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Cap-and-Trade Bill in Congress Quickly Gaining Momentum

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This week, the U.S. House of Representatives Committee on Energy and Commerce is marking up "The American Clean Energy and Security Act" (H.R. 2454), introduced by Representatives Henry Waxman (D-CA) and Ed Markey (D-MA). The bill proposes to create a cap-and-trade system aimed at reducing greenhouse gas ("GHG") emissions from electricity providers and large industrial sources that emit over 25,000 tons of GHGs annually.

Originally released in March 2009 as a discussion draft, the legislation was the focus of high-profile hearings attended by former Vice President Al Gore and former Speaker of the House Newt Gingrich. As currently drafted, the bill sets GHG emission reduction targets as follows:

- In 2020, the quantity of GHGs should not exceed 80 percent of the quantity of GHG emissions in 2005.
- In 2050, the quantity of GHGs should not exceed 17 percent of the quantity of GHG emissions in 2005.

Representative Waxman, who chairs the Committee on Energy and Commerce, has been busy behind the scenes negotiating provisions to secure the majority vote necessary for the bill to move beyond committee consideration. Among the most controversial aspects of the legislation is the formula by which allowances (the authorization to emit one ton of carbon dioxide equivalent of a GHG) would be distributed. During his campaign for the White House, President Obama stated that his goal would be to auction 100 percent of allowances in a cap-and-trade system. Chairman Waxman, however, has found himself giving

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OUR PRACTICE

The Energy, Environment & Natural Resources lawyers at Manatt have one of our firm's fastest-growing practices. That growth reflects our depth of experience and skill in dealing with the interaction of increasingly complex environmental and energy regulations that confront every company doing business in the United States. Our attorneys blend a sophisticated legal understanding with a practical business perspective to enhance the competitive flexibility of all our clients ...more

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away allowances to sectors hit hardest by the bill to soften the impact of and gain the political support necessary for the transition to a world where GHG emissions are regulated.

The bill as currently proposed would give away the majority of emissions permits in the early years of the program (much of this distribution would decline over time and conclude by 2029):

- The electric utility industry would receive 35 percent of the allowances for free.
- Local natural gas distribution companies would get 9 percent of the allowances, with a requirement that state-regulated firms use the funds to protect consumers from natural gas price increases.
- States would get free allowances to invest in renewable energy and energy efficiency, starting at 10 percent from 2012 to 2015, 7.5 percent from 2016 to 2017, 6.5 percent from 2018 to 2021, and 5 percent afterward.
- States would get 1.5 percent of the allowances for programs to benefit users of home heating oil and propane.
- The bill would auction 15 percent of the allowances around 2011, with the proceeds directed toward low- and moderate-income families via tax credits, direct payments and electronic benefit payments. The House Ways and Means Committee must approve this provision.
- Energy-intensive industries would get free allowances, starting at 15 percent in 2014 but phasing out by about 2 percent per year.
- Oil refiners will get 2 percent allowances for free, starting in 2014 and ending in 2016.
- Carbon capture and storage projects would receive 2 percent of the allowances from 2014 to 2017 and 5 percent from 2018 and beyond.
- The auto industry would receive 3 percent of the allowances through 2017 and 1 percent from 2018 to 2025, with the proceeds used to increase production of electric and advanced vehicles.
- Efforts to stem tropical deforestation would receive 5 percent of the allowances from 2012 to 2025, 3 percent from 2026 to 2030, and 2 percent from 2031 and beyond.
- Domestic adaptation efforts would get 2 percent of the allowances from 2012 through 2021, increasing to 4 percent between 2022 and 2026 and to 8 percent in 2027 and beyond.
- International adaptation and clean technology transfer would get 2 percent of the allowances from 2012 to 2021, increasing to 4 percent from 2022 to 2026 and then to 8 percent in 2027 and beyond.
- Worker assistance and job training programs would initially receive 0.5 percent of the allowances from 2012 to 2021 and 1 percent in subsequent years.

In addition to regulating GHG emissions directly, the 946-page bill would invest in carbon capture and storage and in a "smart grid" that would more efficiently deliver electricity. The bill also would impose a national renewable energy standard that generally requires 20 percent of power to come from renewable sources and energy efficiency by the year 2020.

As currently drafted, the proposed bill does not mandate a low carbon fuel standard and would preempt California's and all other states' GHG cap-and-trade systems through 2017. At least as currently drafted, this federal preemption would not upset the GHG reduction targets set by any state, including the targets mandated by California's AB 32 legislation. This bill would also not derail state requirements governing the proportion of renewable energy provided to electricity consumers, including California's Renewables Portfolio Standard (however, there is other legislation expected in the Senate that may have this effect).

Chairman Waxman hopes to move the bill out of committee by Memorial Day (May 25, 2009). Most, if not all, of the Republicans on the committee are expected to oppose the bill. However, because the Democrats have a 36-to-23 majority on the committee, the committee leadership can afford to lose up to 6 Democratic votes and still advance the bill. Even after the bill moves beyond the Energy and Commerce committee, certain provisions in the bill will be considered by the Committee on Ways and Means and possibly other committees, prior to the bill's consideration on the House floor. On the U.S. Senate side, Majority Leader Harry Reid has announced that the Senate will take the House's lead and await passage of the bill, in lieu of advancing a separate version in the Senate.

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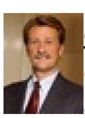
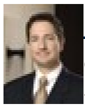


Craig A. Moyer Mr. Moyer's practice focuses on clean air, clean water, hazardous waste, CERCLA, oil spills, emergency response, community right-to-know and hazardous materials issues; analysis and review of environmental impact reports, and coastal zone and environmental permitting. He has advised clients in connection with myriad complex regulatory interactions. He has consistently affected rule modifications through litigation and in other ways enabling clients to take advantage of regulatory changes.



Dana P. Palmer Mr. Palmer's practice involves energy and environmental issues, with a particular focus on land use, water quality, and climate change. As both a litigator and a corporate compliance counselor, Mr. Palmer's work takes him to court and before administrative bodies on a broad array of issues. Mr. Palmer has worked on climate change issues for over 15 years and was part of the U.S. government's delegation to the Sixth Conference of the Parties to the United Nations Framework Convention on Climate Change.

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