JONES DAY®

FALL 2012 ISSUE

THE CLIMATE REPORT

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INITIALLY . . .

SECOND OBAMA TERM MAY BRING MORE AGGRESSIVE CLIMATE CHANGE AGENDA

On November 7, 2012, we learned that the United States had spent in excess of $6 billion on a national election that essentially preserved the status quo—President Obama, a Republican-controlled House of Representatives, and a Democrat-controlled Senate—with one potentially significant difference. Knowing that he will never again need to campaign for votes in a "swing state," President Obama may feel more free in his second term to address the politically challenging issue of climate change.

With opinion polls showing that the economy in general and jobs in particular were the dominant concern of voters, neither candidate devoted much attention during the campaign to climate change or other environmental issues. The U.S. Environmental Protection Agency largely suspended formal action on potentially controversial regulations during the campaign season, most notably deferring from 2012 to 2013 its planned tightening of the national air standard for "smog" and delaying the finalization of greenhouse gas emission standards for new electric utility plants.

Just before Election Day, "Superstorm" Sandy indirectly brought the issue of climate change back into the discussion as media reports sought to assess whether the storm's destructive winds and flooding could be partially attributed to climate change. While it's possible that Sandy will provide the catalyst for greater public support for

governmental efforts to regulate greenhouse gas emissions, that's far from certain. Politically, the areas most significantly affected by Sandy are largely represented in Congress by Democrats who already support climate change legislation. The question is whether Sandy's devastating effects will move citizens not directly touched by the storm (and their elected representatives) to rethink their position on the issue in a way that 2005's Hurricane Katrina did not. Nevertheless, President Obama saw fit in his November 6 victory speech to mention the need to address "the destructive power of a warming planet."

Action by Congress on climate change remains unlikely. The political balance of power that derailed greenhouse gas "cap and trade" legislation in 2009 has actually shifted to the right, with the Republicans gaining control of the House in 2010. Moreover, all Representatives and one-third of all Senators are up for reelection every two years, so political momentum will likely shift only if and when it becomes clear that public perception has shifted.

The 2009 economic stimulus legislation included unprecedented DOE funding for a broad range of programs intended to spur development of renewable energy sources and related technologies, such as electric vehicles and a "smart grid" for electricity distribution. Given concern over federal budget deficits and Republican opposition to the sort of direct funding that preceded the bankruptcy of Solyndra and several other green energy companies, it's highly unlikely that Congress will authorize additional spending on such a scale. However, if not trumped by tax code reform, some types of renewable energy tax credits might find sufficient bipartisan support in Congress.

Although the concept of a carbon tax has been touted by some economists, it has never gained political traction. However, leaders of both political parties have recently spoken of the need for a comprehensive overhaul of the federal tax code, which would inevitably involve horse-trading to achieve passage. If the Obama administration wanted a carbon tax badly enough, Congressional Democrats might be willing to offer enough concessions on other tax issues important to Congressional Republicans that a carbon tax could find its way into a negotiated reform package.

Faced with Congressional gridlock, President Obama's climate change initiatives in his first term were implemented via administrative agency action, primarily involving U.S. EPA, the Department of Energy, and the Federal Energy Regulatory Commission. U.S. EPA has focused on regulating and reducing greenhouse gas emissions, DOE has sought to stimulate development of "green energy" technologies, and FERC has sought to make the national power grid more accommodating to renewable sources like wind and solar. There is every reason to expect these efforts to continue, and even to accelerate, during a second term.

Second-term presidents have devoted varying degrees of attention to their historical "legacy." Having uttered the now-famous reference to "the moment when the rise of the oceans began to slow and our planet began to heal," at the peak of his 2008 election campaign, it does not require much imagination to anticipate that President Obama and his administration will decide to pursue greenhouse gas regulation and other climate change issues more aggressively during his second term.

