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THE AMERICAN CLEAN ENERGY AND SECURITY ACT: HR 2454

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OVERVIEW

On June, 26, 2009, the House of Representatives passed the American Clean Energy and Security Act of 2009 ("ACESA") by the close margin of 219 votes in favor of the bill and 212 against it. This bill, House Bill No. 2454, is popularly called the Waxman-Markey energy bill for its co-sponsors Rep. Henry Waxman (D-Calif.) and Rep. Ed Markey (D- Mass.).

ACESA would establish enforceable reductions in greenhouse gas emissions across various industries. It would cover more than 85% of the U.S. economy, including electricity producers, oil refineries, natural gas suppliers and energy intensive industries like iron, steel, cement and paper manufacturers. ACESA includes both regulatory and market-based approaches, and seeks to improve energy efficiency and establish a renewable electricity standard ("RES"). At the center of the bill is a cap-and-trade system that limits the overall emission of greenhouse gases, while allowing emitters to trade emission permits among themselves in a marketplace.

Companies that will be affected by the passage of ACESA can begin planning now by identifying ways to lower their emissions of greenhouse gases and by looking for opportunities to create offsets by investing in reductions of emissions elsewhere. ACESA, like other programs tracking the emission of greenhouse gases, measures emissions in terms of carbon dioxide equivalents.

In addition to the cap-and-trade system, ACESA calls for state planning programs to reduce emissions from transportation and land use, and for state and federal plans to help consumers and industries transition to a more energy efficient era. The bill creates incentives for individuals and companies to use energy more efficiently, while encouraging the development of alternative forms of energy. Finally, it provides for regulation of the newly created carbon permit market.

GOAL

The specific goal of ACESA is to reduce greenhouse gas emissions to 83% below 2005 emission levels in the U.S. by 2050. The international community considers 2005 as the benchmark year when measuring emissions levels, as it was the year the Kyoto Protocol went into effect. Under ACESA, 2005 will also be used as the yardstick for emission reduction levels, gradually increasing over time as follows:

- 3% below 2005 levels by 2012,
- 17% below 2005 levels by 2020,
- 42% below 2005 levels by 2030, and finally,
- 83% below 2005 levels by 2050.

In order to reach these goals, ACESA requires utility companies to increase their supply of electricity from renewable sources and, at the same time, improve their efficiency.

RENEWABLE ENERGY

ACESA would create a renewable electricity standard requiring retail electric suppliers to produce a certain percentage of their electricity from renewable sources. Retail electric suppliers include every electric utility and its affiliates that sold at least 4 million megawatt hours of electric energy to consumers during the preceding calendar year. Renewable energy sources that qualify under ACESA include wind, solar, geothermal, biomass, marine and hydrokinetic energy, biogas and biofuels derived exclusively from eligible biomass, landfill gas, wastewater-treatment gas, coal mine methane, hydropower projects built after 1992, and some waste-to-energy projects.

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The RES that would be established by ACESA requires retail electric suppliers to provide a percentage of electricity from renewable sources. Specifically, that:

- 6% of electricity come from renewable sources by 2012,
- 9.5% of electricity come from renewable sources by 2014,
- 13% of electricity come from renewable sources by 2016, and
- 20% of electricity come from renewable sources between 2021-2039.

Up to 5% of this requirement can be met by improvements in energy efficiency. If a state determines that its utilities cannot meet these target numbers, then efficiency measures can be increased to account for 8% and the renewable component can be decreased to 12% in 2021.

CAP-AND-TRADE

ACESA would cap the emission of greenhouse gases, requiring industries with high levels to reduce their emissions in order to meet the specific targets outlined above by 2050. These reductions in emissions are referred to as the cap portion of the cap-and-trade system. Regulated industries would be required to obtain a permit for every ton of carbon emitted. These permits are also commonly referred to as carbon credits, or pollution allowances.

