

Client Alert

Latham & Watkins Environment, Land &
Resources Department

Key Senate Developments for Climate Change and Clean Energy Legislation

Introduction

On September 30, 2009, Sen. John Kerry (D-MA), Chairman of the Senate Foreign Relations Committee, and Sen. Barbara Boxer (D-CA), Chairwoman of the Senate Environment and Public Works (EPW) Committee, introduced their much anticipated draft of climate change legislation, entitled the "Clean Energy Jobs and American Power Act" (Kerry-Boxer). Kerry-Boxer sets forth an economy-wide cap-and-trade program to regulate greenhouse gas (GHG) emissions as well as other clean energy-related programs.

The bill largely tracks the climate change legislation passed by the US House of Representatives earlier in the summer, H.R. 2454—the American Clean Energy and Security Act of 2009 (Waxman-Markey), with a few important distinctions.¹ Notably, Kerry-Boxer contains a 20 percent intermediate emission reduction target for 2020 and, at this point, only placeholder language for how emission allowances would be allocated. Kerry-Boxer also contains significant changes to the offset provisions from the House bill. Chairwoman Boxer intends to have her Committee mark up the bill in the coming weeks, at which time the legislation is expected to contain more specifics, particularly on allocation issues. Unlike Waxman-Markey,

however, the scope of Kerry-Boxer was purposely limited primarily to climate change-related issues.

The Senate Energy and Natural Resources Committee has already approved and reported S. 1462—the American Clean Energy Leadership Act of 2009 (ACELA) sponsored by Sen. Jeff Bingaman (D-NM) and placed it on the Senate's general calendar on June 17, 2009. ACELA contains many clean energy and energy efficiency programs similar to those found in Waxman-Markey. For instance, ACELA includes a federal combined efficiency and renewable electricity standard (CERES) and provisions to set up a new Clean Energy Deployment Administration (CEDA, also known as the "Green Bank") to facilitate financing of clean energy technologies. ACELA also contains numerous other programs to enhance energy efficiency. Most commentators expect Senate Majority Leader Harry Reid (D-NV) eventually to merge Kerry-Boxer with ACELA and attempt to pass comprehensive climate change and clean energy legislation. More discussion on the prospects for passage appears at the end of this *Alert*.

This *Client Alert* focuses on the key provisions of Kerry-Boxer and ACELA that will be of interest to electric generators and large industrial sources covered by the cap-and-trade

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program, as well as to entities involved in the development of renewable energy resources, carbon capture and sequestration (CCS) projects and energy efficiency measures that would also be affected by the clean energy programs in both bills.

Global Warming Pollution Reduction and Investment Program

Emission Reduction Targets and Program Coverage

Kerry-Boxer proposes to amend the Clean Air Act by adding "Title VII—Global Warming Pollution Reduction and Investment Program," which sets forth an economy-wide cap-and-trade program that would require aggressive GHG emission reductions using a 2005 baseline. Compliance under the program would begin in 2012 for covered sectors with a cap 3 percent below 2005 emission levels. The cap would steeply decline over time, requiring 20 percent reductions by 2020, 42 percent reductions by 2030 and 83 percent reductions by 2050. Covered entities under the cap-and-trade program would include "downstream" emitters such as electric generators and large industrial stationary sources that emit more than 25,000 tons per year of carbon dioxide equivalents, as well as "upstream" entities such as fuel producers and importers.

The 20 percent intermediate target for 2020 is stricter than both the 17 percent target in Waxman-Markey and the 14 percent target that the Obama Administration had initially proposed. Several Democratic senators have already stated publicly that they could not support a 20 percent target, and so that provision could change as the bill moves forward.

Disposition of Allowances

At this time, Kerry-Boxer does not specify exactly how emission allowances

would be allocated, *i.e.*, the bill does not state what percentages of emission allowances different industries and programs would receive. Importantly, however, Kerry-Boxer does clarify which programs would be funded with allowances directly, as opposed to those that would be funded from the proceeds of allowance auctions and those that would require further appropriations from Congress. Also, Kerry-Boxer states that 25 percent of the allowances would be auctioned each year. That provision could signal a significant change from Waxman-Markey, in which 85-90 percent of the allowances would be allocated for free in the early years of the House cap-and-trade program.

Programs and entities that would receive allocations directly include:

- Electricity and natural gas consumers;
- Home heating oil and propane consumers;
- Domestic fuel producers (*i.e.*, refineries);
- Rebates for certain energy intensive trade exposed industrial entities;
- Commercial deployment of CCS;
- Early action recognition;
- State and local investment in energy efficiency and renewable energy;
- Energy efficient building codes;
- Retrofitting buildings for energy and environmental performance;
- Energy Innovation Hubs;
- The Advanced Research Projects Agency-Energy (ARPA-E);
- International clean energy deployment; and
- International climate change adaptation.

