

Lieberman-Warner Climate Security Act Clears Senate Committee Markup: Future Prospects Uncertain

On December 5, the Senate Committee on Environment and Public Works (EPW) favorably reported the S.2191, The Lieberman-Warner Climate Security Act, by an 11-8 vote. Committee Chair, Barbara Boxer (D-CA), was joined by all of the other Democratic Members of the Committee – Senators Baucus (MT), Cardin (MD), Carper (DE), Clinton (NY), Klobuchar (MN), Lautenberg (NJ), and Whitehouse (RI) – the Independents – Senators Lieberman (CT) and Sanders (VT), and Republican Senator John Warner (VA) in voting to report the bill. All of the other Republican Members of the Committee – Senators Alexander (TN), Barrasso (WY), Bond (MO), Craig (ID), Inhofe (OK), Isakson (GA), Vitter (LA), and Voinovich (OH) – voted against the bill.

S.2191, as reported from the full Committee, retains the major design features of the version reported from the Subcommittee on Private Sector and Consumer Solutions to Global Warming and Wildlife Protection on November 1, 2007. Notable examples include an economy-wide emissions cap, emissions trading flexibility to contain compliance costs, and financial incentives for demonstrating and deploying advanced technologies. However, the full-Committee bill contains a number of substantive changes, the bulk of which were made when the Committee adopted Chair Boxer's substitute and first-degree amendment. Although more than 40 other amendments were offered during markup, very few were adopted. Among those that were, only an amendment on a low carbon fuel standard by Senator Alexander made any significant change to the bill. The major changes from the Subcommittee-reported bill are discussed below.

REGULATED ENTITIES AND EXPANDED SCOPE OF PROGRAM

One very significant change made to the overall framework of the bill was to alter the coverage of the regulatory program by revising the definition of "covered facilities." The term "covered facilities" defines the point of regulation for the regulatory program, *i.e.*, those facilities that are required to obtain and submit to EPA greenhouse gas (GHG) emission allowances. Under the new definition of covered facilities, the following entities are required to submit emission allowances:

- For coal, facilities that use more than 5,000 tons of coal in a calendar year.
- For natural gas, natural gas processing plants, facilities that produce natural gas in Alaska, and entities that import natural gas (including liquefied natural gas).
- For petroleum and coal-based fuels, facilities that produce or process, and entities that import, petroleum-based or coal-based liquid or gaseous fuel.

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- For chemical production of GHGs, facilities that produce for sale or distribution, and entities that import, more than 10,000 CO₂ equivalents (CO₂e, or the amount of GHG with the same global warming potential as one metric ton of CO₂) per year of Group I GHGs (*i.e.*, carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, or a perfluorocarbon).
- Facilities that emit more than 10,000 CO₂e of hydrofluorocarbons (HFCs) as a byproduct of the production of hydrochlorofluorocarbons (HCFCs).

One implication of this new definition is to move the point of regulation for natural gas “upstream,” from major sources burning natural gas to the entities that process or import the natural gas that these facilities consume. Similarly, the bill now covers all imported and produced petroleum fuels, not just those used for transportation. This change effectively expands the scope of coverage of the regulatory program by covering more GHG emissions from the use of natural gas and petroleum. In addition, the bill establishes a separate cap and trade program that regulates the consumption of HFCs, outside of the economy-wide program for Group I GHG emissions.

To reflect the expanded scope of coverage, the emissions cap in 2012 has been increased from 5.2 billion to 5.775 billion tons of CO₂e per year. This expansion will increase the number of allowances allocated to industry and for other purposes given that these allocations are based on a set percentage of the total CO₂e tonnage emissions cap for each calendar year. However, the stringency of the program remains the same, thus, the number of allowances gradually declines each year resulting in 1.732 billion allowances in 2050.

ALLOWANCE AND ALLOCATION PROVISIONS

Annual Auctions

Another change in the bill is an increase in the share of allowances that will be auctioned in the early years of the program. Under the revised measure, 22.5% of total allowances will be auctioned in 2012, gradually increasing to 70.5% in 2031. Under the Subcommittee bill, 18% of allowances would have been auctioned in 2012, rising to 73% in 2036.

Allocations to Industrial Sectors

To provide transition assistance to covered facilities in certain industrial sectors, the bill allocates allowances, free of charge, beginning in 2012 as follows:

- 19% to the fossil fuel-fired electricity generation facilities
- 10% to energy intensive manufacturing facilities, which include facilities that manufacture iron, steel, aluminum, pulp, paper, cement, chemicals, and other products listed by EPA

- 2% to importers and producers of petroleum-based fuel
- 2% to HFC producers
- 1% to rural electric cooperatives.

