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FOCUS ON THE ENVIRONMENT

Don't Wait to Address Climate

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Federal climate legislation that was set to be unveiled in late April 2010 in the U.S. Senate has been postponed again for an indeterminate amount of time while key senators try to sort out a dispute involving a separate initiative on immigration reform, and whether immigration legislation might move ahead of climate change on the Senate calendar.1 However, despite the uncertainty about when comprehensive federal climate change legislation will become law, and what the law will encompass, businesses cannot afford a wait-and-see approach to address and plan for climate change issues. At both the federal and state levels there are still a myriad of currently enforceable and emerging requirements, including reporting and disclosure obligations relating to climate change issues that businesses should be aware of as part of their ongoing planning and compliance efforts.

Colorado is no exception, and in November 2007 the governor launched Colorado's Climate Action Plan having the goal to reduce greenhouse gas (GHG) emissions in Colorado to 20 percent below 2005 levels by 2020, and 80 percent below 2005 levels by 2050. On April 22, 2008, Gov. Ritter issued a number of executive orders implementing this and other goals.2 As part of his executive orders, the Governor directed the Colorado Department of Public Health and Environment (CDPHE) to develop regulations mandating the reporting of greenhouse gas emissions (the regulations are still in the process of being developed); and requested that the Public Utilities Commission require each utility under its jurisdiction to submit electric resource plans that include an analysis showing how the utility could achieve a 20 percent reduction in its greenhouse gas emissions from 2005 levels by 2020.

As part of its commitment to reducing greenhouse gas emissions, Colorado was the first state to create a renewable portfolio standard (RPS) approved by voters in 2004.3 The original version required utilities serving 40,000 or more customers to generate or purchase enough renewable energy to supply 10 percent of their retail electric sales. However, in March 2007, the state passed HB 1281, which among other changes, increased the RPS to 20 percent renewable energy by 2020 and extended a separate renewable-energy requirement to electric cooperatives. Eligible renewable-energy resources include solar-electric energy, wind energy, geothermal-electric energy, biomass facilities that burn nontoxic plants, landfill gas, animal waste, hydropower, recycled energy and fuel cells using hydrogen derived from eligible renewables. Eligible electricity generated in Colorado is favored. Again this year, in March 2010, the governor signed a bill approving yet another increase in the RPS, increasing the requirement to 30 percent renewable energy by 2020.4

Colorado has also joined The Climate Registry (TCR), a voluntary GHG reporting system, which provides a mechanism through which businesses, state agencies, local governments, and others can measure and report their GHG emissions. Its goals are to set consistent and transparent standards to calculate, verify and publicly report GHG emissions in a single registry.5 TCR began accepting data in June 2008. A number of Colorado companies, including utilities and a number of mining and oil and gas companies, already have joined TCR.

Last fall, the U.S. Environmental Protection Agency (EPA) issued a final rule for mandatory reporting of GHG emissions from more than 10,000 facilities, with associated requirements to implement monitoring programs.6 The final rule required that monitoring begin on Jan. 1, 2010, with implementation of monitoring plans (or site-specific requests for extension to file such plans) by April 1, 2010. All 2010 GHG emissions must be reported by March 31, 2011. The rule focuses on obtaining reports of GHG emissions from facilities that emit 25,000 metric tons or more of carbon dioxide (and several other listed GHGs). The rule also encompasses several source categories that have automatic compliance obligations, even if they do not exceed the 25,000 metric ton threshold. EPA is continuing to propose additions to the rule, including its April 12, 2010 proposal to add petroleum and natural gas sectors.7 While some of the affected sources (such as some power plants) already were required to monitor their carbon dioxide emissions, most sources are required to install new monitoring equipment or develop new measurement protocols.

Although not mandatory, on Feb. 2, 2010, the U.S Securities and Exchange Commission ("SEC") published an interpretive guidance on corporate disclosure of climate risk by public companies, recommending that companies consider whether climate change figures in the description of their business and legal proceedings, their disclosure of investment risk factors and in their management discussion and analysis.8

A final illustrative development relates to the need of companies to anticipate GHG limits in Clean Air Act permits. The issue arises out the Supreme Court's decision in Massachusetts v. EPA, which held that GHGs are "air pollutants" within the meaning of the Clean Air Act, and remanded to EPA the question of whether GHG emissions from cars endanger public health and welfare.9 EPA's December 2009 "Endangerment Finding" concluded that GHG emissions from new vehicles cause or contribute to the threat.10 There has been significant legal activity and challenges surrounding these findings, particularly as EPA has moved forward with proposals to issue regulations to bring GHG emissions from stationary sources within the Clean Air Act's existing preconstruction and operating permit programs. Although the legal battles are continuing, on March 29, 2010 EPA issued a final decision that no stationary sources, including power plants, will be required to get Clean Air Act permits that cover GHGs before January 2011.11 EPA pledged to take sensible steps to address GHG and is providing time for large industrial facilities and state governments to put in place cost-effective, innovative technologies to control and reduce carbon pollution as part of phasing in Clean Air Act permitting requirements for GHG emissions from stationary sources. This latest action determines that Clean Air Act construction and operating permit requirements for GHG emissions will not begin until the first national rule controlling GHGs takes effect.

With the ever expanding complex web of climate change initiatives, guidance and requirements at all levels of government, companies cannot afford to be complacent in determining how to approach and react to climate change issues. •

1 Washington Post, Juliet Eilperin, April 26, 2010.

2 Executive Order D-004-08 (GHG emissions reduction goals); Executive Order D-010-08 (establishes an agricultural sequestration offset program); Executive Order B-007-08 (establishes a Colorado Climate Advisory Panel).

3 Amendment 37.

4 HB 1001. The implementing PUC regulations for investor-owned utilities requires them to provide specific percentages of renewable energy and/or recycled energy according to a graduated schedule with interim targets for the years between now and 2020.

5 www.theclimateregistry.org.

6 40 C.F.R. Part 98 (2009).

7 75 Fed. Reg. 18607.

8 Securities and Exchange Commission, SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change (Jan. 27, 2010).

9 549 U.S. 497, 127 S. Ct. 1438 (2007).

10 74 Fed. Reg. 66496 (Dec. 15, 2009).

11 EPA, "Reconsideration of Interpretation of Regulations that Determine Pollutants covered by Clean Air Act Permitting Programs," EPA-HQ-PAR-2009-0597. Currently, if finalized as proposed, the EPA rule limiting GHG emissions for cars and light trucks would trigger these requirements in January 2011.