

INTRODUCTION

FEDERAL CLIMATE CHANGE LEGISLATION – THE PERSPECTIVE FROM 2008

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It is almost certain that the United States will pass some form of comprehensive federal legislation controlling the emission of heat trapping greenhouse gases within the next two years. As of July 2008, there are currently eleven bills in Congress, with one having been brought before the entire Senate and with new ones being prepared by Democratic House Leadership. Both the Republican and Democratic Presidential Candidates have expressed support for such a bill, though with significant distinctions.¹ Though economists have expressed favor for some kind of a CO₂ or CO₂ equivalent tax, the most likely bill will be what is referred to as cap-and-trade.² Cap-and-trade is a system whereby the total amount of the pollutant (in this case CO₂ and other greenhouse gases) is capped, the total allocation is distributed in some way, and those who own these allocations (the rights to emit the gases) can trade them.³

While the last year has brought some clarity with respect to what shape the ultimate federal law will have, there are still many unanswered questions. Several of those questions are

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1. *Whether its McCain or Obama, Washington Preps for '09 Warming Debate*, E&E DAILY, July 29, 2008, available at <http://www.eenews.net/EEDaily/2008/07/29/1/>.

2. The Pew Center has been following the legislative debate closely. In 2007, the opinion was that we were headed for a cap-and-trade bill. See *The Future of Cap and Trade Markets and Nuclear Power in the U.S.*, TRIPLEPUNDIT, Nov. 6, 2007, <http://www.triplepundit.com/pages/the-future-of-capandtrade-mark-002682.php> (last visited Nov. 15, 2008).

3. Victor B. Flatt, *Taking the Legislative Temperature: Which Federal Climate Change Legislative Proposal is "Best"*, 102 NW. U. L. REV. COLLOQUY 136 (2007).

addressed in this symposium, and in this Introduction some of the most important issues will be outlined.

The biggest question, of course, is almost a philosophical one. Do we have the legislative tools necessary to address this problem at all? Professor Schroeder's piece explores the nature of the problem of climate change, why it is so different from prior environmental problems, and why it requires a different level of thinking and analysis. His conclusion that climate change may be the reason to at least partially shift to a mindset of "deep ecology" provides an important insight, not only about climate change, but also about how we think of environmental problems altogether. By tying this to successes and failures of past environmental laws, Professor Schroeder is also able to provide some practical advice as we move forward on constructing this legislation.

From there, the questions become more prosaic, but no less important. When we examine the currently proposed bills, we see several policy issues that must be addressed. The first has to do with the fact that the bills are mostly cap-and-trade.⁴ With any cap-and-trade system, one of the most important questions to be addressed is how allocations to emit the pollutant will be distributed. When the first greenhouse gas cap-and-trade proposals were circulated, it was assumed by many that it would follow the model of the SO₂ cap-and-trade system from the 1990 Clean Air Act Amendments and distribute the allocations freely based on some kind of historical level of emissions. This has the advantage of avoiding large economic disruption in any one sector because historic emitters will still be able to emit (albeit a smaller amount over time) without paying for the right to do so.⁵ This approach is favored by large scale CO₂ producers, such as owners of coal-fired power plants.⁶ This is also the approach used in the first round of allocation of CO₂ emissions rights in the European Union.⁷ However, such an approach does not strongly encourage an immediate switch away from greenhouse gas production because the cost of such production does not rise dramatically.⁸ Moreover, selling or auctioning such emissions

4. See *The Future of Cap and Trade Markets and Nuclear Power in the U.S.*, *supra* note 2.

5. Flatt, *supra* note 3, at 140.

6. *Id.*

7. *European System for Cutting Carbon Dioxide Emissions is Working Well*, SCIENCE DAILY, June 12, 2008, <http://www.sciencedaily.com/releases/2008/06/080610154749.htm>.

8. Flatt, *supra* note 3, at 139-40.

rights also produces revenue that can be used for other purposes.⁹

Most of the current crop of legislative proposals have some type of partial auction and partial give-away mechanism.¹⁰ Though Senator McCain has staked out a position generally opposed to this approach,¹¹ in his campaign materials he has noted that some auction of allowances could provide transition assistance for implementing a cap-and-trade system.¹² The fact that an auction system has gained ground in the last few months points to the increasing public awareness of the problem and the echo of progressives who have been the only ones really discussing bills. Because President George W. Bush has not engaged with climate change policy very much, his administration may have lost the ability to influence the ultimate legislative outcome for certain business interests.¹³ It should also be noted that some business interests, such as nuclear power plants, do comparatively better with an auction system, which means that there is no uniform business position on this issue.¹⁴

An important question that has yet to be answered is how a federal bill will relate to any international regime. In particular, there is concern by many that any reductions made in the United States will be offset by increasing greenhouse gas growth in the developing world, particularly in China, India, Brazil, and others.¹⁵ To address this issue, some proposals have suggested a tariff on goods being imported from countries that do not have binding greenhouse gas controls.¹⁶ In theory, this both

9. *Id.* at 139.

