



Memorandum

To: RFA Board of Directors
From: Samantha Slater
Re: Washington Legislative & Regulatory Update
Date: May 26, 2009

The House and Senate began their Memorial Day recess on May 21st.

Congress will return to Washington, D.C. on June 1st.

Climate Change/Energy Bill: Just hours before the markup of H.R. 2454, the American Clean Energy and Security Act of 2009, House Energy and Commerce Committee Chairman Henry Waxman (D-CA) released his Manager's Amendment (a package of amendments agreed to by both the Majority and Minority in advance of the markup) that was brought before the Committee for consideration.

The Manager's Amendment included a modified Open Fuel Standard (OFS) that would give the Secretary of Transportation authority to establish an "open fuel" standard if there are sufficient E85 and "M85" (85 percent methanol and 15 percent gasoline) volumes and infrastructure available. The language included in the climate change bill gives the Secretary of Transportation the authority to require each light-duty vehicle manufacturer produce "fuel-choice enabling" vehicles (defined as a flexible fuel vehicle), which can operate on higher blends of ethanol up to 85 percent, or a vehicle that has been warranted by its manufacturer to operate on biodiesel) after model year 2015. The U.S. Department of Transportation (DOT), as well as the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Energy (DOE), determines whether the fuel will be available in sufficient quantities and if there is adequate infrastructure for distributing the fuel in "a cost-effective way to achieve the nation's energy independence and environmental objectives."

As if the above was not weak enough, the OFS provision also allows for a temporary exemption of the requirement "if the [DOT] Secretary determines that unavoidable events not under the control of the manufacturer prevent the manufacturer...from meeting its required production volume of fuel choice-enabling automobiles," including a disruption in the supply of any component required for compliance with the regulation or a disruption in the use and installation by the manufacturer of such component. The provision did not define the length that is provided for temporary exemptions. It should be noted that the version of the OFS that was included in the Manager's Amendment is much less stringent than the legislation introduced earlier this year by Representative Eliot Engel (D-NY) that would require half of new cars to be able to operate on gasoline, ethanol and methanol by 2012 and 80 percent by 2015. The RFA did not support the revised language.

Also included in the Manager's Amendment was a revised definition of "renewable biomass" under the Renewable Fuels Standard (RFS) that was intended to ease some of the restrictions included in the Energy Independence and Security Act of 2007 (EISA).

During the first day of markup, the Committee approved an amendment by a 51 to 6 vote offered by Representatives John Dingell (D-MI), Jay Inslee (D-WA), and Bart Gordon (D-TN) that would create an autonomous Clean Energy Deployment Administration within the DOE and make reforms to DOE's loan guarantee program for low-emission projects. The Clean Energy Deployment Administration would be empowered to provide a suite of financing options, including direct loans, letters of credit, loan guarantees, insurance products and others. The bank would fund "breakthrough" technologies and is aimed at bridging what is known as the "valley of death" that can prevent promising technologies from moving from the lab into commercial demonstration and markets for lack of private-sector lending. The bank could fund projects for energy production, transmission, storage and other areas that could reduce greenhouse gases, diversify energy supplies and save energy. The amendment does not outline specific technologies, but advanced nuclear and renewable energy projects, as well as carbon capture and storage, would qualify. The amendment specifies that the Clean Energy Deployment Administration must adopt a "portfolio investment approach" and ensure no particular technology receives more than 30 percent of the total funding available. In addition to the energy bank, the amendment makes changes to the loan guarantee program that was first authorized in the Energy Policy Act of 2005, including subjecting nuclear-power projects that may receive guarantees to Davis-Bacon prevailing wage requirements.

The Committee also approved a "cash for clunkers" provision giving thousands of dollars to consumers who trade in older cars for newer, more fuel-efficient models. To take advantage of the program, new cars must get at least 22 miles per gallon, with the size of vouchers going up between \$3,500 and \$4,500, depending on the difference between the fuel efficiency of the new vehicle and the one it replaces.

