

# Morgan Lewis

## Energy and Climate Change: Federal Legislative Initiatives in the 111<sup>th</sup> Congress



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# Summary of Presentation

- Overview and status update of legislation pending in Congress
- Substantive content of pending legislation
  - Notable differences between pending legislation are highlighted
- Next steps – Continued development of legislation and potential pathways to enactment



# Notable Legislation

- The American Clean Energy and Security Act of 2009 (“Waxman-Markey”) – H.R. 2454
  - Addresses both energy development and regulation and climate change
  - Introduced in the United States House of Representatives (“House”) on May 15, 2009
  - Passed by the House on June 26, 2009, by a 219 to 212 vote
  - Presently pending on the United States Senate (“Senate”) legislative calendar
  - No date for a Senate vote has been scheduled



## Notable Legislation (cont.)

- American Clean Energy Leadership Act of 2009 (“Senate Bill”)
  - Presently addresses only energy development and regulation
  - Exists in draft form; no bill number has been assigned.
  - Represents a compilation of six separate energy-related bills introduced in the Senate during the 111<sup>th</sup> Congress
  - Reported out of the Senate Committee on Energy and Natural Resources following a 15 to 8 vote



# Substantive Provisions of Waxman-Markey

## Summary of Major Provisions

- Provisions Directly Controlling Emissions
  - Greenhouse Gas Emissions Cap and Trade
- Provisions Concerning Energy Production and Consumption
  - National Renewable Electricity Standard
  - Transmission Planning
  - Energy Efficiency
  - Carbon Capture and Sequestration
  - Clean Energy Investment
- Related Provisions
  - Expanded FERC Jurisdiction and Powers



# Substantive Provisions of Waxman-Markey (Cont.)

- **Greenhouse Gas Emissions Reduction/Cap and Trade**
  - Establishes national goals for greenhouse gas reductions
    - Goal: Reduce US GHG emissions to:
      - 97% of 2005 levels by 2012
      - 83% of 2005 levels by 2020
      - 58% of 2005 levels by 2030
      - 17% of 2005 levels by 2050
    - GHGs include: (i) CO<sub>2</sub>; (ii) methane; (iii) nitrous oxide; (iv) sulfur hexafluoride; (v) hydrofluorocarbons emitted as a byproduct; (vi) perfluorocarbons; and (vii) nitrogen trifluoride



# Substantive Provisions of Waxman-Markey (Cont.)

- **Greenhouse Gas Emissions Reduction/Cap and Trade (cont.)**
  - Implements an emissions allowance program
    - Requires covered entities, starting April 1, 2013, to have one emission allowance for each ton of CO<sub>2</sub> equivalent of GHGs that were emitted.
    - Covered entities: (i) electricity generators; (ii) various fuel producers and importers; (iii) fluorinated gas producers and importers; (iv) geological sequestration sites; (v) various industrial sources; (vi) and local distribution companies that deliver natural gas



# Substantive Provisions of Waxman-Markey (Cont.)

- **Greenhouse Gas Emissions Reduction/Cap and Trade** (cont.)
  - Emissions allowances to be allocated as follows:
    - Up to 35% to electricity LDCs; 9% to natural gas LDCs; 1.5 % to states for home heating oil consumers; 15% directly to low income consumers
    - 13.5% to energy-intensive, trade-exposed industries; 3.5% to merchant coal-fired generators; 2% to petroleum refineries; unspecified share of electricity sector allowances for certain LT power contract operators
    - 7.5% to states to support renewable energy and energy efficiency efforts
    - 6% to promote technological advances; 10.5% to further other objectives.
  - Additional allowances to be distributed through quarterly auctions beginning in 2011.



# Substantive Provisions of Waxman-Markey (Cont.)

- **Greenhouse Gas Emissions Reduction/Cap and Trade (cont.)**
  - Preempts certain Title V air permit regulation of GHGs
    - Prevents EPA from regulating GHGs via a National Ambient Air Quality Standard (NAAQS) because of their climate impact.
    - Prevents new or modified stationary sources from coming under the Clean Air Act's New Source Review provisions solely because they emit greenhouse gases.
    - Prevents any source from having to obtain a state permit under Title V of the Clean Air Act solely because they emit greenhouse gases.



