

MAYER • BROWN

Post-Inauguration Series: Energy Outlook in the New Administration

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Introduction and Overview

- Speakers
 - Robert H. Edwards, Jr. – Global Projects Team – Renewable Energy
 - Jeffrey G. Davis – Tax Transactions – Energy Tax Credits
 - David B. Finnegan – Global Trade/Government Relations
- Current renewable energy policy
- Obama administration's strategic approach to energy policy
- Renewable energy policies in current legislation
- Tax credits and tax incentives in proposed legislation
- Obama administration approach to domestic and international climate change efforts
- Prospects for Copenhagen and beyond

US ENERGY POLICY

Robert H. Edwards, Jr.

US Energy “Policy” – Where We Were Pre- January 21st 2009

- Patchwork of Renewable Energy “Policy”
 - Short-term extensions of production tax credits
 - More than 25 states with renewable portfolio standards
 - Renewable fuel standard
 - Ethanol – Volumetric Ethanol Excise Tax Credit
 - California and regional efforts on climate change
 - In short – lack of coherent energy policy

Key Principles of Obama Administration Energy Policy

- Increase renewable energy and harness efficiency
 - Increase production of electricity from wind, solar and other renewable resources
 - Long term extension of production tax credits and related credits and incentives
 - Federal renewable portfolio standard
 - Invest in increased electric transmission infrastructure
 - Invest in Smart Grid
 - Efficiency as low hanging fruit
- Enhance energy security
 - Reduce US oil consumption by at least 35% or 10 million barrels per day by 2030
 - Double the fuel economy of all new passenger cars and light trucks
 - Continue federal renewable fuel standard
 - Promote the development of plug-in hybrid cars

Key Principles of Obama Administration Energy Policy (cont'd)

- Green technology-driven economic recovery
 - Science and technology as foundation for green tech economy
 - Wind and solar to create new jobs as well as provide clean energy
 - Detroit to re-tool for production of cars of the future
- Combat climate change
 - Implement an economy-wide cap and trade program to reduce greenhouse gas emissions by 80 percent by 2050
 - Participate and lead in international climate change efforts

Obama Administration Efforts to be Guided by the Following Principles

- Public investment and removal of barriers to private investment in energy
- Combination of government spending and tax cuts
- Investments chosen based on highest yield for economy (e.g., job creation)
- No earmarks
- Transparency

Obama Administration off to a Fast Start –

- President Obama directed the EPA to again review the California waiver request to set car emissions levels
- He instructed the Department of Transportation to act on CAFE standards
- Stimulus package to include significant spending on energy initiatives

Obama Administration Off to a Fast Start – Key Energy Initiatives in the Stimulus Package

- House Appropriations Committee bill includes
 - \$19 billion for Smart Grid and related efforts to improve the electricity grid
 - \$8 billion for renewable energy loan guarantees
 - Billions for federal buildings, local government and home energy efficiency and weatherization efforts
 - \$2 billion for advanced battery loans and grants to help establish US-based manufacturing
 - \$2.4 billion for carbon capture and sequestration

US ENERGY TAX POLICY

Jeffrey G. Davis

Tax Incentives and Energy Policy: Relationship to Economic Stimulus

- Senate Finance Committee Chairman Baucus, on the stimulus bill:
 - “With the right mix of tax cuts and investments, the American Recovery and Reinvestment Act will create green energy jobs, highway jobs, health care jobs, and other opportunities for folks to get back on their feet”
 - “Together with the provisions that the Appropriations Committee will approve, these Finance Committee measures are the best ways to get folks working and get our economy moving again”
- Senate Finance Committee Ranking Member Grassley, on the extended tax credit carryback provisions:
 - “This much longer carryback period is designed to help get more wind projects started again”
 - “The economic stimulus bill is the perfect place to make this policy change because due to the economic downturn, the tax-equity financing market, which is typically how wind-energy projects are financed, has dried up as the investors in these projects, mainly large financial institutions, no longer have any appetite for obtaining the PTC because they have income tax liabilities. So a lot of projects are on hold”
 - “[T]he longer carryback is designed to get some of those stalled projects going and to get people working again”