Democrats repeatedly defeated Republican amendments, including an amendment by Representative Mike Rogers (R-MI) that would have essentially ended the cap-and-trade program unless China and India adopt a mandatory greenhouse gas program as stringent as in the Committee's bill. Republicans argued it was necessary to prevent those two countries from gaining a competitive advantage.

Representative Greg Walden (R-OR) offered an amendment to include woody biomass on Federal lands and ease limits on materials from private lands in the bill's definition of renewable biomass for the renewable electricity standard, but the amendment was defeated by a 32 to 26 vote. The underlying bill allows some materials from Federal forest lands to qualify for the renewable electricity standard. Four Democrats voted for the Walden amendment.

An amendment offered by Representative Roy Blunt (R-MO) that would have negated the entire law if the average retail electricity rate sold to the residential sector increases by more than 10 percent in one or more census divisions was defeated by a 23 to 32 vote. Chairman of the Energy and Commerce Subcommittee on Energy and the Environment Ed Markey (D-MA) argued that it would be impossible to attribute rate increases to the specific consequences of the bill, and not broader trends or other events.

Four Democrats crossed party lines to vote for an amendment offered by Representative Lee Terry (R-NE) that would have negated the law if gas prices reach \$5 a gallon. Chairman Markey argued that

the amendment was simply an attempt to undermine the bill. Representative Walden expressed concern about rural American's paying more for gas. The Walden amendment failed 25 to 31 v.

The second day of the markup included amendments to the bill's sections on energy efficiency, the greenhouse gas reductions plan and cap-and-trade emissions permit system. The end of the day's markup brought an amendment from Representative Terry that would have prohibited EPA from using international indirect land use effects to determine compliance with the greenhouse gas emissions reductions required in the Energy Independence and Security Act of 2007. Speaking in support of his amendment, Representative Terry said, "This lacks common sense to add in international land use into the life cycle of ethanol and biofuels." The Terry amendment was strongly opposed by Chairmen Waxman and Markey, as well as Representative Jay Inslee (D-WA). Chairman Markey countered that EPA should be allowed to finish its review so the complete greenhouse gas impact of ethanol is known. "To deny ourselves the information which the EPA seeks to develop, in my opinion, will ultimately come back to haunt us," Chairman Markey said. The Terry amendment failed 20 to 36.

Earlier in the day, the Committee rejected, by a 26 to 30 vote, an amendment from Representative Cliff Stearns (R-FL) to exclude all nuclear power from the baseline electricity sales used to measure a renewable electricity production increases in the bill. The first Republican amendment to be approved by the Committee came from Representative John Shadegg (R-AZ). Representative Shadegg's amendment requires a Federal annual report regarding whether China and India have adopted greenhouse gas emission standards at least as strict as called for under the House bill. The amendment was approved by voice vote after Representative Shadegg agreed to drop a requirement that those findings be specifically sent to all Congressional offices and the media.

On the evening of May 21st, the third day of markup, following more than 37 hours of debate and 94 amendments, the Committee completed work on the climate change bill, ultimately passing the bill out of Committee by a 33 to 25 vote. Four Democrats voted against the bill and one Republican, Representative Mary Bono Mack (CA), voted for the bill. The four Democrats on the Committee to vote against the climate change bill were: Jim Matheson (UT), John Barrow (GA), Mike Ross (AR), and Charles Melancon (LA).

Prior to the vote on final passage, the Committee considered more than 20 amendments. One of the amendments, offered by Representative Melancon, would have erected a number of barriers to the introduction of mid-level ethanol blends into commerce. The Melancon amendment would have allowed EPA to authorize the introduction of a mid-level ethanol blend only if a report by the EPA's Science Advisory Board is issued within the year describing the impact of the blend's impact on engine performance, emissions, materials compatibility, the ability of wholesale and retail gasoline distribution infrastructure to introduce the fuel into commerce without consumer confusion or misfueling and the estimated ability of consumers to purchase gasoline other than the blend. The report would then have to be certified by EPA. Representative Melancon withdrew his amendment before it was voted on.

