Energy Alert

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Federal COVID-19 Economic Relief and Its Impact on the Energy Sector: An Overview

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Policy-makers in Washington have deployed a range of actions to help address the economic fallout from the response to the COVID-19 pandemic. While not targeting the energy sector per se, recent actions taken by the Federal Reserve, Congress and the Administration still offer relief to many in the energy sector.

Monetary Policy – Federal Reserve

On March 23, The Federal Reserve announced various measures to deal with the economic fallout from the COVID-19 pandemic, and keeping U.S. credit markets functioning. While not specific to the energy sector, one of these measures is the Primary Market Corporate Credit Facility (PMCCF), which will provide bridge financing for a maximum of four years, with interest rates based on market conditions. Until September 30, 2020 (unless extended), the Federal Reserve will buy corporate bonds from eligible issuers and make loans to eligible issuers. Specific procedures and timelines for accessing the PMCCF have not yet been published, but interested parties should consider taking the steps outlined here to prepare for this assistance.

Fiscal Policy – CARES Act

Capping more than a week of intense negotiations, Congress passed and the President signed into law on March 27 sweeping legislation to provide more than $2 trillion in fiscal stimulus to address the economic fallout from the pandemic. This legislation represents the third major package enacted to address the public health crisis, including the Coronavirus Preparedness and Response Supplement Act (H.R. 6074), which focused on providing funding to treat and prevent the spread of the disease, and the Families First Coronavirus Response Act (H.R. 6201), which focused on employee leave and retention issues.

The third package, the Coronavirus Aid, Relief and Economic Security (CARES) Act (H.R. 748), focuses on the economic fallout from the response to the outbreak and includes several significant provisions that are applicable across the entire economy, and while not specific to the energy sector, are important to note, including:

- The creation of a $500 billion Exchange Stabilization Fund administered by the Department of Treasury and the Federal Reserve to support airlines and other

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distressed industries. Under the law, the Treasury Department is to publish procedures within 10 days of enactment. Additional discussion of eligibility criteria, terms and conditions, and other aspects of this available relief are discussed at the following link of the Akin Gump COVID-19 Resource Center.

- The adoption of significant changes to the Internal Revenue Code. These changes are also not specific to the energy sector, but changes of particular note include an increase of interest expense deduction limitations (IRC Section 163(j)), a relaxation of Net Operating Loss (NOL) rules under Section 172, as well as several employer related tax provisions. These tax provisions are discussed in detail at the following link of the Akin Gump COVID-19 Resource Center.

Beyond these general provisions applicable to most—if not every—sector of the American economy, the CARES Act provides fairly limited relief to the energy sector and does not include many of the sweeping energy-related measures that were discussed during legislative negotiations. For example, the bill does not include any conditions for emissions standards related to federal financial support for certain industries, extensions for clean energy tax credits or investment in broad energy infrastructure development. While failing to prioritize major energy-related provisions in this third legislative stimulus package, Congress may consider such measures as part of future legislation that would provide additional federal assistance to deal with the COVID-19 pandemic.

Provided below is a review of some of the key energy policy and funding issues included in the CARES Act, followed by some of the key issues that were not included and likely will be considered in future legislation, and finally, some of the near term issues that could potentially be the focus of Executive Branch action.

What IS included in the CARES Act:

1. *Suspension of Aviation Excise Tax on Fuel* – The Act establishes an "excise tax holiday period" to begin after its enactment and to end before January 1, 2021. During the holiday period, use of kerosene as fuel for commercial aviation will not be taxed.
2. *Draw Down of the Strategic Petroleum Reserve* – The Act authorizes the Secretary of Energy to draw down and sell up to $450 million of crude oil from the Strategic Petroleum Reserve in fiscal years 2020, 2021, 2022. Proceeds from the draw down are to be deposited in the Energy Security and Infrastructure Modernization Fund in each fiscal year the sales occur.
3. *Supplemental Appropriations* – The Act includes additional funding to bolster certain programs and departmental operations, including:

- $900 million for payments under the Low Income Home Energy Assistance Program (LIHEAP).
- $99.5 million for the Department of Energy Office of Science and the National Nuclear Security Administration to support personnel, equipment and operations of scientific user facilities.
- $28 million for the Department of Energy Departmental Administration to support remote access for personnel.

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- $50 million for the U.S. Army Corps of Engineers to prevent, prepare for and respond to the COVID-19 pandemic.
- $3.5 million for the Nuclear Regulatory Commission to prevent, prepare for and respond to the COVID-19 pandemic.

