

SMOKE AND MIRRORS: THE LEGAL RISKS OF FOSSIL FUEL ADVERTISING

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A report by Clean Creatives

INTRODUCTION

We are in the midst of a climate emergency. Our world is becoming increasingly unlivable and unsustainable, which is largely a consequence of fossil fuels, a form of non-renewable energy which are the main cause of global warming. In 2021, carbon emissions reached an all time high of 36.3 gigatons, and fossil fuels and industry were responsible for [over 90%](#) of global CO2 emissions.

In the face of disaster, many people, companies and governments are urgently working to protect our climate. In 2015, over 190 countries signed the [Paris Agreement](#), an international treaty to reduce carbon emissions to limit global warming to preferably 1.5, if not 2 degrees Celsius (it is currently at 1.1-1.2 degrees Celsius). However, a [2019 report](#) from the United Nations Environment Program shows that the world is not on track to honor the Paris Agreement, primarily because the fossil fuel industry is on track to produce double the coal, oil, and gas that we can burn by 2030.

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We are unable to reach our climate goals because of fossil fuel companies. The Paris Agreement symbolized the beginning of a shift towards net-zero, but the World Benchmarking Alliance has [found](#) a “systemic lack of accountability and action” by the top 100 companies, who are predicted to “burn through the sector’s 1.5° C carbon budget by 2037.”

Fossil fuel producers have been able to mislead people about climate change with the support of advertising agencies who have helped them spin false or deceptive narratives. However, they’re not getting away with it anymore. As of May 2021, there were [1,841](#) ongoing or concluded climate litigation cases around the world, with legal developments on the rise.

Climate education is essential to protecting our planet. Article 12 of the Paris Agreement emphasizes that we need to inform people about the truth and reality of the climate crisis. However, that’s exactly what fossil fuel companies spend advertising money to conceal. Continuing to work with fossil fuel clients and the PR firms who represent them will put companies at great legal, business and reputational risk. Here’s what you should keep in mind about working with oil and gas clients.

SECTION 1: WE HAVE THE RECEIPTS: MISLEADING MARKETING IS BEING EXPOSED

Fossil Fuel Producers Are Deceiving Consumers About Their Environmental Impact

For decades, fossil fuel companies have been aware of their contributions towards climate change, but have consciously worked to spread climate disinformation through advertising rather than take responsibility.

The 2015 [Climate Deception Dossiers](#) published 85 internal memos from fossil fuel companies in the United States, showing that from 1981 onwards, fossil fuel companies have intentionally

deceived the public. They had evidence of the risks and environmental harm of their product, but chose to use advertising to promote uncertainty around climate change or declare that it was a hoax. As their partners, advertising agencies have been complicit in campaigns to deny climate science.

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For example, in 1991, coal companies in the United States formed a front group called the Information Council on the Environment “with the express purpose of deceiving the public about climate science” through advertising. They spent \$500,000 on a campaign to deny global warming, although internal documents show that they were aware of a proven “long-term warming trend.” In their strategy, they planned to target younger, low-income women whom they believed would “soften their support for federal legislation” after hearing the deceptive messaging in the campaign.

Similar information about deceptive campaigns has come to light in other countries, such as [TotalEnergies in France](#), who received warnings about the damaging environmental impact of its product as early as 1971, but only started to publicly accept climate science in 1997. Further evidence of disinformation has been revealed from Exxon, where a senior lobbyist was [captured on camera](#) admitting how the company “aggressively [fought] against some of the science” and “join[ed] some shadow groups to work against some of the early efforts.”

Even today, fossil fuel advertisers are participating in the most extreme form of greenwashing or climate-washing, selectively disclosing or sharing misleading information about their environmental performance and contributions to climate change. This is much more severe than other cases of greenwashing we see in the news, such as the [complaints filed](#) against

Innocent Juice for an advertising campaign that claimed to “fix up the planet” while promoting a product with single-use plastic, and has more devastating consequences. If a company falsely claims its product is eco-friendly, it’s a serious matter, but if a fossil fuel company denies its contributions to climate change or claims global warming is a hoax, it’s a disaster.