These percentages decline to zero in 2031.

Allocations to Load-Serving Entities and Natural Gas Distributors

The bill allocates 9% of each year's allowances to electric load-serving entities and 2% of each year's allowances to retail natural gas distributors with the mandate that the value of such allowances be used to mitigate economic impacts on low and middle income energy consumers and to promote energy efficiency on the part of such consumers.

Allocations to States

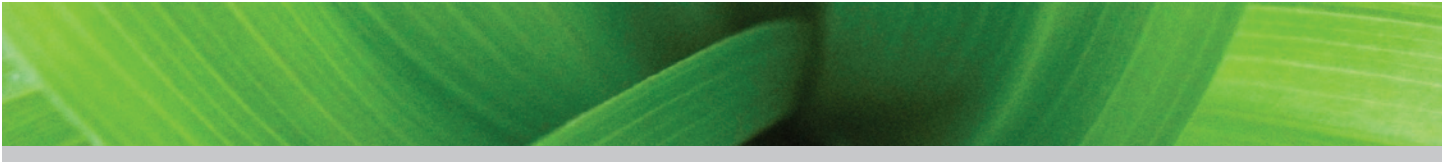
The bill increases the allocation to states to 11% (from 5% in the Subcommittee version). Of this amount:

- 1% is allocated to states in which 90% of new buildings comply with energy efficiency building codes
- 1% is allocated to states to operate, expand and increase the efficiency of mass transit systems
- 2% is allocated to states that have adopted "decoupling" rate-making methodology for electric and natural gas utilities
- 2% is allocated to states that have imposed GHG emission limits more stringent than the federal limits
- 4.5% is allocated to all states based on each state's level of LIHEAP expenditures, population and the quantity of CO₂ embedded in the fossil fuels that are mined or produced in the state
- 0.5% is allocated to a Program for Tribal Communities.

CARBON CAPTURE AND SEQUESTRATION BONUS ALLOWANCES AND INCENTIVES

Another significant change to the bill is to expand the types of projects that would qualify for bonus allowances for carbon capture and sequestration (CCS). Most importantly, projects are no longer required to capture 85% of their CO₂ emissions in order to qualify for the bonus allowances. Specifically, projects can qualify if they meet one of the following annual CO₂ emissions performance standards:

- For existing electricity generating units, the performance standard is 1,200 pounds or less of CO₂ per megawatt-hour (MWh) of net electricity generation, after subtracting the amount of CO₂ that is captured and sequestered.
- For generating units commencing construction before July 1, 2018, the standard is 800 pounds or less of CO₂ per MWh of net electricity generation, after subtracting the amount of CO₂ that is captured and sequestered.



- For generating units commencing construction on or after July 1, 2018, the performance standard is 350 pounds or less of CO₂ per MWh of net electricity generation, after subtracting the amount of CO₂ that is captured and sequestered..
- For non-electricity generating units, the capture and storage of at least 85% of total CO₂ emissions.

The Committee-reported bill also provides incentives for the deployment of technologies that meet these CO₂ emission performance standards. The bill authorizes the Climate Change Credit Corporation to award loan guarantees, cost-sharing grants, or production-based payments for deployment of advanced coal and sequestration technologies.

LOW CARBON FUEL STANDARD

Senator Alexander successfully offered an amendment that would create a low carbon fuel standard. Under this new provision, transportation fuel would be required to contain 5% less carbon by 2015 and 10% less carbon by 2020.

NEXT STEPS IN THE SENATE

It is anticipated that the full Senate will debate S.2191 sometime in 2008. Once Senate debate begins, supporters will need to muster 60 votes in favor of the bill in order to defeat an almost-certain filibuster. In addition, many of the more controversial amendments that were offered in the EPW Committee markup will reappear during full Senate consideration. At this point, it is impossible to predict how the bill will be amended and whether it will be enacted by the Senate.

Van Ness Feldman is preparing a detailed summary of the Environment and Public Works Committee markup hearing. If you are interested in receiving this summary, please contact your Van Ness Feldman relationship professional.

FOR ADDITIONAL INFORMATION

Van Ness Feldman has an experienced climate change and emissions trading team that assists a wide range of clients on policy, transactional, strategic and advocacy issues. The firm has been actively involved for clients in the development of climate change legislation. We are in a strong position to provide expert analysis and advice on the bills emerging in Congress, the surrounding policy and political debate, and the implications for your organization. If you would like more information, please contact Kyle Danish, Tom Roberts, Doug Smith, Stephen Fotis, or any member of the firm's Climate Change and Emissions Trading Practice group at (202) 298-1800.

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