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The American Clean Energy and Security Act of 2009: How Would the Bill Passed by the House Affect the Aviation Industry?[1]

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On June 26, 2009, the United States House of Representatives passed the American Clean Energy and Security Act of 2009, commonly referred to as the "Waxman-Markey Bill." The Waxman-Markey Bill seeks to create clean energy jobs, achieve energy independence, reduce global warming pollution and transition the nation to a clean energy economy. The central feature of the Waxman-Markey Bill is a cap-and-trade program for greenhouse gas emissions that would reduce the amounts of allowable emissions from United States sources through 2050.

The passage of the Bill in the House is historic, because it is the first piece of climate legislation passed by the House or the Senate. It is uncertain whether climate legislation can garner the 60 votes necessary to pass the Senate this year and how the legislation might change during debate in the Senate and reconciliation with the House version. Nonetheless, the Bill's provision provides important insights about how aviation may be affected by comprehensive climate change legislation.

Aviation, like the rest of the economy, would be affected by the Waxman-Markey Bill, even though aviation is not the direct subject of its provisions. The inclusion of liquid petroleum fuels, including jet fuel, in the cap-and-trade program means that jet fuel will become progressively more expensive as allowances for emissions are reduced through the year 2050. This will likely increase costs associated with air travel and increase the already-present incentives for airlines to increase fuel economy. The price effects on liquid fuels will be especially important to aviation, because it does not have viable electrification or other fuel options for the foreseeable future, except for biofuels. At this time, it remains uncertain how much of the industry's demand for fuel can be met by biofuels.

The Waxman-Markey Bill also contains other provisions, as discussed below, which may affect aviation interests:

- Additional regulatory authority for the Environmental Protection Agency ("EPA") over transportation sources of greenhouse gases
- Requirements to include greenhouse gases in metropolitan surface transportation planning, which may affect ground access to airports
- Provisions for funding projects to help adapt to the effects of climate change

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The version of the Waxman-Markey Bill passed by the House is more beneficial for aviation in some ways than earlier versions. For example, an earlier version[2] of the Waxman-Markey Bill included a requirement that the EPA promulgate new rules regarding greenhouse gas emissions from aircraft and aircraft engines by the end of 2012.[3] This mandate would have required the EPA to "promulgate standards applicable to emissions of greenhouse gases from new aircraft and new engines used in aircraft" as well as standards for other classes and categories of aircraft and aircraft engines as determined by the EPA. The standards promulgated by the EPA would have been required to "achieve the greatest degree of emissions reduction achievable" based on the available technology, taking into account the cost, energy, and safety factors associated with the application of such technology.[4] This provision was not included in the final version of the Bill.[5]

The following sections highlight some of the provisions of the Waxman-Markey Bill that are of interest to aviation.

Cap-and-Trade Program

The Waxman-Markey Bill would establish a cap-and-trade program under the aegis of the Clean Air Act.[6] The program seeks to limit greenhouse gas emissions by setting a gradually declining cap on emissions while allowing emissions allowances to be traded under the program. The aim of the program is to reduce greenhouse gas emissions by more than 80 percent by 2050.

Not all sources of greenhouse gas emissions would be covered by the cap-and-trade program—only sources of emissions explicitly included in the Bill would be covered. The Bill would create ten categories of "covered entities,"[7] only one of which may include a sector of the aviation industry—boilers and other combustion devices used in the manufacturing sector.[8]

Under the cap-and-trade program, a "covered entity" is defined, in part, as any "fossil fuel-fired combustion device (such as a boiler) or grouping of such devices" that is part of an industrial source and that emits 25,000 tons or more of carbon dioxide equivalent in a given year.[9] To the extent aircraft manufacturing facilities—which are covered as industrial sources according to the Bill[10]—operate such fossil fuel combustion devices and emit 25,000 tons or more of carbon dioxide equivalents, they would be covered by the cap-and-trade program and must cover these

[2] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (as introduced by Reps. Waxman and Markey, May 15, 2009).
[3] *Id.* § 221.
[4] *Id.*
[5] Mandates for regulation of new heavy-duty and non-road engines remain in the Bill.
[6] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 321(as passed by the House of Representatives, June 26, 2009).
[7] *Id.* § 321.
[8] *Id.* § 321 (proposed § 700(13)(I) and §700(30)(B)(i) of the Clean Air Act).
[9] *Id.* § 321 (proposed § 700(130(I) of the Clean Air Act).
[10] *Id.* § 321 (proposed § 700(30)(B)(i) of the Clean Air Act).

