal of the Paris Climate Agreement: to limit global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C.

Similarly, the 2023 proposal was (¶103):

RESOLVED: Shareholders request the Company to set a medium-term reduction target covering the greenhouse gas (GHG) emissions of the use of its energy products (Scope 3) consistent with the goal of the Paris Climate Agreement: to limit global warming to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C.

[18] See id., ¶100.

[19] See id., ¶¶102, 104.

[20] 17 C.F.R. § 240.14a-8(i)(7).

[21] 17 C.F.R. § 240.14a-8(i)(12). Specifically, the resubmission exclusion reads:

(12) Resubmissions. If the proposal addresses substantially the same subject matter as a proposal, or proposals, previously included in the company's proxy materials within the preceding five calendar years if the most recent vote occurred within the preceding three calendar years and the most recent vote was:

(i) Less than 5 percent of the votes cast if previously voted on once;

(ii) Less than 15 percent of the votes cast if previously voted on twice; or

(iii) Less than 25 percent of the votes cast if previously voted on three or more times.

[22] In addition to the legal and factual factors that favored Exxon, the company included in its complaint unflattering portraits of both Arjuna and Follow This, tactics which would have been unlikely to garner the same amount of attention or exact pressure for the activists to withdraw their proposal if the only audience had been the SEC's Division of Corporation Finance. As to Arjuna, Exxon highlighted for the court that one of Arjuna's managing partners, Natasha Lamb, had been found to be "manifestly biased against Exxon Mobil" by a New York Supreme Court judge in 2019. Complaint, ECF No. 1 at ¶52 (citing *People v. Exxon Mobil Corp.*, 119 N.Y.S.3d 829, 65 Misc. 1233(A), at *16 n. 7 (N.Y. Sup. Ct. Dec. 10, 2019). Additionally, with respect to Follow This, Exxon included a screenshot of the Follow This website wherein it describes its "Goldilocks Trojan Horse" approach to the 2024 proposal because "it is neither too vague nor too prescriptive" but will lead "the company

[to] stop exploring for more oil and gas." Complaint, ECF No. 1 at ¶183; see also For Investors, <https://www.follow-this.org/for-investors/> (last visited Feb. 3, 2024).

[23] In Focus: Shareholder Proposals in the 2023 U.S. Proxy Season (issgovernance.com). <https://insights.issgovernance.com/posts/in-focus-shareholder-proposal-in-the-2023-us-proxy-season/>.

[24] SEC Commission Mark T. Uyeda Remarks (June 21, 2023), SEC.gov | Remarks at the Society for Corporate Governance 2023 National Conference. https://www.sec.gov/news/speech/uyeda-remarks-society-corporate-governance-conference-062123#_ftnref23.