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CALIFORNIA BEGINS DISTRIBUTION AND AUCTION OF "CAP AND TRADE" EMISSION ALLOWANCES

California has begun the process of distributing and auctioning greenhouse gas emission allowances under its "cap and trade" program. Starting on January 1, 2013, sources subject to the program must have acquired allowances or other compliance instruments (such as offsets) equal to their annual greenhouse gas emissions.

Earlier this summer, the California Air Resources Board ("CARB") introduced its Compliance Instrument Tracking System Service, known as CITSS, which is used to establish accounts to record the holding, transfer, and retiring of compliance instruments for each entity that participates in the program. The first phase of CITSS was released in July 2012. It enabled participants to register as users of CITSS and to apply for compliance instrument accounts. The second phase was introduced in October 2012 and adds features to manage the movement of compliance instruments into and out of the various accounts.

In addition, CARB has established an auction process to sell emission allowances. CARB held a practice auction on August 30, 2012 to test the auction mechanics and its interface with CITSS. A total of 112 entities bid during the mock auction, and 1,947 bids were submitted.

To participate in the cap and trade program, a regulated entity must have a CITSS account. To establish the account, individual representatives of participants (such as individuals representing sources subject to the program) first must provide requested information to CARB and receive a CITSS User ID. User IDs are issued only to natural persons, not to entities. Approval as a CITSS user and an active User ID enable the individual to apply for CITSS accounts on behalf of the entity that he or she represents. The creation of an account in CITSS requires the completion of an electronic application in CITSS, followed by mailing required information and attestations to CARB. It takes about 10 working days to obtain a CITSS account.

Under Section 95912 of the cap and trade regulations, an entity that intends to participate in an auction must submit a registration application at least 30 days in advance. The application confirms an intention to bid, allows verification of the identity of the representative and the entity he or she represents, and enables the submission of bid guarantee information. Auction applications for the upcoming November 14 auction were due on October 15. Auctions will be held quarterly each year. Entities that did not meet the deadlines associated with the November 14 auction can begin the process for the next auction, which will take place in February 2013.

The distribution and auction of allowances, each of which equals one metric ton of greenhouse gas emissions, will take place in November 2012. On November 1, CARB distributed free allowances into the CITSS accounts of the entities identified in section 95870 of the cap and trade regulations. CARB will hold its first allowance auction on November 14. The auction will take place from 10:00 a.m. until 1:00 p.m. Pacific Time. The minimum number of allowances available for sale during the auction is 21,804,539 in 2013 and 39,450,000 in 2015. The reserve price is $10 for one allowance for both 2013 and 2015 vintages. Bids must be submitted in lots of 1,000 allowances. Bids can be revised or withdrawn during the three-hour bidding window, but once the window closes, no further changes to bids are permitted.

Section 95912 of the cap and trade regulations requires that those bidding at an auction must submit financial guarantee instruments consisting of cash, an irrevocable letter of credit, a bond, or a combination of the three. The amount of the guarantee must be greater than or equal to the sum of the value of the bids submitted by the auction participant. Bid guarantees for the November 14 auction were to be submitted by November 2. There are also limits on the number of allowances an entity or group of affiliated entities may purchase from the allowances sold at the auction, as well as holding limits, which are the maximum number of allowances that may be held by an entity or group of entities with a direct corporate association.

The results of the November 14 auction will be posted on the CARB web site. The public report will include (among other information) the number of allowances that were available and sold at the auction, a list of qualified and successful bidders, and the settlement price of an allowance.

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CLIMATE CHANGE ISSUES FOR MANAGEMENT

Christine Morgan, Editor

REPORT CONNECTS CLIMATE CHANGE WITH INCREASED INSURER PAYMENTS AND DECREASED INSURER FINANCIAL HEALTH

The investor advocacy group Ceres released a report in September 2012 that outlines concerns about the future cost and availability of property insurance, and the financial health of property and casualty insurance companies, due to worsening adverse weather conditions. The report, entitled "Stormy Future for U.S. Property/Casualty Insurers: The Growing Costs and Risks of Extreme Weather Events," recommends various actions that can be taken by insurance companies and others to address the concerns. Ceres is a coalition of investors, companies, and public interest groups that promotes sustainable business practices.