Currently, fossil fuel companies are using misleading communications and marketing to make consumers believe that they are helping to solve, instead of contributing to, climate change. Many are also trying to downplay or deny their responsibility for a problem they have created.

In [Shell’s advertising campaigns](#), they even admit that “Shell’s operating plans and budgets do not reflect Shell’s net-zero emissions ambition.” With [\\$84 billion](#) of the company’s capital investments going into fossil fuels since 2016, that is quite clear. Other companies are following suit, releasing advertising to promote sustainability efforts that a negligible amount of their money is going towards. Chevron used sustainability language like “renewable” and “clean” in [14 out of 22 ads](#) and 80% of their total airings between June 1, 2020 and August 31, 2021, but actually spent only [1.8%](#) (\$239 million) of their capital expenditures on non-oil and gas projects in 2020.

The Public is Concerned About the Climate and Holding Polluters Liable

Why are governments and courts beginning to hold fossil fuel companies accountable for their advertising and comms practices? It’s because we can no longer deny the severity of the climate crisis and the overwhelming responsibility of Big Oil and its advertisers for misleading the public for decades.

There is a growing global effort to financially divest from fossil fuels and hold fossil fuel companies accountable to their sustainability commitments, from new legislation to advertising

bans. The industry knows that sustainability is a business imperative, and continuing to work with fossil fuel clients or participate in the disinformation they are propagating may not just lead to reputational risk, but also jeopardize your bottom line.

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Climate justice is increasingly important to today's consumers. In the last year, the Edelman Trust Barometer reports a [51% increase](#) in people who say that addressing climate change has become more important to them. People are more prepared to speak up, with a 36% increase in those who say that speaking up when they see the need for changes and reforms has become more important to them. 50% of employed people say they are more likely now, versus one year ago, to voice their opinions to management or engage in a workplace protest. Agencies who continue to work with fossil fuel clients risk losing talent and facing serious backlash from their employees.

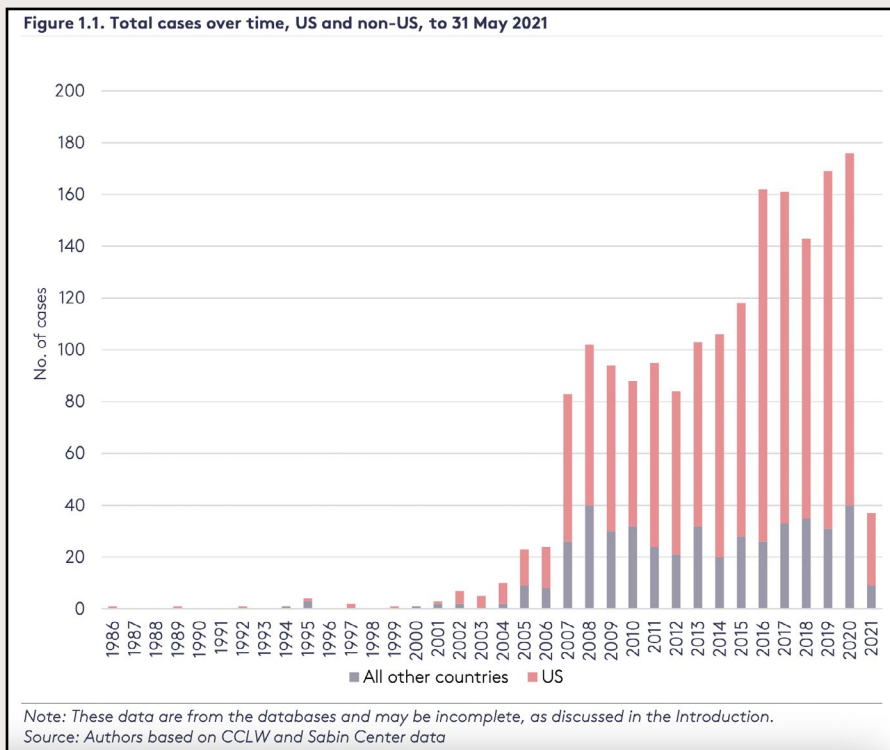
Marketing companies should be aware that people are paying attention and failing to meet their sustainability commitments can lead to legal action.

