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# Top Issues in Energy Law

December 14, 2023

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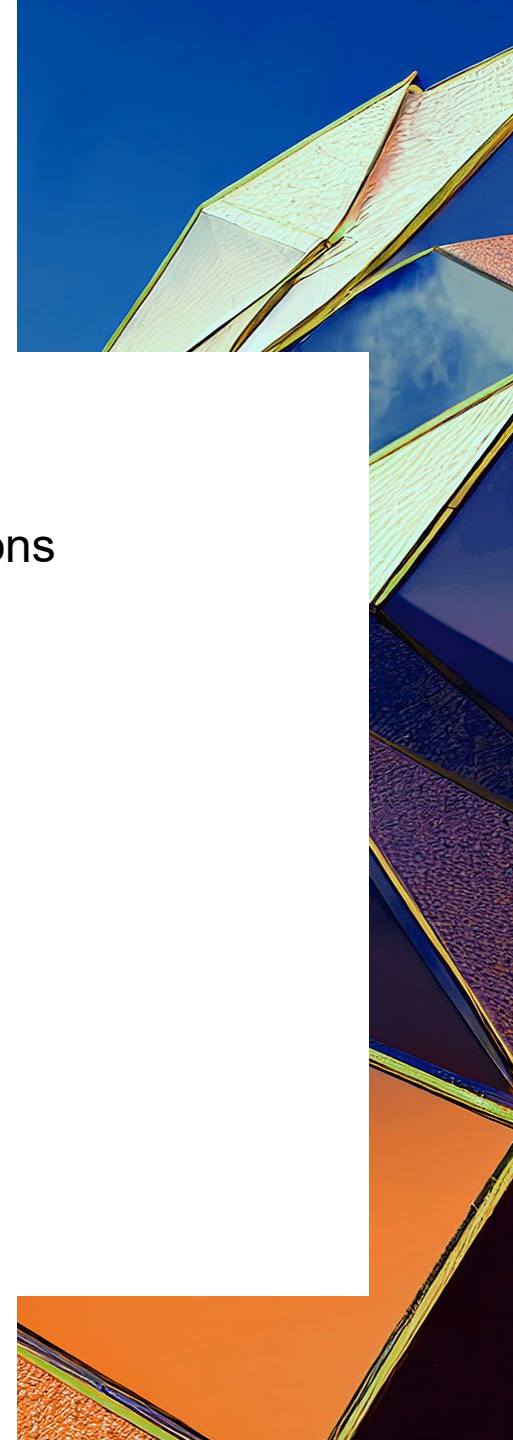
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# Agenda

- Updates in Employment: What to watch for from onboarding to the exit interview
- Trends in Energy Finance: Inflation Reduction Act and the effect on tax equity transactions
- Applications and challenges for AI in the energy industry
- Overview and updates on “greenwashing” litigation in the energy industry





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# Updates in Employment

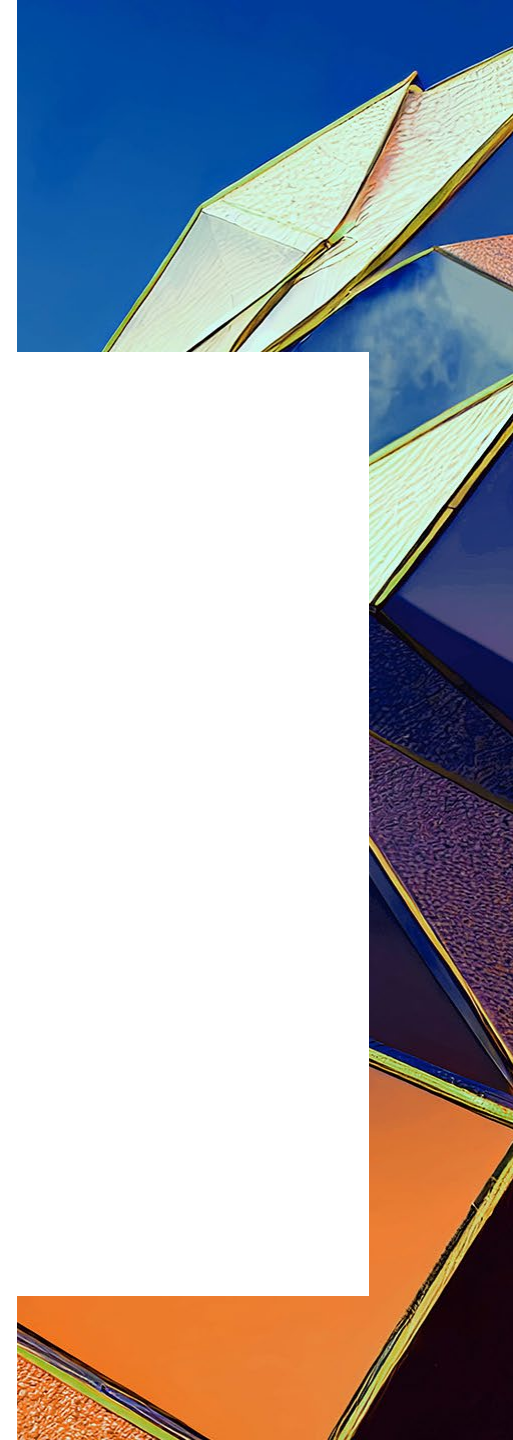
## What to watch for from onboarding to the exit interview

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# Employees are the Energy of Business