The report follows a Ceres study issued in September 2011 that also focused on the insurance sector. As we previously discussed in *The Climate Report*, "Climate Risk Disclosure by Insurers: Evaluating Insurer Responses to the NAIC Climate Disclosure Survey" analyzed responses by 88 insurance companies to a climate risk survey conducted by the National Association of Insurance Commissioners and concluded that most insurers only marginally considered climate risk in their business models and risk assessments.

The outlook for insurance companies has continued to decline since 2011. The report indicates that extreme weather events cost U.S. property/casualty insurers more than $32 billion in losses in 2011. According to a 2012 report by crop risk insurance experts at the University of Illinois, publicly owned crop insurers are expected to pay losses of about $18 billion due to droughts. Violent storms in 2012, including the series of intense storms, known as a derecho, that struck the eastern U.S. in June and "Superstorm" Sandy that struck the Mid-Atlantic coast in November (after the Ceres report was issued), can also be expected to result in substantial payments by insurers. As a result of these weather-related

events, payments by insurers in 2012 may exceed the $32 billion experienced in 2011.

The report finds that the value of insured losses due to weather has been trending upward over the past 30 years. Losses from excessive precipitation during 2008–2011 were the highest on record. Average annual winter storm losses have nearly doubled since the 1980s. Since 1980, wildfires burned the highest amount of acreage in 2005, 2006, and 2007, and in 2010 wildfires caused more than $1 billion in damage.

Impacts on Insurers. According to the report, a variety of factors are adversely affecting insurance companies, including low interest rates, capital market volatility, and slow economic growth, as well as an additional significant factor—the weather. Both total economic losses as well as insured losses have risen significantly from 1980 through 2011. The report explains the upward trend as largely due to the growing value of assets damaged, growth of urban areas, and the impacts of increasingly frequent and unpredictable severe weather events.

The report states, "As a result of the costs of extreme weather, property/casualty industry net underwriting income (defined as net premiums earned less incurred losses, expenses, and dividends to policyholders) was a negative $34 billion (equal to approximately 6 percent of year-end policy holders' surplus)." The report also indicates that the overall profitability of the property/casualty insurance sector has significantly lagged behind other industries, with the return on equity for all *Fortune* 500 companies reportedly exceeding that of the property/casualty sector in every year since 1994.

Impacts on Insureds. Increasing weather-related losses are affecting the affordability and availability of property insurance. The report indicates that major insurance brokers saw property insurance rates for catastrophe-exposed risks increase in the range of 10 to 20 percent during the first quarter of 2012. In addition, homeowners in wind-exposed areas are seeing rate increases in the range of 5 to 12 percent.

Ceres's Recommendations. One of the reasons for the adverse financial conditions discussed in Ceres's new report may be the conclusion reached in its 2011 analysis—most insurers are giving insufficient consideration to climate risk in their business models and risk assessments. According to the report, "many industry observers describe climate change as having the potential to undermine insurers' prevailing business models and risk management practices," and actuarially based insurance pricing and industry diversification models are being challenged by climate change.

The report concludes that insurers need to better understand and anticipate changes in climate and weather extremes so they can adapt their pricing accordingly and promote effective risk management strategies to customers. Among its other recommendations, the report recommends that insurers develop and use catastrophe models that anticipate the probable effects of climate change on extreme weather events, and that they update insurance pricing and underwriting of risks to reflect changes in extreme weather impacts on property damage loss trends.

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MAINE PUBLIC UTILITIES COMMISSION TABLES CONSIDERATION OF OFFSHORE WIND PILOT PROJECT

The Maine Public Utilities Commission has tabled its consideration of a term sheet submitted by Statoil North America proposing a Power Purchase Agreement ("PPA") to sell electricity produced by Statoil's proposed "Hywind Maine" deepwater offshore wind pilot project. Statoil proposed the project in response to the Commission's call for proposals following Maine's passage of the 2010 Ocean Energy Act, which established official state production goals of 300 megawatts ("MWs") of offshore wind by 2020 and 5,000 MWs of offshore wind by 2030. As no proposals for offshore wind projects other than Hywind Maine have been considered by the Commission, the state does not appear to be on track to meet those goals.

