Energy and Clean Technology Alert: Climate Bill Differences: Waxman-Markey versus Kerry-Boxer

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By Katherine Holliday and Kevin Fay

On September 30, 2009, Senators John Kerry (D–Mass.) and Barbara Boxer (D–Calif.) introduced the Clean Energy Jobs and American Power Act (the Kerry–Boxer bill). This bill follows the American Clean Energy and Security Act of 2009, sponsored by Representatives Henry Waxman (D–Calif.) and Edward Markey (D–Mass.), which passed the U.S. House of Representatives in June 2009. This article will describe the main differences between the Kerry–Boxer bill and the Waxman–Markey bill.

The Kerry–Boxer bill targets a 20% reduction in greenhouse gas emissions from covered, capped sources below 2005 levels by 2020, which is slightly more aggressive than the Waxman–Markey goal of a 17% decrease by such time. Under the Kerry–Boxer cap–and–trade system, approximately 7,500 facilities in the United States will be immediately covered. This accounts for roughly 75% of the country's carbon emissions. In contrast, the Waxman–Markey bill took a hybrid approach, by phasing in covered entities over a five–year time frame. Specifically, it is estimated that the entities to be covered by the Waxman–Markey cap–and–trade program will account for approximately 68% of carbon emissions in 2012, 76% in 2014 and 85% in 2016.

The Kerry–Boxer bill has also tried to relieve a growing concern about the cost of instituting a cap–and–trade system by installing what is known as a "price collar" on carbon permits. Since the permits will be a tradable commodity, the Kerry–Boxer bill attempts to set an initial floor ($11/ton) and ceiling ($28/ton) on the price of an allowance. The theory is that a price collar will limit volatility and add some predictability to the market process. The Waxman–Markey bill did not have a price collar.

Another notable difference between the two pieces of legislation relates to regulatory oversight of the cap–and–trade market. The House bill had the Federal Energy Regulatory Commission (FERC) overseeing the cash market and the Commodity Futures Trading Commission (CFTC) handling derivatives, while the Senate version gives complete authority to CFTC to regulate both cash and derivatives.

There was some controversy in the Waxman–Markey bill regarding the free allocation of allowances to specific industries like electric utilities and coal companies. The House version had been criticized by environmentalists for giving away about 85% of the allowances for free, rather than auctioning them off. The Kerry–Boxer bill does not yet describe how allowances will be allocated, leaving the most controversial section of the bill for further mark–up.

The Kerry–Boxer bill endeavors to more rigorously scrutinize offset projects under the cap–and–trade system. Specifically, the Kerry–Boxer bill puts more focus on international offsets, as well as on the accounting method for offset reversals, which would occur when the expected amount of carbon offset is not achieved. The two bills are similar in that both allow covered entities to use offset credits to demonstrate compliance under the cap–and–trade system for up to a maximum of two billion tons of greenhouse gas emissions annually. However, it is notable that the Kerry–Boxer bill allows up to 75% of this limit to come from domestic offsets, whereas Waxman–Markey allowed a 50–50 split between domestic and international offsets.

The Waxman–Markey bill provides for a federal renewable portfolio standard (RPS) that would require electricity generated from renewable sources, together with energy efficiency savings, to equal at least 6% of retail electric utilities' baseload power starting in 2012 and increasing to a 20% target by 2020. The Kerry–Boxer bill does not contain a federal RPS or renewable energy credit trading program, most likely because similar proposals are already under Senate consideration in the separate American Clean Energy and Leadership Act of 2009 (the Bingaman Bill), reported out of committee by Senator Jeff Bingaman (D–N.M.), Chairman of the United States Senate Committee on Energy & Natural Resources.[1] The Kerry–Boxer bill provides grants from the Environmental Protection Agency (EPA) for projects that increase the quantity of energy that a state uses from renewable resources, with priority to applicants in states with a binding RPS mandate.

Noteworthy in comparison to the Waxman–Markey bill, the Kerry–Boxer bill contains provisions related to nuclear development: nuclear workforce training and an R&D program to address such factors as the reliability, availability, productivity and safety of nuclear power and the continued operation of existing nuclear plants. Also noteworthy in comparison are EPA grants available to natural gas distributors and others for the commercial demonstration or early development of low–emitting technologies fueled by natural gas.

The legislative initiatives are largely in accord on transportation–related greenhouse gas reductions. Both the Waxman–Markey bill and the Kerry–Boxer bill require the Administrator of the EPA, in conjunction with the Secretary of Transportation, to promulgate national, transportation–related, emission reduction goals within 12 months of enactment, with final regulations no later than 18 months after enactment. States and municipal planning organizations would have one year under the Waxman–Markey bill or two years under Kerry–Boxer bill to develop surface, transportation–related, emission reduction targets and strategies to meet those targets. The Kerry–Boxer bill provides for grants from the Department of Transportation to states and municipal planning organizations to help implement these goals and defray the cost. Both the Waxman–Markey bill and the Kerry–Boxer bill also require the Administrator of the EPA to promulgate emissions standards for heavy–duty motor vehicles or heavy–duty motor vehicle engines by December 31, 2010, and non–road engines and vehicles (such as marine vessels) by December 31, 2012. Both expand the Smartway Transport Partnership, a program to upgrade the trucking fleet to more fuel–efficient and less polluting vehicles.

The House and Senate versions align with regard to carbon capture and sequestration (CCS) initiatives, with the Administrator of the EPA to report to Congress on legal and regulatory barriers to commercial scale CCS within a year of enactment and to establish a coordinated approach to certifying and permitting CCS sites. A multi–stakeholder task force will examine the statutory framework for CCS within 18 months of enactment. Both bills allow for the formation of a Carbon Storage Research Corporation, by referendum of electric distribution utilities, that would collect assessments on KWhs generated from coal (highest assessment), natural gas and oil to support commercial–scale CCS demonstration projects.

With regard to more energy–efficient buildings, the Waxman–Markey bill provides for the promulgation by the Secretary of Energy of a new national building code for both residential and commercial building, representing a 30% energy reduction goal over existing codes upon enactment, and a 50% energy reduction goal over existing codes by January 1, 2014 for residential buildings and by January 1, 2015 for commercial buildings. The Kerry–Boxer bill gives the Administrator, or another agency head as may be designated by the President, the power to adopt more efficient codes and does not specify targets, likely because the pending Bingaman bill is specific as to targets.[2] Both the Waxman–Markey bill and the Kerry–Boxer bill establish a retrofit program to be funded by dedicated allowances that would pay up to 50% of the cost of retrofitting existing buildings for increased energy efficiency. The Kerry–Boxer bill requires states to set aside 10% of program funding for retrofitting public and assisted housing.

Both Waxman–Markey and Kerry–Boxer address the same CO_2 emissions standards for new coal–fired plants initially permitted between January 1, 2009 and January 1, 2020, and thereafter, respectively. Both would create an Office of Consumer Advocacy with the FERC to represent ratepayer interests in proceedings before the Commission.

The next mark–up of the Kerry–Boxer bill is expected in late October, and will likely answer the crucial question of how free allowances will be allocated among stakeholders.

Endnotes

[1] The American Clean Energy and Leadership Act of 2009 provides for a federal renewable portfolio standard of 3% beginning in year 2011 and increasing to a target of 15% by year 2021.

[2] The American Clean Energy and Leadership Act of 2009 directs the Department of Energy to set energy savings improvement targets for residential and commercial national model building energy codes at 30% in 2010 and 50% in 2016.

If you have any questions about the new regulations or the regulatory process, please call your Mintz Levin service professional or any of those listed below.

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