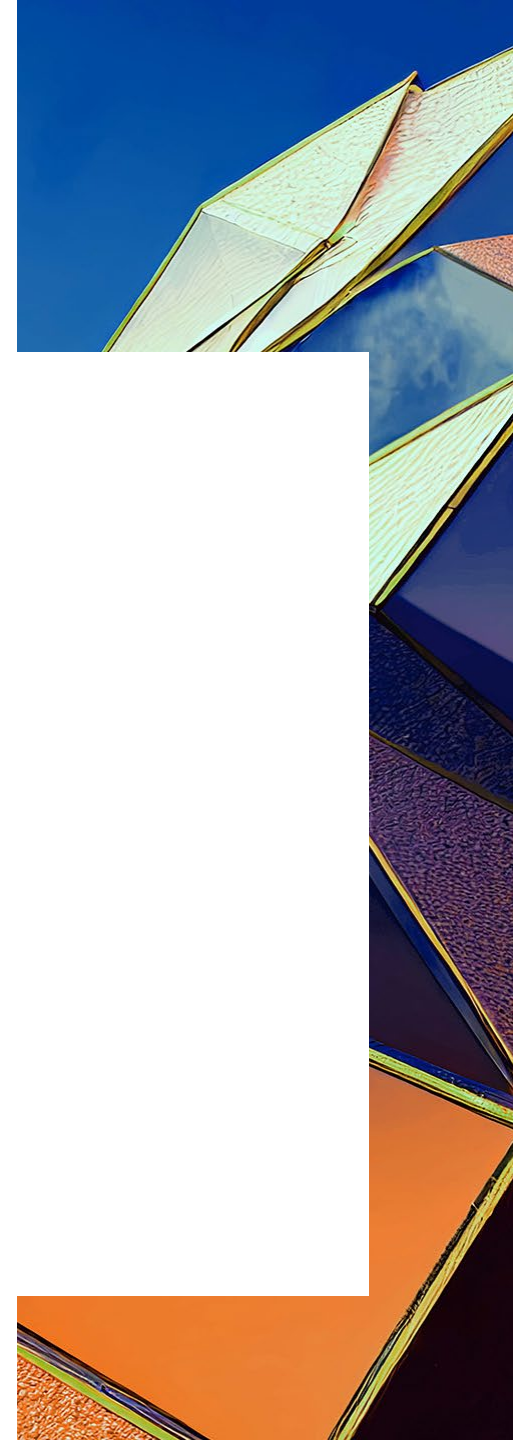
- Onboarding:
  - I-9 Verification / E-Verify
  - Documentation
- Retention/Engagement:
  - Wage and Hour
  - Protecting Information
- Exit
  - Protecting Information
  - Protecting Relationships





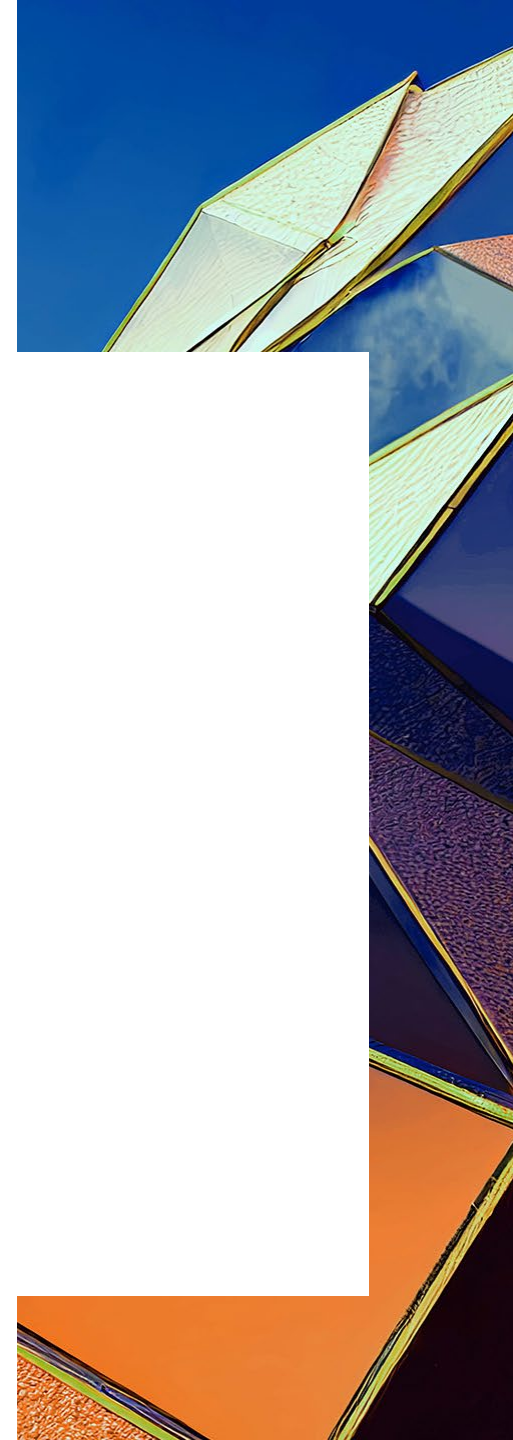
# Welcome Aboard!

- Forms I-9
  - Remote verification is here to stay.
  - E-verify
    - AL, AZ, FL, GA, LA, MS, NC, SC, TN, UT
- Onboarding documentation
  - Non-Competes
  - Confidentiality Agreements
- Recruiting
  - Pay Transparency



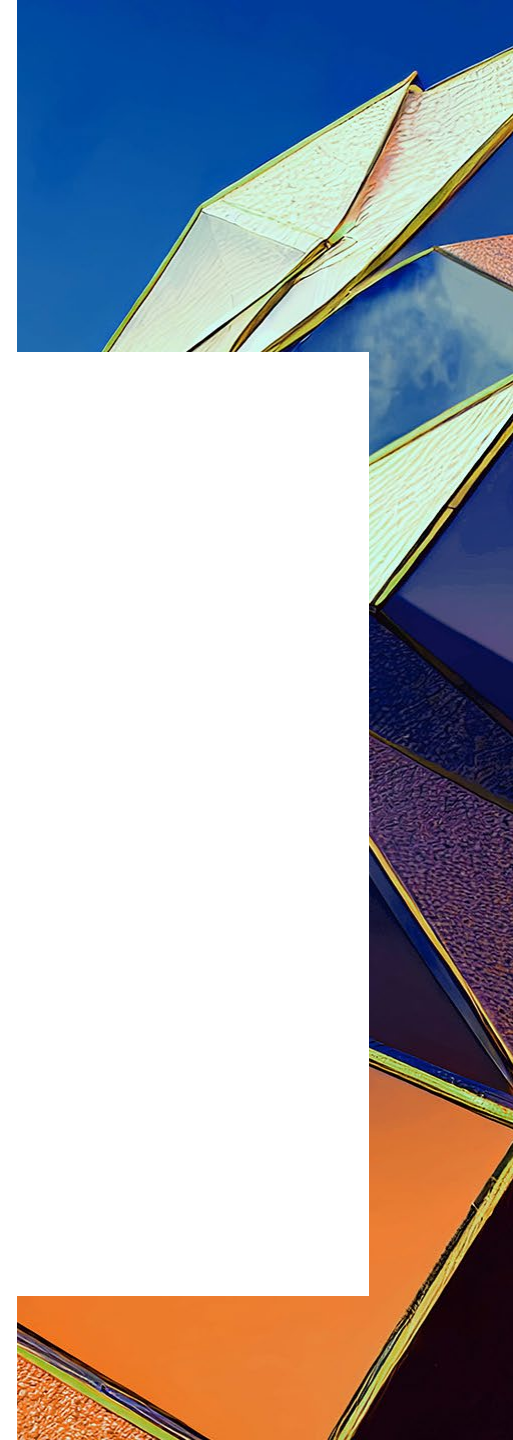
# Stay a while...

