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Spotlight On Climate Bill Shifts To Senate

By Jesse Greenspan

Law360, New York (June 29, 2009) -- When the U.S. House of Representatives narrowly approved a climate bill Friday aimed at limiting greenhouse gas emissions for the first time, it created momentum for — but by no means assured — passage of similar legislation in the U.S. Senate, experts say.

The climate bill, known as the American Clean Energy and Security Act, passed the House by a 219-212 vote, with only eight Republicans in favor and 44 Democrats against. It will require even more support at the next stage, however, in order to overcome a likely Republican-led filibuster, according to Stephen J. Humes, co-chair of the climate change and renewable energy group at McCarter & English LLP.

"Maybe some of the Republicans will find it acceptable, but I wouldn't bet on that," he said.

No companion bill has been introduced in the Senate yet, but because the bill has momentum and because President Barack Obama supports it, the Democratic leadership will take action sooner rather than later, Humes said.

For his part, Graham Noyes, an energy and biofuels attorney with Stoel Rives LLP, said there would likely be no Senate action until the fall, after health care reform is dealt with.

"We are going to see both sides mounting very substantial resources for and against this," Noyes said. "I would anticipate that this is going to be a little bit of a battle royale out there on the political side."

What happens with the economy over the next few months is going to be very significant in terms of the bill's chances for success, according to Noyes.

"It's harder to get something like this passed [in a down economy], though obviously the House did it, so it's not like it can't be done," he said.

"This is probably the best chance for meaningful, comprehensive energy legislation in the near future," said Michael S. Hindus, a partner at Pillsbury Winthrop Shaw Pittman LLP. "There's a lot of division on it, but I think this is going to get a run for its money."

Sen. Barbara Boxer, D-Calif., will use the American Clean Energy and Security Act as a template for writing her own bill, which would then be combined down the road with a separate energy bill introduced by Sen. Jeff Bingaman, D-N.M., experts said.

Bill Bumpers, head of the global climate practice at Baker Botts LLP, said the Senate should work on streamlining the House version, which currently runs about 1,300 pages.

"It was a humongous effort, and it was a monumental event to get this passed out of the House," Bumpers said. "But it carries baggage with it. It's very cumbersome and confusing."

Furthermore, the bill was never really analyzed or marked up in the House, and the Senate process is more transparent and deliberative by its nature, he said.

Even if the bill doesn't pass, however, it might help the U.S. at the United Nations' Copenhagen climate conference in December, when the global community will try to hammer out a follow-up to the Kyoto Protocol.

"You don't necessarily have to have a finished bill that the president has signed prior to Copenhagen for the U.S. to be effective there," Noyes said.

"The ideal solution would be for the Senate to try and look forward in anticipation of potential agreements and think about ways that domestic industries can be protected from international competition from countries that are less subject to a cap-and-trade system," he added.

As it stands now, the American Clean Energy and Security Act would reduce greenhouse gas emissions from electric utilities, oil companies, large industrial sources and other covered entities 17 percent below 2005 levels by 2020 and 83 percent by 2050.

The bill would also require retail electricity suppliers to meet 20 percent of their demand through renewable sources and energy efficiency by 2020, would invest billions of dollars in carbon capture and sequestration and other green technologies, would authorize funding for retrofitting existing commercial and residential buildings, and would harmonize fuel economy standards to simplify compliance for the auto industry, among other things.

But in order to placate Democrats from fossil-fuel dependent states, the bill's sponsors agreed to give most allowances away for free in the early stages of compliance, rather than auctioning them off.

They also agreed to put the U.S. Department of Agriculture in charge of most offsets, rather than the U.S. Environmental Protection Agency, and to prevent the EPA from calculating indirect greenhouse gas emissions when implementing a federal biofuels mandate.

"I think that was the pivotal point in getting the bill passed," Humes said. "They only won by four votes, and [Rep. Collin] Peterson, [chair of the House Committee on Agriculture,] had said he wouldn't support it unless these changes were made. And he spoke not only for himself, but also for a number of people in the farming coalition."

"Everybody got what they wanted, or a little bit of what they wanted, in order to get the bill through," added Gail Suchman, special counsel at Stroock & Stroock & Lavan LLP.

Most environmental groups support the bill, but Greenpeace and a couple of others have come out against it, saying it sets emission reduction targets far lower than science demands and then undermines even those targets with massive offsets.

"The giveaways and preferences in the bill will actually spur a new generation of nuclear and coal-fired power plants to the detriment of real energy solutions," said Carroll Muffett, deputy campaigns director for Greenpeace USA. "To support such a bill is to abandon the real leadership that is called for at this pivotal moment in history. We simply no longer have the time for legislation this weak."

Industry is also divided between those that support it and those against it. The U.S. Climate Action Partnership — a coalition of corporate giants and environmental organizations including General Motors Corp., General Electric Co., Duke Energy Corp., PepsiCo Inc. and the Nature Conservancy — was very active in crafting the bill, saying it would reduce business uncertainties and help lower dependence on foreign sources of energy.

Other groups vowed to continue fighting, however, saying it would have a catastrophic effect on the economy.

"The last thing this country needs is 1,400 new job-killing regulations and mandates," said William Kovacs, senior vice president at the U.S. Chamber of Commerce. "The Chamber hopes, at some point, that Congress will find a way to balance the need for a strong U.S.

economy while still addressing global climate change. Unfortunately, Congress has fallen short with this bill.”

The Congressional Budget Office has estimated that the bill would cost the average American household about \$175 per year, but many industry groups have disputed those numbers, saying the annual cost to each household could be as much as \$3,300.

“The criticisms that I’ve seen around the passage in the House have been citing economic costs either to U.S. households or to particular industries,” Noyes said. “I think we’ll continue to hear those two themes.”

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