# Substantive Provisions of Waxman-Markey (Cont.)

- **National Renewable Electricity Standard (RES)**
  - Requires retail electricity suppliers to obtain defined percentage of electricity supply from renewable energy resources or from energy efficiency improvements.
    - Utilities selling less than 4 million megawatt hours annually are exempt.
  - RES begins at 6% in 2012 and increases to 20% in 2021 through 2039.
  - FERC responsible for issuing Renewable Energy Credits (RECs) and for monitoring utility compliance with RES
  - Utilities subject to RES may satisfy obligations through RECs, demonstrated energy savings, or alternative compliance payments (\$25/MWH)
  - Non-compliance penalized by FERC at \$50/MWH



# Substantive Provisions of Waxman-Markey (Cont.)

- **Transmission Planning**

- Requires FERC to promulgate transmission planning principles. Entities may volunteer to develop regional plans. 18 months after FERC issues principles, regional plans must be submitted to FERC, and FERC will combine regional plans into larger, and possibly interconnection-wide, plans.
- Provides FERC with siting authority over transmission projects in the Western Interconnection so long as the project is included in a regional transmission plan submitted to FERC.
- Provides financial incentives for development and construction of transmission lines and facilities using advanced electric and high efficiency transmission property



# Substantive Provisions of Waxman-Markey (Cont.)

- Promotes energy efficiency
  - Requires DOE to update the national model building energy codes
  - Creates a program for retrofitting residential and commercial buildings
  - Establishes lighting and appliance efficiency standards
  - Requires the EPA Administrator to establish greenhouse gas emission reduction standards for vehicles



# Substantive Provisions of Waxman-Markey (Cont.)

- **Promotes vehicle efficiency**
  - Requires electric utilities to develop plans supporting the use of hybrid and electric vehicles
  - Provides financial assistance for the development of plug-in vehicles
  - Authorizes the Secretary of Transportation to establish an open fuel standard for vehicles developed after 2015.
- **Load serving entity energy efficiency**
  - Requires load serving entities to establish and meet goals that reduce peak electricity demand. Goals must be “realistically achievable with an aggressive effort to deploy Smart Grid and peak demand reduction technologies.”



# Substantive Provisions of Waxman-Markey (Cont.)

- **Encourages carbon capture and sequestration**
  - Orders several studies relating to carbon capture, and establishes a Carbon Storage Research Corporation to administer a program to accelerate commercial availability of carbon capture technologies.
  - Requires new coal plants to achieve a certain amount of carbon dioxide reduction
    - A covered unit that is initially permitted after January 1, 2009, and before January 1, 2020, must achieve a 50% reduction in carbon dioxide emissions by a compliance date that will be determined at a future time
    - A covered unit that is initially permitted on or after January 1, 2020, shall reduce carbon dioxide emissions by 65%.



# Substantive Provisions of Waxman-Markey (Cont.)

- Establishes a Clean Energy Deployment Administration (“CEDA”) within the Department of Energy and a Clean Energy Investment Fund
  - CEDA may issue direct loans, letters of credit, loan guarantees, or other credit and debt instruments for the purpose of deploying clean energy technology.
  - CEDA is directed to develop financial arrangements that will promote private sector support for clean energy technology through securitization, indirect credit support, or other credit enhancements.



# Substantive Provisions of Waxman-Markey (Cont.)

- **Nuclear Energy Financial Awards**

- The Secretary of Energy shall establish a program to make monetary awards to the owners and operators of new and existing electric energy generation facilities or thermal energy production facilities using fossil or nuclear fuel, to encourage them to use innovative means of recovering any thermal energy that is a potentially useful byproduct of electric power generation to generate additional electric energy



# Substantive Provisions of Waxman-Markey (Cont.)

- **Expanded FERC Jurisdiction and Powers**

- FERC granted authority to regulate cash market for emission allowances

- FERC is to promulgate regulations for the establishment, operation, and oversight of the cash market that are designed to prohibit fraud, market manipulation, and excess speculation.
- Provides measures to limit unreasonable allowance price fluctuations. Participants are limited to no more than a 10% position in any class of regulated allowance or allowance derivative.
- Establishes criminal penalties for anyone engaging in fraud or making knowing false statements in connection with a transaction involving a regulated allowance. Penalties include up to 20 years imprisonment.