- Wage and Hour
  - Overtime Compliance
    - *Helix* – canary in the coal mine
      - Highly Compensated Employees
  - Minimum Wage
    - 25 States + DC
  - Paid Leave
- Salary Thresholds
  - Restrictive Covenants
  - Overtime Exemption



# Thanks for coming!

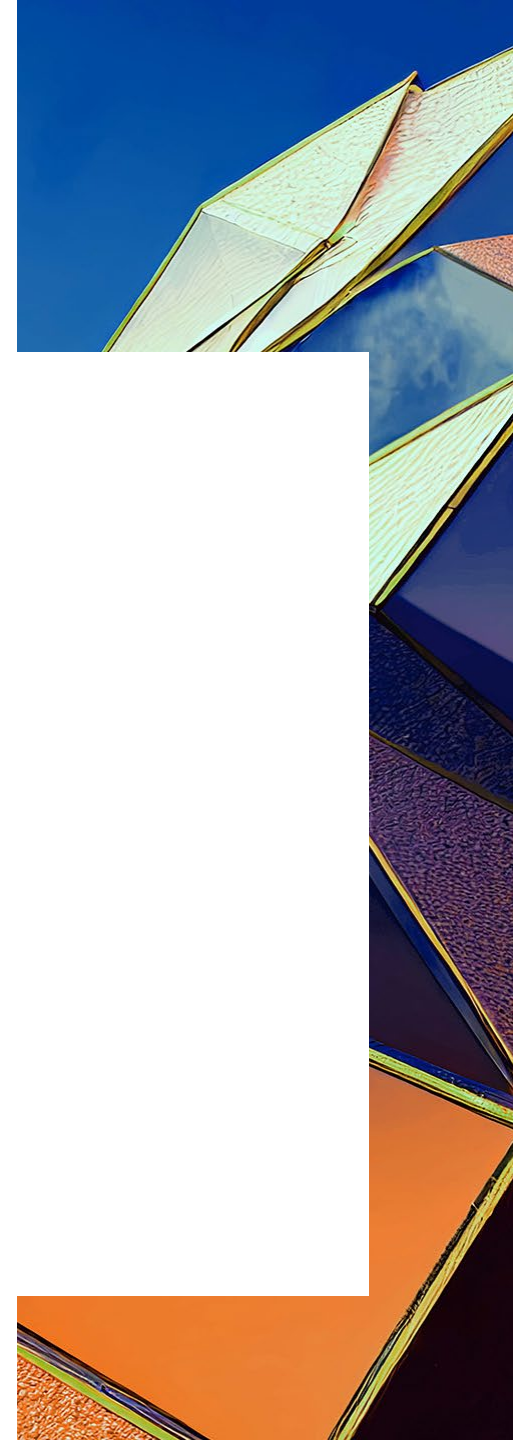
- Exit Interviews
  - When and Why
- Protecting Information
  - No “Exiting through the Gift Shop”
- Protecting Relationships
  - Be proactive
  - Working within the changing boundaries of the law





# But its not over yet...

- Constant vigilance!
- Preserve data, devices
  - Maintain email accounts
  - Hold off before wiping and redeploying devices
- Disable access
  - Don't forget about archives/locally stored accounts
- Stay alert in the marketplace





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## Trends in Energy Finance:

Inflation Reduction Act and the  
Effect on Tax Equity  
Transactions

# Tax Credit Transferability

- Eligible taxpayers may transfer **all (or any specified portion of)** an eligible credit to an unrelated taxpayer under Section 6418 of the Code and the relevant proposed regulations, which may be relied on until final regulations are issued.
- Eligible credits **do not** include any business credit carryforward or business credit carryback determined under Section 39 of the Code.
  - Example: for the ITC, if a project owner places a project in service in 2023, the owner can't use the credit on their own tax return and carry it forward, they cannot then decide to sell the credit in 2025.



# Eligible Taxpayers and Purchasers

- Generally, **any taxpayer** may sell credits
  - But, tax-exempt entities, states, political subdivisions, TVA, Indian tribal governments, Alaska Native Corporations, and rural electric cooperatives **cannot**
- Any US taxpayer can be a buyer, with some restrictions
  - Can have multiple buyers for one credit (i.e., the project generates \$100 ITC, can sell \$25 each to four different buyers).
  - A dollar of credit cannot be sold more than once.
  - Buyer **can't be related** to the seller.
    - “Related” defined by cross reference to 267(b) and 707(b)(1).
      - Generally, more than 50% overlapping ownership.
      - Complex attribution rules apply.

# Amounts and Payment Requirements

- Eligible credit is separately determined for each eligible credit property.
- Any amounts paid by the buyer must:
  1. Be paid: (A) in cash, (B) not before the start of the seller's taxable year for which credit is determined, and (C) before the tax return of the buyer or seller in which the 6418 Transfer Election is included is filed;
    - “Paid in cash” means by US Dollars, by cash, check, cashier's check, money order, wire transfer, ACH transfer, or other bank transfer of immediately available funds
    - Contractual commitments to purchase are ok, as long as cash payment made during a specified time
  2. directly relate to the specified credit portion; and
  3. not be considered an “excessive transfer.”

# Post-Transfer Treatment

- The **buyer is treated as the “eligible taxpayer”** for purposes of the Code with respect to the credit purchased.
- Because of the prohibition on transferring credits more than once, the buyer is not permitted to transfer the credit again once purchased from the seller.
- Proposed regulations would **permit buyers to carry back a purchased credit for up to three years**, assuming certain requirements are satisfied.



# Risk of Recapture

- What is **recapture**?
  - Applies to ITC only (and several other credits, but **not the PTC**).
  - Recapture can occur **if the taxpayer disposes of credit property** or it **ceases to be eligible** credit property.
    - Examples: sale of the project, casualty event, owner of the project becomes tax exempt.
  - Historically, for a partner in a partnership, reduction of their interest below **2/3 of interest in applicable credit year** causes recapture as to that partner.
  - Amount of credit at risk of recapture is reduced by 20% each year for five years.
    - After five years, no more recapture risk.

