

Recent Developments Regarding Climate Change

Although it has been widely reported that cap-and-trade legislation is “dead” due to the loss of the filibuster-proof Democratic majority in the United States Senate and other political developments, the Executive Branch appears to be continuing the push for action regarding greenhouse gas emissions and other climate change issues. In addition to the Endangerment Finding and new emissions reporting requirements adopted by the Environmental Protection Agency, discussed in our December 2009 Client Alert, the Obama Administration has recently taken two noteworthy actions at an administrative level, discussed below.

SEC Issues Climate Change Disclosure Guidance

On February 8, 2010, the Securities and Exchange Commission (“SEC”) published its Guidance Regarding Disclosure Related to Climate Change (the “Guidance”). Although it has become increasingly common for public companies to provide disclosures identifying potential impacts that climate change regulation could have on their businesses, the Guidance will cause many companies to rethink, and most likely expand, their climate change-related disclosures.

The Guidance interprets Items 101, 103, 303, and 503(c) of existing Regulation S-K as requiring at least four kinds of climate-change related disclosures. These include: (1) direct impacts on the public company’s business or operations from future U.S. legislation or regulations, (2) direct impacts on the public company’s business or operations from international accords, (3) indirect consequences of regulations and business trends, and (4) physical effects from any actual climate change. The following is a brief summary of the detailed discussion of these disclosures contained in the Guidance:

- *Effects of U.S. legislation and regulation.* The Guidance indicates that public disclosures should evaluate the potential effects of existing state and federal requirements as well as pending legislation or regulation on a company “[u]nless management determines that [the pending legislation or regulations are] not reasonably likely to be enacted.” Furthermore, “[r]egistrants should consider specific risks they face as a result of climate change legislation or regulation and avoid generic risk factor disclosure that could apply to any company.” However, a “registrant should not limit its evaluation of disclosure of a proposed law only to negative consequences.” Finally, the Guidance recognizes that “climate change regulation is a rapidly developing area” and instructs registrants “to regularly assess their potential disclosure obligations given new developments.”
- *Impact of international accords.* The Guidance states that the potential effects of international accords on climate change should be evaluated to the same extent as U.S. legislation and regulation. Notably, the Guidance specifically names both the Kyoto Protocol and the European Union Emissions Trading System as examples of such accords.

- *Indirect consequences of regulation or business trends.* The Guidance indicates that potential sources of disclosure also include assessments of circumstances where “legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for registrants. These developments may create demand for new products or services, or decrease demand for existing products or services.” Interestingly, the Guidance also provides as an example of indirect risk “the impact on a registrant’s reputation” resulting from “the public’s perception of any publicly available data relating to its greenhouse gas emissions.”
- *Physical effects of climate change.* Finally, the Guidance requires registrants to disclose whether “effects on the severity of weather (for example, floods or hurricanes), sea levels, the arability of farmland, and water availability and quality, have the potential to affect a registrant’s operations and results.” Examples of such effects would include consequences for coastal operations, disruptions to the operations of major customers or suppliers, decreased agricultural capacity, and impacts on insurance claims, liabilities, and premiums.

The Guidance does not create a new rule, regulation or legal requirement, or change the materiality standards under existing SEC rules. Rather, it is intended to clarify, and encourage consistent application of, existing disclosure rules. The Guidance does not require disclosure of quantitative greenhouse gas emissions data or information concerning strategies for reducing greenhouse gas emissions. Commissioner Elisse Walter observed that mandating these additional disclosures would require the SEC to adopt an entirely new rule.

President Announces Carbon Capture Task Force

On February 3, 2010, President Obama issued a memorandum to the heads of the Cabinet-level agencies announcing the formation of an “Interagency Task Force on Carbon Capture and Storage.” According to the memorandum, the Task Force “shall develop” within the next six months a proposed plan “to overcome the barriers to the widespread, cost-effective deployment of CCS [carbon capture and storage] within 10 years, with a goal of bringing 5 to 10 commercial demonstration projects online by 2016.” This may signal future opportunities for obtaining federal funding for such projects.

Notably, the memorandum states that “comprehensive energy and climate legislation that puts a cap on carbon pollution will provide the largest incentive for CCS because it will create stable, long-term, market-based incentives to channel private investment in low carbon technologies.” This may signal the President’s ongoing support for climate change regulation by Executive Branch agencies such as EPA, despite the current headwinds cap-and-trade legislation appears to be encountering.

We anticipate that these developments will raise a number of questions and concerns for public companies as well as non-reporting companies such as municipal and cooperative utilities. If you would like to discuss how these emerging climate change issues may impact you, please contact Kevin R. Murray, James C. Burr, or Patrick S. Malone at 801-533-0066.

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