Representative Terry also offered an amendment with Representative Bruce Braley (D-IA) to provide loan guarantees to construct renewable fuel pipelines that was approved by the Committee by voice vote. This language had been sought by Magellan.

Looking forward, the House parliamentarian has referred the Waxman-Markey climate change bill to nine Committees: Energy and Commerce, Ways and Means, Agriculture, Science, Transportation and Infrastructure, Financial Services, Foreign Affairs, Natural Resources, and Labor. Several of the Committees are not expected to take much interest in the issue beyond staff-level meetings to walk

through the bill. Three Committees in particular, however – Ways and Means, Agriculture and Natural Resources – have expressed great interest in holding a markup of the climate change legislation when the sections of jurisdiction come before their Committees later this summer. House Agriculture Committee Chairman Collin Peterson (D-MN), in particular, has expressed interest in amending various sections of the bill. Although it is likely that only the section providing the Commodity Federal Trading Commission (CFTC) authority to regulate carbon credits will fall within the House Agriculture Committee’s jurisdiction. Other concerns raised by Chairman Peterson in recent weeks, including the renewable biomass definition and international land use change effects, may not be addressed until the climate change bill is brought to the House floor for consideration.

Democratic leaders and Committee chairs will begin to map out their plans for getting the climate change bill to the House floor once Congress returns from the Memorial Day recess.

Senate Energy and Natural Resources Committee Chairman Jeff Bingaman (D-NM) was not able to complete his energy bill markup before the start of the Memorial Day recess. Chairman Bingaman has tentatively scheduled the next markup of the bill for June 9th. During the May 19th markup session, the Committee’s Democrats defeated a series of Republican amendments to Chairman Bingaman’s legislation that would create an 11-member commission chosen by the president to study alternatives to the geologic repository at Yucca Mountain, including permanent disposal elsewhere, long-term storage on site or in regional sites, and reprocessing. The nuclear waste management title of Chairman Bingaman’s bill would also assess the mistakes made in the Yucca Mountain project, the costs and benefits of reprocessing, a new entity to manage the waste issue and funding mechanisms for nuclear waste management.

The Committee made few changes to the energy bill’s title on electric grid cyber-security. The cyber-security title would give the DOE 90-day emergency authority to order utilities to enact certain measures to protect their systems from an attack, and would also give the Federal Energy Regulatory Commission (FERC) the authority to order interim rules -- with or without public hearings -- to protect the grid from vulnerabilities, which are identified to be a problem in the short term. Several amendments were adopted that would: strengthen rules on privacy and disclosure of information obtained for cyber-security purposes; allow utilities to obtain cost recovery for emergency actions; require the U.S. Department of Defense to prepare a plan to protect military facilities outside of the bulk power grid; and terminate any interim rules issued by FERC to expire when a standard is approved through the normal process.

On May 21st, Chairman Bingaman put before the Committee the renewable electricity standard (RES) title. Immediately, the Committee considered an amendment to strike the entire RES title offered by Senator Jeff Sessions (R-AL). The Sessions amendment failed by a 9 to 13 vote, signaling that the provision will ultimately be adopted. Chairman Bingaman then tabled the RES title to allow Committee staff to clear as many of the 54 amendments filed as possible before the next markup. After the vote on the amendment to strike the RES title, the Committee turned to the unfinished business from the previous mark-up -- adding refined products to the Strategic Petroleum Reserve and building efficiency codes.

The RES title is expected to be considered during the June 9th markup. Last week, Chairman Bingaman was able to secure the three votes in support of the RES he needed to be able to pass an energy bill out of the Committee with the RES title included. Those three votes came from Senators Debbie Stabenow (D-MI), Sam Brownback (R-KS) and Blanche Lincoln (D-AR).