# Recapture Risk Post-Transfer (Seller v. Buyer Recapture)

Triggered by recapture of the purchased credit	Triggered by reduction of partner's interest in the Transfer Partnership
<ul style="list-style-type: none"><li>• Transfer of underlying property</li><li>• Property ceases to be ITC property</li></ul>	<ul style="list-style-type: none"><li>• Bank foreclosure of partner interest</li><li>• Transfer of partner's interest</li></ul>
Buyer's credit is recaptured and is obligated to repay the IRS directly	Partner's otherwise allocable share of ITC is recaptured and is obligated to pay the IRS directly
Buyer relies on indemnity from Seller	Partner in Transfer Partnership is directly liable – lender to address in debt documentation
Risk allocated in Credit Transfer Agreement	Risk addressed by partner and financing parties

# Issues to be Addressed in Tax Credit Transfer Debt Transactions

- Tax Credit Transfer Pricing for Bridge Loans (Committed v. Uncommitted)
- Whether step-up in basis is achievable
- Recapture Risk (Buyer v. Seller)
- Project-level v. back-leverage Collateral
- Flexibility of remedies to avoid recapture
- Whether Interparty / Forbearance Agreement is required





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# Applications and Challenges for AI in the Energy Industry

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# October 30, 2023 Executive Order on Safe, Secure, and Trustworthy AI

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Aimed at ensuring that “America leads the way in seizing the promise and managing the risks of AI.”

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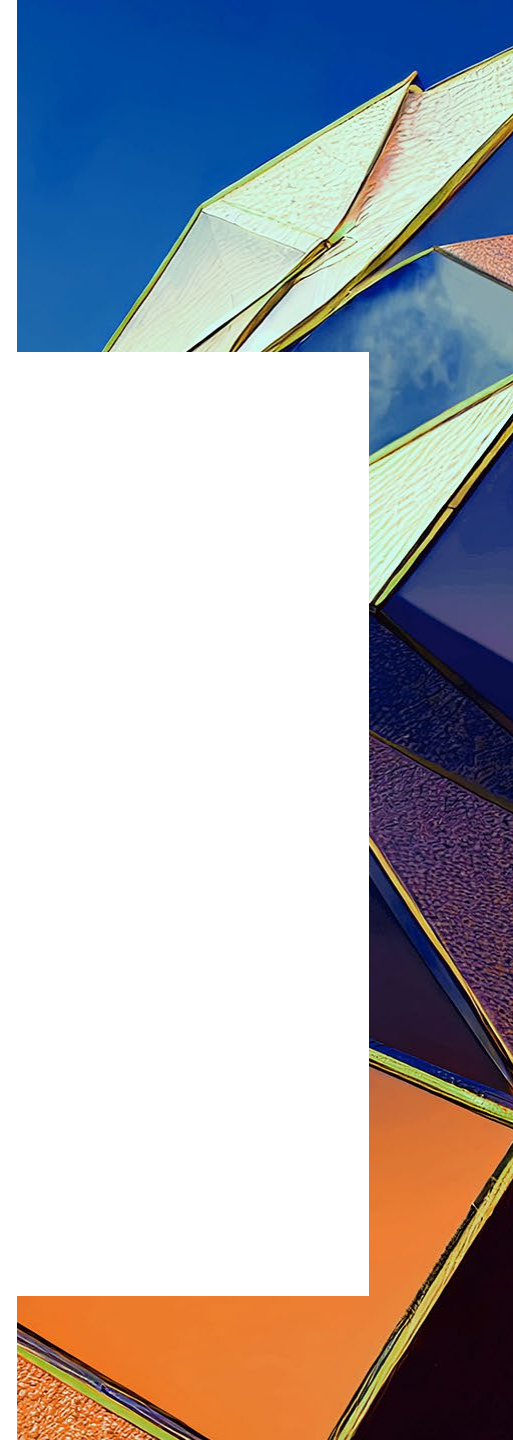
New standards governing AI safety, security, and privacy concerns while promoting innovation and competition.

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EO instructs the DoE to address AI threats to critical infrastructure by setting rigorous standards to ensure safe deployment of AI systems within energy infrastructure.

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DoE is establishing rules and regulatory compliance to comply with the EO – this will take at least 9 months.

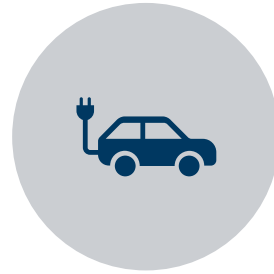




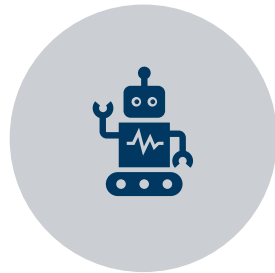
# Top 8 Growth Areas for AI in Energy



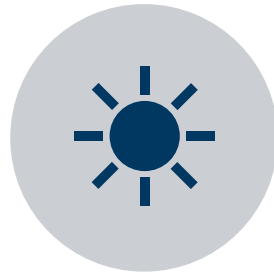
**Smart Grids:** Electricity supply networks use AI to detect and react to changes in usage.



**Demand Response Management:** Adjusting the electricity usage of consumers in response to signals from grid operators



**Predictive Maintenance:** AI predicts when equipment is likely to need maintenance.



**Renewable Energy Forecasting:** AI plays a critical role in forecasting the generation of renewable energy.



# Top 8 Growth Areas for AI in Energy



**Energy Storage:** AI improves the storage & and distribution of energy from renewable sources based on supply, demand, price, and grid conditions.



**Carbon Capture, Utilization, and Storage:** AI optimizes the efficiency of these processes by enhancing the capture of CO2 from the atmosphere or emission sources.

