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Preemption Issues for Federal & State Climate Change Schemes

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Climate Change Legislation: Risks & Opportunities
May 8, 2008 – The Cornell Club, New York

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Preemption Defined

- Preemption doctrine concerns the question of whether and to what degree a state law survives if a federal law addresses the same regulatory matters. Three legal theories:
 - express preemption: fed. law specifies aspects of state law that are preempted.
 - implied preemption: “Field” preemption & “conflict” preemption
- Our focus is express preemption

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The Issue

- RGGI goes into effect 1/1/09
- RGGI auction of allowances begins 9/08
- Other state/regional climate change initiatives may also become effective before federal law is enacted
- Should state climate change programs be permitted to coexist with the federal cap-and-trade scheme?
 - Why/why not?
 - How?
 - Implications for industry

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Lieberman-Warner, S.2191

- Authorizes states to enact GHG restrictions that are at least as stringent as those in the federal law. (See Section 9003.)
- This means that state and regional carbon trading markets like RGGI would continue, provided the emission reductions are equal to or greater than the federal standard

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Four Basic Options

- Allow federal and state schemes to coexist; no integration (as under S.2191)
- Preempt state schemes; no integration
- Integrate federal and state schemes by allocating additional fed. allowances to states with carbon markets & let the states manage integration
- Integrate federal and state schemes by preempting state/regional schemes upon enactment of fed. scheme, but accept state allowances in federal trading scheme

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Fed. & State Schemes Coexist; No Integration

- Problems:
- Large emitters subject to state scheme has incentive to relocate to state without add'l emission limits (“leakage” problem)
- Even if emitters remain in state, the more stringent state emission limits means that emitter requires less fed. allowances, so more fed. allowances would be available and overall GHG emissions would remain unchanged
- Frustrates industry objective to avoid patchwork of state schemes

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Preempt State Schemes; No Integration

- Problems:
- States would likely oppose blanket preemption: they have invested time, resources and political capital
- Industry members that invested in banked state emission allowances would be penalized
- State carbon market could plummet in final years before fed. law is enacted

Integrate Fed. & State Schemes: Allocate Additional Fed. Allowances to States

- Problems:
- Incentivizes states to begin auctioning, banking allowances before enactment of fed law to justify claim on portion of add'l fed. allowances
- Allocating sufficient allowances to state could restrict the number of allowances available for other purposes (e.g., promoting carbon capture, investing in international forest protection)

Integrate Fed. & State Schemes: Preempt States, But Accept Banked Allowances

- **Advantages:** less complicated; more efficient to have single market; enables firms to invest/bank state allowances without fear of losing value
- **Problems:**
 - Could lead to extra allowances in first year of fed. program
 - Any failures in state program would carry over to fed. program (e.g., overallocation)
 - Could suppress initial value of fed. allowances

Other Integration Issues

- How to handle early emission reductions generated through offset projects
- Credit for early action