When a company is able to reduce its emissions to such an extent that it has acquired more permits than it needs to cover its own emissions, the company can sell its excess permits to other emitters, or it can save them for future use. Companies requiring more permits than they have acquired can buy them from other companies or borrow against their future credits, although, in that event, they would have to pay interest on them. Thus, there is some flexibility worked into the cap-and-trade system. If a company cannot acquire enough permits to cover its emissions, the U.S. Environmental Protection Agency ("EPA") will have the authority to enforce regulatory penalties. ACESA further outlines the regulation of the cap-and-trade system, including the issuing, trading, banking, retiring and verifying of permits.

The cap-and-trade program will go into effect in stages. Beginning in 2012, companies generating electricity will be required to obtain permits for emissions, followed by industrial sources of emissions (in 2014), and finally for companies distributing natural gas and fossil fuel (in 2016). Distributors of natural gas and fossil fuel will be required to obtain permits for the amount of emissions expected to come from consumer use of their product. The cap-and-trade program would be completely implemented by 2016.

ALLOCATION OF PERMITS AND REVENUE

In the first few years after the passage of ACESA, most (85%) of the permits would be provided for free in order to offset new costs incurred by companies working toward compliance. The remaining 15% of permits would be available by auction. Over time, the percentage of permits given for free will decrease and the percentage auctioned will increase.

Of all the permits to be distributed for free:

- 30% would be given to local electricity companies. These free permits will be phased out between 2026 and 2030.
- 10% of permits would be given to state governments in order to support renewable energy, energy efficiency, transportation planning and transmission projects.
- 9% would be given to local natural gas distribution companies. The free permits will be phased out between 2026 and 2030.
- 3% would be given to the automobile industry between 2012 and 2017, and 1% between 2017 and 2025. The value of these permits is to be used for the development of clean car technologies.

The federal government would earmark the majority of revenues from the auctioned permits to offset energy costs for low and moderate income households, support research of clean-energy technologies at home and abroad, and help the U.S. and other nations adapt to the negative effects of climate change. ACESA would also establish the Clean Energy Deployment Administration, an agency within the federal government that would provide loans to encourage investment in energy technology. Some revenue is intended to be used to help U.S. workers transition away from fossil fuel dependent industries into new jobs.

By 2025, ACESA estimates that $190 billion in revenues will be directed toward energy technologies and efficiency measures. These include:

- $90 billion for energy efficient and renewable energy technologies,
- $60 billion for carbon capture and sequestration technology,
- $20 billion for advanced automotive technologies, and
- $20 billion for basic scientific research.

In 2012, the EPA estimates that the permits will cost about $13 for each ton of carbon dioxide emitted. The value of a permit will rise over time as emission ceilings are lowered. By 2025, a permit for one ton of emissions will likely be valued at $25. The value of all permits combined is estimated to be about $60 billion in 2012, increasing to $113 billion by 2025.

Some environmentalists have criticized the initial allocation of free emission permits. However, this system is intended to create incentives for companies to lower emissions in order to sell excess permits for revenue. A similar system was adopted as an amendment to the U.S. Clean Air Act in 1990 to control the pollution of nitrogen oxides (NOx) and sulfur oxides (SOx) that lead to acid rain. The SOx program sets a cap on the total amount of SOx that can be emitted by utilities in the U.S., and permits for emitted units can be traded like carbon permits would be under ACESA. Nitrogen oxide reductions, on the other hand, are achieved through a more traditional regulatory system. Since the phased-in implementation of this program in 1995, emissions have been significantly reduced, well beyond the levels legislated by the Clean Air Act.