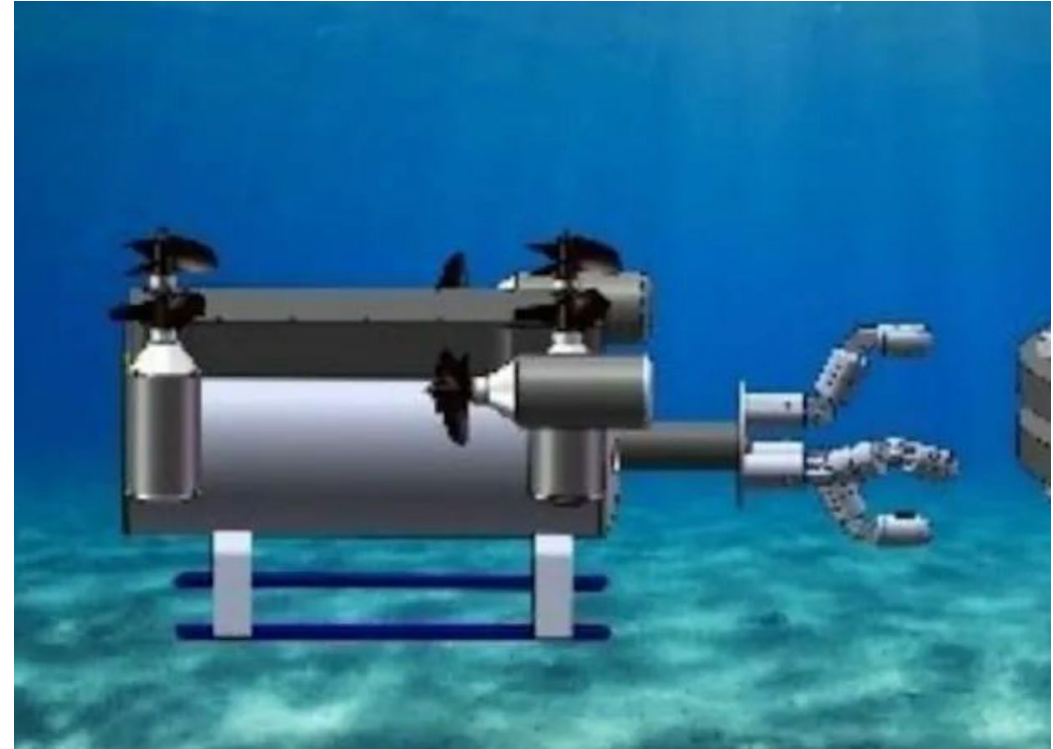
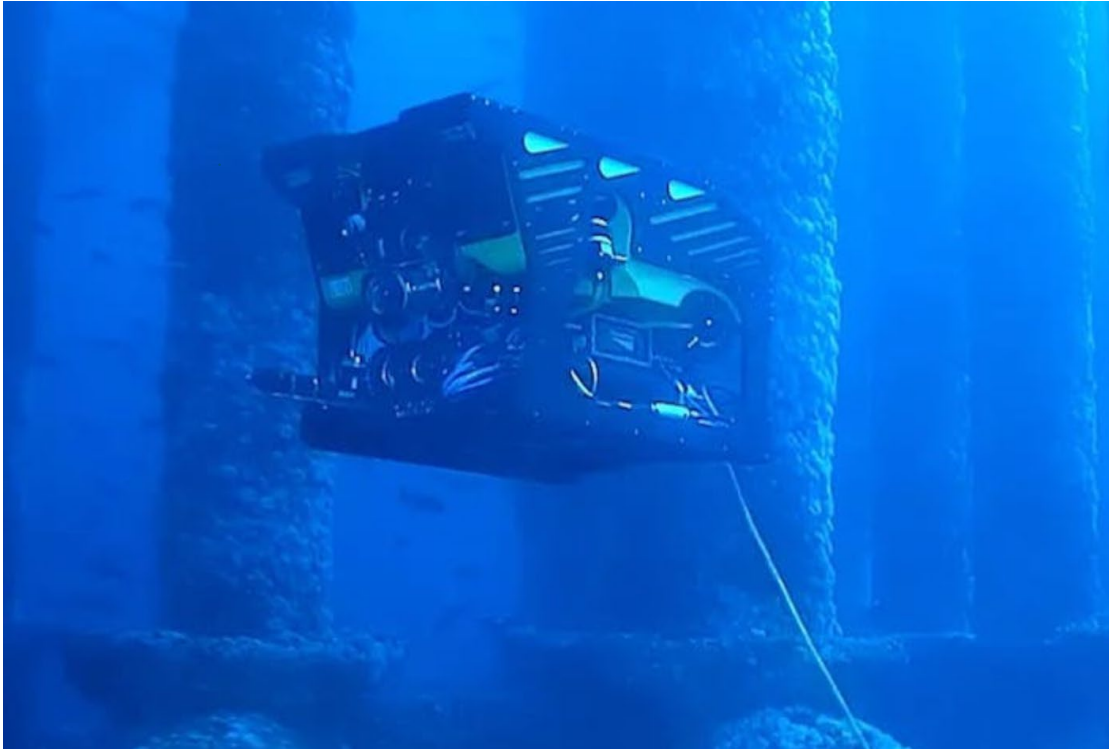


**Energy Trading:** AI analyses market conditions in energy trading. It reviews real-time data on pricing, supply, and demand trends, allowing energy leaders to make informed, profitable trading choices.



**Oil and Gas Exploration:** By processing large amounts of seismic data with incredible precision, AI can identify oil and gas reserves that may have gone unnoticed using traditional methods.

# Example: AI Subsea Inspection



# Key Challenges of AI in Energy



**Cost**: Substantial upfront costs related to implementing AI systems and integrating them into existing infrastructure.



**Lack of Quality Data**: AI is reliant upon large amounts of data. Getting quality data in a form that can be processed in some areas of the energy industry is a challenge.



**Data Privacy**: The energy sector deals with vast amounts of sensitive data. Ensuring the security of this data is critically important, and AI systems must be protected against security breaches.