Many companies have set net zero targets without building clear and realistic strategies for how they will accomplish them. But the world plans to hold them accountable. At COP26 in November 2021, the United Nations announced a 'High Level Expert Group' to analyze companies' net zero commitments and an International Sustainability Standards Board to develop global baseline requirements for sustainability disclosure with investors. Tools like the [Corporate Climate Responsibility Monitor](#) have been built to assess the "transparency and integrity of companies' climate pledges and whether they are sufficient and credible. Marketing companies should be

aware that people are paying attention and failing to meet their sustainability commitments can lead to legal action.

SECTION 2: JUSTICE WILL BE SERVED: CLIMATE CHANGE LITIGATION IS CONFRONTING MISLEADING ADVERTISING

Cases Are Heating Up

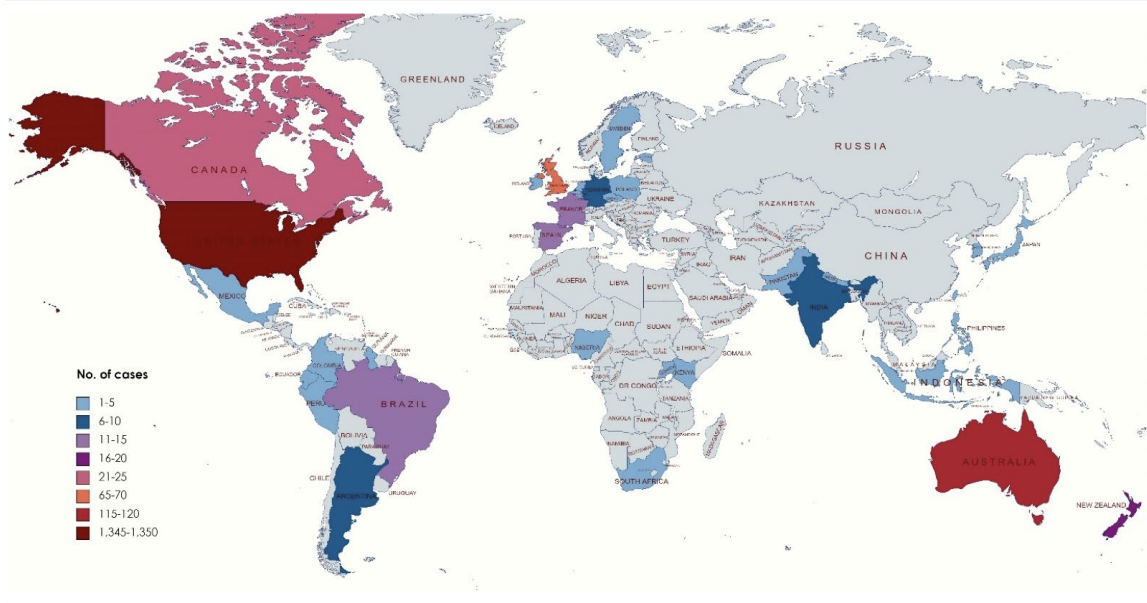


There is a tremendous wave of legal and regulatory activity focused on addressing fossil fuel advertising and PR, with over 100 [initiatives](#), campaigns, court cases, reports, pieces of scientific research and NGOs that are working to hold companies liable.

