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‘Oil is the New Tobacco’ a slippery slope for Democrats, critics warn

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If the Democrats’ newly announced “Oil is the New Tobacco” campaign catches on, the nation’s potato chip and ice cream manufacturers may want to watch their backs, critics warn.

The Congressional Progressive Caucus is scheduled to host a forum Wednesday drawing parallels between the tobacco and fossil fuel industries in support of a coordinated effort to use the legal system to pursue climate change dissenters, starting with Exxon Mobil Corp.

The “Oil is the New Tobacco” event, co-hosted by the Sustainable Energy and Environment Coalition, centers on the industry’s “concerted efforts to deceive elected officials, investors, and the American public” on climate change.

But critics say the campaign to probe Exxon for consumer and securities fraud makes as much sense as pursuing fraud charges against candy makers for being insufficiently forthcoming about their product’s contribution to tooth decay.

“Every ice cream maker is disliked by some obesity expert, but it doesn’t mean that every time an ice cream maker tells its stockholders, ‘Everything is great, we’re selling more ice cream this year,’ they’re committing consumer fraud,” said Cato Institute senior fellow Walter K. Olson. “It doesn’t matter even if the critique of ice cream is correct. You still don’t have fraud.”

Alex Epstein, who founded the free market Center for Industrial Progress, argued that it would be impossible for Exxon to have committed tobacco-style violations because the company would have had to “directly conceal or fabricate evidence.”

While Exxon has done its own research on climate change, so have universities, academics and other institutions, often relying on widely available government data.

“All the evidence about CO2 and climate is in the public domain, largely collected and disseminated by government agencies or government-funded educational institutions,” Mr. Epstein said. “All the industry can do is express opinions about the issue — which is exactly what it and others (including me) are being persecuted for.”

The caucus became involved after 17 attorneys general announced in March that they would investigate fossil fuel companies and their supporters over accusations that they misled the public about the dangers of rising carbon dioxide emissions in the atmosphere.

The model for the anti-oil campaign is the successful prosecution of top tobacco companies, which were found guilty in 2006 of violating the federal Racketeer Influenced Corrupt Organizations Act. That year, the cigarette companies made a \$206 billion settlement brokered by state attorneys general.

Documents uncovered during the federal investigation “reveal the extent to which the industry manipulated the chemicals in their products, deceptively marketed these products, and concealed the serious health effects of smoking,” according to the Public Health Law Center at the Mitchell Hamline School of Law.

Climate change groups argue that fossil fuel backers did similar deception, even though Mr. Olson, who has studied the tobacco litigation, said the comparison between oil and tobacco falls short on both the consumer and securities fraud fronts.

In terms of consumer fraud, “The line that tobacco companies were alleged to have crossed was [devising] a scheme in large part to get people to buy their product by misrepresenting what was in it,” said Mr. Olson, who discussed the litigation in his 2004 book, “The Rule of Lawyers: How the Litigation Elite Threatens America’s Rule of Law.”

“In order for there to be a parallel, you would have to have a lawsuit on behalf of people who filled their tank at the gas station because you said it was environmentally good, and now that they find it was environmentally bad, they say, ‘I would never have filled my tank with your gas. I would have bicycled instead of owning a car if I had only known,’” said Mr. Olson.

So far, however, prosecutors have focused on climate change — “this wildly different, ‘You harmed society’s overall interest by getting Congress to vote differently because you put out disinformation,’” said Mr. Olson.

At least four of the attorneys general have launched investigations, including New York Attorney General Eric T. Schneiderman. He has cited the state’s Martin Act on shareholder fraud, which lets him oversee financial wrongdoing related to the New York Stock Exchange.

The argument that Exxon violated the Martin Act by defrauding shareholders is “less silly,” said Mr. Olson, but still “fails on a number of different grounds.”

“Companies are always doing simulations of what if this happened versus what if that happened. ‘Let’s be sure we’re ready if things go this way versus if things go that way,’” Mr. Olson said. “Companies of that size plan for an economic boom and an economic bust. They plan for pollution being more of a problem than they expected, and they plan for it being less of a problem than they expected.”

“Picking out a document here and a document there and saying, ‘Well, look, you told your investors you were optimistic about the future of the oil business’ when this part of the company was planning on there not being long-term growth — it just isn’t securities fraud,” he said. “You need more than that.”

Mr. Schneiderman has rejected accusations that the attorneys general are violating the free speech rights of Exxon and its supporters, including the Competitive Enterprise Institute and other free market groups.

He blasted what he described as “First Amendment opportunism,” which he said threatens “essential law enforcement tools that prevent fraud and protect public safety.”

“This threat, which I and some others call First Amendment opportunism, rests on a false premise, that free speech rights of corporations can supersede the duties of our democratically elected government officials to protect the people we represent,” Mr. Schneiderman said June 9 at the Bloomberg Big Law Business Summit.

Another feature of the tobacco litigation was that by the 1980s, virtually nobody except industry-funded think tanks was contesting the impact of smoking on health. Similarly, Democrats have accused fossil fuel companies of funding skeptics and academics in order to cast doubt on the extent and causes of climate change.

The problem is that there are hundreds if not thousands of climate scientists, researchers, policy wonks and other skeptics scattered around the globe who have challenged the consensus on climate catastrophe. In addition, Exxon announced in 2007 that it had stopped funding advocacy groups.

“It turns out that with respect to tobacco, that there was no legitimate scientific difference about the danger of tobacco, and that tobacco scientists knew that,” said Heritage Foundation senior legal fellow John Malcolm.

“But here, there is a legitimate disagreement among scientists,” he said. “You can think one side is right or the other side is wrong, but I don’t think for instance anybody claims that the CEI or Heritage or any of these other groups that have their own researchers are somehow in the back pocket or on the payroll with Exxon Mobil.”

Finally, while it’s hard to come up with a societal benefit from smoking, energy from fossil fuels has “indispensable, life-and-death benefits for billions of people,” said Mr. Epstein.

Appearing at the Congressional Progressive Caucus forum are Kathy Mulvey of the Union of Concerned Scientists; Ed Garvey, former Exxon researcher; Harvard professor Naomi Oreskes; and Natasha Lamb, Arjuna Capital director of equity research and shareholder engagement.