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Developments in Global Climate-Change Regulation

ENVIRONMENTAL LAW

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Special to the Legal

Feb. 16 marked a milestone in the international effort to address global climate change. On that day, the Kyoto Protocol came into force — without the United States' participation.

The United States' failure to adopt the Kyoto Protocol, however, does not mean that U.S. companies and the attorneys who represent them can safely ignore climate-change issues. To the contrary, a varied and dynamic set of laws, regulations and incentives directed toward limiting the emission of so-called greenhouse gases (GHGs) such as carbon dioxide continues to develop at the international, national and local level.

As these efforts to regulate GHG emissions unfold, U.S. businesses will be forced to take into account what is currently a patchwork of GHG regulatory regimes. The following article outlines some of the regulatory programs related to global climate change that even local businesses might need to consider in the near future.

INTERNATIONAL RESPONSE

The international community first addressed the issue of global warming in 1992 through the United Nations Framework Convention on Climate Change (UNFCCC), through which participating countries, including the United States, agreed to inventory greenhouse gas emissions, formulate national strategies to

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reduce such emissions, and cooperate to promote development of technologies that reduce GHG emissions. The effort to achieve the goals of the UNFCCC led to the adoption of the Kyoto Protocol in 1997. The Kyoto Protocol sets individual GHG-emission targets that developed countries — called Annex I Parties — must achieve by 2012, with the U.S. target set at 7 percent below 1990 emission levels.

The subsequent Marrakesh Accords, adopted in 2001, established three market-based mechanisms to assist the Annex I parties in achieving their Kyoto emission targets: international emissions trading; joint implementation, which allows Annex I parties to receive credit for sponsoring emission reductions in other Annex I countries; and the "clean development mechanism," which allows Annex I parties to receive credit for emission reduction investments in developing countries.

While the U.S. has refused to participate in the Kyoto Protocol, many countries have enacted GHG-emission limits and reduction programs that would apply to any U.S. corporation's operations within those borders. Further, the lack of U.S. participation means that domestic businesses may be shut out of what promises to be a lucrative international emissions-trading market.

FEDERAL PROGRAMS

To date, the federal government has declined to adopt a mandatory regulatory program to limit GHG emissions as an alternative to the Kyoto Protocol. In fact, the USEPA, in response to an administrative petition, determined in 2003 that the Clean Air Act did not grant it the authority to regulate carbon dioxide and other GHGs. Subsequently, a coalition of 12 states, including New Jersey, challenged this in the D.C. Circuit Court of Appeals decision *Commonwealth of Massachusetts v. EPA*. The D.C. Circuit heard oral arguments this past April, and a decision may come later this year.

In place of mandatory GHG-emission caps and reductions, the Bush administration has pursued a series of voluntary, incentive-based initiatives. For example, President Bush's 2002 Clear Skies Program included a commitment to reduce GHG intensity (i.e., the amount of GHG emission per unit of economic activity) by 18 percent. The Clear Skies Program also included improvements to the Department of Energy's voluntary GHG-emission-reduction registry, initially established under the 1992 Energy Policy Act. These improvements to the registry, which include the ability to request domestic and international emission reductions and bank them as cred-

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it towards any future U.S. GHG policy, were published in the *Federal Register* in March, remain open for public comment until June 22 and are expected to become effective in September. In total, according to the White House, during the past two years the Bush administration has pursued more than 25 programs designed to address climate change issues.

Congress has also been active in the climate change area, introducing a number of bills related to GHG emissions. According to the Pew Center on Global Climate Change, nearly 100 legislative proposals concerning climate change were introduced during the last Congressional session. During the current session, senators John McCain, R-Ariz., and Joseph Lieberman, D-Conn., re-introduced the Climate Stewardship Act, which proposes a cap and trade system to reduce carbon dioxide emissions to 2000 levels by 2010. The same bill, however, was previously defeated, making its prospects during the current session somewhat uncertain.

ADDITIONAL EFFORTS

The federal government's current reluctance to implement a comprehensive, mandatory climate-change program has given an opportunity for regional, state and local regulatory authorities to step in and attempt to implement their own climate change programs. One of the more aggressive states is California, where the California Air Resources Board last fall adopted the first regulations to limit GHG emissions from vehicles.

A coalition of automobile manufacturers and auto dealers filed suit in the U.S. District Court for the Eastern District of California to block the regulations, arguing, in part, that the GHG emission limits the amount to "de-facto" fuel economy standards that only the Department of Transportation's National Highway Traffic Safety Administration may establish. The outcome of that case, *Central Valley Chrysler v. California Air Resources Bd.,* could have effects that reverberate across the country, as a number of northeastern states have traditionally chosen to adopt California's auto emission rules.

