

On the Subject

Energy & Commodities Advisory

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Although the future of new emissions and renewable energy legislation is increasingly uncertain, business still needs to prepare for climate change regulation.

A Cooler Climate for Federal Cap-and-Trade Legislation

Further evidence that the White House may be backing off of the aggressive agenda to advance economy-wide climate change legislation that it was championing a year ago surfaced on February 1, 2010, when President Barack Obama released his proposal for the 2011 federal budget. President Obama's current spending proposal eliminated an estimated \$646 billion in new revenue over 10 years from a new federal "cap-and-trade" program that had been included in the White House's budget plan last year. The current budget proposal still makes reference to a federal program to limit greenhouse gas emissions through a new market-based mechanism, but now describes the program as "deficit-neutral" as opposed to a significant source of new government revenue. This subtle change appears to recognize that the current political climate may require a more limited program than the Obama administration once envisioned if any climate change legislation can be enacted in 2010.

The Congressional Climate

On June 26, 2009, the U.S. House of Representatives passed the American Clean Energy and Security Act of 2009 by a narrow margin of 219 to 212. This bill, sponsored by Representative Henry Waxman (D-CA) and Edward Markey (D-MA), would have established a cap-and-trade program for the seven most common greenhouse gases, along with a new federal renewable energy standard.

In the U.S. Senate, the Committee on Energy and Natural Resources reported the American Clean Energy Leadership Act of 2009, a renewable energy bill sponsored by Senator Jeff Bingaman (D-NM) on July 16, 2009. Then, on November 5, 2009, the Committee on Environment and Public Works in the

U.S. Senate passed the Clean Energy Jobs and American Power Act, a cap-and-trade bill sponsored by Senator John Kerry (D-MA) and Chairman Barbara Boxer (D-CA).

The House and Senate bills contained several significant differences. Notably, the Waxman-Markey bill expressly prohibits the Environmental Protection Agency (EPA) from regulating greenhouse gas emissions under the existing provisions of the Clean Air Act. The Kerry-Boxer proposal preserves the EPA's authority to regulate carbon dioxide and other greenhouse gases through a "tailored" version of the Clean Air Act's current permitting process. The Waxman-Markey bill also includes detailed provisions to address international competitiveness through the possible imposition of carbon-based border tariffs. The Kerry-Boxer bill contemplates some form of trade protection mechanism, but provides no detail regarding how or when these measures should be implemented.

Nevertheless, despite their differences, the House and Senate proposals shared much common ground, including identical mid- and long-term emissions reduction goals, comparable treatment of voluntary reductions and offsets, and similar methods of providing price stability and certainty to market participants (e.g., an allowance price floor and "strategic reserve pool" to establish a price ceiling).

The Uncertain Road Ahead

By November 2009, the razor-thin coalition that had assembled to support the House and Senate proposals began to disintegrate. Senator Boxer's victory moving her bill out of the Committee on Environment and Public Works was, to many observers, hollow because it took place over a Republican boycott led by Senator Lindsey Graham (R-SC) and others who said that the legislation was rushed. A month later, the international community gathered in Copenhagen to negotiate the terms of a new international accord that would replace the Kyoto Protocol, which expires in 2012. Despite hopes that Copenhagen would result in a new common approach to limiting global greenhouse gas emissions that incorporated both developed and developing nations, the meeting ended with no binding commitments to reduce emissions. Instead, leaders from the world's major economies,

including China, “pledged” to meet certain self-imposed emissions commitments as part of a broader aspirational goal of limiting global temperature increase to 2 degrees Celsius. The uncertain future of U.S. climate change legislation has been further exacerbated by the prolonged debate over health care reform and an unexpected Republican coup in the Massachusetts special election to fill the late Edward Kennedy’s Senate seat.

As the Obama budget proposal and recent events suggest, it is unlikely that Congress will enact comprehensive energy and climate change legislation in 2010. Instead, members of the House and Senate, eager to fortify their “green” credentials before the November elections, may try to pass a smaller, simpler and less controversial bill. In particular, Senator Bingaman’s renewable energy proposal could find sufficient support, particularly in Midwestern states looking to attract “green jobs” through wind and other zero emissions energy projects. At a February 2, 2010, town-hall meeting in Nashua, New Hampshire, President Obama specifically acknowledged that some form of renewables/green jobs compromise might be necessary when he said in response to a question about new jobs relating to renewable energy, “[w]e may be able to separate [the cap-and-trade program and renewable energy legislation] out. And it’s possible that’s where the Senate ends up.”

Alternatively, a streamlined cap-and-trade program similar to the model proposed by Senators Maria Cantwell (D-WA) and Susan Collins (R-ME), or even a more modest carbon tax, also could move forward, provided that Congress finds the time to focus on this issue.

Regardless of the path that Congress takes, business still needs to prepare for climate change regulation. As Congress waits and debates, the EPA is moving ahead with its own regulatory program for greenhouse gas emissions. Likewise, many states and regional coalitions are rapidly developing new programs to address climate change, either through cap-and-trade programs or other regulatory approaches. Adapting to the new environment presents as many opportunities as challenges, but it also will take time and effort, and that work should begin now.

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