Climate Change Update

RECENT HAPPENINGS REGARDING CLIMATE CHANGE

March 2009

Welcome to the inaugural issue of Weil, Gotshal & Manges' **Climate Change Update**. This monthly publication seeks to provide timely and practical updates on significant legal, business and political developments related to domestic and international efforts to reduce greenhouse gas emissions and how those efforts impact corporations. Please contact any member of the Editorial Board (see p. 3) or your contact at Weil Gotshal for more information on the topics discussed in this publication.

In This Issue

Obama Administration Moves Ahead on Climate Change

In the face of a severe economic recession, President Obama twice last week reaffirmed his commitment to pursuing a mandatory cap-and-trade program targeted at reducing greenhouse gas ("GHG") emissions. While critics contend that such a system would drive up the costs of manufacturing and energy production, the President believes that cap-and-trade will not only help create thousands of "green collar" jobs, but also will generate significant amounts of revenue for the federal coffers.

In his first speech to a joint session of Congress, President Obama called on the legislators to send him "legislation that places a market-based cap on carbon pollution and drives the production of more renewable energy in America." Two days later, the President released his proposed budget, which provided some much-anticipated detail on the Administration's preferred cap-and-trade system. The budget outline calls for an "economy-wide emissions reduction program" designed to reduce GHG emissions 14 percent below 2005 levels by 2020, and 83 percent below 2005 levels by the middle of this century. As he indicated he would during his campaign, President Obama seeks to auction 100 percent of the emissions credits, which the Office of Management and Budget estimates would generate nearly $650 billion for the federal government between 2012, when the first auction would occur, and 2019.

Also tucked away in the budget outline is a statement that USDA will be working with farmers to help them take advantage of opportunities to participate in emerging markets for climate credits, which seems to suggest that the President's preferred cap-and-trade system would allow, to some degree, for offset projects to generate tradable emissions credits that could be used to meet an emitter's GHG reduction obligations. It is almost certain that offset projects will not be limited to the agriculture sector, though it remains to be seen whether offset credits generated by international projects will be accepted in the President's plan. The availability of offsets in any form should come as welcome news to emitters, as they can often provide downward pressure on the price of emissions allowances.

While it is certain that the President will not be able to achieve each of the goals set out in his budget plan, the document reinforces the Administration's desire for a cap-and-trade system to address GHG emissions. Fortunately for the President, he has powerful allies with similar goals in Congress. Rep. Henry Waxman (D-CA), for example, chairs the House Energy and Commerce Committee and plans to pass a climate change bill out of his committee by Memorial Day. In the Senate, Majority Leader Harry Reid (D-NV) has stated his intent to begin debating a climate change bill by the end of this summer. While getting the 60 votes necessary to advance a controversial bill in the Senate could prove to be difficult, pressure to make progress before the United Nations Climate Change Conference in Copenhagen this

December could convince wavering lawmakers to support the right cap-and-trade bill. What such a bill might look like remains to be seen, though Rep. Waxman and Sen. Barbara Boxer, chairman of the Senate Environment and Public Works Committee, are each expected to introduce legislation this spring.

Congress, however, may end up being late to the game. U.S. EPA Administrator Lisa Jackson recently suggested that she would soon decide whether to use the Clean Air Act ("CAA") to regulate carbon dioxide emissions. Ms. Jackson hinted that EPA could issue its endangerment finding before April 2, 2009, or the second anniversary of the *Massachusetts v. EPA* decision, in which the U.S. Supreme Court found that EPA had the authority under the CAA to restrict carbon emissions if EPA found that such emissions endanger the public health or welfare. While EPA claims that it has not yet reached a decision, Ms. Jackson may have telegraphed her thinking on the issue when she recently announced that EPA will conduct a "vigorous review" of a memo by Bush Administration EPA Administrator Stephen Johnson that declared that EPA would not regulate carbon dioxide emissions from new power plants under the CAA.

Critics argue that the CAA was not designed to address climate change, and that any attempt to regulate GHG emissions through the CAA would be overly complicated, costly and result in protracted litigation. In fact, Carol Browner, the Assistant to the President for Energy and Climate Change, recently told the Western Governors Association that President Obama believes that "the best path forward is through legislation, rather than through sort of the weaving together the various authorities of the Clean Air Act, which may or may not end in a cap-and-trade program." Notwithstanding the President's preferences, it appears clear that EPA will move forward under the CAA to regulate GHGs as Ms. Jackson believes the agency is required to under the Supreme Court's *Massachusetts v. EPA* decision. Only time will tell whether Congress will preempt EPA, though one thing is certain: despite unprecedented economic difficulties, the Obama Administration and its allies in Congress will push hard for GHG limits in 2009.

Stimulus Bill Invests in Alternative Energy

The American Recovery and Reinvestment Act of 2009 ("Act"), signed into law by President Obama on February 17, contains almost $100 billion for clean and alternative energy projects. For many in the alternative energy industry, the timing could not be better, as lower oil prices and a tight credit market have dramatically altered the financial viability of alternative energy projects such as wind farms and large-scale solar arrays.

The Act employs several approaches to direct federal dollars to where its sponsors believe they can do the most good, with tax credits, grants and accelerated write-offs featured prominently. For example, the Act provides:

- a three-year extension of the Production Tax Credit for electricity produced by wind facilities that are placed into operation by the end of 2012, as well as for geothermal, biomass, hydropower, landfill gas, waste-to-energy and marine facilities that come online by the end of 2013.
- to producers who are eligible for the Production Tax Credit, the option of instead taking a 30 percent investment tax credit or grants equal to 30 percent of the cost of eligible projects that begin construction or are placed into service before 2011.
- $2.3 billion in tax incentives for projects that establish, retool or expand manufacturing facilities that make fuel cells, smart grid technologies, components used to generate renewable energy or equipment for carbon capture and storage.

In addition to tax incentives and grants, the Act provides for $16.8 billion in direct spending for renewable energy programs over the next ten years, including $11 billion directed at modernizing the nation's electricity grid with smart grid technologies designed to increase transmission efficiencies. There is also $2.5 billion dedicated for renewable energy research and development and $6 billion available for temporary loan guarantees for developers of renewable energy power generation and transmission projects that begin construction before September 30, 2011.

Beyond those discussed here, there are many more provisions in the Act designed to promote investment in numerous alternative and clean energy technologies. While it remains to be seen whether these programs will spur private investment and create the promised "green-collar" jobs, alternative energy project developers are encouraged to analyze the Act and reevaluate the financial viability of their pending projects in light of these new funding sources.

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