- **CFTC granted additional authority to regulate energy commodities and derivatives**

- However, the President possesses the discretion to delegate oversight authority over derivatives markets to “appropriate agency.”



# Substantive Provisions of Waxman-Markey (Cont.)

- **Expanded FERC Jurisdiction and Powers (Cont.)**
  - FERC authorized to issue “cease-and-desist” orders for violations of Natural Gas Act and the Natural Gas Policy Act.
  - NGA and NGPA provide for administrative and judicial review of cease-and-desist orders.
  - Federal Power Act *not* amended to give FERC “cease-and-desist” authority under FPA.



# Substantive Provisions of Waxman-Markey (Cont.)

- **Expanded FERC Jurisdiction and Powers (Cont.)**
  - Establishes Office of Consumer Advocacy within FERC
    - OCA will serve as advocate for the public interest to represent, and appeal on behalf of, energy customers concerning rates or service of public utilities and natural gas companies under FERC jurisdiction.



# Substantive Provisions of Senate Bill

## Summary of Major Provisions

- National Renewable Energy Standard
- Transmission Development
- Expanded FERC Jurisdiction and Authority
- Cyber Security
- Clean Energy Investment
- Oil and Gas Development
- Nuclear Waste Management



## Substantive Provisions of Senate Bill (cont.)

- **Establishes a National Renewable Electricity Standard**
  - Except for the applicable percentages, Senate bill RES is similar to that approved in the House bill.
  - Applicable percentages begin at 3% in 2011 and increase to 15% in 2021.
  - Qualifying renewable sources are: (i) wind; (ii) solar; (iii) ocean; (iv) geothermal; (v) biomass; (vi) landfill gas; (vii) incremental hydropower; (viii) hydrokinetic; and (ix) new hydropower at existing dams with no generation.



# Substantive Provisions of Senate Bill

- **Transmission Development**

- Requires FERC to coordinate interconnection-wide transmission development.
  - FERC must issue electricity grid planning principles addressing the incorporation of high-priority national transmission projects (“HPNTP”) onto the electric grid.
  - Utilities must submit a plan to FERC addressing HPNTPs’ incorporation onto the electric grid. Utilities are encouraged to submit a joint regional or interconnection-wide plan, but are permitted to submit a plan for its system only. Plans are due within 2 years after enactment.



# Substantive Provisions of Senate Bill (cont.)

- **Transmission Development** (cont.)
  - Provides FERC with national transmission siting authority
    - FERC may issue a certificate for public convenience and necessity authorizing construction of a HPNTP if a state fails to approve construction, rejects an application for a HPNTP, or authorizes construction subject to unreasonable conditions.
    - FERC must consider whether a proposed HPNTP is included in one of the regional, interconnection-wide, or system plans submitted by utilities.
    - **Note:** Such authority is different that the House Bill, which provides FERC with siting authority only in the Western Interconnection.



# Substantive Provisions of Senate Bill (cont.)

- **Transmission Development** (cont.)
  - Requires FERC to coordinate cost allocation
    - FERC must issue a rule establishing a cost allocation methodology for the development and operation of HPNTPs.
    - Costs may be allocated across an entire region, and may be allocated to electric generators or load serving entities
    - Allocated costs must be reasonably proportionate to measurable economic and reliability benefits in the region subject to the allocation



## Substantive Provisions of Senate Bill (cont.)

- **Expands FERC's authority over electric rates**
  - Grants FERC to authority to temporarily suspend or modify any rate, term or condition on file in an emergency circumstance.
    - FERC must first determine that such action is necessary: (i) to ensure reliability of service to electric consumers; or (ii) to protect consumers from potential abuse of market power or market manipulation.
    - An emergency is defined as a major disturbance in wholesale electric markets that: (i) substantially disrupts or threatens disruption to the reliability of service; or (ii) is characterized by sudden and excessive price fluctuations in wholesale electric markets.



## Substantive Provisions of Senate Bill (cont.)

- **Addresses Cyber Security**

- Requires FERC to issue rules and orders as are necessary to protect critical electric infrastructure from cyber security vulnerabilities if a vulnerability is identified.
  - FERC is also given authority to issue a rule or order without prior notice if the Commission determines that action is required immediately.
  - Any order or rule will remain valid until NERC develops a standard addressing the vulnerability and FERC approves the standard, as required by Section 215 of the Federal Power Act.