Statoil proposed in its term sheet a pilot project of four floating deepwater wind turbines that would generate just 12 MW of total capacity. The proposal was for a 20-year contract with Maine's three investor-owned utilities (Central Maine Power Company, Bangor Hydro Electric Company, and Maine Public Service Company). Statoil proposed two pricing options ($290/MW-hour or $320/MW-hour) based on alternative price escalation provisions. Statoil committed to spending at least 40 percent of the project's capital and operational expenses in Maine, employing approximately 150 Maine residents, and seeking out local suppliers.

If the term sheet is approved, the Commission would direct Statoil to enter into a PPA with one or more of the Maine utilities. Upon consideration of Statoil's proposal, however, two of the Commission's three Commissioners were unwilling to approve the term sheet as written because it did not sufficiently illustrate a long-term benefit to Maine consumers relative to its cost. Consequently, they suggested that Statoil modify the term sheet to incorporate more explanation of benefits to Maine residents. The Commission did not reject the term sheet but instead tabled the matter pending further discussions between its staff and Statoil regarding modifications to Statoil's proposal.

Without the ability to enter into a PPA, Statoil may have difficulty securing the financing necessary for the Hywind Maine project to move forward, as the cash inflows for offshore wind farms come from contracts for the sale of energy, capacity, and Renewable Energy Credits generated by the farms. In the absence of a long-term PPA to guarantee those sales, investors may lack confidence in the project, particularly given the developing nature of the construction, technology, and length of the approval process surrounding offshore wind. The prospect that existing federal tax credits for offshore wind projects will not be renewed after 2012 makes PPAs all the more crucial for purposes of obtaining project financing.

Even where a PPA is approved for some of a project's output, financing is not guaranteed. Proposals for other offshore wind projects have been hampered by a lack of financing attributed to PPA shortfalls. Energy Management, Inc. has submitted multiple PPAs to the Massachusetts Department of Public Utilities for "Cape Wind," EMI's proposed offshore wind project off the coast of Cape Cod.

EMI initially proposed two PPAs, each for half of Cape Wind's total output: the first with National Grid and the second with an unknown future buyer, proposed in advance to facilitate Cape Wind's subscription of all of its output. In November 2010, the Department approved only the National Grid PPA, leaving Cape Wind with 50 percent of its future capacity unsubscribed.

In March 2012, EMI sought approval for a second PPA for 27.5 percent of Cape Wind's capacity, which would bring the total under contract to 77.5 percent. In testimony before the Department regarding this second PPA, Cape Wind's representative asserted that "despite the PPA with National Grid for half of the Project's output, financiers want to see long-term commitments for an even greater percentage." According to EMI, approval of the second PPA would be sufficient to enable Cape Wind to secure financing.

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OFFSHORE WIND INCHES ITS WAY FORWARD IN NEW JERSEY

The New Jersey Board of Public Utilities has proposed to readopt and amend its rules for offshore wind facilities and Offshore Renewable Energy Certificates ("ORECs"). The sale of ORECs is intended to help fund the offshore wind facilities, but the Board has yet to establish a funding mechanism for ORECs, stalling potential developments.

When the Board initially adopted the rules in 2011 and again readopted them with amendments this fall, it reserved the issue of the OREC funding mechanism for a later date. The Board held four stakeholder meetings on the funding mechanism during 2011 and accepted comments and draft proposals before and after each conference. Although it recently retained a consultant on the funding mechanism, the Board has yet to propose a rule and has taken no public action since the last stakeholder meeting more than a year ago.