greenhouse gas emissions with allowances.[11] Airports, which may operate similar fossil fuel combustion devices, are not considered an industrial source according to the Bill, and thus would not be covered under the cap-and-trade program.[12]

In addition to the potential direct impact of the cap-and-trade program on the aircraft manufacturing sector, aviation would be indirectly affected because fuel producers and importers are a covered entity under the cap-and-trade program. Producers and importers of petroleum-based liquid fuels (which would include jet fuel) would be covered under the cap-and-trade program if the combustion of such fuel would emit 25,000 tons or more of carbon dioxide equivalent in a given year.[13] As covered entities, producers and importers of jet fuel would then be required to secure one emissions allowance for each ton of greenhouse gas emissions associated with the fuel they sell.[14] Fuel producers are likely to pass along the costs associated with this requirement to the aviation industry in the form of higher jet fuel costs.

The Waxman-Markey Bill seeks to alleviate some of the cost pressure by freely allocating some allowances to benefit consumers and affected industries.[15] However, most of the allowances that would be allocated for free are designated for the benefit of electricity consumers. In 2012, the first year of the cap-and-trade program, over 44 percent of the allowances would be given to the electricity industry for the benefit of electricity consumers (43.75%), energy efficiency, renewable electricity, and low-income ratepayer assistance (0.5% collectively).[16]

Conversely, in 2012 only 1.875% of the allowances would be allocated to alleviate cost pressures associated with the increased cost of petroleum. Further, the allowances would be used for the benefit of home heating oil and propane consumers, a category that would not help alleviate cost pressures for the aviation industry.[17] Starting in 2014, an additional 2.25% of the allowances would be distributed to domestic petroleum refineries[18] for the purpose of promoting "energy efficiency and a reduction of greenhouse gas emissions at such facilities."[19]

The Bill would also allocate just under one percent of the emission allowances to be used to finance public transportation projects,[20] some which could potentially be used to improve transit access to airports.

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[11] *Id.* § 311 (proposed § 722(b)(7) of the Clean Air Act) (however, fossil fuel fired combustion devices that burn (i) petroleum-based or coal-based liquid fuel; (ii) natural gas liquid; (iii) renewable biomass or gas derived from renewable biomass; or (iv) petroleum coke or gas derived from petroleum coke do not require their emissions to be covered by an allowance pursuant to this section).
[12] *See id.* § 321 (proposed § 700(30)(B)(i) of the Clean Air Act).
[13] *Id.* § 321 (proposed § 700(13)(B) of the Clean Air Act).
[14] *Id.* § 311 (proposed § 722(b)(2) of the Clean Air Act).
[15] *See id.* § 321 (proposed § 782 of the Clean Air Act).
[16] *Id.* § 321 (proposed § 782(a) of the Clean Air Act).
[17] *Id.* § 321 (proposed § 782(c) of the Clean Air Act).
[18] *Id.* § 321 (proposed § 782(j) of the Clean Air Act).
[19] *Id.* § 321 (proposed § 787 of the Clean Air Act).
[20] *Id.* § 132(c)(4)(E).

Because of the distribution of allocations under the Bill, industries reliant on liquid petroleum fuels – like aviation – will bear a greater share of the cost of the cap-and-trade program than industries like electric power producers. And, the Bill would not allocate any of the revenues from allocation to aviation-related efficiency programs, such as NextGen or NASA sub-sonic aerospace research.

The Congressional Budget Office ("CBO") estimates that an average household will see additional costs of $175 per year as a result of the enactment of the Waxman-Markey Bill.[21] The American Petroleum Institute ("API") has estimated that the price of jet fuel will increase by $0.88 a gallon as a result of the Waxman-Markey Bill.[22] However, the CBO claims the API estimate is not supported by their analysis.[23]

Additional Greenhouse Gas Standard and Potential Effects

While aviation is not among the "covered entities" under the cap-and-trade program created by the Bill, greenhouse gas emissions from stationary sources at airports and manufacturing facilities could potentially be subject to other regulations from EPA under the newly created "Additional Greenhouse Gas Standard."[24]

Under the Additional Greenhouse Gas Standard, the Bill would require EPA to designate certain categories of activities that emit a minimum threshold of greenhouse gas emissions that are not covered by the cap-and-trade program and promulgate standards for new or modified sources.[25] Airports' stationary sources could be designated as a category subject to this Additional Greenhouse Gas Standard if they meet threshold criteria. A category of stationary sources may be subject to additional standards to be promulgated by the EPA, if the category is, in the aggregate:

