GLOBAL CLIMATE: HEATING UP THE BOARDROOM

TOP TAKEAWAYS

Federal Greenhouse Gas Developments

- The current Clean Air Act (CAA) was not designed for greenhouse gas (GHG) control programs. There is no carbon tax authority, highly questionable cap-and-trade authority, and the mandated annual pollutant tonnage levels for stationary source permitting (100/250 tons) would cover so many truly small sources (apartments, restaurants) that CAA implementation would be "paralyzed" (EPA's own characterization).

- Proponents of federal GHGs controls have pushed for new comprehensive legislation from Congress that would establish carbon tax and/or cap-and-trade authority under the CAA, and fix the 100/250 "paralyzation" issue. But efforts to pass comprehensive climate legislation have seriously bogged down.

- EPA has moved forward to issue GHG regulations under current CAA. Seeking to avoid "paralyzation," EPA has proposed a "tailoring" regulation that would subject only 25,000+ ton sources to permit programs. EPA has recently announced it may go even higher (75,000 or 100,000 tons) in response to widespread fears that even 25,000 ton level would be impossible to administer.

- Many observers fear that courts on judicial review would reject EPA's "tailoring" – the current CAA specifies 100/250 tons without exception. There are accordingly proposals in Congress to put EPA's current regulatory efforts on hold for a year or two.

- Right now, the GHG situation at the federal level may accordingly best be described as muddled.

State Action on Climate Change

- Regardless of what happens nationally, the states are likely to continue to pursue options and policies that are responsive to climate change. These state actions will have direct impacts for businesses located within those states.

- For the states, transitioning from a high carbon to a low carbon economy means much more than just reducing greenhouse gas emissions. If done right, the states see this as an opportunity to transform and grow their economies while at the same time creating jobs and becoming less dependent on fossil fuel derived energy.

- Even with national climate change legislation, the states are likely to play an important role in not only implementing certain provisions of the national law but also by pursuing complementary state policies to reduce greenhouse gas emissions.

SEC Climate Change Disclosure Guidance

- SEC has decided to provide public companies with interpretive guidance on a number of existing SEC disclosure requirements as they apply to business or legal developments relating to the issue of climate change in the following areas:
    - **Impact of Legislation and Regulation:** When assessing potential disclosure obligations, a company should consider whether the impact of certain existing laws and regulations regarding climate change is material. In certain circumstances, a company should also evaluate the potential impact of pending legislation and regulation related to this topic.
    - **Impact of Treaties or International Accords:** A company should consider and disclose when material, the risks or effects on its business of international accords and treaties relating to climate change.
    - **Indirect Consequences of Regulation or Business Trends:** Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for companies. As such, a company should consider, for disclosure purposes, the actual or potential indirect consequences it may face due to climate change related regulatory or business trends.
    - **Physical Impacts of Climate Change:** Companies should also evaluate for disclosure purposes the actual and potential material impacts of environmental matters on their business.