Tax Incentives and Energy Policy: Coordination Among Relevant Players

- Obama Administration
 - Economic advisors
 - Energy advisors
- Congress
 - House of Representatives, including Ways & Means Committee
 - Senate, including Finance Committee
 - Joint Committee on Taxation
- Industry Representatives
 - Trade Associations (e.g., AWEA & SEIA)
 - Participants (e.g., equipment manufacturers, developers, investors)

Tax Incentives and Energy Policy: American Recovery and Reinvestment Tax Act of 2009

- Obama Administration
 - Calling for economic stimulus, even prior to Inauguration
 - Visits to Capitol Hill
- House of Representatives
 - January 22 – Ways and Means Committee approves (by vote of 24-13) \$275 billion tax package (H.R. 598)
 - January 28 – Full House passes stimulus bill, including tax package, by a vote of 244 to 188
- Senate
 - January 27 – Senate Finance Committee approves (by vote of 14-9) \$342 billion tax package
 - Week of February 2 – Full Senate vote expected on economic stimulus bill, including tax package
- Congressional leaders want to complete legislation before President's Day recess

Tax Incentives and Energy Policy: Energy Incentives for Businesses

- Section 45 PTC Extension
 - Current law allows PTC for production and sale of electricity from renewable resources
 - 2.1 cents (adjusted for inflation) per kWh
 - Allowed over 10-year period from placed-in-service date
 - Facility must be originally placed in service prior to a specified date
 - House bill would extend placed-in-service deadlines
 - Wind – extend three years to December 31, 2012
 - Closed-loop biomass, open-loop biomass, geothermal, municipal solid waste, hydropower – extend three years to December 31, 2013
 - Marine and hydrokinetic renewable energy – extend two years to December 31, 2013
 - Senate bill contains same provision
 - Grassley amendment (rejected by Senate Finance Committee) would make PTC permanent (or minimum 5-year extension)

Tax Incentives and Energy Policy: Energy Incentives for Businesses

- Section 48 ITC Election
 - Current law allows ITC for investments in certain energy property, with the credit being claimed in the year the property is placed in service
 - House bill would allow irrevocable election to claim Section 48 ITC instead of Section 45 PTC
 - ITC would be 30% of basis
 - Would apply to facilities placed in service in 2009 or 2010
 - No PTCs could have been claimed and no PTCs would be allowed
 - Would apply to wind, closed-loop biomass, open-loop biomass, geothermal, municipal solid waste, qualified hydropower facilities, and marine and hydrokinetic renewable energy facilities
 - Senate bill contains same provision, except election would apply to facilities placed in service through the expiration of Section 45 PTC (see prior slide)

Tax Incentives and Energy Policy: Energy Incentives for Businesses

- General Business Credit (GBC) Carryback Period
 - Current law allows, in the case of taxpayers with insufficient federal tax liability to use GBCs currently, one year carryback and 20 year carryforward of GBC
 - Senate bill would extend carryback period to 5 years and relax limitation on ability to use GBC
 - House bill does not include this provision

Tax Incentives and Energy Policy: Energy Incentives for Businesses

- Department of Energy (DOE) Grant Program
 - House bill would require DOE to provide a grant to each “person” who places in service during 2009 and 2010 certain renewable energy projects
 - Grant would be in lieu of Section 45 PTC or Section 48 ITC
 - Amount would be equal to specified percentage of basis in qualified energy producing facilities
 - 30% for facilities using wind, closed-loop biomass, open-loop biomass, geothermal, municipal solid waste, qualified hydropower, marine and hydrokinetic renewable energy, as well as qualified fuel cell, solar and qualified small wind energy property
 - 10% for qualified microturbine, combined heat and power and geothermal heatpump property
 - 5-year recapture for disposition or disqualification of facility
 - Grant would not be includible in gross income, but 50% basis reduction
 - Adoption of rules similar to those applicable to Section 48 ITC would permit leases of Section 45 facilities, including the 3-month placed-in-service rule for sale-leasebacks
 - Tax-exempt entities not eligible for grant
 - Senate bill does not include this grant program