Staying in the east, nine states, including New Jersey and Delaware, are participating in a cooperative effort to reduce GHG emissions from power plants through a regional cap and trade system called the Regional Greenhouse Gas Initiative (RGGI). Pennsylvania, while not a participant in the RGGI, is an "observer." The RGGI's original goal was to have an agreement among the participant states by April 2005, but that deadline has passed without an agreement. Nevertheless, in anticipation of an agreement, New Jersey proposed a rule last fall that would make it the first state in the country to classify carbon dioxide as an air contaminant.

While at this point Pennsylvania is only an "observer" in the RGGI program, it too has taken a number of steps to address GHG emissions. Most recently, Gov. Edward G. Rendell signed into law Act 213 of 2004, or the Alternative Energy Portfolio Standards Act. This act will require that by 2020, 18 percent of electricity sold to retail customers in Pennsylvania include electricity generated from various alternative energy sources.

To support this effort, Rendell also signed the Alternative Fuels Incentive Act (Act 178), which provides the Pennsylvania Energy Development Authority (resurrected under the auspices of the Department of Environmental Protection by an earlier executive order) with $10 million to finance alternative energy projects. In April, the authority released guidelines for obtaining financial assistance for "innovative, advanced energy research and deployment projects, and for businesses interested in locating their advanced energy operation" in Pennsylvania.

Pennsylvania's climate change activity may not stop with alternative energy mandates and incentives. This past February, state Rep. Greg Vitali, D-Delaware, introduced the Greenhouse Gas Reduction Act (H.B. 500), which would require the Department of Environmental Protection to create an annual GHG-emission inventory, publish a report on the impact of global warning in Pennsylvania, and develop a GHG "plan of action" to reduce GHG emissions in Pennsylvania. While the bill does not propose any specific limits for or controls upon GHG-emission sources, if enacted, it could be a first step towards imposing mandatory GHG restrictions.

Even cities have stepped into the global climate-change arena. Seattle Mayor Greg Nickels has spearheaded an effort to get U.S. mayors to sign onto a document called the U.S. Mayors Climate Protection Agreement. Signatories to this agreement agree to "strive to meet or exceed" the Kyoto Protocol's 7 percent reduction target for the U.S. According to Nickels' office, 137 mayors have signed the agreement, including New York Mayor Michael Bloomberg and Los Angeles Mayor James Hahn. Nickels also plans to seek an endorsement of the agreement from the U.S. Conference of Mayors at their annual meeting in June.

LEGAL PROCEEDINGS

The people that may have the most immediate impact upon the climate-change issue might not be elected lawmakers, but rather judges and juries hearing common law tort claims that allege harm from GHG emissions and global warming.

For example, in a case reminiscent of recent tobacco litigation, last summer eight attorneys general and three land-trust organizations filed lawsuits in the Southern District of New York against five large energy suppliers alleging that the carbon dioxide emissions from the defendants' power plants contribute to the public and private nuisance of global warming and entitle the plaintiffs to relief under federal and state common law (*State of Connecticut et al. v. American Electric Power et al.* and *Open Space Institute, Inc. et al. v. American Electric Power et al.*).

The complaints do not ask for monetary damages, but instead seek an order that holds the defendants jointly and severally liable for contributing to an ongoing nuisance, caps the defendants' carbon dioxide emissions, and requires specific reductions in carbon dioxide emissions for the next decade. All of the defendants have filed motions to dismiss based upon jurisdictional grounds and a failure to state a claim. The briefing on these motions closed in March, and they are currently pending before Judge Loretta A. Preska.

INVESTOR ACTION

Finally, in addition to pursuing climate change issues through legislation and litigation, advocates of GHG emission reduction have turned to the boardroom in order to get results. According to the Coalition for Environmentally Responsible Economics (CERES), investors have filed more than 30 resolutions during the 2005 proxy season requesting companies to analyze and disclose their financial risk related to climate change issues. These resolutions are not empty, symbolic proposals.

CERES reports that similar proposals last year garnered support as high as 37 percent, with seven proposed resolutions withdrawn after the companies agreed to undertake climate risk assessments. Similarly, CalPERS, the

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California pension fund with over $182 billion in assets, recently approved a shareholder initiative calling for companies to join existing efforts to disclose business risks associated with climate change.

Major U.S. corporations have begun to take notice. Ford Motor Co., for example, recently announced that it will produce a report this year analyzing its various business policies and their impact on GHG emissions. And Jeffrey Immelt, the chairman and CEO of General Electric Corp., recently announced that GE would embark upon a program to reduce its own GHG emissions, while also developing and marketing clean energy technologies that could generate revenues of $20 billion by 2010.

THE FORECAST

Exactly how the climate-change issue will play out for potentially affected corporations is just as difficult to predict as the potential effects of climate change itself. It is clear, however, that the varied climate change regulations and initiatives will present unforeseen risks — and opportunities — that will require even local businesses and the attorneys who advise them to become familiar with and remain apprised of the changing regulatory regimes related to GHG emissions. •

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