10. *Id.* at 141.

11. See Posting of Robert Reich to Robert Reich's Blog, <http://robertreich.blogspot.com/2008/06/mccain-obama-and-cap-and-trade-we-need.html> (last visited Nov. 15, 2008) (discussing climate change proposal differences).

12. See JohnMcCain.com, Climate Change, <http://www.johnmccain.com/Informing/Issues/da151a1c-733a-4dc1-9cd3-f9ca5caba1de.htm> (last visited Nov. 15, 2008).

13. As noted by the Pew Center, it is akin to "playing blackjack without a dealer at the table." *The Future of Cap and Trade Markets and Nuclear Power in the U.S.*, *supra* note 2.

14. See, e.g., Peter Crampton & Suzi Kerr, *Tradeable Carbon Permit Auctions: How and Why to Auction Not Grandfather*, 30 ENERGY POLICY 333, 333-45 (2002) available at <http://www.cramton.umd.edu/papers2000-2004/02ep-tradeable-carbon-permit-auctions.pdf> (asserting that while carbon-inefficient utilities will decrease in value, carbon-efficient utilities, such as nuclear power plants, will increase were an auction system implemented).

15. Robert Collier, *China Poses Big Challenge on Warming*, SAN FRANCISCO CHRON., May 7, 2007, at A-15.

16. See generally, Steven Mufson, *In Battle for U.S. Carbon Caps, Eyes and Efforts Focus on China*, WASH. POST, June 6, 2007, at D-1 (stating "a variety of lawmakers,

encourages countries to control their own emissions and also protects American businesses from unfair competition. There is speculation that some of these approaches might run afoul of the World Trade Organization, but the fact that they are considered and discussed points out the importance of this issue. Patricia McCubbin's contribution to this symposium examines these questions more specifically in relation to China.

Another important issue that will have a big impact on how any future system will work and who wins or loses is what federal legislation will do with pre-existing greenhouse gas controls in states and localities. Though state and local initiatives run the gamut, some, such as those in California and Washington State, propose stringent economy wide reductions.¹⁷ Should a federal bill pre-empt state and local initiatives? Should it pre-empt some of them? Many businesses, claiming to worry about having to deal with inconsistent regulation, are very concerned about the issue. Many state and local governments remain committed to the local approach, at least until any federal system is up and running and having an impact.¹⁸ The Democratic Leadership has indicated that it prefers not to pre-empt state and local efforts, but in an attempt to alleviate concerns about incompatibility, the leading Senate Bill, Lieberman-Warner-Boxer, has been altered to offer local and state governments a "carrot" for integrating with the federal system.¹⁹ Whether and how this occurs is an important question, and is explored more fully in this symposium by Professor William Andreen.

One of the last critical issues that must be decided is the scope of the federal law. Will it cover the entire economy? Will it cover all greenhouse gases? Will offsets be allowed? If so, how will they be structured and monitored? Will they have additional environmental considerations? Must they meet the so-called "additionality" test?²⁰ What about other currently existing

environmentalists and business leaders are looking at ways to engage China in the battle against climate change - or pay the price for doing nothing. Proposed strategies range from providing financing and technology transfers to imposing special carbon-based import tariffs").

17. Colin Sullivan, *As Bill Dangles Federal "Carrots," Two States Stay Course on Emissions*, GREENWIRE, May 27, 2008, available at <http://www.eenews.net/Greenwire/2008/05/27/archive/1?terms=carrots+emissions>.

18. *Id.*

19. *Id.*

20. The Kyoto Protocol allows credit only for projects resulting in "additional" emission reductions. Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted Dec. 10, 1997, 37 I.L.M. 22 (1998), art. 12(5)(c); Framework

trading systems, such as in the European Union? How will the system be monitored? There are many issues to be considered here and there are lessons to be learned from the system currently in operation in the European Union. Additionally, the answers to these questions have significant economic effects for various interests, so there is significant pressure on many sides.

The complexity and importance of a comprehensive federal system cannot be overstated. The issues touched on in this Introduction and many other issues will be debated and decided soon. These decisions will have large scale impacts and costs. This symposium sheds light on some of the issues underlying proposed federal climate change legislation.