**Human Resources**: Shortage of trained AI professionals.





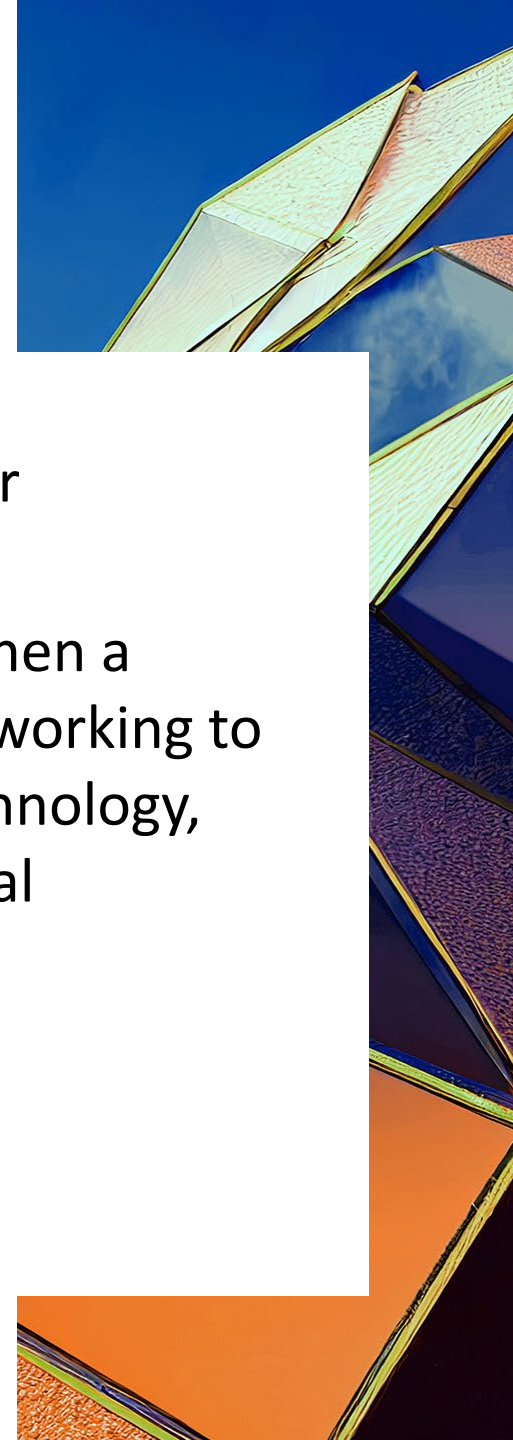
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# Overview & Updates in “Greenwashing” Litigation in the Energy Industry

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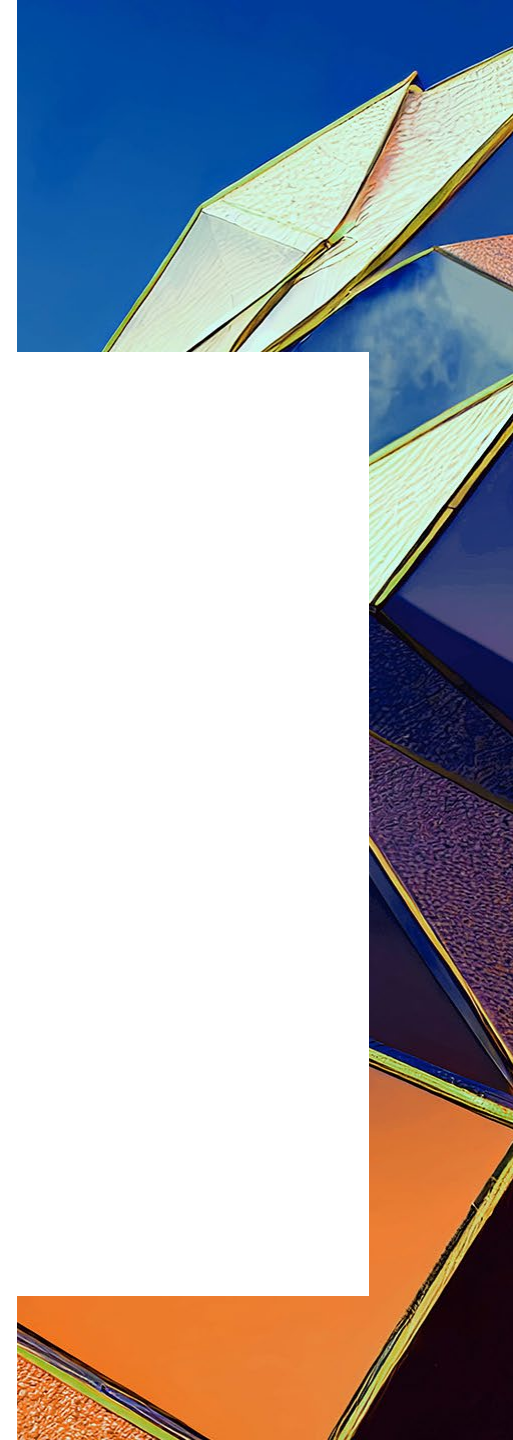
# What is “Greenwashing”?

- “Greenwashing” is the term for a company’s exaggerated, misleading, or unsupported claims about its environmental practices
- In the oil and gas industry, allegations of greenwashing typically arise when a company known for its production of fossil fuels makes claims that it is working to reduce its carbon footprint, advertising its use of renewable energy technology, or utilizing a marketing campaign illustrated with the color green, natural landscapes, and/or phrases such as “eco-friendly”



# Where is it?

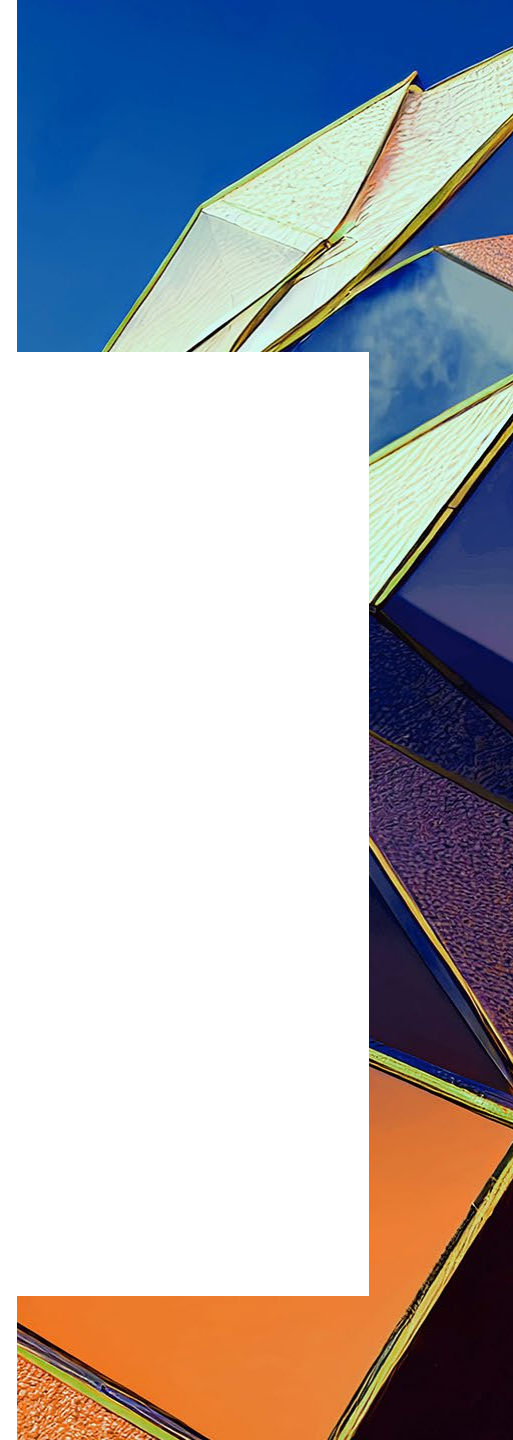
- Advertising
  - Social media
  - Commercials
  - Billboards
- Product labels
- Corporate or governmental commitments
- ESG disclosures
- Public filings





