New York Law Journal

SERVING THE BENCH AND BAR SINCE 1888

WWW.NYLJ.COM

An ALM Publication

VOLUME 257—NO. 33

TUESDAY, FEBRUARY 21, 2017

Outside Counsel

Expert Analysis

A Carbon Tax Plan Proposal: What Are Its Prospects?

By
Jeff Salinger

On Wednesday, Feb. 9, 2017, a group of prominent Republicans and business leaders[1] from the Climate Leadership Council released a carbon tax proposal entitled "The Conservative Case for Carbon Dividends." Acknowledging "mounting evidence" of climate change and the need to "hedge against the risks associated with future warming," the four-pronged proposal would impose a tax on carbon for oil, gas and coal use, which together comprise nearly 80 percent of total U.S. greenhouse gas emissions (GHGs). In a nod to industry preferences as well as conservative Republican principles, the proposal also contemplates the elimination of certain existing regulations aimed at reducing carbon dioxide emissions (CO_2).

Cognizant that a carbon tax on producers would be felt by the American public, the proposal attempts to offset anticipated increases in consumer prices (e.g., likely increases in gasoline prices) with a quarterly dividend paid directly to U.S. taxpayers. The proposal endeavors to reduce uncertainty surrounding existing and potential future CO_2 regulations. Notably, it also proposes the elimination of tort liabilities for coal, oil and natural gas emitters.

JEFF SALINGER *is counsel at Shearman & Sterling.*

The Proposal (the 'Plan')

The plan has four primary components.

First, the plan would establish a tax on carbon emissions, to be paid upstream, at the point where fuels are extracted from the earth, such as a mine, or "at the refinery or the first point where fossil fuels enter the economy." Increased production costs would presumably be passed on to consumers via price increases. The plan suggests a $40 per metric ton tax, to begin, but stresses that the tax would increase steadily over time. Given current U.S. annual emission levels, a $40 per metric ton rate is predicted to generate annual revenues in excess of $200 billion.

Cognizant that a carbon tax on producers would be felt by the American public, the proposal attempts to offset anticipated increases in consumer prices with a quarterly dividend paid directly to U.S. taxpayers.

Second, the plan proposes that all revenue derived from the carbon tax be returned to the American people, tax free—the express purpose of the dividend checks would be to alleviate anticipated increased energy costs. Various options for redistribution are floated, including dividend checks, direct deposits or contributions to individual retirement accounts.

According to the proposal, dividends would increase over time as carbon tax rates increased.

Third, the plan would protect U.S. exporters and penalize U.S. importers via the imposition of credits or fees, respectively, in order to ensure that all are subject to the same carbon-based pricing constraints. This feature is intended to ensure American competitiveness and "punish free-riding by other nations." The plan sets out simple operational mechanics: Proceeds collected (via fees charged on imports from countries without comparable carbon-pricing regimes) would increase the pool of carbon dividends, while American companies exporting to countries without comparable carbon tax policies would receive rebates on carbon taxes paid.

Fourth, the plan contemplates the elimination of certain CO_2 regulations, including the outright repeal of the Clean Power Plan. In an effort to achieve bipartisan support, the plan proposes that the initial carbon tax rate be sufficient to achieve reductions of CO_2 emissions in excess of current regulatory requirements. In lieu of top-down regulations, the plan proposes a preference for free market economics, which could lead to more efficient industry and consumer behavior.

Finally, the authors propose the elimination of unspecified federal and state tort liability for emitters. However, the proposal provides little specificity regarding the scope, extent or mechanics of any such changes.

Analysis

Generally speaking, the response to the proposal has been muted. While some have called the plan "stillborn," the plan could appeal to a broad array of stakeholders that could conceivably support the votes for approval. Libertarians would likely welcome the lesser regulation and smaller government themes implicit in this proposal, particularly since the plan proposes to replace a broad suite of existing and potential future regulations with a straight tax. Advocates for growth would welcome diminished uncertainty, which could encourage greater confidence in longer term investments. Economic populists might welcome "the distributive impact" of the dividend structure. And the plan might prove palatable to environmentalists who have long sought a clear federal commitment to carbon pricing, as well as the reductions in CO_2 that should occur given the plan's pricing structure. Finally, there is significant support from large integrated oil and gas companies that have for years sought certainty concerning CO_2 and GHG emissions requirements.