Tax Incentives and Energy Policy: Manufacturing Recovery

- Credit for Investment in Advanced Energy Property
 - Senate bill would allow 30% credit for investment in qualified property used in qualified advanced energy manufacturing projects (QAEMP)
 - QAEMP is a project that re-equips, expands, or establishes a manufacturing facility for the production of property:
 - Designed to produce energy from the sun, wind, or geothermal deposits;
 - Designed to manufacture fuel cells, microturbines, or an energy storage system for use with electric or hybrid-electric motor vehicles;
 - Designed to manufacture electric grids to support the transmission of intermittent sources of renewable energy; or
 - Designed to manufacture equipment for use for carbon capture or sequestration.
 - Construction, reconstruction, or erection must be completed after October 31, 2008
 - Credits available through certification by Treasury (with DOE input)
 - \$2 billion aggregate limit on credits
 - House bill does not include this credit

Tax Incentives and Energy Policy: General Stimulus for Businesses

- Net Operating Loss (NOL) Carryback Period
 - Current law allows NOL carryback of 2 years
 - House bill would allow election to extend NOL carryback to either 3, 4 or 5 years
 - Would apply to losses from taxable years ending during (or if so elected, beginning during) 2008 or 2009
 - Permanent 10% reduction in applicable NOL
 - Election not available to TARP fund recipients (and members of the same affiliated group)
 - Suspend 90% limit on use of NOL carryback against alternative minimum tax
 - Senate bill contains same provision, except no 10% reduction

Tax Incentives and Energy Policy: General Stimulus for Businesses

- Bonus Depreciation

- Current law generally allows additional 50% depreciation deduction for certain property acquired and placed in service during 2008
- House bill would provide one-year extension to allow bonus depreciation to certain property acquired and placed in service during 2009
- Senate bill contains similar provision

Tax Incentives and Energy Policy: Other Energy Incentives for Businesses

- Removal of limitation on Section 48 ITC for qualified small wind energy property
- Increase in amount authorized for “new clean renewable energy bonds” and “qualified energy conservation bonds”
- Increase in Section 30C credit for alternative fuel vehicle refueling property
 - Includes ethanol, natural gas, compressed natural gas, liquefied natural gas, liquefied petroleum gas, hydrogen or biodiesel mixtures
- Addition of 20% credit for qualified energy research expenses in 2009 or 2010
 - Research must be related to fields of fuels cells and battery technology, renewable energy, renewable fuels energy conservation technology, efficient transmission and distribution of electricity and carbon capture and sequestration

Tax Incentives and Energy Policy: Energy Incentives for Individuals

- Section 25C credit for qualified energy efficiency improvements to existing homes
 - Increase in credit rate and limit
 - One-year extension of placed-in-service deadline
 - Repeal of limitation for subsidized energy financing
- Section 25D credit for residential energy efficient property
 - Removal of limitations on credit amount for solar water heating, small wind property and geothermal heat pumps
 - Repeal of limitation for subsidized energy financing

Tax Incentives and Energy Policy: What's Not Covered

- Refundability or transferability of PTC/ITC or depreciation benefit
 - But DOE grant program provides similar economics to refundability in case of ITC
- Inapplicability of at-risk limitations under Section 465 or passive-activity loss limitations under Section 469
- Clarification regarding economic substance and pre-tax profit requirement
- Clarification that Section 263A capitalization does not apply to production of renewable energy