For the time being, Kerry-Boxer preserves Waxman-Markey's division of allowances allocated among electricity consumers between electricity local distribution companies (LDCs), merchant coal units, long-term contract generators, small LDCs and certain cogeneration facilities. Moreover, this version of the Senate bill also retains the distribution formula for utilities based half on their historical emissions

and half on their retail deliveries. This formula was the result of a delicate compromise crafted during the House negotiations by the Edison Electric Institute. Rural cooperatives and several Midwestern states that are heavily dependent on coal-fired generation have lobbied to revise this formula to focus only on emissions.

With specifics on allocations still up in the air, it remains to be seen whether the natural gas and nuclear industries have fared better under the Kerry-Boxer bill than they did under Waxman-Markey. Kerry-Boxer would authorize EPA to carry out a program to provide incentive payments for power generation projects that achieve GHG emission reductions compared to the electric utility sector average for 2007. Presumably, such a program would attempt to recognize the lower carbon intensity of natural gas and nuclear generation, as compared to coal-fired units. Kerry-Boxer would not, however, fund this particular program with emission allowances. Similarly, the bill includes a meager nuclear section that makes findings about the importance of the industry and proposes programs for worker training, safety and waste management, but it would not allocate allowances directly to fund any of those new programs.

Cap-And-Trade Program Rules

Kerry-Boxer provides several cost mitigation mechanisms for compliance (in addition to an offset program, described separately later in this *Alert*) that are quite similar to those found in Waxman-Markey. Trading of emission allowances, compensatory allowances and offset credits would be allowed and would not be restricted to covered entities. Entities could receive compensatory allowances for a number of actions, including the destruction of certain fluorinated gases that are also greenhouse gases. The Senate bill would allow unlimited banking of allowances for compliance in future

years and unlimited borrowing of allowances from the following year's compliance period without interest payments. Borrowing from years 2-5 of future compliance periods would be limited to 15 percent of an entity's compliance obligation in the current year and would require interest payments (8 percent of allowances).

The US Environmental Protection Agency (EPA) would administer quarterly auctions that would follow a single-round, sealed-bid, uniform price format. Any person could participate in the auctions and purchase up to 5 percent of the allowances offered for sale, subject to possible financial assurance requirements that EPA could promulgate in the future. The reserve auction price would be \$10 per allowance in 2012, and it would rise at the rate of 5 percent per year plus the rate of inflation.

Additionally, under the proposed Senate program, EPA would hold quarterly "Market Stability Reserve" auctions of emission allowances. Unlike the regular auctions, only covered entities that provide financial assurances would be allowed to participate in these auctions. The purchase limit would be 20 percent of a covered entity's compliance obligation for that year, and no person would be allowed to purchase more than 20 percent of the allowances offered for sale in any quarterly auction. Moreover, Kerry-Boxer would allow any entity holding offset credits to request that the EPA Administrator include those offset credits in the upcoming market stability reserve auction. This provision would provide holders of offset credits another avenue to liquidate those assets by essentially converting them to emission allowances in addition to those under the cap.

The minimum stability reserve auction price would be \$28 per allowance in 2012. That price would rise at the rate of 5 percent per year plus the rate of inflation through 2017. Starting in 2018, the rate would increase 7 percent per

year plus the rate of inflation. Senator Boxer has suggested that this provision, in combination with the minimum auction price described previously, would serve as a “soft collar” on allowance prices. Several of Senator Boxer’s colleagues and other industry groups, however, are calling for a hard price ceiling, or “safety valve,” on allowance prices in the regular auctions, a provision not included in Waxman-Markey.

Kerry-Boxer would potentially allow the use of international emission allowances (e.g., European Union Allowances) for compliance purposes under the US system so long as the international climate change program meets certain qualifications, including that the program imposes “a mandatory absolute tonnage limit” on GHG emissions and is “at least as stringent” as the US program. Kerry-Boxer would also give EPA the ability to modify, by rule, the percentage of a covered entity’s compliance obligation that could be met with international emission allowances.

As under the House legislation, the penalty for non-compliance would be twice the fair market value of emission allowances for that compliance year multiplied by the number of tons of carbon dioxide equivalent for which the covered entity failed to comply. In addition, covered entities that fail to comply would have to offset their shortfall the following year.

