

Representatives Dingell and Boucher Release Discussion Draft of Climate Change Legislation

On October 7, Rep. John Dingell (D-MI), Chairman of the House Committee on Energy and Commerce, and Rep. Rick Boucher (D-VA), Chairman of the Subcommittee on Energy and Air Quality, released a “discussion draft” climate change bill intended to stimulate discussion and serve as a basis for legislation in the next Congress.

At the heart of the Dingell-Boucher discussion draft is an economy-wide cap-and-trade regime for regulating greenhouse gas emissions. The Dingell-Boucher proposal also would preempt state and regional greenhouse gas cap-and-trade programs (such as the Regional Greenhouse Gas Initiative) and create a variety of dedicated funds to channel proceeds from allowance auctions to energy efficiency programs, consumer rebates, adaptation, international programs, and other purposes. The draft outlines different options in some key areas – including allowance allocation, and greenhouse gas emissions standards for automobiles under the Clean Air Act and state law – which are intended to serve as a basis for consultations with stakeholders over the next few months.

KEY FEATURES OF THE DINGELL-BOUCHER PROPOSAL

Just as with its predecessor proposals in Congress, the centerpiece of the Dingell-Boucher discussion draft is an economy-wide cap-and-trade regime for controlling U.S. greenhouse gas emissions. Key features of the draft legislation are outlined below:

Targets

The discussion draft would set a cap on greenhouse gas emissions equal to six percent below 2005 levels in 2020; 44% below 2005 levels in 2030; and 80% below 2005 levels by 2050. The cap would enter into force in 2012. In the near term, these targets are less aggressive than those proposed in the Lieberman-Warner bill.

Coverage

“Covered” entities that would be responsible for submitting allowances under the Dingell-Boucher proposal include:

- all electricity generators that emit greenhouse gases;
- producers and importers of petroleum-based or coal-based liquid fuels (in quantities whose combustion would release more than 25,000 tons of CO₂ per year);
- entities that produce for sale, or that import for sale, more than 25,000 tons CO₂ equivalent per year of nitrous oxide, perfluorocarbons, sulfur hexafluoride, nitrogen trifluoride, fluorinated greenhouse gases, or fossil-fuel based CO₂;
- large industrial facilities in enumerated sectors;

- natural gas local distribution companies delivering more than 460,000 cubic feet per year to residential and commercial consumers; and
- geologic sequestration sites.

The drafters estimate that the cap-and-trade program described in the Dingell-Boucher proposal will cover 88% of U.S. greenhouse gas emissions. The Dingell-Boucher proposal would authorize the Environmental Protection Agency (EPA) to regulate greenhouse gas emissions from smaller sources using industry-specific performance standards.

Coal-fired power plants receiving New Source Review permits after January 1, 2009 would also be required to sequester 60% of their carbon dioxide emissions by 2025 or four years after commencement of operation, whichever comes later.

Allowance Allocation

The Dingell-Boucher discussion draft presents four alternative options for allowance distribution. The alternatives provide for varying numbers of allowances to be distributed for free to covered entities in certain sectors and to be auctioned by EPA for special purpose funds financing adaptation, clean energy technologies, energy efficiency programs, consumer rebates, “green jobs” training, and other projects. Under each of the four options, some allowances are reserved to incentivize carbon capture and storage and renewable energy technologies through “bonuses” to qualifying facilities.

Under all four options, 100% of allowances would be auctioned, after 2025, with all proceeds going to rebates to households on a per capita basis. The stated goal of this approach is to encourage Congress to reauthorize the legislation before 2026.

Allowance Price Mitigation

In order to address concerns that allowance prices could rise to excessive levels, the Dingell-Boucher proposal creates a special “strategic reserve” of allowances to be auctioned subject to a floor price. The minimum reserve auction price would start at \$20 to \$30 for 2012. After 2015, the minimum reserve auction price would be set at a premium of 30 to 100% above the average daily spot allowance price for the previous 36 months.