Senate: On May 20th, Senator Ron Wyden (D-OR) introduced a broad package of eight energy bills aimed at reducing the nation's consumption of fossil fuels, including a low carbon fuel standard. The bills would introduce a wide range of alternative energy market incentives to make sustainable energy technologies more cost-competitive with fossil fuels. Senator Wyden's bill, the America's Low-Carbon Fuel Standard Act of 2009, (S. 1095) would revise the existing RFS to create a "technology neutral" low-carbon fuel standard. Under the legislation, ethanol would qualify as a low-carbon fuel but would compete with other low-carbon alternative fuels like electric vehicles and hydrogen. Low-carbon fuel is defined as a renewable fuel that minimizes lifecycle greenhouse gas emissions. This would include electricity for plug-in cars or hydrogen for fuel cells. Senator Wyden's legislation requires the replacement of increasing percentages of petroleum-based motor fuel sold rather than simply requiring specific volumes of renewable fuels to be consumed, and would establish a timeline by which low-carbon fuels would constitute more than 30 percent of U.S. transportation fuel by 2030, an amount equal to the level of U.S. imports from the Organization of the Petroleum Exporting Countries.

On May 21st, Senator Charles Grassley (R-IA) introduced a companion bill (S. 1148) to legislation introduced by House Agriculture Committee Chairman Peterson that would require the U.S. Department of Agriculture (USDA) and the DOE, instead of the EPA, to be the lead agencies responsible for assessing lifecycle greenhouse gas emissions. It would also broaden the definition of renewable biomass to the definition included in the 2008 Farm Bill, and would extend the grandfathering exemption for corn-based plants to meet their lifecycle greenhouse reduction threshold to biodiesel plants which commenced construction by December 19, 2007. "Every chance I get, I'm going to bring this issue up. It's so obvious that the EPA's rationale doesn't meet the common sense test," said Senator Grassley. "It's ridiculous to think that Brazilian farmers are looking to see what Iowa farmers are doing to determine how they run their own business, and quite frankly it's plain unfair to farmers," Senator Grassley added. Senator Grassley also raised his concerns with the President during a recent private lunch, and with Nancy Sutley, the chair of the Council on Environmental Quality at the White House. The bill is co-sponsored by Senators Christopher Bond (R-MO), Claire McCaskill (D-MO) and John Thune (R-SD).

House: On May 21st, the House Agriculture Committee held a hearing to review low-carbon fuel standard proposals. Witnesses included: Bob Dinneen, Renewable Fuels Association; Brian Jennings, American Coalition for Ethanol; Tom Buis, Growth Energy; and, Carlos Riva, Verenum Corp. Mr. Dinneen's testimony focused on three main points: (1) the general misunderstanding about the difference between direct and indirect market-mediated effects and the pervasiveness of secondary impacts in energy markets; (2) the inconsistency between the EPA's lifecycle greenhouse gas analysis of ethanol and Congress's intent as expressed in the EISA; and, (3) the inherent uncertainty and limitations associated with current methodologies used to estimate indirect international land use change that render the results highly questionable. Speaking of the RFS2 proposed rule, Chairman of the House Agriculture Committee Peterson said, "I feel very strongly that right now we don't have the right standard." Chairman Peterson has indicated that he would like to address the issue of how lifecycle emissions are assessed when the climate change legislation comes before his Committee later this summer.

On May 21st, the House Small Business Subcommittee on Regulations and Healthcare held a hearing on the impacts of outstanding regulatory policy on small biofuels producers and family farmers. The first panel included witnesses from the USDA and the EPA. The second panel consisted of witnesses representing: Lake Erie Biofuels, Keystone Biofuels, Green Earth Fuels, the American Soybean Association, the Georgia Farm Bureau Federation, and the University of Georgia's Biorefining and Carbon Cycling Program.

Testifying on behalf of the EPA, Margo Oge, director of the Office of Transportation and Air Quality at EPA's Office of Air and Radiation, again defended the inclusion of the indirect land use change effects in the RFS2 proposed rule, saying the EPA was following the Congressional intent of the law. Ms. Oge said, “[r]ecognizing that lifecycle analysis is a new part of the RFS program and much of our methodology represents groundbreaking science, the agency has set forth multiple opportunities to solicit public and expert feedback on our proposed approach.” “Additionally, although our lifecycle analysis relies whenever possible on peer-reviewed models and data, between this proposal and the final rule, we will conduct additional peer-reviews of key components of our analysis,” she added.