1. responsible for emitting at least 20 percent annually of the uncapped greenhouse gas emissions, and

2. individual sources within that category emit at least 10,000 tons of uncapped greenhouse gas emissions.[26]

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[21] Congressional Budget Office, The Estimated Costs to Households from the Cap-and-Trade Provisions of H.R. 2454, (June 19, 2009), *available at* http://www.cbo.gov/doc.cfm?index=10327.
[22] American Petroleum Institute, Statement from API President Jack Gerard on CBO's Cost Estimate on the American Clean Energy and Security Act of 2009, http://www.api.org/Newsroom/gerard-cost-estimate.cfm.
[23] Congressional Budget Office, Director's Blog, The Impact of Cap-and-Trade Proposals on Fuel Prices, (June 26, 2009), http://cboblog.cbo.gov/?p=306.
[24] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 331(as passed by the House of Representatives, June 26, 2009).
[25] *Id.*
[26] *Id.* § 331 (proposed § 811 of the Clean Air Act).

It is not yet clear whether EPA can or might aggregate airport stationary sources in a way that may meet these criteria.[27] Some airport heating and cooling plant facilities have sources that emit more than 25,000 tons of carbon dioxide in a year. Thus, this section bears watching as it moves through the Senate process.

Surface Transportation Planning

The Waxman-Markey Bill also would change the surface transportation planning process, including the requirement to require regional transportation plans to include greenhouse gas emission reduction targets.[28] The language in the Bill was taken verbatim from the Surface Transportation Authorization Act of 2009 proposed by Rep. Oberstar.[29]

The greenhouse gas emission reduction targets mandated by the Waxman-Markey Bill would require transportation plans to contribute to achievement of the national transportation-related greenhouse gas emissions reduction goals by including efforts to increase public transportation ridership and the use of nonmotorized transportation, such as walking and bicycling.[30]

While the reduction targets for transportation plans explicitly address only surface transportation-related greenhouse gas emissions, airports would be affected insofar as they are significant traffic generators in metropolitan areas and subject to transportation conformity requirements for most new ground-access infrastructure. Airports may be asked or pressured to consider additional ways to reduce trips to the airport by, for example, increasing transit access to the airport or through the establishment of carpooling programs. The Bill also provides a potential funding source to enhance transit and other surface projects. The Bill allocates just under one percent of the emission allowances to be used to finance public transportation projects,[31] some which could potentially be used to improve transit access to airports.

Adaptation

While many of the provisions of the Waxman-Markey Bill discussed above would create new burdens on the aviation industry, the Bill also provides some financial resources to begin addressing the effects that climate change may have on aviation. For example, airports may be able to secure funding from state programs established by the Bill for projects to build resilience to climate change impacts.[32]

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[27] *Id.*
[28] *Id.* § 222(b).
[29] *See* Surface Transportation Authorization Act of 2009, H.R. _____ Committee Print (proposed by Rep. Oberstar, June 22, 2009), *available at* http://transportation.house.gov/Media/file/Highways/HPP/OBERST_044_xml.pdf.
[30] American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 222(b) (as passed by the House of Representatives, June 26, 2009).
[31] *Id.* § 132(c)(4)(E).
[32] *Id.*

In 2012, 0.9% of the total emission allowances under the Bill are to be distributed to states for the purpose of adapting to the impacts of climate change. The number of emission allowances to be allocated to this program will increase over time, with 3.9% of the total allowances being distributed to the states for this purpose in the years 2027-2050.[33] These allowances are to be used "exclusively for the implementation of projects, programs, or measures to build resilience to the impacts of climate change, including:

> (A) extreme weather events such as flooding and tropical cyclones;
> (B) more frequent heavy precipitation events;
> (C) water scarcity and adverse impacts on water quality;
> (D) stronger and longer heat waves;
> (E) more frequent and severe droughts;
> (F) rises in sea level;
> (G) ecosystem disruption;
> (H) increased air pollution; and
> (I) effects on public health.[34]

Airports may be able to take advantage of these state programs to address the effects of climate change. For example, coastal airports that are threatened by sea level rise or airports that have inadequate stormwater detention capacity may be able to fund projects to reduce vulnerability through these state programs.

[33] *Id.* § 321 (proposed § 782(l) of the Clean Air Act).
[34] *Id.* § 453(e).