CLIMATE CHANGE

David B. Finnegan

Perspectives on President Obama's 2009 Domestic/International Climate Agenda

- In his inaugural address, President Obama signaled action domestically and internationally on climate change
 - He said “With old friends and former foes, we will work tirelessly to ... roll back the specter of a warming planet”
- Obama, at a bipartisan Governors' Climate Summit, said on November 18, 2008 that “Climate change and our dependence on foreign oil, if left unaddressed, will continue to weaken our economy and threaten our national security”

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Key climate change players – interests
- Administration
 - Secretary of Energy (DOE): Steven Chu
 - Secretary of Transportation (DOT): Ray LaHood
 - EPA Administrator: Lisa Jackson
 - Council on Environmental Quality (CEQ): Nancy Sutley
 - Council on Economic Advisors (CEA): Lawrence Summers
 - White House Energy/Climate Coordinator: Carol Browner

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Congress: principle legislative committees
 - House: Energy and Commerce Committee
 - Chair: Henry Waxman (D-CA)
 - Ranking member: Joe Barton (R-TX)
 - Subcommittee: Energy and Environment
 - Chair: Edward Markey (D-MA)
 - Ranking member: Fred Upton (R-MI)

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Senate: Environment and Public Works Committee
 - Chair: Barbara Boxer (D-CA)
 - Ranking Member: James Inhofe (R-OK)
- Private Sector
 - Environmentalists, green techs, and other activists
 - Industry, agriculture, energy producers, small business, labor, scientists, others
- Public Sector
 - States/local governments

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Domestic Agenda
- Administratively, former President Bush administration left Obama with uncompleted significant climate-related decisions
 - Finalization of Corporate Average Fuel Economy (CAFE) standards for cars and light trucks that need to be in place in April 2009, 18 months before 2011 model year
 - California request for reversal of Environmental Protection Agency (EPA) denial of Clean Air Act waiver for California and other States to adopt own fuel economy standards for vehicles

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Delayed proposal of first broad-based greenhouse gas (GHG) emission registry required by Congress to be finalized June 2009
- Carry out 2007 Supreme Court mandate in *Massachusetts v. EPA* for EPA to decide whether a GHG air pollutant “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare”
- While none of these are simple, any one or all could profoundly affect Federal climate change action domestically and even internationally

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- In November, the EPA's Director of the Office of Transportation and Air Quality indicated that reversing the waiver would require consideration of "a number of legal, technical, and policy issues related to the waiver request. At confirmation hearing, the new EPA administrator committed to reviewing the California waiver "very soon", and "working with the EPA staff to "explore ways" to reduce GHG emissions
- Earlier this week, the President issued two memoranda to the heads of the DOT and the EPA
- He directed the DOT to act on CAFE standards apparently by finalizing CAFE standards for model year 2011 by March 30, 2009 and before issuing standards for model year 2012 and beyond considering various factors. He called that a "down payment on reducing dependence on foreign oil"
- He also directed the EPA to "assess whether the EPA decision" to deny the waiver request was appropriate with the law
- The President said "Our goal is not to further burden our already struggling industry", but to help it "prepare for the future" and "thrive by building cars of tomorrow"

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Legislatively

- In remarks last November also at the Governors' Summit, Obama added that his Presidency “will mark a new chapter in America's leadership on climate change, starting with “a federal cap and trade system” with “strong annual targets that set us on a course to reduce emissions to their 1990 levels by 2020 and reduce them an additional 80% by 2050”
- These remarks were made before Obama established his climate energy and economic teams and before the most recent economic concerns surfaced

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Details of a “cap and trade system,” such as what GHG emissions are covered, when cap begins, size of cap, rate of decline of cap from start to 2020 and beyond, assessment of economic impact, cost containment, whether permits/allowances to emit are allocated free or all or some are subject to periodic auction, if there are auctions, what disposition of proceeds, carbon market issues, use of offsets, and many more, have yet to be provided
- The President has not indicated whether he will submit comprehensive climate legislation or a set of principles to Congress

