Will a Tax to Cut Carbon Dioxide Emissions Reduce Litigation Work, Too?

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August 15, 2017

When Exxon Mobil Corp. endorsed a carbon tax proposal initiated by former Secretaries of State James Baker and George Shultz, some observers foresaw a future with dramatically fewer regulations.

Not so, says W. Thaddeus "Thad" Miller, the executive vice president and chief legal officer of Houston-based electrical provider Calpine Corp., who also endorses the Baker proposal. He expects a much less dramatic shift in the regulatory environment if the carbon tax becomes reality.

"This is not as large a change on the regulatory front as people may think," Miller says. "Although the proposal includes a rollback of future regulations on carbon emissions, there are a host of environmental regulations regarding other emissions that have been successfully implemented and would remain in place. I would expect regulatory lawyers who deal with environmental regulations will continue to be involved [with] advising and litigation on those; it's just that the potentially fertile ground of CO2 [carbon dioxide] emissions regulation and litigation will not materialize."

Miller's company has already found ways to generate electricity and keep a reduced carbon footprint. On its website, Calpine calls itself "America's largest generator of electricity from natural gas and geothermal resources. ... Because we use clean fuel and renewable resources, Calpine also ranks among the cleanest power generators in the nation."

But if a carbon tax takes hold, Calpine's costs will undoubtedly rise, Miller says.

In February, Baker and his fellow members of the Climate Leadership Council, a group composed largely of former Republican White House officials, unveiled a proposal to have Congress authorize a tax on carbon emissions. In exchange, it would trash proposed carbon regulations in the Clean Power Plan, established by the Obama administration, and subject of legal challenges brought by the fossil-fuel industry.

Exxon, along with Shell Oil Co. and BP plc, took out an ad supporting the Baker-Shultz proposal in The Wall Street Journal in June, though Miller and other lawyers say the plan's details remain sketchy.

"Mounting evidence of climate change is growing too strong to ignore," the proposal states. "While the extent to which climate change is due to man-made causes can be questioned, the risks associated with future warming are too big and should be hedged."

The proposal continues: "For too long, many Republicans have looked the other way, forfeiting the policy initiative to those who favor growth-inhibiting command-and-control regulations, and fostering a needless climate divide between the GOP and the scientific, business, military, religious, civic and international mainstream. Now that the Republican Party controls the White House and Congress, it has the opportunity and responsibility to promote a climate plan that showcases the full power of enduring conservative convictions."

The plan calls for a tax starting at $40 a ton, which would steadily rise; dividends paid through the Social Security system from the carbon tax proceeds; border carbon adjustments to protect U.S. competitiveness; and, perhaps most significantly, a "regulatory rollback." The proposal argues that under such a plan it would be possible to eliminate "regulations that are no longer necessary upon enactment of a rising carbon tax whose longevity is secured by the popularity of dividends."

Consumers, meanwhile, would make bigger gains if they conserved energy, because it would cost more. "[F]orward-looking households would have an incentive to borrow to make durable purchases that would reduce their carbon footprint," the report states.

The U.S. Environmental Protection Agency's authority over carbon dioxide emissions would be phased out, the report states, predicting "an outright repeal of the Clean Power Plan."

What else goes away? Potential liability for fossil fuel producers. "Robust carbon taxes would also make possible an end to federal and state tort liability for emitters," the report says.

And what about the carbon tax consequences for Miller's own company? "In terms of the impact for Calpine as a company," Miller says, "we've long been advocates of pricing carbon. It levels the playing field and stops the government from picking winners and losers."

The Regulatory Framework

Patrick Ferguson heard about the Shultz-Baker carbon tax proposal from Shultz himself in April. A partner in Davis Wright Tremaine's San Francisco office, Ferguson is on the board of the directors of the Power Association of Northern California (PANC), to whom Shultz presented the carbon tax plan.

"Our Energy Opportunities and How to Realize Them," was the title of Shultz's lunchtime talk to the PANC members, who included energy professionals from investor-owned utilities, independent power producers, power marketers, fuel suppliers, municipal utilities, energy customers and agencies.

"As always, the devil's in the details," says Ferguson about the plan. "It's a high-level proposal. There would have to be kind of exceptions to the rules." He envisions that certain industries would be exempt, and says that how broad and numerous those exceptions are will ultimately dictate how effective the tax becomes at achieving its goal of carbon reduction.

Investments in the energy distribution system are required to make the costs of a carbon tax livable, Ferguson says. A discussion of those failed to make it into the Shultz-Baker plan. They are "very unsexy" and "expensive," Ferguson says, but nonetheless a necessity to make a carbon tax succeed politically.

The carbon tax proposal will eventually lead to a split in the fossil fuel industry, the Davis Wright lawyer says, pitting modern natural gas turbine operators against other providers, including coal plants and older gas facilities. "In a lot of ways, a carbon tax would be a boon to the natural gas industry," he says.

A carbon tax "just means we will be paying more for our fuel, which is natural gas," says Calpine's Miller. But those costs will be passed onto consumers.

"The coal guys emit so much CO2. We happen to emit about half of what they emit," Miller says. Under a carbon tax proposal, he says, "their fuel is going to be more costly. A carbon tax will hit coal hard."

Will the carbon tax proposal or other broad-scale regulatory changes be hitting the clean energy world soon? Miller doubts it, based on the political realities of the bottleneck in Washington, D.C., which is engulfed in the Trump administration's dramas and the raging battles over health insurance. "We don't expect any kind of massive congressional proposals," Miller says. "They've got their hands full at the moment."

The Outlook for Law Firms

Even though it could idle some lawyers, partners from Baker Botts, Haynes and Boone, and Jackson Walker—all Texas-based firms with corporate oil-and-gas clients—have voiced tentative support for the Baker-Shultz carbon tax proposal. The lawyers reacted positively to the news that Exxon and the other oil companies supported the plan. "I think it's incredible to have Exxon's support," says Megan Berge, a partner in the Washington, D.C., office of Baker Botts. She stressed she was only speaking for herself and not any particular client or for Baker, who is also a partner at the firm.

"I see the endorsement of this by the world's largest gas producers as game-changing," says Amy Baird, a Jackson Walker partner in Houston.

A policy switch could have big implications for lawyers who counsel clients on regulatory matters and litigate challenges to the Clean Air Act. "It will be less work for all those people," Baird predicts. "If all there is to dispute is the level of emissions, that's a heck of lot easier for the government to enforce."

If the tax is set high enough, Baird says, both emissions and litigation could decline in the long run, as utility companies and their consumers simply rely less on carbon-producing fuels.

But there's no consensus that lawyers would lose out.

"I don't see it as a lawyer unemployment act," says Baker Botts' Berge. "It might unemploy some lawyers, but the work would shift to different arenas."

At this early stage, particularly since the Trump administration has not signaled support for a carbon tax, determining precisely which lawyers would win work and which would lose work as a result of a carbon tax "is more than a little bit speculative," Berge says.

Diana Liebmann, a partner at Haynes and Boone, says that support for the proposal would hinge on its details. And even if demand for some legal work were to decline, she says, there would be a silver lining: "A new group of lawyers would deal with the tax credits."

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