Who’s afraid of New York’s Martin Act? Right now, a lot of Wall Street and energy industry companies, that’s who. Why are they concerned about the Martin Act? Because it grants the New York State Office of the Attorney General (NYAG) power to aggressively scrutinize the public statements of energy companies on the subject of climate change. Many other states’ attorneys general have also indicated that they will step up climate change-related investigations in their jurisdictions. This client alert focuses on strategies for managing and obtaining insurance coverage for such investigations.

Background: Under the Martin Act, NYAG Ramps Up Investigations of Energy Companies’ Climate Change Disclosures

Enacted in 1921 to deter fraud in the sale of securities and commodities, the Martin Act has been reinvigorated by the New York State Office of the Attorney General to aggressively scrutinize the public statements of energy companies on the subject of climate change. The Martin Act generally gives NYAG exceptionally broad powers to bring civil and criminal actions against suspected perpetrators of securities fraud. Unlike certain federal securities provisions, this state “blue sky” law does not require the government to prove scienter (intent to defraud), or show that investors acted in reliance upon allegedly fraudulent statements or suffered damages as a result.

In 2007 and 2008, using its authority under the Martin Act, NYAG opened investigations into the climate change disclosures of publicly-traded utilities doing business in New York. These investigations resulted in Assurance of Discontinuance agreements with the targeted utilities, i.e., negotiated settlements containing
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stipulated findings and remedies to further the goal of accurate disclosure. The agreements were influential in the development of the SEC’s climate change disclosure document, which was issued in February of 2010.\(^1\) The guidance contained in the SEC’s disclosure document has been applicable to annual reports on Form 10-K and other SEC filings made subsequent to its issuance.

In 2013, NYAG launched an investigation into the adequacy of the climate change disclosures of Peabody Energy Company. In November 2015, Peabody resolved that investigation by entering into a settlement in which it agreed to make more detailed disclosures to investors about the financial risks faced by the company from changes in policies and regulations on climate change and other environmental issues that could reduce the demand for coal and thus affect the company’s profitability.\(^2\) Also in November 2015, the New York Attorney General issued a subpoena to ExxonMobil Corporation, again using its authority under the Martin Act. The subpoena sought documents related to the company’s research into the effect that climate change could have on the company’s business.\(^3\)

**Other Attorneys General Join the Effort**

In the months following these developments in New York, a group of state attorneys general from 17 jurisdictions announced a cooperative effort called “AGs United for Clean Power.” This coalition consists of the attorneys general of California, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington State, as well as the attorneys general of the District of Columbia and the Virgin Islands. This coordinated enforcement approach has been compared to the efforts of various attorneys general to investigate misleading public statements of the tobacco industry regarding the dangers of cigarette smoking. AGs United for Clean Power may also seek to recruit other state attorneys general to join the cause. Finally, U.S. Attorney General Loretta Lynch has publically acknowledged that the Department of Justice is evaluating the possible pursuit of civil actions against those who deny the effects of climate change in their public statements to investors, and that the FBI is assessing the potential involvement of federal law enforcement.

Thus, there is escalating effort to bring pressure to bear on companies with respect to their public securities statements on the effects of climate change. Although the details of future enforcement activity are not clear, it is reasonable to expect increasing government scrutiny of climate change related disclosures. We discuss below steps which companies can take to prepare for any such investigation, specifically, initial management strategy and assessment of the availability of insurance coverage.

**Strategies for Managing and Responding to Civil Investigative Demands and Subpoenas**

Targets of climate change-related investigations should consider the following initial steps. Review the subpoena, Civil Investigative Demand (CID) or other investigative demand carefully. Ensure that you understand the scope of information requested, terms used, and time frame affected. It is highly advised that counsel experienced in handling subpoenas be consulted. Counsel can begin the conversation with the issuing
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When government officials seek to fully understand the information being requested by the Government, Counsel can also help to evaluate whether the scope of the request is overly broad and could be narrowed to (i) effectively target the relevant information sought by the Government, and (ii) efficiently respond to the Government’s requests and minimize the disruption that collecting such information entails.

Importantly, any recipient of requests should promptly issue document preservation directives to the appropriate custodians likely to have relevant information. Proper response to such requests is critical. Depending on the circumstances, an internal investigation may be appropriate to fully understand risks and liabilities that may flow from the Government request.

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