From 2015 to May 31, 2021, the [cumulative number](#) of climate-related cases has more than doubled, with [1,841 cases as of](#)

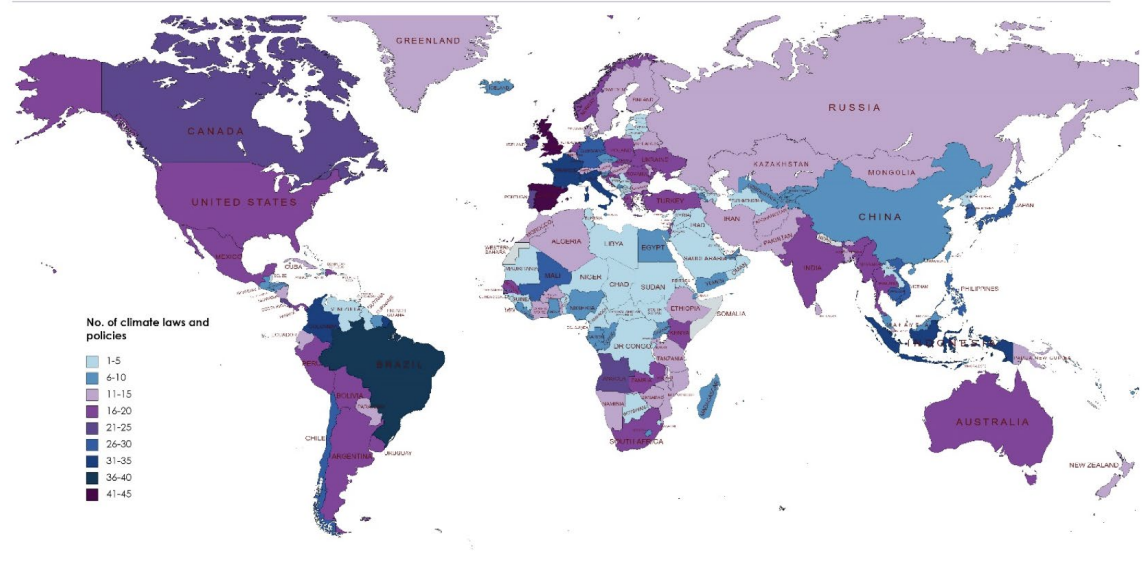
[May 2021](#). Although most of these cases are handled by U.S. courts, they represent 39 countries around the world. As of May 2021, 1,472 are active and 369 have concluded, with [58% of resolved cases](#) (218 cases in total) having outcomes that were favorable for climate action. Between May 1, 2020 and May 31, 2021, 191 new cases were filed globally, in contrast to the 140-170 cases filed annually from 2015-2019, which shows a significant rise in the number of new filings.

Figure 1.2. Number of cases around the world, per jurisdiction, to May 2021



Notes: Cumulative figures to May 2021. Map created with mapchart.net.
 Source: Authors based on CCLW and Sabin Center data

Figure 1.6. Number of climate laws and policies around the world, per jurisdiction, to May 2021



Notes: Cumulative figures to May 2021. Map created with mapchart.net
 Source: Authors based on CCLW

All charts: [Global trends in climate change litigation: 2021 snapshot](#)

(LSE's Grantham Research Institute on Climate Change and the Environment and The Centre for Climate Change Economics and Policy)

Legal Risks Are Multiplying

Fossil fuel companies are under increasing scrutiny for their advertising. Over the last few years, oil companies including ExxonMobil and Chevron have faced several climate liability lawsuits from U.S. cities such as San Francisco, Oakland and New York City to [7 states](#) including New York and Connecticut and Rhode Island. These include consumer fraud cases, deceptive trade practices, false advertising that violates codes, greenwashing, and cover-ups of industry knowledge of climate science.

The majority of current lawsuits in the U.S. deal with cost recovery and consumer protection. Cost recovery lawsuits seek compensation for climate adaptation costs like sea walls to protect from the environmental damage that fossil fuel companies have caused, and lied about. Consumer protection lawsuits seek a civil penalty for misleading consumers through advertising and other immoral business practices.