On May 20th, Representatives Charlie Dent (R-PA), Mark Souder (R-IN) and Dan Lungren (R-CA) introduced legislation, the Chemical Facility Security Authorization Act of 2009 (H.R. 2477), that would extend authorization for the current program through October 1, 2012. More than 30 industry organizations have asked Congress to reauthorize chemical security provisions in current law without making changes or adding language they say could disrupt federal security standards and burden companies that handle chemicals with additional work and costs. The organizations include: National Paint and Coatings Association, Synthetic Organic Chemical Manufacturers Association, National Association of Manufacturers, National Mining Association, American Petroleum Institute, American Farm Bureau Federation, the National Association of Chemical Distributors, and U.S. Chamber of Commerce.

EPA: Senator John Barrasso (R-WY) announced last week that he has released the procedural "hold" he had placed on the President's nominee for the assistant administrator of the EPA's office of air and radiation, Gina McCarthy. Senate Democratic leaders have scheduled a vote for June 2nd following the Memorial Day recess to confirm Ms. McCarthy.

On May 20th, the President announced his intention to nominate Bob Perciasepe as deputy administrator for the agency. Mr. Perciasepe was most recently chief operating officer at the Audubon Society. Prior to joining Audubon in 2001, Mr. Perciasepe spent eight years at the EPA, first as assistant administrator for Water, then assistant administrator for Air and Radiation. From 1990 to 1993, Mr. Perciasepe was secretary of environment and directed pollution control and environmental protection for the state of Maryland.

Also on May 20th, the President announced that he will nominate Colin Scott Fulton as the EPA's general counsel. On February 4th, the President designated Mr. Fulton to serve as acting deputy administrator for the EPA. Mr. Fulton has been with the EPA since 1990, serving in various enforcement-related positions.

CFTC: On May 19th, the Senate approved the President's nomination of Gary Gensler to chair the Commodity Futures Trading Commission (CFTC) by an 88 to 6 vote. Senators Bernie Sanders (I-VT) and Maria Cantwell (D-WA) placed holds on the nomination, but removed them after meeting with Mr. Gensler. Senator Sanders said in a statement he had been encouraged by the commitments Gensler made “to regulate hedge funds, to make sure that banks are not allowed to manipulate the price of heating oil and crude oil, and to prevent the enormous conflicts of interest that exist with respect to our energy markets, among many other things.” Senator Sanders noted the Administration has introduced a plan to regulate credit default swaps and other over-the-counter derivatives. With Chairman Gensler in place, both Senate Agriculture Chairman Tom Harkin (D-IA) and House Agriculture Chairman Peterson said they expect to move CFTC reform legislation this summer. The House Agriculture and the House Financial Services Committees are both expected to hold hearings on CFTC and derivatives issues in June, and are likely to pass reform legislation out of those Committees in June or July.

On May 19th, the President announced his intent to nominate Bart Chilton to another full term on the CFTC ending in 2013. Prior to joining the CFTC in August 2007, Commissioner Chilton was chief of staff at the National Farmers Union, executive assistant to the Farm Credit Administration Board, farm hand to former Senator Tom Daschle, deputy chief of staff to former Secretary of Agriculture Dan Glickman, and executive director of the Congressional Rural Caucus.

Miscellaneous:

- **Idaho** – On May 12th, Idaho Governor C.L. Otter (R) signed a bill (H. 338) into law that eliminates the state's 2.5 cents per gallon tax exemption for ethanol and biodiesel blends, beginning June 1st. The new law was designed to address the financial shortfall associated with the 10 percent (2.5 cents per gallon) tax exemption. “Of the approximate 660 million gallons of gasoline taxed in Idaho annually, at least 25 percent of the total, or 165 million gallons, is gasohol [ethanol],” according to a fiscal note description accompanying the bill text. “At a loss of 2.5 cents per gallon, this results in a loss in revenue of \$4.1 million a year. Eliminating the exemption will add \$4.1 million annually in tax revenue to the Highway Distribution Account,” the fiscal note explained.