What general provisions of the CARES Act significantly benefit the energy sector without direct industry support:

1. *163(j) Business Interest Deduction Limit Increase* – As noted briefly above, the Act increases the Section 163(j) interest deduction limitation for taxpayers (other than, solely for the 2019 tax year, partnerships) from 30 percent to 50 percent of adjusted taxable income for tax years beginning in 2019 or 2020. With respect to partnerships' 2019 tax year, 50 percent of a partner's interest in excess business interest from the partnership will be exempt from the interest deduction limitation, with the balance subject to the prior rules on deduction of business interest. The change in the interest deduction limitation will be a benefit to investors in renewable energy investments, which are significantly tax motivated as there are more losses available for allocation between the investors.
2. *Adjustment of NOL Carryback Limitations* – Also as alluded to above, the Act provides for a five year net operating loss (NOL) carryback for losses incurred in 2018, 2019 and 2020 and permits NOLs to be applied to 100 percent of the taxpayer's taxable income. This is a change from the NOL rules created by the Tax Cuts and Jobs Act of 2017, which eliminated NOL carrybacks and limited carry forward NOL deductions to 80 percent of taxable income. These changes will create more appetite for tax benefits, which are a major impetus for investment in renewables.
3. *Forgivable Small Business Loans* – The Act also provides that businesses with less than 500 employees are eligible for a loan from the U.S. Small Business Administration of up to $10 million, which loan may, subject to certain conditions, be forgiven to the extent of payroll costs, loan interest, rent and utility payments in the eight weeks following the loan. Many businesses in the energy industry are small businesses that are eligible for these loans. The incremental liquidity they afford can bridge operations for a period of months as development, construction and operations are interrupted by the virus.

What is NOT included in the CARES Act, but may be considered in subsequent legislation to address the COVID-19 pandemic:

1. *Clean Energy or Emissions Conditions* – Despite a strong push from Democrats on both sides of Congress, the CARES Act does not include any clean energy standards for industry or set conditions for emissions. These types of requirements have precedent—for example, auto-makers were compelled to produce more fuel-efficient cars following their industry's bailout in 2009. In talks preceding the final legislative text for the CARES Act, requirements to reduce carbon emissions for commercial aviation and for cruise ship industries were proposed but were ultimately not included.
2. *Extensions for Clean Energy Tax Credits* – Several Democrats and renewable energy companies hoped to include an assortment of clean energy tax credits in the stimulus package. Their proposal was to include seven expired renewable energy

tax credits that had been left out of a year-end tax extenders package in December 2019.

3. *Funding to Purchase Oil for the Strategic Petroleum Reserve* – While an earlier draft of the CARES Act included $3 billion in appropriations for the Department of Energy's Strategic Petroleum Reserve for "necessary expenses related to the acquisition, transportation, and injection of domestic petroleum products," it did not make it into the final legislation. This followed strong opposition from Democrats.

Even as Congress was considering passage of the CARES Act, preliminary discussions related to a potential fourth legislative package were beginning. As such, stakeholders should be mindful of such legislation as an opportunity for additional assistance or changes to current law, including, but not limited to, the items noted immediately above.

Separately, administrative and regulatory relief has been provided in certain contexts for the energy sector. For example, the Environmental Protection Agency (EPA) announced three regulatory actions it was undertaking, including: (1) Waiving the summer gasoline requirements through May 20, 2020, in order to manage gasoline inventories. (2) Adopting a temporary policy of exercising enforcement discretion to provide companies and facilities additional flexibility during the COVID-19 pandemic in light of worker shortages and social distancing restrictions. The EPA intends to review the need for and scope of this policy on a regular basis and to update it if changes are deemed appropriate. (3) Announcing their intention to extend the Renewable Fuel Standard (RFS) compliance date for small refineries and to provide them with additional flexibility.

Other possible means of administrative or regulatory relief have been raised by various stakeholders and may include:

- Potential that EPA will relax provisions of settlement agreements or consent decrees with refiners to reduce costs.
- Potential use of Section 232 of the Trade Expansion Act of 1962 to limit imports of foreign oil and support the domestic oil and gas exploration and production sector.
- Potential for a temporary royalty reduction for extraction on public lands and waters to lower the cost of production of oil and gas on federal lands and waters.

At this time, it is unclear whether any of these or other additional steps might be taken, however, we will provide updates as developments warrant at the Akin Gump COVID-19 Resource Center and the AG Speaking Energy Blog.

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