Climate change has been called a “serious issue of human rights” and an increasing number of human rights cases (currently 112) are being filed globally. This goes to show that people are recognizing that fossil fuel companies may not simply be deceiving them, but also actively denying them of their basic human [“right to a stable climate”](#). Climate change is also being recognized as a [racial justice issue](#), as it disproportionately impacts communities of color.

Governments Are Passing and Updating Laws to End Fossil Fuel Advertising

Outside of the courtroom, people and governments are working relentlessly on initiatives against fossil fuel advertising. They include Amsterdam banning all fossil fuel ads from public spaces, which inspired many other cities in the EU to do the same, media platforms like The

Guardian banning big oil ads, and advertising agencies such as ours refusing to work for the fossil fuel industry. In the UK, the number of ads banned for greenwashing by the Advertising Standards Authority (ASA) has [tripled in a year](#), with 16 campaigns which “exaggerated their company’s green credentials or made environmental claims that could not be backed up.”

Over the years, governments around the world have passed new laws and updated existing ones to regulate or ban fossil fuel advertising. Through these constant developments, many countries are closely monitoring fossil fuel companies’ marketing activities and holding them liable to their environmental and civil responsibilities.

The world is well aware of the fossil fuel industry’s deception and intends to hold them fully accountable in public opinion and a court of law.

For example, in 2005, The European Parliament and Council published the [Unfair Commercial Practices Directive](#) to prevent misleading advertising. In December 2021, they issued a [guidance](#) clarifying the implications for fossil fuel companies, including that “highly polluting industries should ensure that their environmental claims are accurate” and comparative environmental claims should be fairly measured and not misleading. In March 2022, the European Commission also proposed to [update](#) the EU consumer rules to “strengthen consumer protection” against greenwashing and misleading advertising.

Some EU member states have even gone one step further, such as France, where their parliament passed the [Climate and Resilience Law](#) in July 2021, which includes a ban on fossil fuel advertising. In 2028, the country will take this one step further and ban commercials for the highest polluting vehicles.

In the U.S., the House of Representatives' Committee on Oversight and Reform launched an [investigation](#) into “the fossil fuel industry’s long-running campaign to spread disinformation about climate change and greenwash its role in causing global warming.” Through a series of hearings which started in February 2022, Congress will determine whether “climate pledges made by fossil fuel companies Exxon, Chevron, Shell, and BP are adequate to address global warming...or are instead just the latest example of climate disinformation.” The world is well aware of the fossil fuel industry’s deception and intends to hold them fully accountable in public opinion and a court of law.

SECTION 3: HOW ADVERTISERS ARE GETTING BURNED: CASE STUDIES

ClientEarth v. BP

In December 2019, environmental law group ClientEarth filed a greenwashing complaint against supermajor oil and gas company BP, [claiming](#) that their latest advertising campaigns “Keep Advancing” and “Possibilities Everywhere” were “misleading consumers about its focus on low carbon energy.” ClientEarth also called for all fossil fuel advertising to be banned “unless it comes with a tobacco-style health warning about dangers to the planet and people.”

This was BP’s largest global marketing push in a decade, following the disastrous Deepwater Horizon spill of 2010. While drilling an exploratory well, BP’s oil rig exploded, killing 11 workers and releasing over 200 million gallons of crude oil into the Gulf of Mexico, which was the largest marine oil spill in history. That year, the company invested \$50 million into an advertising campaign to improve its reputation, which backfired and received criticism from the public and global leaders including President Barack Obama, who [called](#) the spill “the worst environmental

disaster America has ever faced” and said the money should have been spent on cleanup and compensating the workers and business owners who were affected.

BP’s ads led consumers to believe that BP was finding a solution, when in fact, they are responsible for the problem.