The Board's August 2012 proposed amendments to its application rules similarly do not provide any information on how ORECs will be funded. They instead require applicants to specify in detail their anticipated costs, revenues, and the price per OREC in MW-hours necessary to make the project commercially viable. The proposed amendments include:

- OREC pricing proposals must represent the calculation of the price based on the total revenue requirements of the project over a 20-year period, specifying all anticipated costs, revenues, taxes, financing, and subsidies.
- OREC pricing proposals must specify the expected energy output of the project and the price per OREC in MW-hours necessary to make the project commercially viable.
- The value of the electricity generated would not be deducted when calculating the OREC price but must be returned to ratepayers along with any tax credits, subsidies, or environmental benefits.
- Applicants must provide substantiating documentation for any claims that manufacturing will be based in New Jersey.
- Applicants must seek Board of Public Utilities approval for any changes to the organizational structure of key employee positions.
- Applicants must provide evidence of financing, such as a letter of intent to offer credit from credible financiers, a commitment from equity investors, and/or guarantees from an investment-grade party.
- Ratepayers, suppliers, or providers may not make up any potential cost differences resulting from changes in tax laws or decommissioning costs in excess of anticipated costs.

Comments on the proposed amendments were due on October 19, 2012. It is likely that the Board will not post comments on its web site until it issues a final rule on the amendments this winter.

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NINTH CIRCUIT AFFIRMS DISMISSAL OF FEDERAL COMMON LAW CLIMATE CHANGE CLAIMS

On September 21, 2012, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit upheld a decision of the U.S. District Court for the Northern District of California dismissing the federal common law nuisance and civil conspiracy damage claims of the Native Village of Kivalina and the City of Kivalina against a group of U.S. oil, energy, and utility companies ("Energy Producers"). The plaintiffs, located on a coastal Alaskan island, alleged that the greenhouse gas emissions of the Energy Producers have contributed to climate change, which in turn severely eroded the land where Kivalina sits and threatens it with imminent destruction and other global warming-related impacts. The court found that since the Clean Air Act provides for the regulation of greenhouse gas emissions, the federal common law doctrines have been displaced and the claims failed. *Kivalina v. Exxon Mobil Corp.*, _____ F.3d_____, 2012 WL 4215921 (9th Cir. Sept. 21, 2012).

Kivalina is a remote village that is home to approximately 400 residents and sits on a six-mile barrier reef on the northwest coast of Alaska, which has been a home to the Inupiat Native Alaskans for hundreds of years. As alleged by Kivalina, arctic sea ice long served as a barrier against waves and protected the village from erosion. However, Kivalina alleged that because sea ice levels have decreased significantly in recent years as a result of climate change, the village has become at risk to storms and flooding.

Kivalina brought suit against the Energy Producers alleging that the Energy Producers' substantial contribution to global warming, in the form of greenhouse gas emissions, represented a public nuisance under the federal common law. Kivalina also claimed that certain of the Energy Producers were also guilty of a civil conspiracy to conceal the harmful effects of global warming.

The Court of Appeals upheld dismissal of both claims, holding that a federal common law claim does not lie when the question is controlled by federal legislation that displaces otherwise applicable federal common law. The court held that Kivalina's claim was displaced by the Clean Air Act, in light of the U.S. Supreme Court's earlier holding in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that the Act empowered the U.S. Environmental Protection Agency to regulate greenhouse gas emissions. In essence, the Court of Appeals found that Congress already had "spoken directly" to the issue of regulating greenhouse gas emissions.

Specifically, the Court of Appeals stated that the U.S. Supreme Court's decision in *American Electric Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527 (2011), required that Kivalina's common law action against the Energy Producers be dismissed. In *American Electric Power*, the Supreme Court ruled the Clean Air Act, and the regulation of greenhouse gases the Act authorized, displaced a federal common law nuisance action for injunctive relief that was filed against the five largest emitters of carbon dioxide in the United States.

Although the plaintiffs in *American Electric Power* had sought injunctive relief through court-ordered emissions caps, and the *Kivalina* plaintiffs sought damages for alleged harm already caused, the Court of Appeals stated that if a cause of action is displaced by federal legislation, the displacement extends to all remedies. The plaintiffs' civil conspiracy claim against the Energy Producers also failed since it was based upon the substantive public nuisance claim and could not stand on its own once the nuisance claim was dismissed.

