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Financial Institutions and the Economy Section

The Banking Law Committee of the Financial Institutions and the Economy Section held its annual event entitled “An Evening with the General Counsels of the Federal Banking Agencies” on Nov. 15, 2006, at the University Club in Washington, D.C. The speakers included Scott Alvarez of the Federal Reserve Board, John Bowman of the Office of Thrift Supervision, Robert Fenner of the

National Credit Union Administration, Douglas Jones of the Federal Deposit Insurance Corporation, and Julie Williams of the Office of the Comptroller of the Currency. The moderator and program chair was Paul Pilecki of Winston & Strawn LLP. The sold-out audience heard a discussion of significant current legal issues affecting the regulation of depository institutions. James Sivon of Barnett, Sivon & Natter and chair of the committee’s Executive Council paid a

special tribute to Richard Peterson, a longtime participant in the development of the law in this area. **TFL**

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is an essential component of the basic food cycle by which green plants produce oxygen and sugars. And greenhouse gases are necessary for maintaining Earth at habitable temperatures.

The second distinction is that the sources of carbon dioxide and other greenhouse gases are ubiquitous. Every breath a human being takes produces carbon dioxide. Residential heating through natural gas, heating oil, or propane produces carbon dioxide. According to a recent editorial in the *New York Times*, greenhouse gases produced by livestock raised primarily for food produce 18 percent of the global warming effect—a larger proportion than the fuel used for transportation produces.⁶ There is no intrinsic basis for imposing a greenhouse gas surcharge on some producers of greenhouse gases and not on others, or imposing a surcharge on some producers more heavily than on others. One of the principal reasons that the widely expressed concern regarding possible human contributions to global climate change has not resulted in government controls on the generation of greenhouse gases is the absence of a popular consensus on which of the many offending activities should be given priority and what human activities should be curtailed. The inactivity of the government “of the people, by the people and for the people” largely reflects the absence of an effective consensus among the people about how much of a burden society should currently bear to prevent future consequences and how those costs should be apportioned. Absent a collective ordering of priorities, one would expect each molecule of carbon dioxide to be taxed with the same surcharge—whether it is produced through the burning of fossil fuels for transportation or power generation, through the raising of livestock, or through human respiration. Thus, the only democratic basis for allowing some production of greenhouse gases to proceed freely while limiting or imposing a surcharge

on other processes producing such gases is for the democratically elected government to reach a collective value judgment on which processes should be free and which should be taxed, and what tax rate should apply to each use. Any such rational ordering of priorities would require a detailed evaluation of what alternative modes of transportation, power generation, heating, food production, and other economic activities are available; the costs and effectiveness of greenhouse gas absorption technologies; the long-term greenhouse effects of each alternative; and the ultimate economic and social impacts of restraining the atmosphere concentration of such gases.

A third factor overlooked by those advocating the use of litigation to impose controls on private behavior to alleviate global warming is the global character of any human contribution to global warming. Because gases emitted into the atmosphere do not remain fixed in any municipality, state, country, or continent, litigation arbitrarily imposing liability on those emitting greenhouse gases in any single state or country will neither solve the supposed problem nor apportion the costs equitably.

It may be unfortunate and even frustrating that no one has yet devised a set of priorities among greenhouse gas-generating activities that they can persuade a majority of the electorate to accept. The recent change in control of Congress may produce significant developments on this front. If not, as Winston Churchill observed, “No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of government except all those other forms that have been tried from time to time.” **TFL**

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Endnotes