## Substantive Provisions of Senate Bill (cont.)

- **Expands market regulation and transparency**
  - Grants FERC cease-and-desist authority to order an entity to cease a certain practice if FERC determines that the entity is violating, is attempting to violate, or has violated the market manipulation provisions of the Federal Power Act or the Natural Gas Act.
    - **Note:** The House bill provides FERC with cease-and-desist authority only for violations of the Natural Gas Act.
  - The Energy Information Administration is directed to collect new data identifying physical petroleum holdings of the fifty largest oil traders.



## Substantive Provisions of Senate Bill (cont.)

- **Establishes a Clean Energy Financing Source**
  - Establishes a Clean Energy Deployment Administration (“CEDA”) within the Department of Energy and a Clean Energy Investment Fund
    - The provisions in the Senate bill relating to CEDA are similar in effect to those approved in the House Bill.



## Substantive Provisions of Senate Bill (cont.)

- **Promotes Oil and Gas Development**
  - Opens the eastern Gulf of Mexico to oil and gas development so long as development occurs at least 45 miles from the coastline.
  - Increases the federal guarantee for financing an Alaska natural gas pipeline to \$30 billion.
  - Authorizes the issuance of rights-of-way for a high pressure natural gas pipeline in certain areas of the Denali National Park in Alaska.



## Substantive Provisions of Senate Bill (cont.)

- **Nuclear Waste Management**
  - Establishes a National Commission on Nuclear Waste
    - The purpose of the Commission is to conduct “a comprehensive study of alternative means of safely managing or disposing of spent nuclear fuel and high-level radioactive waste from civilian nuclear activity and atomic energy defense activity;” and “to recommend to Congress such legislative or other action as may be necessary to manage or dispose of spent nuclear fuel and high-level radioactive waste successfully and safely.”
    - The Commission is directed to submit a report to the President and Congress within 2 years of enactment



## Substantive Provisions of Senate Bill (cont.)

- **Additional Provisions**

- Directs the Secretary of Energy to create a carbon capture demonstration program, and authorizes the Secretary to provide financial assistance for up to 10 demonstration projects.
- Establishes a variety of reports and studies relating to: (i) the impact that energy production has on domestic water resources; and (ii) oil and gas development in the outer continental shelf.
- Establishes efficiency standards for light fixtures and building codes.



## Substantive Provisions of Senate Bill (cont.)

- **Additional Provisions (cont.)**

- Directs FERC to establish an interconnection standard for small power production facilities for the purpose of promoting distributed generation.
- Promotes energy job training through the establishment of career academies and grant programs for educational institutions that implement energy workforce training programs.
- Provides financing incentives through grants and loan programs for implementing energy efficiency in the manufacturing sector, retrofitting residential and commercial buildings, and electric vehicle development.



## Next Steps

- Potential avenues for enactment include:
  - Passage of the House Bill by the Senate
    - This could be accomplished through the use of Senate Rule 14, which allows a bill that passed the House to be placed directly on the Senate calendar, after two readings, without referring the bill to any Senate committee.
    - The Senate has invoked Rule 14 to place the House Bill on its calendar. However, there is no obligation to conduct a Senate debate or vote on the House Bill. Presently, no vote is scheduled in the Senate for the House Bill.



## Next Steps (cont.)

- Potential avenues for enactment include (cont.):
  - Passage of the Senate Bill by the Senate
    - This approach would render the House Bill dead in the Senate.
    - Following passage of the Senate Bill by the Senate, two possibilities could occur:
      - The House could consider the Senate Bill and pass it without altering it.
      - A reconciliation process would allow the House and Senate to reconcile the differences between the House and Senate Bills. Following this process, both chambers would need to pass the resulting reconciliation bill.



## Next Steps (cont.)

- Any action will not occur until at least September 2009.
  - The Senate has indicated that it will continue developing the Senate Bill, but will be in recess through Labor Day.
    - Presently, six different Senate Committees are developing climate change legislation. The Senate Majority Leader has given the committees a September 28 deadline to complete its work.
    - The Senate has not formally indicated whether the climate change legislation will be rolled into the existing Senate Bill, or whether it will be a stand-alone piece of legislation.