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Congressional Consideration

- In the 110th Congress, a number of climate bills were introduced, climate issue papers were the subject of hearings, and in the Senate the Lieberman-Warner bill (S.3036) was offered for consideration but, in essence, time ran out
- Earlier in January, during the 111th Congress, while the legislative clock was ticking, Speaker Pelosi indicated uncertainty in timing for legislation “this year” because she did not “know if we’ll be ready.” But, after Obama’s inaugural climate remarks the Speaker said she plans to hold a House vote on a cap-and-trade bill before the U.N. meeting scheduled to develop international climate agreements in December in Copenhagen, Denmark

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- The Speaker said on January 22 “I believe we have to because we see that as a source of revenue. Cap and trade is there for a reason. You cap and you trade so you can pay for some of these investments in energy independence and renewables”
- At a January 15, 2009 Energy and Commerce Committee hearing where the US Climate Action Partnership (USCAP), whose diverse members include businesses and environmental organizations, provided a “Blueprint” for legislative action, Chairman Waxman said his “goal” is to pass “comprehensive climate and energy legislation” in the Committee before the Memorial Day “Congressional recess”, which he called “an ambitious schedule”
- Citing Waxman’s schedule and the USCAP position, Chairwoman Boxer recently said “The writing is on the wall that legislation to combat global warming is coming soon” and that she was going to propose “principles” for legislation

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- International

- The 14th session of the Parties to the U.N. Framework Convention on Climate Change (FCCC) and 4th session of the Parties to the Kyoto Protocol met last December in Poznan, Poland to map out a negotiation schedule of meetings in 2009 under the Convention and the Protocol for developing a decision at their 15th and 5th sessions, respectively, next December 7-18 in Copenhagen for one or more new climate agreements
 - The negotiations will continue to proceed along a two-track process: one that does not include the US to establish new post-2012 Kyoto Protocol targets and commitment periods for industrialized GHG-emitting country parties to the Protocol; and one that includes the US, called the “Bali Action Plan” adopted at COP-13 in 2006 at Bali, Indonesia, under the FCCC and which also calls for a Copenhagen decision regarding mitigation, adaptation, technology assistance and financial assistance aimed at reducing GHG emissions

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Efforts by some countries to merge the two tracks have been resisted by developing countries, such as China, India and Brazil. The US has also opposed because of the Senate's "Sense of the Senate" rejection of the Kyoto Protocol in 1997, as it does not include commitments by developing country GHG-emitters and would harm the US economy
- A significant issue for the US and other FCCC Parties is how to include emissions of such developing countries in any FCCC agreement developed in Copenhagen
- There will be at least four negotiation sessions, starting in March and continuing in June, August and probably October, aimed at developing agreements for Copenhagen

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- Also at the above-referenced Governors' Summit, Obama said of the international negotiations that once he is President, "you can be sure the United States will once again engage vigorously in these negotiations, and help lead the world toward a new era of global cooperation on climate change."
- He added that "Stopping climate change won't be easy. It won't happen overnight. But I promise you that "any nation that's willing to join the cause of combating climate change will have an ally in the United States of America."

Perspectives on President Obama's 2009 Domestic/International Climate Agenda (cont'd)

- The Obama Administration will have to develop a negotiation strategy for the US by March, or at least before the June session, when an actual negotiating text is planned to be put on the table
 - Activists see an opportunity for the Congressional committees, at least, to send a signal to Obama through committee adoption of climate legislation as to what could be the basis for US participation in an international agreement at Copenhagen and ultimate adoption through ratification in the Senate. Such ratification requires at least 67 affirmative Senate votes or, alternatively, through legislation requiring only 51 such votes by both Houses.
 - While Mayer Brown attended the Poznan, Poland session and prior ones for over a decade for clients in order to have input in the negotiations. However, it is noted that US business representation is sparse compared to that of business and industry from Europe and Asia. The 2009 meetings should be extremely important to US business interests. We offer our representation to those who also recognize their importance.

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