The “Keep Advancing” and “Possibilities Everywhere” campaigns were released in the U.S, U.K. and Germany and stated the company’s intention to “make energy cleaner”, suggesting it was transitioning to renewable energy, when in reality, the company had been

spending over 96% of its capital annually on oil and gas. The ads led consumers to believe that BP was finding a solution, when in fact, they are responsible for the problem, as the [6th largest fossil fuel contributor](#) towards carbon dioxide equivalent emissions from 1965 to 2017. The campaign also [suggested](#) that “increasing global energy demand, including greater use of gas in the coming decades, is essential to human progress,” when fossil fuels are the greatest contributor towards global warming.

The lawyers at ClientEarth filed a 100-page complaint to intergovernmental environmental organization OECD, the first of its kind to claim a fossil fuel-related breach of OECD’s guidelines for multinational companies. The guidelines [declare](#) that companies should “Not make representations or omissions, nor engage in any other practices, that are deceptive, misleading,

fraudulent or unfair,” and BP was violating them by deceiving consumers about their actual investment in clean energy and failing to acknowledge the reality of their contributions towards climate change.

By showing how BP is violating guidelines, ClientEarth appealed to the government to include tobacco-style warnings on their ads to warn consumers about the environmental damage of their products. “Make no mistake, this is a climate emergency,” Marjanac [said](#) to The Independent. “Meanwhile BP is doubling down on business as usual, running its biggest ad campaign since the Deepwater Horizon disaster to put up a shiny green facade for the public.”

Three months later, BP withdrew their “Possibilities Everywhere” campaign, [saying](#) that they would “stop corporate reputation advertising” and are focusing on “using that funding to actively advocate for progressive climate policies,” but it’s unclear whether any significant change has been made. Meanwhile, this case has inspired others, such as [ClimateEarth’s case](#) against TotalEnergies for the greenwashing in their “Reinvention” campaign which “falsely portrays the company as on track to address the climate crisis [through] questionable carbon neutrality claims.”

Honolulu v. Big Oil (including BP, Chevron, ExxonMobil and Shell)

In 2020, the City and County of Honolulu, Hawaii filed a groundbreaking lawsuit against Big Oil companies including BP, Chevron, ExxonMobil and Shell seeking damages related to disinformation and negative climate impacts from fossil fuel companies.

The lawsuit indicates the severe effect of climate change on Hawaii, from rising sea levels to flooding to decreasing fish populations, and is the first in the United States to use state tort law to seek damages from fossil fuel companies’ disinformation campaigns.

“We are facing incredible costs to move critical infrastructure away from our coasts and out of flood zones, and the oil companies that deceived the public for decades should be the ones helping pick up the tab for those costs—not our taxpayers,” [said](#) City Council Chair Tommy Waters. “Their behavior demonstrates how large corporations value their own profit over public health and safety,” shared Councilmember Radiant Cordero.

Although over [two dozen similar cases](#) have been filed since 2017, this case is historic as it is [the first](#) where a climate nuisance case has “survived [fossil fuel companies’] motions to dismiss” and will proceed to trial.

“The oil companies that deceived the public for decades should be the ones helping pick up the tab for those costs—not our taxpayers.”

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“Honolulu’s victory is a watershed moment for efforts to hold oil companies accountable and make them pay for the enormous costs that their lies and pollution have forced on taxpayers,” [said](#) Richard Wiles, president of the Center for Climate Integrity. “This development should send a message to communities across the country that the legal case for making polluters pay for lying about fossil-fueled damages is strong and defensible.”

Milieudéfensie et al. v. Shell

In 2018, Friends of the Earth Netherlands (Milieudéfensie) filed a lawsuit against Shell, stating in their [court summons summary](#) that the company is “violating its legal duty of care” to the public, “endangering human rights and lives”, and must reduce its CO2 emissions to comply with the Paris Agreement. The case was later joined by 6 other organizations and 17,000 Dutch

citizens. Lawyers [claimed](#) that Shell was “breaching article 6:162 of the Dutch civil code and violating articles 2 and 8 of the European convention on human rights — the right to life and the right to family life — by causing a danger to others when alternative measures could be taken.” In a PDF summary of [Milieudefensie’s court summons](#), the case also refers to the company’s deceptive advertising through “PR campaigns that misled the public about Shell’s real intentions.”

