

Green-house Counsel

sponsored by

MANKO | GOLD | KATCHER | FOX_{LLP}

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE



ARE YOU A LIABILITY?

ETHICAL ISSUES AND THE DISCLOSURE OF POTENTIAL LIABILITY ARISING FROM GREENHOUSE GAS REGULATION

by [Bart E. Cassidy](#) – Partner, Manko, Gold, Katcher & Fox, LLP

During the past several years, few issues in environmental law have received the attention, and have such broad implication for potential change, as [greenhouse gas \(“GHG”\) regulation](#). Unlike the more traditional areas of regulatory focus, virtually every operating business contributes [GHG emissions](#). The global warming debate has raged for decades, preventing any clear regulatory direction in the United States. However, several significant developments in the last several years have dramatically changed that landscape; these changes require in-house counsel to evaluate their approach toward financial disclosures. In the face of these developments, counsel should begin to question their disclosure obligations relative to potential liability arising from GHG emissions if they have not already.

First, the United States Supreme Court issued a decision in [Massachusetts v. EPA](#), determining that EPA has authority to regulate GHG emissions under the federal [Clean Air Act](#). Second, several courts have now determined that public or private entities may proceed with actions in nuisance against companies emitting GHGs, alleging that such companies’ emissions cause or contribute to global warming, posing significant risks, at least in coastal communities.

Third, EPA has now promulgated a [regulation](#) – the first federal regulation in the United States specifically targeting GHG emissions – which requires reporting of greenhouse gas emission rates for certain sources. At the same time, EPA has initiated a separate [rulemaking effort](#) which would, if promulgated, result in emission control requirements for certain new or modified sources of GHGs.

The Security and Exchange Commission’s (“SEC”) [Regulation S-K](#) establishes disclosure requirements for certain business operations under the [Securities Act of 1933](#) and/or the [Securities Exchange Act of 1934](#). In general, these disclosure/reporting requirements extend to issues posing “material risks” to the financial condition of the company. The SEC has not issued any determination or relevant guidance specific to this issue. A group of nonprofit organizations and investors petitioned the SEC, requesting interpretive guidance “confirming” that public companies should disclose the potential financial liabilities arising from compliance with “foreseeable” climate change regulations or litigation. The SEC has not issued any such determination, but has made public statements acknowledging that a determination in this context may be appropriate.

- more -

ARE YOU A LIABILITY? (cont'd)

Although this issue may not be clearly resolved as a legal matter, in-house counsel nonetheless confront a current question of whether the risk of material financial exposure is sufficiently foreseeable to support a disclosure, in light of the recent federal regulatory activity and significant determinations by federal courts. Such requirements have arguably become more foreseeable following President Obama's recent statements that the United States will discuss a commitment to achieve a 17 percent reduction in GHGs by 2020 as part of the [international climate change discussions in Copenhagen](#) during December.

Of course, even to the extent that a company determines that GHG regulation and/or litigation is foreseeable in the current environment, quantifying any "material risk" of loss associated with such legal developments raises even greater challenges. In this context, counsel must evaluate the opportunities to enhance the protection of shareholders/investors by undertaking such analysis. The point here is not that disclosure is clearly warranted or even appropriate under the current circumstances. Instead, in-house counsel may now be in a position to evaluate the degree of shareholder protection that can be advanced by undertaking an analysis of "foreseeable" impacts from climate change regulation or litigation, determining whether such impacts are estimable and should be disclosed, and potentially accounting for such considerations in strategic planning.

Association of Corporate Counsel, 2009 All Rights Reserved, www.acc.com