Seeking to take advantage of a concurring opinion by District Judge Pro (sitting by designation), on October 4, 2012, the *Kivalina* plaintiffs filed a petition for rehearing en banc. In his concurrence, Judge Pro had asserted that there is some tension between the U.S. Supreme Court's rulings in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S. 1, 4 (1981), and *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), as to whether, when a common law nuisance claim for injunctive relief is displaced, a common law nuisance claim for damages claim likewise is displaced. Judge Pro had nonetheless agreed that the doctrine of displacement foreclosed the federal common law claims in *Kivalina*.

It remains to be seen what the full Ninth Circuit will do. Under Rule 35(e) of the Federal Rules of Appellate Procedure, the

Energy Producers are precluded from filing a response to the petition unless and until ordered by the Court of Appeals.

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CLIMATE CHANGE REGULATION BEYOND THE U.S.

Chris Papanicolaou, Editor

THE EQUATOR PRINCIPLES TO EMBRACE CLIMATE CHANGE CONSIDERATIONS

The Equator Principles, "a credit risk management framework for determining, assessing and managing environmental and social risk" in project finance deals, arose from a 2002 meeting in London among nine international banks and the International Finance Corporation of the World Bank. Equator Principles Financial Institutions ("EPFI") voluntarily agree not to provide "project related loans and project finance advisory services to projects where the borrower will not, or is unable to comply with, the Equator Principles."

The latest draft of the Equator Principles, known as "EP3," was published for stakeholder comment on August 13, 2012 and provides, for the first time, risk management tools whereby project finance lenders are able to ensure that climate change is addressed as a key aspect of the identification, assessment, and management of environmental risk in large, complex, and expensive projects. EP3 was launched following a strategic review with the aim that the Principles continue to be the "gold standard" in environmental and social risk management in the financial sector.

EP3 contains a host of changes that aim to improve transparency in EPFI compliance reporting and to ensure that the Principles take account of increasing global awareness of environmental, social, and human rights issues. The key changes in EP3, from an environmental perspective, are as follows:

Environmental and Social Assessment and Independent Monitoring. For each project categorized as A or B (i.e., those that involve at least a limited potential of environmental and social risk), an EPFI will still develop and maintain certain social and environmental assessment documentation

concerned with identifying, assessing, and managing environmental risk. The environmental assessment documentation must demonstrate that the borrower has considered various environmental factors at the project level, such as energy efficiency, protection and conservation of biodiversity, pollution prevention, and waste management.

EP3 states that an independent environmental and social consultant, not directly associated with the borrower, is to be appointed to ensure compliance with the assessment process and, in certain cases, may need to state that the project cannot be made Equator Principle-compliant. In addition, to improve EPFI compliance transparency, various environmental assessment documents must now be disclosed online.

Applicable Environmental Standards. EP3 clarifies which environmental standards are generally applicable to a project based on the location of the project. For projects located in non-OECD countries and OECD countries that are not designated as high-income, EPFIs are required to comply with the applicable International Finance Corporation ("IFC") Standards and IFC Environmental Health and Safety Guidelines in their Equator Principle-compliance assessments. Projects located in high-income countries, on the other hand, must comply with relevant host country laws, regulations, and permits, as these are generally considered to meet or exceed the requirements of the Equator Principles

Greenhouse Gas Emissions. Where greenhouse gas emissions are expected to exceed 100,000 tons annually on a project, an analysis of alternatives—in line with the IFC Performance Standards on Environmental and Social Sustainability—must now be undertaken by the EPFI, addressing less carbon-intensive fuel sources and technologies. Once completed, the borrower is under an obligation to provide evidence of technically and financially feasible and cost-effective options to reduce greenhouse gas emissions during the design, construction, and operation of the project. Borrowers must now report these emissions publicly.

EP3 is expected to be published in final form by January 2013.

