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EPA MOVING CLOSER TO GREENHOUSE GAS REGULATION

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While key members of Congress begin voicing concern over President Obama’s plan to introduce comprehensive greenhouse gas cap and trade legislation during one of the deepest recessions ever experienced in this country, the U.S. Environmental Protection Agency (“EPA”) is working quietly behind the scenes on its own initiatives to regulate greenhouse gas emissions. Last month, EPA introduced a proposal for the first comprehensive national system for reporting emissions of carbon dioxide and other greenhouse gases produced by major emitting sources in the U.S. And this month, EPA is expected to issue a determination that greenhouse gases are air pollutants that pose a danger to public health and welfare. Both of these measures, while short of imposing actual controls or limitations on greenhouse gas emissions, will likely advance the enactment of comprehensive climate change legislation—sooner rather than later.

Proposed GHG Reporting Rule

On March 10, 2009, in response to the requirements under the FY2008 Consolidated Appropriations Act, EPA released a proposed rule that would require mandatory monitoring and annual reporting of greenhouse gas emissions from facilities that emit 25,000 tons or more of carbon dioxide equivalent per year. To put this reporting threshold into perspective, 25,000 tons is equal to the annual energy use of approximately 2,200 homes or the consumption of roughly 55,000 barrels of oil or 131 railcars’ worth of coal. The purpose of the rule is to collect comprehensive and accurate data on greenhouse gas emissions that can be used to inform future

regulatory decisions. The rule would impact approximately 13,000 facilities nationwide, which account for approximately 85 to 90 percent of the total greenhouse gas emissions emitted in the U.S. The new reporting requirements would apply to, among others, cement production, iron/steel production, electric generating facilities, refineries, suppliers of fossil fuels and industrial chemicals, motor vehicle and fossil fuel fired engine manufacturers and many large livestock operations. Given the 25,000 ton threshold, the vast majority of small emission sources, however, would not be subject to the reporting rule. Under the proposed rule, the first annual reports for most regulated sectors would be due in 2011, covering greenhouse gas emissions for calendar year 2010. EPA estimates the financial impact to comply with the rule by the private sector to be \$160 million for the first year and approximately \$127 million per year thereafter. EPA is accepting written comments and will be holding public hearings on the proposed rule in early April. The final rule is expected by June 26, 2009. For more information on EPA's proposed greenhouse gas reporting rule see EPA's website at <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>

Anticipated Endangerment Finding

With the second anniversary soon approaching of the U.S. Supreme Court's decision in *Massachusetts v. EPA* — in which EPA was found to have the authority to regulate greenhouse gas emissions under the Clean Air Act and was ordered to determine whether carbon dioxide emissions endanger human health and welfare — EPA is expected to issue a positive determination in early April that greenhouse gas emissions are harmful to public health and welfare. The so-called “endangerment” finding will set the stage for EPA to promulgate regulations under the Clean Air Act to control or limit emissions of greenhouse gases from mobile and stationary sources. According to a draft of EPA's proposed endangerment finding, EPA may limit the scope of its endangerment finding to greenhouse gas emissions from large stationary and mobile sources. EPA recently forwarded a copy of its proposed endangerment finding to the White House, and the Office of Management and Budget has commenced its review of the proposal. If the proposal is issued, a public comment and hearing process will follow before the proposal is finalized.

What Does All of This Mean?

Regulation of greenhouse gas emissions, in one form or another, is on its way. Although the two recent EPA initiatives, by themselves, do not impose limitations on or require reductions in greenhouse gas emissions from regulated facilities, they certainly are precursors to comprehensive greenhouse gas regulation and will likely put pressure on Congress to enact comprehensive climate change legislation in the near term, rather than allow EPA to regulate greenhouse gases under the Clean Air Act. Indeed, many view the Clean Air Act as ill equipped to regulate greenhouse gas emissions. And using the existing Clean Air Act to regulate greenhouse gas emissions it is not the approach preferred by the White House or the regulated community. Moreover, EPA greenhouse gas regulations could take several years to finalize and would be subject to inevitable challenges in the courts. Tailor-made congressional legislation, therefore, would be preferred. Drafts of climate-related legislation are already being introduced and the ground work for what inevitably will be a battle in Congress is being laid. We anticipate that comprehensive climate change legislation will be enacted either this year or (at the latest) next year. We will continue to keep you posted on the developments in this area.

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