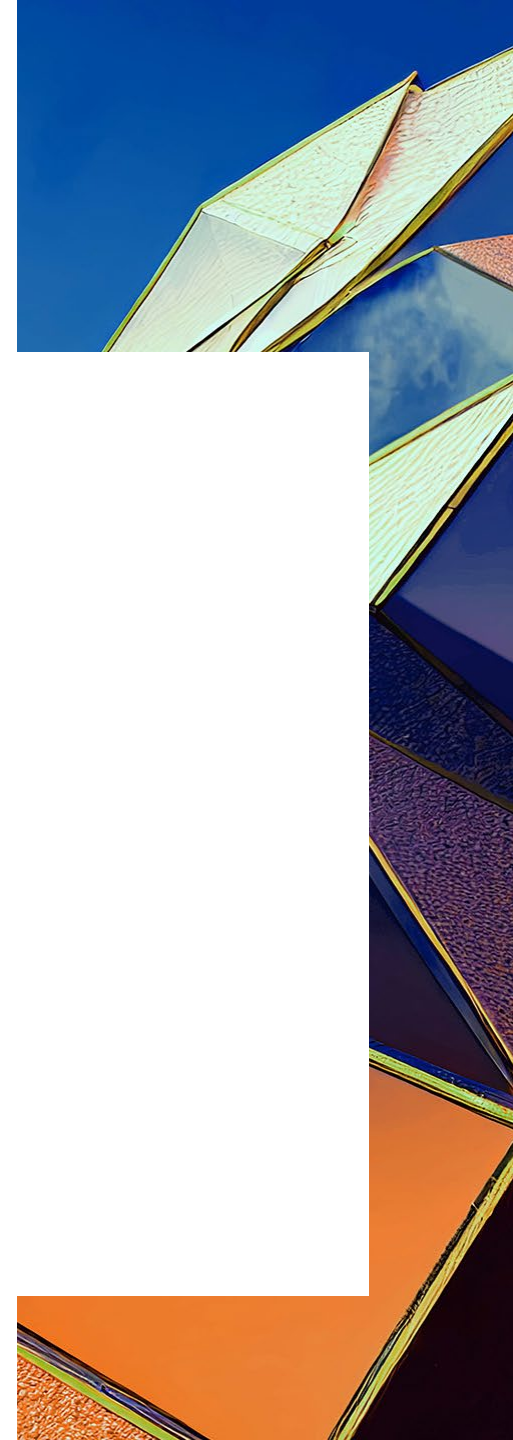
# The Rise in Greenwashing and Climate Litigation

- 2017 – 884 cases in 24 countries
- 2020 – 1,550 cases in 38 countries
- 2023 – 2,341+ cases have been filed
  - A majority of these cases are in the US



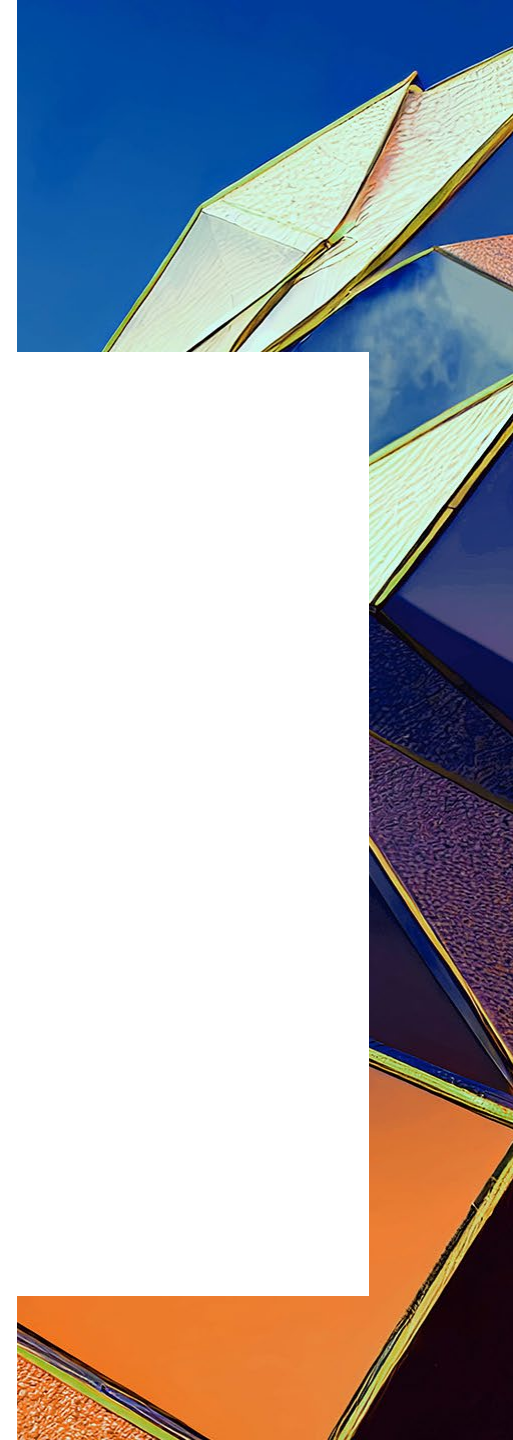
# Impacted Industries

- Fashion – H&M, Allbirds, Nike, Canada Goose, Zara
- Food & Beverage – Starbucks, McDonalds
- Banking – Deutsche Bank
- Auto – Volkswagen
- Furniture – Ikea
- Sports – FIFA
- Airlines – KLM, Ryanair, Lufthansa
- Energy – BP, ExxonMobil, Shell