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FRANCE ADOPTS LEGISLATION GOVERNING 2013–20 AUCTIONS OF GREENHOUSE GAS EMISSION ALLOWANCES

As previously described in *The Climate Report*, under the EU-ETS Directive, which established the European Union's cap and trade program for greenhouse gas emissions, as amended by Directive 2009/29/EC of April 23, 2009, and to Regulation No. 1031/2010 of November 12, 2010, the auctioning of emission allowances becomes the rule for the 2013–2020 period, while their allocation for free will become the exception. The French Code of the Environment and the French Monetary and Financial Code have been amended by a legislative ordinance (Ordinance No. 2012-827 of June 28, 2012) to adapt domestic law to the new auctioning requirements. Beyond implementation of the "full auction" principle, this Ordinance imposes a variety of new environmental requirements.

France has chosen to exclude only hospitals from the EU scheme of small installations subject to equivalent measures. For these installations, sanctions are stepped up. Excess emissions shall entail a fine proportionate to the volume of such excess emissions. The amount of such fine shall be set out by decree and shall be based on the average value of CO_2 allowances in the preceding year.

As amended, the French Code of the Environment now provides that the quantity of emission allowances allocated for free to sectors not exposed to carbon leakage shall be 80 percent of the quantity determined on the basis of the *ex-ante* benchmarks provided by the EU-ETS Directive. The proportion of emission allowances distributed for free shall decrease each year thereafter by equal amounts, resulting in 30 percent free allocation in 2020 with a view to reaching no free allocation in 2027.

Furthermore, the French Code of the Environment accommodates the uncertainty of the outcome of current status of international talks under the auspices of the United Nations'

Framework Convention for Climate Change regarding the proposed extension of the Kyoto Protocol to an additional implementation phase. The Code seeks to afford maximum flexibility to operators in complying with their emission obligations in the future by allowing them to rely upon a diversity of emission units/credits originating from other systems than the EU-ETS.

On the monetary and financial end, the recent Ordinance entrusts the French Financial Markets Authority (*Autorité des marchés financiers* or "AMF") with various prerogatives, including that of issuing the authorization required by EU Regulation No. 1031/2010 enabling entities established in France to participate in the auctions. The AMF is also entrusted with control, inquiry, and sanction prerogatives to ensure the accomplishment of its mission. In turn, the Ordinance entrusts the Prudential Control Authority (*Autorité de contrôle prudentiel*), with prior advisory opinion from the AMF, with the mission of issuing the authorization required by EU Regulation No. 1031/2010 to allow investment firms and credit institutions established in France to bid on their own account or on behalf of their clients.

As per a commitment made at the Governmental Environmental Conference of September 14–15, 2012, revenues generated by the auctions of emission allowances will be allocated to the national thermal renovation plan launched by the French government.

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UK GREEN INVESTMENT BANK RECEIVES EU STATE AID APPROVAL

On October 17, 2012, the United Kingdom received European Commission approval to use £3 billion of UK public funds in setting up the world's first Green Investment Bank, in line with the EU state aid rules. The Green Investment Bank's mission is to invest in projects in innovative, environment-friendly areas to assist in reducing the UK's carbon emissions in line with the UK's 2020 target for carbon reduction by accelerating development of a green economy.

The EU approval paves the way for the Green Investment Bank to invest in projects where there has been a market failure in obtaining funding. The main projects that will benefit will be offshore wind power generation, waste infrastructure, nondomestic energy efficiency, biofuels, biomass, carbon capture and storage, marine energy, and renewable heat generation. The UK Department for Business, Innovation and Skills has said that the Bank will be the first of its kind in the world. It will disburse funds by syndicating and underwriting junior, mezzanine, and senior debt and by taking equity stakes or granting guarantees.

The EU considered the use of public funds acceptable, subject to certain safeguards to preserve a level playing field among funders in the EU single market and to avoid the stifling of private investment. This will be achieved, as the funds will be provided only where those seeking funding can provide evidence that they have been denied funds or have not obtained all the necessary funding from market operators. Wherever possible, the Green Investment Bank's involvement will be provided as a co-investor alongside private funding. The EU approval will be valid for four years.

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