Offsets

Kerry-Boxer, like Waxman-Markey, would allow covered entities to satisfy their compliance obligations with carbon offset credits (i.e., credits from GHG-emission reducing projects at entities not covered by the cap). While many of the offset provisions in the two bills mirror each other, the bills deviate notably in their treatment of international offsets, regulatory authority and oversight, initially eligible project types, capture of fugitive methane emissions from coal mines and landfills, reduction in ozone-

depleting chemicals, and public health and environmental safeguards. Many of these issues are likely to be subject to debate as the bill moves forward.

Both Kerry-Boxer and Waxman-Markey make available up to 2 billion tons of offset credits each year. Kerry-Boxer provides for up to 1.5 million tons from domestic projects and 0.5 million tons from international offset projects, whereas Waxman-Markey splits the available offsets evenly between domestic and international project types. Both bills permit EPA to adjust the amount of available international offsets up—Kerry-Boxer to 1.25 million tons and Waxman-Markey to 1.5 million tons. Under both bills, one offset credit, domestic or international, would equal one emission allowance until 2018, and starting in 2018, 1.25 international offset credits would equal one emission allowance. The ability to use offset credits would be divided *pro rata* among covered entities under both bills.

Kerry-Boxer places jurisdiction over the offset program with the President, rather than following the Waxman-Markey approach and dividing authority between the United States Department of Agriculture (USDA), for all domestic projects in the agriculture and forestry sectors, and the EPA, for projects in the international and other domestic offset sectors. Kerry-Boxer directs the President to consult with “appropriate federal agencies” and neither rules out, nor guarantees, a role in the offset program(s) for any particular agency. The division of authority in the House bill was the result of a compromise to balance the interests of farm groups in a leadership role for the USDA, and the interests of environmental groups in EPA control of the program. This compromise was widely recognized as securing necessary farm state support for passage of the bill; however, it has been criticized by environmentalists and other stakeholders, who found the division of responsibilities ambiguous and with the potential to result in inconsistent and

inefficient regulatory regimes. Already, alternate language is being proposed on Capitol Hill that would move Kerry-Boxer closer to the House text and create a more clearly defined role for USDA and EPA. These provisions are likely to be subject to extensive debate as the bill advances through the Senate.

Kerry-Boxer also creates a new offset enforcement role for the United States Department of Justice, by establishing an "Office of Offsets Integrity" under the Assistant Attorney General for the Environment and Natural Resources Division. The new office would conduct investigations, enforce laws and prevent fraud related to offsets. The House bill was silent on the matter of enforcement, leaving the details to be developed by the EPA and USDA as to their respective programs. Similar to the House bill, Kerry-Boxer also establishes an independent Offsets Integrity Advisory Board (OIAB), composed of scientists and others with relevant expertise, to provide recommendations on offset project type eligibility, methodologies, scientific uncertainty and related issues.

Under Kerry-Boxer, the President would have the ultimate responsibility for establishing and periodically revising a list of eligible offset project types and their corresponding methodologies. Kerry-Boxer directs the President to give priority consideration to offset project types that are recommended by the OIAB and to "consider" a specific list of projects types, including:

- capture of fugitive methane emissions from coal mines, landfills, oil and gas distribution facilities, manure management and biogas;
- agricultural, grassland, and rangeland sequestration and management practices; and
- changes in carbon stocks attributed to land use change and forestry activities.

The House bill, in contrast, left it to the discretion of EPA to develop an initial list of project types under its

offset programs, but prescribed for the Secretary of Agriculture an initial list of project types. Failing to have a list of eligible project types in place when compliance under the cap-and-trade program begins may result in delays that could disrupt covered entities' initial compliance planning, defer entities' ability to use offsets for compliance and potentially slow the overall development of the carbon market.

Kerry-Boxer makes other noteworthy additions to Waxman-Markey, including Kerry-Boxer's allowing projects that reduce ozone-depleting chemicals to count as offsets and requiring the President to act to avoid or minimize, to the maximum extent practicable, adverse effects on human health or the environment resulting from offset projects (including by rejecting projects, if necessary).

Other components of the offset provisions in Kerry-Boxer closely mirror those under the House bill, including:

- Offsets would be subject to strict (but as yet undetermined) additionality and verification requirements according to approved methodologies.
- Persons would be able to petition to modify the eligibility list to include a particular offset project type or methodology.
- The regulator would approve or reject a potential offset project only 90 days after receiving a completed approval petition.
- Early action offset projects undertaken pursuant to voluntary, state or regional GHG cap-and-trade programs would potentially be eligible for credits, subject to certain restrictions.

