Climate for Change — and Opportunity

By John M. Toth


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Global climate change, no matter what its scientific acceptance, is a regulatory and business reality. The U.S. Supreme Court's 2007 *Massachusetts v. Environmental Protection Agency* ruling that the EPA can regulate mobile source greenhouse gas emissions under the Clean Air Act illustrates this fact. However, says Gabrielle Sigel, co-chair of Jenner & Block's Climate and Clean Technology Law Practice, many major companies are moving ahead of regulatory action to develop "verifiable, transparent and clearly articulated strategies for reducing their greenhouse gas emissions." Such strategies may involve significant costs and even business disruption for organizations, but Robert L. Graham, also co-chair of Jenner & Block's Climate and Clean Technology Law Practice, believes they will create substantial opportunities. "Companies that proactively deal with global climate change today," he asserts, "will be analogous to those that took first advantage of Silicon Valley's digital revolution 20 years ago."

A Regulatory Crazy Quilt

The key issue for corporate America in the rapidly evolving regulation of greenhouse gases is whether to support a single federal standard, or accommodate a wide range of state programs that Sigel believes could produce "a crazy quilt of different standards and requirements." Although some states may keep regulation minimal, others, including Illinois and Massachusetts, are considering strict emission controls and trading systems for emission credits. California has already mandated that companies in the state lower their greenhouse gas emissions to 1990 levels by 2020.

Given this disparity in state regulation, Sigel says that any company with multistate operations should actively advocate for a consistent federal regulatory approach that supercedes fragmented state action. Ultimately, any federal program will likely require emissions reduction from a baseline level, as California does now. "The problem," Sigel adds, "is that there is no clearly articulated protocol or standard for determining baseline emissions in such a way that companies can get credit for reducing them." However, she recommends that rather than wait for a single standard to emerge, companies should prepare for comprehensive federal regulation by measuring and monitoring CO_2 emissions now, to build a proactive record that will be verifiable under any future emissions reduction rules.

Know Thyself

Businesses should pursue additional plans for stronger greenhouse gas regulation, says Graham. He defines the aim of the planning process as "simultaneously transforming your organization and working to influence events, to be a driver and not a victim of the new regulatory environment." A multifaceted approach should begin with an understanding of climate change issues, an assessment of how those issues impact organizational needs and a pragmatic effort to influence decision makers as they develop the new regulatory structure. Proactive examination of the roles that both suppliers and customers play is crucial—as Graham notes. "If you buy products from suppliers that have a large carbon footprint, at the very least you will face cost-push price pressures as these companies face higher compliance costs."

The compliance assessment process is a business issue, not just a legal one. "Carbon

The Supreme Court and Climate Change

The U.S. Supreme Court's *Massachusetts v. Environmental Protection Agency* decision did not broadly expand greenhouse gas regulation, says Robert L. Graham, co-chair of Jenner & Block's Climate and Clean Technology Law Practice. The Court ruled affirmatively on the narrow issues of whether motor vehicle carbon dioxide emissions are pollutants under the Clean Air Act, and whether states can sue the EPA to force CO_2 regulation. The ruling gives the EPA discretion to regulate carbon dioxide emissions, but the Court warned the agency, as Graham says, "You must explain your reasoning if you decline to exercise this discretion." More important, he believes, is that the ruling creates a tipping point in climate change regulation. "The regulatory world was already changing before the Court's decision," Graham says. "The real significance of the ruling is that it reinforces the prominence of the climate change issue, and creates a ripple effect that applies environmental law and regulation to greenhouse gases."

emissions do not just come from tailpipes; they are generated in some way by virtually every business activity," Graham warns. Every business needs to evaluate how much CO_2 it generates, what regulatory actions would put it in jeopardy and whether it can function in a cap-and-trade system of buying emission offsets, such as currently exists on the Chicago Climate Exchange. Avoid compartmentalizing your analysis of these items by applying a full range of disciplines to reflect intellectual property, tax, litigation and corporate issues as well as regulatory concerns.

Don't Be an Ostrich

Because, as Graham asserts, "any company will lose with an ostrich-like approach to climate change regulation," he and Sigel both identify actions as prudent to take now. They fall into three broad categories:

1. Regulatory

Identify every state where your operations could produce CO_2 and other greenhouse gases, and continually monitor state legislative and regulatory efforts to restrict emissions.

Review your compliance process to maximize the advantages of confidentiality by using legal counsel to hire and structure the analyses of energy and environmental consultants.

2. Organizational

Think beyond environmental compliance alone and structure a cross-disciplinary team to address issues related to greenhouse gas emissions in the full range of your organization's production operations and facility management.

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Create a board of directors subcommittee with responsibility for risk assessment and change empowerment to deal with emissions mitigation actions.

3. Operational

Establish a baseline year from which to measure greenhouse gas emissions and keep comprehensive, verifiable records of emission reductions from that point.

Explore the use of alternative energy sources such as solar, wind, biofuels and biomass, with particular emphasis on state incentives for use (such as solar power in Arizona).

Prepare to report publicly on your remedial actions, in everything from securities filings to affirmative public relations messages.

Sigel believes such steps will create "a comprehensive approach that is practical, sustainable and that reflects organizational values," allowing companies to retain control of their own futures no matter what regulatory framework ultimately emerges.


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