

Chapter 5

Commercial Transactions in a Carbon-Constrained Environment

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§ 5.01. Introduction.

For the past two decades, political momentum has been building in the United States for comprehensive, nationwide regulation of greenhouse gases (GHGs) such as carbon dioxide (CO₂) and methane (CH₄). This momentum has manifested itself in the form of state renewable energy standards, voluntary and mandatory regional GHG emission reduction compacts, the introduction of climate change legislation in the U. S. Congress, and GHG emissions monitoring and reporting rules promulgated by the U. S. Environmental Protection Agency (EPA). The cumulative effect of these uncoordinated and relatively decentralized components of climate change policy initiatives should lead industry stakeholders to consider the extent to which such piecemeal efforts to regulate will impact the manner that regulated firms conduct purchase and sale transactions among themselves.

This chapter first examines existing and proposed GHG-related regulations from EPA, various Congressional legislative initiatives, and recently issued guidance by the U. S. Securities and Exchange Commission (SEC) with respect to climate change related disclosures for publicly

traded firms. Next, it outlines the scope and objectives of environmental due diligence in the context of mergers and acquisitions (M&A) by and among firms contemplating such matters. Finally, it addresses due diligence considerations with respect to GHG regulations and policies for firms contemplating mergers and acquisitions and related transactions, and explores drafting considerations for legal practitioners involved in the preparation and review of environmental representations and warranties in commercial transactions.

§ 5.02. Environmental Protection Agency (EPA) Rulemaking.

The U.S. EPA has been compelled to act in the context of greenhouse gas and climate change related matters by judicial mandate as well as by the policy preferences of President Obama's administration. Accordingly, it is useful for interested stakeholders to recall the lead-up to recent EPA actions.

[1] — *Massachusetts v. EPA*.

In 1999, more than a dozen environmental, renewable energy and other organizations petitioned EPA to propose rules to regulate GHG emissions from new motor vehicles under its Clean Air Act (CAA) § 202(a) authority.¹ The EPA declined on the grounds that it did not have legal authority to regulate GHG emissions under the Clean Air Act, and that, even if it did, it would decline to regulate for policy reasons. As a result, various state and local governmental agencies commenced litigation against EPA to compel it to regulate mobile source GHG emissions. In 2005, the Court of Appeals for the District of Columbia ruled against the plaintiffs, and that decision was appealed to the U. S. Supreme Court.²

On April 2, 2007, in *Massachusetts v. EPA*, the United States Supreme Court found that GHGs are air pollutants covered by the Clean Air Act.³ The Court held that EPA must determine whether or not emissions of greenhouse gases from new motor vehicles cause or contribute to air pollution which may

¹ 42 U.S.C. § 7521(a)(1).

² *Mass. v. EPA*, 415 F.3d 50 (D.C. Cir. 2005).

³ *Mass. v. EPA*, 549 U.S. 497 (2007) at 524.