OFFSETS

ACESA would allow companies to offset their emissions and meet their required reductions by funding clean energy projects elsewhere, instead of cutting their own emissions. Investing in offset projects is potentially a lower cost method of complying with the new law. The bill would create the Offsets Integrity Advisory Board, composed of scientists and others with relevant expertise, which would make recommendations to the EPA as to which offset programs are eligible for the program. The EPA will have the ultimate authority to determine eligibility based on these recommendations, and will be responsible for periodic evaluations of project eligibility. Projects eligible as offsets must be "verifiable, additional, and permanent." Half of the eligible offset projects will be domestic and the other half will be international, unless there are not enough domestic offset projects available. In that event, up to three quarters of offset projects may be international under ACESA.

In an effort to garner support in the House of Representatives, an amendment was included as part of ACESA that would create an offset program, run by the U.S. Department of Agriculture, that identifies specific domestic agriculture and forestry projects for which companies could receive early offset credits. In addition, the amendment allows farmers, ranchers and forestland owners to participate in the cap-and-trade program. It also addresses concerns related to the use of biofuels, placing a five year moratorium on the regulation of biofuels under the bill. This moratorium will allow time for further study in order to determine if biofuels lead to indirect land use changes that require regulation.

OTHER MEASURES

ACESA contains other measures worth noting, including information on:

- **Coal-Fired Power** - New coal-fired power plants built between 2009 and 2020 would be expected to adopt carbon capture and sequestration technologies. By 2025, all coal plants built after 2009 must capture at least 50% of their carbon dioxide emissions, and those built after 2020 must capture 65%. Companies that capture emissions now will be rewarded with bonus emission permits for 10 years.
- **Energy Efficient Building Standards** - ACESA would establish new standards for lighting products, commercial furnaces and other appliances. These standards require a 30% improvement by 2010 and a 50% improvement by 2016. Each U.S. household would be eligible for $3,000 toward improving energy efficiency at home.
- **Worker Transition** - ACESA would increase funding for the Energy Worker Training Program of 2007. Workers displaced by the regulation of emissions, in particular, by this bill, will be entitled to 70% of their average weekly wages and 80% of their monthly health care premium for 156 weeks, as well as $1,500 for assistance with job searching and up to $1,500 for relocation.
- **Advanced Automotive Technologies** - ACESA amends the Public Utility Regulatory Policies Act to require utilities to consider developing plans to support electric vehicle infrastructure and protocols for integration with smart grid systems. It also authorizes the Secretary of Energy to provide financial assistance for the integration of grid-connected vehicles or to assist existing factories that manufacturer electric vehicles. Funds may be used for offsetting the incremental cost of purchasing new plug-in electric drive vehicles, purchasing batteries for vehicles, deploying electric charging stations and battery exchange locations, or facilitating the integration of smart grid equipment with plug-in electric drive vehicles.

WHAT'S NEXT?

In the House of Representatives, ACESA required substantial compromises in order to garner the votes it needed to pass.

Fierce debate is expected in the Senate, where political divisions and regional differences can be even more stark.

The Waxman-Markey bill was placed on the Senate Calendar on July 7, 2009. It is currently in the mark-up process in the Senate Environment and Public Works Committee chaired by Barbara Boxer (D- Calif.), although other committees, including Finance, Foreign Relations, Agriculture and Commerce, are also working on portions of the bill. The core package of the bill is expected to be released at the end of July or beginning of August 2009, and Majority Leader Harry Reid has set September 18, 2009, as a deadline for the committees to produce their pieces of the bill. He would like to see the legislation reach the Senate floor between mid-September and early October, though other members are skeptical that the 60 votes needed to avoid a filibuster can be secured by that time.

If the Senate does pass a version of this bill, it will have to be reconciled with the House of Representative's Waxman-Markey bill before it goes to President Obama to be signed into law. Proponents of the bill hope to have legislation passed before the international climate change discussions in Copenhagen, Denmark, in December 2009.

COZEN O'CONNOR ENERGY, ENVIRONMENTAL & PUBLIC UTILITIES LAW PRACTICE GROUP

Cozen O'Connor's Energy, Environmental & Public Utility Practice Group provides strategic counseling to energy and clean technology companies on climate change, energy, public utility and environmental matters.

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