To counter the risk of reversals from sequestration offset projects, an offset reserve is established, from which offsets will be retired on a one-to-one basis in the event of a reversal. A project developer that faces a reversal must replenish the reserve with offsets or allowances, for intentional reversals on a

one-to-one ratio for those reversed, and for unintentional reversals, on a 0.5-1 ratio for credits reserved or reversed, whichever is the lesser amount. Kerry-Boxer also provides that any person may petition the President for a determination that an offsets reversal has occurred, which, combined with the requirement to post approval petitions publicly, opens the door to potential citizen suits.

With respect to international offset project eligibility, Kerry-Boxer's approach closely tracks Waxman-Markey. Under both bills:

- Offset projects in developing countries would be eligible for credits if a bilateral or multilateral agreement with the host country exists.
- EPA would identify sectors in specific countries for which issuing international offset credits on sector-wide basis would be appropriate.
- International offset credits issued by an international body (e.g., the Kyoto Protocol's Clean Development Mechanism (CDM) Executive Board) would be eligible for credits, if EPA determines that the international body issuing those credits has requirements in place that provide "equal or greater assurance of the integrity" of the credits. As a practical matter, if EPA certifies the CDM Executive Board, then any CDM credits (that also meet the other legislative requirements for international offset credits) should become eligible as offsets under the United States cap-and-trade program. If not, however, then CDM credits may need to go through an extra layer of regulatory approval in the United States. At least one set of international offset program types that are eligible under the CDM, those based on the destruction of hydrofluorocarbons, is specifically prohibited under Kerry-Boxer, and others may be added as the bill progresses through the Senate.
- Credits would be provided for reduced deforestation projects in

developing countries, subject to certain restrictions. Deforestation projects in major GHG-emitting nations would be limited to national-scale activities, or state-level activities in states that would be considered major emitters themselves.

An additionally noteworthy requirement added by Kerry-Boxer is that an international offset project developer must be eligible to receive service of process in the United States, which opens the door to potential civil and regulatory action in the federal courts against a developer. Kerry-Boxer also permits EPA to establish additional categories of international offsets under certain circumstances, including if the auction price for allowances reaches the Market Stability Reserve Auction price for two consecutive years.

We can expect continued negotiation over the appropriate requirements for, and quantity of, international offsets in the weeks ahead. The reduction in available international offsets under Kerry-Boxer will find support with groups that criticize the environmental integrity of overseas projects, including those under the CDM. Reducing the pool of potential international offsets, however, has the potential to increase the cost of the climate regime, as projects overseas are often cheaper to develop than United States-based projects, and it is questionable whether the United States can supply enough domestic offsets to meet demand, particularly in the early years of a mandatory regime. A recent analysis by the Congressional Research Service, for example, found that inclusion of international offsets in a cap-and-trade programs shifts cost estimates by 60 percent or more.

Preemption of State and Regional Programs for Five Years

Kerry-Boxer provides that no state may implement or enforce its own GHG cap-and-trade program from 2012 to 2017, provided that the federal cap-and-

trade program holds its first auction of emission allowances by March 31, 2011. If that initial auction were delayed, the state preemption would not begin until at least nine months from whenever that initial auction finally occurs. The similar state preemption provision in Waxman-Markey is not conditional in this manner. Like Waxman-Markey, Kerry-Boxer would allow states to implement command-and-control GHG measures, such as those currently being developed in California for fleet-wide motor vehicle emission requirements and fuels.

Kerry-Boxer would also provide an "exchange" for GHG allowances issued before December 31, 2011, or the date that is nine months after the first federal auction, by the State of California, the Regional Greenhouse Gas Initiative (RGGI) or the Western Climate Initiative in an "amount that is sufficient to compensate for the cost of obtaining and holding such State allowances." This provision is intended to ease the transition to the federal cap-and-trade program, but importantly does not provide a one-for-one allowance exchange. If the clearing price for federal allowances is \$6/ton (for example), as compared to the approximately \$3/ton RGGI allowance price, then an allowance holder would receive one federal allowance in exchange for two RGGI allowances.

Carbon Market Oversight

At this point, Kerry-Boxer only contains placeholder language on this issue and does not specify which agency would have oversight authority over the carbon markets. The placeholder language does state, however, that "it is the sense of the Senate that there shall be a single, integrated carbon market oversight program." So, it is reasonable to expect that the next version of Kerry-Boxer will not split authority between different agencies as the House bill did between the Federal Energy Regulatory Commission (FERC) and the Commodity Futures Trading Commission (CFTC).

