VALE'S ESG DISCLOSURES LEAD TO REGULATORY AND SHAREHOLDER LITIGATION

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U.S. Litigation and Dispute Resolution Alert

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On 28 April 2022, the Securities and Exchange Commission (SEC) filed suit against Vale S.A. (Vale), a publicly traded Brazilian mining company and one of the world's largest iron ore producers, alleging that Vale had made false and misleading claims about the safety of its dams prior to the January 2019 collapse of its Brumadinho dam.[1] The collapse killed 270 people, caused immeasurable environmental and social harm, and resulted in losses of more than US$4 billion in Vale's market capitalization.

The SEC alleges that between 2016 and 2019, Vale manipulated safety audits, obtained fraudulent stability certificates, and misled local governments, communities, and investors about the safety of the Brumadinho dam through its environmental, social, and governance (ESG) disclosures. Specifically, the SEC alleges that "Vale knowingly or recklessly obtained eight fraudulent and deceptive stability declarations in connection with corrupted audits of the Brumadinho dam."[2] The Complaint alleges that when Vale obtained these stability declarations, Vale knew they were based on unreliable and flawed laboratory data or a flagrant disregard for minimum standards of safety that Vale purported to follow. Vale knew that assessments of the Brumadinho dam, based on best engineering practices, had revealed that the dam did not even meet Vale's own safety standards much less international standards for dam safety.[3]

The SEC further alleges that Vale "obtained these fraudulent stability declarations through a pattern of deceptive acts" and "removed auditors when they refused to bend to Vale's will and utilized 'blackmail' to coerce other auditors to comply with Vale's demands."[4]

According to the SEC, Vale also falsely claimed in investor reports that all of its dams were certified to be in stable condition[5] and publicly declared its "'commitment to sustainability' and achieving 'zero harm' to employees and surrounding communities."[6] These representations, according to the SEC, were false. In its Complaint, the SEC noted that Vale raised nearly US$1 billion on U.S. debt markets during this period.[7]

The SEC's complaint, filed in U.S. District Court for the Eastern District of New York, seeks injunctive relief, disgorgement plus prejudgment interest, and civil penalties. "Many investors rely on ESG disclosures like those contained in Vale's annual Sustainability Reports and other public filings to make informed investment decisions," said Gurbir S. Grewal, Director of the SEC's Division of Enforcement.[8] "By allegedly manipulating those disclosures, Vale compounded the social and environmental harm caused by the Brumadinho dam's tragic collapse and undermined investors' ability to evaluate the risks posed by Vale's securities."[9]

The action against Vale is the result of an investigation by the SEC's Climate and ESG Task Force. In 2021, the SEC formed the Climate and ESG Task Force in the Division of Enforcement with a mandate to both identify material gaps or misstatements in issuers' ESG disclosures, such as the false and misleading claims allegedly

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made by Vale, and analyze investment advisers' and funds' ESG strategies. The Vale action indicates a clear direction by the SEC toward more aggressive enforcement of ESG disclosures.

The collapse of the dam also spawned a civil shareholder class action suit against Vale and certain of its senior executives, which is currently pending in the United States District Court for the Eastern District of New York.[10] In that action, commenced on 28 January 2019, shortly after the dam collapse, plaintiffs allege Vale and its senior executives violated Section 10(b) of the Exchange Act and Rule 10b-5 and Section 20(a) of the Exchange Act by making materially false and misleading statements regarding Vale's business and its assessment of the risk and potential damage of the dam collapse, as well as the adequacy of Vale's programs to mitigate health and safety incidents. Specifically, the operative complaint in the action alleges that the scope of Vale's misstatements was exacerbated by the company's public commitments to minimize environmental damage following a 2015 dam collapse at a mine in Brazil that Vale jointly-owned.

On 20 May 2020, the court denied the defendants' motion to dismiss. Notably, the court rejected the defendants' argument that certain of Vale's statements about safety and sustainability were too generic to be actionable, finding that “because it repeatedly emphasized its commitment to such priorities, Vale put the topic at issue such that the Court cannot say that, as a matter of law, investors would not find certain representations material.”[11] Thus, the court determined that statements such as “sustainability is part of the core business” and “it is necessary for the mining company to be environmentally, socially, and economically sustainable for its survival” are potentially actionable.[12] On 31 March 2022, the court granted plaintiff's motion for class certification.[13]

The tragic dam collapse reflects the broad scope of risks that ESG issues can lead to, in this case resulting in both regulatory and shareholder class action litigation. Although Vale through its ESG disclosures declared its commitment to safety and sustainability as a core aspect of its business, Vale's senior executives are alleged to have engaged in widespread governance misconduct by ignoring safety issues, obtaining false audit reports, and misleading investors about the safety and sustainability of its dam, the collapse of which caused severe environmental damage to the community. In light of the increased scrutiny of ESG disclosures by regulators, investors, and consumers, public companies must ensure they have robust auditing measures in place to ensure the accuracy of their disclosure and mitigate the risks arising from them.

FOOTNOTES

[1] Complaint & Demand for Jury Trial, Securities and Exchange Commission v. Vale S.A., No. 22-cv-2405 (E.D.N.Y. Apr. 28, 2022) (Compl.).

[2] Compl. at ¶ 13.

[3] *Id*. at ¶ 14.

[4] *Id*. at ¶ 15.

[5] *Id*. at ¶ 237.

[6] *Id*. at ¶ 9.

[7] *Id*. at ¶ 273.

[8] SEC Press Release, *SEC Charges Brazilian Mining Company with Misleading Investors about Safety Prior to*

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Deadly Dam Collapse, (Apr. 28, 2022), available at https://www.sec.gov/news/press-release/2022-72.

[9] *Id*.

[10] In re Vale S.A. Securities Litig., C.A. No. 19-CV-526-RJD-SJM (E.D.N.Y).

[11] Mem. and Order at 22, D.I. 74, In re Vale S.A. Securities Litig., C.A. No. 19-CV-526-RJD-SJM (E.D.N.Y).

[12] *Id*.

[13] Order Adopting R. & R., D.I. 116, In re Vale S.A. Securities Litig., C.A. No. 19-CV-526-RJD-SJM (E.D.N.Y).

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