Flexible Mechanisms

Under the proposal, regulated entities could utilize several mechanisms to make compliance more economical, including banking, borrowing, and offsets. The discussion draft permits regulated entities to purchase EPA-approved offset credits for domestic and international emission reduction projects. For example, the proposal instructs EPA to recognize domestic offset credits for landfill methane, afforestation or reforestation, manure management, and methane collection at coal mines.

As the economy-wide emissions cap becomes more stringent over time, regulated entities are permitted to meet a gradually escalating proportion of their compliance obligation with offsets. In the first five years of the program, for example, regulated entities may use offsets to meet 5% of their obligations; by 2024, that limit would increase to 35%.

Indirect Emissions from Manufacture of Imported Goods

The discussion draft proposes the creation of an International Climate Change Commission that will assess whether the United States' trading partners have undertaken greenhouse gas abatement policies "comparable" to those in the United States. Importers bringing in carbon-intensive goods from "covered" countries that have not taken comparable actions would be required to surrender "international reserve allowances."

Options for Proceeding on Vehicular Greenhouse Gas Emission Standards

The discussion draft presents three options for responding regulating greenhouse gas emission standards from vehicles pursuant to § 202 of the Clean Air Act. The first alternative simply states that the Administrator of EPA will be regarded as having made a positive "endangerment" finding under § 202, and requires the Administrator to take into account the costs and likely changes resulting from the cap-and-trade program when designing vehicular greenhouse gas standards. A second alternative requires that EPA's vehicular greenhouse gas standards be "fully consistent" with the Corporate Average Fuel Economy (CAFE) requirements promulgated by the National Highway Traffic Safety Administration (NHTSA). The third alternative bars EPA from issuing vehicular greenhouse gas standards for any vehicle or engine for which NHTSA has already issued a CAFE standard.

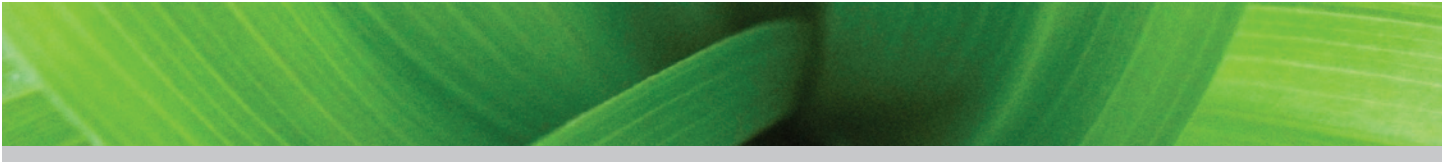
The discussion draft also proposes two options for responding to EPA's denial of California's petition for a preemption waiver under § 209 of the Clean Air Act, which prevents California and other states from implementing state-level vehicular greenhouse gas standards. One option is to grant the waiver, allowing the states to implement California's tailpipe greenhouse gas standards. The second option is to expressly preempt the states from regulating greenhouse gas emissions from any vehicle already subject to CAFE or EPA greenhouse gas standards.

Preemption

The Dingell-Boucher proposal would explicitly preempt state, local, and regional cap-and-trade programs for greenhouse gas emissions. The preemption provision does not address other possible forms of state greenhouse gas regulation.

Clean Air Act

The Dingell-Boucher proposal would eliminate EPA's authority to regulate greenhouse gases as criteria pollutants or hazardous air pollutants.



Allowance Market Oversight

The Dingell-Boucher proposal would amend the Federal Power Act to vest responsibility for oversight and management of the carbon allowance market with the Federal Energy Regulatory Commission.

LOOKING AHEAD

Chairmen Dingell and Boucher have made clear that they intend their discussion draft to be a focal point for consultation with stakeholders, which will inform their formal introduction of a climate change bill in 2009.

Van Ness Feldman will be preparing a more in-depth analysis of the Dingell-Boucher discussion draft for clients. Please do not hesitate to contact us if you are interested in this analysis.

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. We are in a strong position to provide expert analysis and advice on 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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