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Are Climate Change Disclosure Cases A New Trend?

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Law360, New York (November 19, 2015, 9:53 AM ET) -- New York Attorney General Eric T. Schneiderman may be leading the way again. In the past, the office has led groundbreaking investigations using New York's Martin Act that presaged significant U.S. Securities and Exchange Commission investigations and actions. Now the NY AG has filed a "first-of-its-kind" settlement with the world's largest coal producer, Peabody Energy Corp. Using the Martin Act and statements made by the company in its filings with the SEC as well as other public statements, the NY AG charged Peabody with repeatedly making false and materially incomplete statements regarding climate change. In the Matter of Investigation by Eric T. Schneiderman, Attorney General of the State of New York of Peabody Energy Corporation, Assurance No. 15-242 (Nov. 9, 2015).

The assurance of discontinuance of the above-captioned investigation makes two key findings: first, that Peabody's statements violated the Martin Act and other statutes because the company "denied its ability to reasonably predict the future impact of any climate change regulation on its business, while the company and its consultants projected severe impacts from certain potential regulations that would materially affect ..." the company. Second, the company repeatedly made materially incomplete statements regarding the position of the International Energy Agency or IEA, omitting its less-favorable projections. In essence, the firm repeatedly misled investors regarding its future prospects using a series of false and materially incomplete statements.

The false statements date back to 2011, according to the investigative findings. In its 2011, 2012, 2013 and 2014 SEC Form 10-K annual reports, Peabody repeatedly denied its ability to reasonably predict the impact on its future business from any future law or regulation relating to greenhouse gas emissions generated from the combustion of coal. Yet, the firm had in fact made market projections:

- In March 2013 the firm projected that "if a specific aggressive regulatory action scenario for existing power plants and future electricity generation were to be implemented ... it would in 2025 reduce the dollar value of sales ... [in one area] by 38% ... [and in another by] 33% ..." and

- In March 2014 the firm hired an outside consulting firm "which projected that enactment of a $20 per ton carbon tax would reduce the demand for coal ... between 38% and 53% compared to 2013 levels."

Also, the firm in "numerous SEC filings ... and other public communications ... [provided an] incomplete discussion of the findings and projections of the International Energy Agency ... [omitting] less favorable IEA projections for future coal demand." The IEA is considered the "world's leading authority on future global energy development." It makes projections about world coal demand based on various scenarios it calls the New Policies Scenario, which is the central scenario; the Current Policy Scenario, which is the high case for coal usage; and the 450 Scenario, which is the low scenario. The IEA does not endorse a particular scenario.

Peabody in public statements repeatedly referred to the Current Policy Scenario while omitting the others. For example:

- In its 2011 Form 10-K annual report, the company cited statistics for future coal use from the Current Policies Scenario without referencing the less favorable projections in the New Policies Scenario and the 450 Scenario.

- In its 2012, 2013 and 2014 Form 10-K annual reports, and in other public statements, the firm essentially repeated the one-sided presentation by presenting IEA statistics from the Current Policy Scenarios but not the much-less-favorable others.

To resolve the investigation, Peabody agreed: 1) to make corrective disclosures in its next Form 10-Q filing with the SEC; 2) that in any future SEC filings and communications with shareholders, the financial industry, investors, the general public and others it will not make inconsistent disclosures with those agreed to here; and 3) that it shall not represent in any public communication that it cannot reasonably project or predict the range of impacts that any future laws or regulations related to climate change may have on its business.

While the Peabody investigation may be the first of its kind, it is not the last. Currently the New York attorney general is investigating climate change statements made by Exxon Mobil Corp., according to disclosures made by the company following a report in the Los Angeles Times. Four members of Congress from the House Oversight and Government Reform Committee have also sent a letter to SEC Chair Mary Jo White requesting that "your agency investigate ExxonMobil's past filings to determine if securities laws were violated by failing to appropriately disclose material risks related to climate change."

While the initial focus is on two energy companies, there is little reason to believe that this issue is confined to those firms. To the contrary, the New York attorney general appears to have set the stage for a new round of SEC investigations as he has done in the past that may well extend to other companies making statements about how questions like climate change may impact future business prospects.

—By Thomas O. Gorman, Dorsey & Whitney LLP

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