This was one of the first cases that used the Paris Agreement’s temperature limit to enforce a legal standard of conduct.

In May 2021, the case was passed by the Hague District Court in the Netherlands, who ordered Shell to “at once” start to reduce its CO2 emissions by 45% by 2030 to stay in line with the Paris Agreement’s 1.5° C global warming limit. It also acknowledged that Shell is responsible for the emissions of its customers and suppliers.

In March 2022, Shell appealed the judgment. This was one of the first cases that used the Paris Agreement’s temperature limit to enforce a legal standard of conduct, even though the Paris Agreement is non-binding upon private actors. It set an important precedent where the Paris temperature goals were used to enforce legal action, and held Shell responsible.

This case is especially powerful because it’s easily replicable due to its reliance on the international standards of the Paris Agreement, making it much more straightforward for people to file lawsuits against any company who has made a net-zero commitment without evidence of any tangible action.

In the past, Shell has been sanctioned several times for misleading advertising, such as their “Carbon Neutral” campaign in August 2021 which claimed that customers can offset the carbon emissions from their fuel purchases, by paying an extra fee towards Shell’s drive to plant trees and reabsorb CO2. However, Shell had no proof to support these claims, so Dutch officials ordered the company to stop the campaign.

In March 2022, a complementary action was [launched](#) by ClientEarth in the U.K., taking legal action against Shell’s board for its insufficient climate strategy. “In failing to properly prepare the company for the net-zero transition, Shell’s board is increasing the company’s vulnerability to climate change, putting the long-term value of the company in jeopardy,” [said](#) climate accountability lawyer Paul Benson.

CONCLUSION: AGENCIES SHOULD CHOOSE WHAT THEY CREATE

1. All major oil and gas companies are facing substantial legal and regulatory risk.

The advertising industry works with clients who are responsible for making our world increasingly inhabitable. Our 2021 report [The F-List](#) shows that the top 5 advertising holding companies (WPP, IPG, Dentsu, Publicis and Omnicom) all currently work with fossil fuel clients to improve their public image and reputation while they continue to pollute the Earth. By continuing to partner with these clients, agencies and PR firms are part of the problem.

2. This is no longer just about reputation. Advertising and PR agencies are also susceptible to legal and regulatory risks.

Many agencies may not even be aware of the extent to which their clients are withholding information from them which could lead to legal action. We may believe we are changing the industry, when in fact, we are unknowingly peddling misinformation. Agencies are not immune

against litigation — public interest may supersede contractual arrangements with fossil fuel companies. Working with clients that cause harm can seriously cost you. In 2020, McKinsey & Company was forced to pay nearly [\\$600 million](#) for marketing advice given to opiate makers. The marketing industry has a responsibility to the climate and needs to work towards the limitation of the global temperature increase.

3. Your voice matters.

No matter what capacity you work in, you have an influence. We create work that moves people; we shouldn't be complicit in deceiving the public. You can work to convince your company to stop working with fossil fuel clients or at least think more critically about your involvement in the climate crisis. According to the [2021 Edelman Trust Barometer](#), 76% of employees say they will “take action to produce or motivate urgently necessary changes within their organization” and 61% would “choose, leave, avoid or consider employers based on their values and beliefs.” Everyone who works in the industry, from copywriters to CSOs, can choose to create clean.

Clean Creatives

We created [Clean Creatives](#) as a solution for the industry, to give agencies and employees a resource to hold our companies and business partners accountable to creating a more sustainable future. If you would like to take a stand with us, join the 700+ creatives and 250+ agencies who have [signed our pledge](#) to decline future contracts with the fossil fuel industry or agencies that retain fossil fuel clients.

If you'd like to learn how you can support our efforts or make change within your company, connect with us at duncan@fossilfree.media.