But the plan would also be expected to draw opposition, including, for example, environmental activists if the plan were framed as the only "regulation" of CO_2 emissions. As drafted, the plan would address 80 percent of current U.S. CO_2 emissions; however, the plan does nothing to address the remaining 20 percent of annual U.S. GHG emissions. Any effort to impose a carbon tax without additional regulations covering other sources of CO_2 and GHG emissions (such as methane from landfills) would likely face opposition. Others might object on the grounds that the plan leaves little room for governmental spending in areas where the private sector has historically underinvested, such as research and development for low carbon technologies. Government programs can also be helpful where economic incentives do not align, such as energy efficiency incentives that might, for example, appeal to a landlord who might otherwise opt out because energy bills are paid by tenants.

Industry Support

Generally speaking, the plan echoes the approach advocated by some large integrated oil companies. For example, Secretary of State Rex Tillerson, Exxon Mobil's former chief executive, has previously remarked that a carbon tax would be the "most efficient means of embedding the cost of carbon in all economic decisions." Royal Dutch Shell Plc Chairman Charles Holliday has called a carbon tax the most effective and practical way of driving that change. BP Plc has said that a well-constructed carbon tax "would reduce emissions at a larger scale and at a lower cost than alternative policy measures." Integrated oil and gas operations are not alone in

supporting a carbon tax. Elon Musk of Tesla Motors has lobbied the Trump administration on the issue, presumably because a carbon tax would likely benefit the (lesser) carbon footprint of the electric vehicle business.

Political Opposition?

While a carbon tax could be a component of a larger tax overhaul that candidate Trump advocated and Congressional Republicans have long sought, it is more likely that this, or any other carbon tax proposal, might also be dead on arrival. Statements and actions by President Trump and Congressional Republicans over the past 12 months suggest significant opposition to any such proposal.

In March 2016, Trump, in a response to a survey by the American Energy Alliance, opposed the idea of a carbon tax. Further complicating President Trump's pathway to a carbon tax may be campaign commitments he made to coal workers. Simply, because a carbon tax would likely have the greatest impact on coal (because it generates more CO_2 emissions than natural gas and oil), the plan would likely complicate Trump's commitments to bring back coal mining jobs.

Republican Congressional leaders may also be limited by previous commitments. Last June, the Republican-led House of Representatives approved a resolution that deemed the idea of a carbon tax "detrimental to American families and businesses." Because President Trump has pledged to eliminate environmental regulations limiting emissions of CO_2 and other GHGs, Republicans may be able to scale back emissions regulations without concessions to Democrats or environmentalists. Eliminating CO_2 regulations and the Clean Power Plan without instituting a carbon tax would have the added political benefit of shielding GOP politicians from primary challenges from climate change deniers or anti-tax candidates.

Congressional Democrats, particularly moderates, could conceivably gravitate to the plan, particularly if faced with the prospect of a weakened EPA and executive actions aimed at overturning Obama-era environmental regulations. The dividend aspect of the plan would likely appeal to those in the party looking to make gains with blue collar workers, while the implicit acceptance of the science concerning human activity and climate change from their Republican peers might be enough to satisfy other moderates. Progressives would likely oppose the Plan as not going far enough, and Democrats inclined to support a carbon tax plan would likely run into opposition from trial lawyers that would presumably oppose initiatives to eliminate tort liability for integrated oil and gas companies.

The plan seeks to appeal to a broad array of stakeholders and offers an intriguing option for members of both political parties that are committed to tackling human caused climate change.

Conclusion

The proposed carbon tax represents an alternative option for managing CO_2 emissions that moves away from previous cap and trade proposals and focused rule making by the Environmental Protection Agency. The plan seeks to appeal to a broad array of stakeholders and offers an intriguing option for members of both political parties that are committed to tackling human caused climate change. That the plan appeals to industry, libertarians, certain environmentalists and arguably moderate Democrats and Republicans suggests that there may be a path forward for this proposal. If so, we may be closer than we think to a grand compromise on this most thorny of political issues.

1. The members include Henry Paulson, James Baker, George Shultz, Rob Walton, Thomas Stephenson, Martin Feldstein, Ted Halstead, and N. Gregory Mankiw.

Reprinted with permission from the February 21, 2017 edition of the NEW YORK LAW JOURNAL © 2017 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm.com. # 070-02-17-27