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The Bleak Future Of Cap-And-Trade Legislation

Law360, New York (December 9, 2010) -- As the 111th Congress concludes its lame duck session, it is clear that it will make tax policy its main, if not exclusive, priority. Senate Republicans, for example, have indicated their intention to filibuster any legislation until an extension of the current tax rates is enacted.

When the 112th Congress begins its session in January, however, the most significant effect of the 2010 midterm elections on federal environmental law and policy will likely be the suspension, if not outright death, of any legislative effort to create a national cap-and-trade program to limit greenhouse gas emissions.

Industrialized countries began considering cap-and-trade programs to curb greenhouse gas emissions after the signing of the Kyoto Protocols in 1997. In the protocols, countries committed themselves to reducing greenhouse gas emissions by specified amounts. (The U.S. is not a signatory to the protocols.)

Although the protocols allowed signatory countries to develop with their own systems to achieve reductions, many countries, including those in the European Union, implemented cap-and-trade systems. Under a cap-and-trade system, a governmental authority issues or auctions allowances to emit regulated gases to each regulated facility.

Any facility that reduces the amount of gases emitted may sell or trade the excess allowances it no longer needs. The U.S. had implemented a cap-and-trade system for mitigation of acid rain under the Clean Air Act of 1990 that most observers consider to have been successful.

The U.S. House of Representatives passed a bill that included a national cap-and-trade program for greenhouse gases in June 2009. In the Senate, Lindsey Graham, R-S.C., John Kerry, D-Mass., and Joseph Lieberman, I-Conn., drafted the counterpart to the House bill.

However, the fate of cap-and-trade in the Senate was sealed in April 2010, when Graham withdrew his support for any cap-and-trade system. Sen. Harry Reid, D-Nev., then made public his intention to table the cap-and-trade legislation for the remainder of the 111th Congress.

While the Senate was considering cap-and-trade, the U.S. [Environmental Protection Agency](#) developed a rule that establishes thresholds for greenhouse gas emissions. Any new facility that would, and existing facilities performing major modifications that do, emit gases in excess of the thresholds would have to undergo the burdensome new source review process, and obtain proper Title V permits under the Clean Air Act.

The proposed EPA rule provides that the nation's largest greenhouse gas emitters, power plants, refineries and cement production facilities, will be subject to the new rules beginning January 2011. It is possible that the EPA proposed the rule primarily to spur legislative action. In effect, the EPA may have been issuing a threat to Congress, insinuating to Congress that if they did not quickly adopt a market-based cap-and-trade system, the EPA would implement a top-down authority driven system that constituents may not like.

If that was the EPA's strategy, it failed. Congress did not adopt a system, and the EPA is now in the position of defending its proposed rule.

Many members of Congress viewed the EPA's proposed rules as a blatant attempt to circumvent Congress' authority with respect to climate change regulation. Sen. Lisa Murkowski, R-Alaska, promptly introduced a resolution that would have rescinded the authority of the EPA to regulate greenhouse gases under the Clean Air Act. That resolution failed to pass in the Senate, losing by a vote of 53-47. (The White House would have likely vetoed the measure anyway.)

In addition, more than 150 businesses, advocacy groups, trade associations and government entities have joined in judicial challenges to the EPA's proposed rules pending in the U.S. District Court for the District of Columbia. After the vote on the Murkowski resolution, Sen. Jay Rockefeller, D-W. Va., introduced a bill that would postpone the effectiveness of the EPA's regulations for two years. It appears unlikely the Rockefeller bill will come to a vote in the lame duck session.

As the Democratic majority in the Senate has shrunk, however, the effort to strip the EPA of any authority to regulate greenhouse gases may be renewed. Only one senator who voted against the Murkowski resolution will be replaced by a new senator who opposes greenhouse gas regulation.

Former West Virginia Gov. Joe Manchin has replaced Sen. Robert Byrd, D-W.Va., who passed away last year. Like Byrd, Manchin is a Democrat. However, his senatorial campaign featured colorful opposition to cap-and-trade legislation.

Six Democrats, though, have so far agreed to co-sponsor the Rockefeller legislation. By adding those six Democratic co-sponsors to the 47 senators voting in favor of the Murkowski resolution, and adding Manchin, 54 senators may vote in favor of at least postponing EPA efforts to regulate greenhouse gases.

The politics of the effort may not be as simple as the arithmetic, though. Senators attempting to judge the mood of the national electorate must consider the results of the 2010 California election. In November, California voters rejected a Ballot Initiative 23 that would have delayed

implementation of California's cap-and-trade program until certain employment rate goals had been met.

The initiative was defeated by a 61 percent to 38 percent margin. In addition, California voters elected Jerry Brown as governor. Gov. Brown had made his support of California's cap-and-trade program a centerpiece of his election campaign. While it is hard to generalize what happens in California to the rest of the country, the California election results indicate that there is at least a significant part of the electorate that is opposed to backsliding on climate change regulation.

To ascertain the status of cap-and-trade programs, therefore, a practitioner must, in the beginning of 2011, follow the EPA's proposed rules, the litigation challenging the rules, the action of the Senate in attempting to limit the EPA's authority and the overall prospects for the legislative cap-and-trade program.

--By Peter J. McGrath, [Moore & Van Allen PLLC](#)

Peter McGrath (petermcgrath@mvalaw.com) is a member in the Charlotte, N.C., office of Moore & Van Allen PLLC.

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