# Who Are the Plaintiffs?

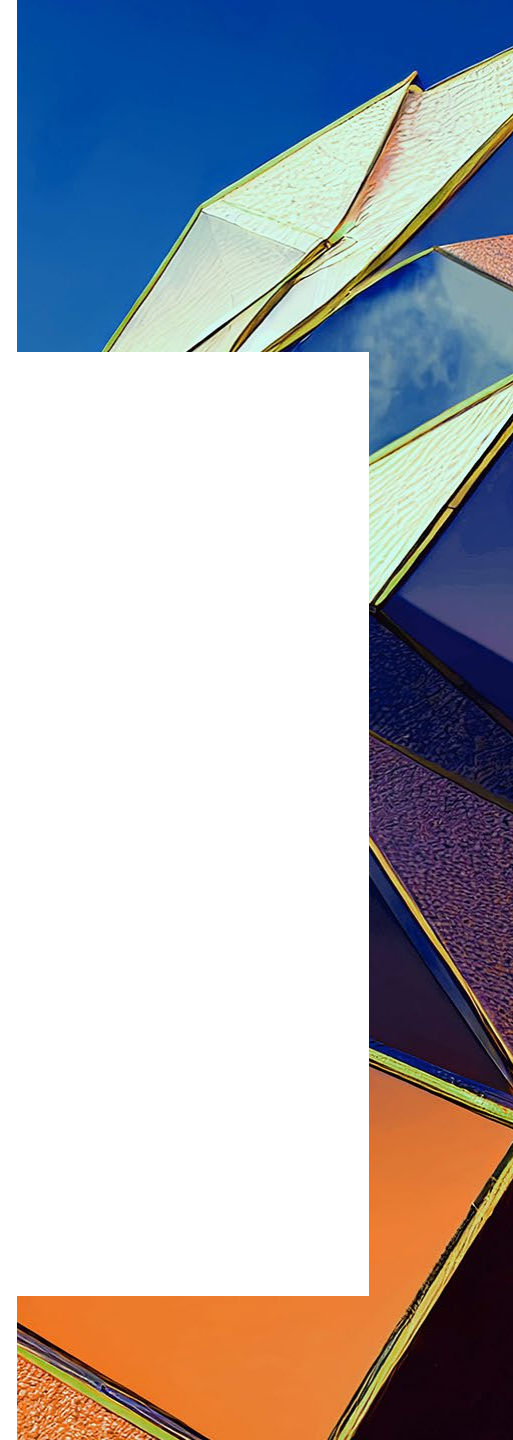
- Consumer groups
- Environmental groups
- Citizen groups
- Class actions
- States
- Municipalities
- Governmental agencies





# Types of Claims

- Unfair and deceptive trade practices
- Fraud
- False advertising
- Public nuisance
- Private nuisance
- Trespass
- Negligence
- Conspiracy
- Securities fraud
- Shareholder litigation



# Recent Greenwashing Litigation Against Energy Companies

- February 2023 – A non-governmental organization filed a complaint with the SEC against Shell, claiming that it misled investors by overstating its financial investments in renewable energy sources
- June 2022 – Non-governmental organization sued utility, Washington Gas, for misleading customers with advertisements depicting methane gas as a clean fuel that can serve as an important climate solution
- March 2022 – Environmental organizations sued Total, claiming that its “reinvention” ad campaign violates European consumer law by misleading the public on what the company’s plans mean for the climate
- December 2019 – Environmental organization filed complaint against BP, claiming that it misled consumers about its focus on low carbon energy and solutions to climate change in advertising campaign

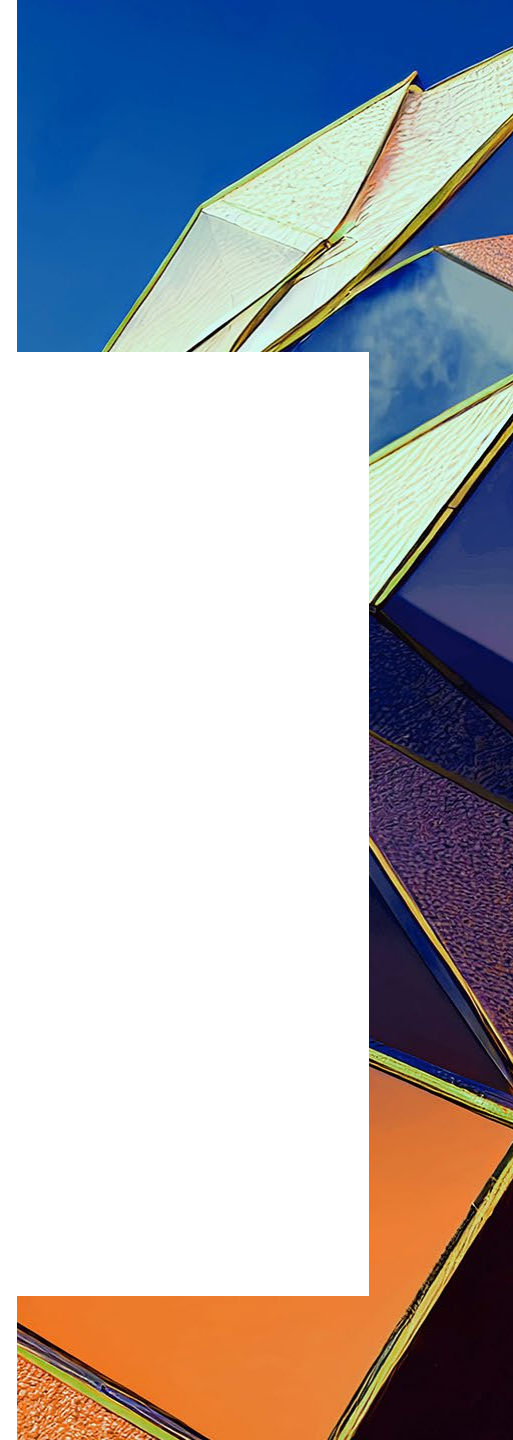
# Climate Litigation Against Energy Companies

- September 2023 – California sued ExxonMobil, BP, ConocoPhillips, Shell, Chevron, and API for deceiving the public by downplaying the risks posed by fossil fuels, and seeking the creation of a special fund to pay for recovery
- June 2023 – An Oregon county sued oil and gas companies for \$50B to counter harms caused by extreme weather fueled by climate change, alleging that they intentionally deceived the public about the dangers of burning their products for decades
- October 2022 – New Jersey sued ExxonMobil, BP, ConocoPhillips, Shell, Chevron, and API for concealing and denying their knowledge of fossil fuel consumption's impact on the climate



# Litigation Strategies Pursued

- Removing cases to federal court
- Invoking First Amendment free speech protections
- Filing motions to dismiss
- Discovery
- Settlements



# Mitigating the Risk

- Review the company's advertising and marketing campaigns
- Maintain or create internal policies and procedures that provide guidance
- Review FTC Green Guides and regulations to ensure compliance
- Review the company's environmental commitments, disclosures, and public filings
- Stay up-to-date with developments with greenwashing litigation

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