Exemptions From Other Clean Air Act Provisions

Unlike the House legislation, Kerry-Boxer provides no exemptions for greenhouse gases from regulation under other provisions of the Clean Air Act. Waxman-Markey would prevent greenhouse gases from being regulated as criteria air pollutants, which would require the promulgation of new National Ambient Air Quality Standards (NAAQS), or hazardous air pollutants (HAPs). The House bill would also have prevented GHG emissions from affecting the New Source Review (NSR) program or Title V operating permit determinations. At this point, Kerry-Boxer contains no similar provisions.

Additional GHG Standards

Kerry-Boxer would prevent EPA from promulgating new source performance standards for greenhouse gases under Section 111 of the Clean Air Act before January 1, 2020 for stationary sources that emit uncapped GHG emissions and qualify as eligible offset projects. This provision represents a significant change from the House legislation to allow more projects to qualify as offsets, particularly those involving methane capture. Waxman-Markey, in contrast, would require EPA to use existing authority under Section 111 to set GHG emission standards for certain uncapped stationary sources of GHG emissions that emit more than 10,000 tons per year of carbon dioxide equivalent.

Perfluorocarbon and HFC Cap-and-Trade Program

Additionally, Kerry-Boxer would require EPA to regulate the production and consumption of perfluorocarbons. These provisions are expected to change as the legislation progresses. In this draft, the bill would give EPA discretion to determine whether to regulate perfluorocarbons via a separate cap-and-trade program or command-and-control regulations that would require entities to implement best available control technology. Waxman-

Markey would not separately regulate perfluorocarbons.

Similar to the House bill, Kerry-Boxer would also regulate the production and consumption of hydrofluorocarbons (HFCs), many of which are potent GHGs themselves, under a separate cap-and-trade program. This program is designed to address a gap in coverage of the Montreal Protocol on Substances that Deplete the Ozone Layer. Allowances would be distributed through a combination of annual auctions and non-auction sales based on the auction price. This cap-and-trade program would require 85 percent reductions of HFC consumption by 2032. Offset credits to be used for compliance under this program could be obtained through the destruction of chlorofluorocarbons (CFCs).

Performance Standards for New Coal-Fired Power Plants

Like Waxman-Markey, under Kerry-Boxer, new coal-fired power plants receiving their initial Clean Air Act permits on or after January 1, 2020 would be required to achieve a 65 percent reduction in their annual carbon dioxide emissions. New coal-fired plants permitted after January 1, 2009 and before January 1, 2020 would be required to achieve a 50 percent reduction in their annual carbon dioxide emissions. Enforcement of the latter standard would begin at a later compliance date depending on the commercial availability of CCS technology, but no later than January 1, 2025. Kerry-Boxer would also require EPA to publish a report on the progress of CCS 18 months after enactment and semi-annually thereafter.

Federal Combined Efficiency and Renewable Electricity Standard

ACELA would revise Title VI of the Public Utility Regulatory Policies Act

of 1978 to establish a federal combined efficiency and renewable electricity standard (CERES) for electric utilities that sell more than 4 million MWh of electric energy per year. The CERES program under ACELA would be significantly weaker than what Waxman-Markey would impose. In 2012, the CERES target under ACELA for electric utilities would only be 3 percent. That percentage would rise gradually to 15 percent by 2020. By contrast, under Waxman-Markey the target would start at 6 percent in 2012 and rise to 20 percent in 2020. Additionally, under ACELA, the Secretary of Energy could waive the penalty for an electric utility's noncompliance with the CERES for reasons "outside of the reasonable control" of the electric utility. Moreover, the Secretary could waive the CERES requirements for electric utilities due to natural disasters or to limit the rate impact to customers to less than 4 percent in any year. No similar waiver or variance provisions exist in the CERES provisions under Waxman-Markey.

Electric utilities would be required to demonstrate their compliance with the target under ACELA by (1) submitting "Federal Renewable Electricity Credits" (RECs), each representing a defined amount of electric energy generated from a qualifying renewable energy resource; (2) submitting "Federal Energy Efficiency Credits," which some commentators have referred to as "white certificates," each representing a defined unit of reduction in the consumption of electricity at a facility of an end-use customer, for up to 26.67 percent of the target; (3) making alternative compliance payments of 2.1 cents per kilowatt hour; or (4) any combination of the above. The use of white certificates for compliance purposes would likely be more flexible under ACELA than demonstrated electricity savings would be under Waxman-Markey.

Under ACELA, the CERES program rules would afford electric utilities a

considerable amount of flexibility for compliance planning purposes. Federal RECs and white certificates would be fungible, regardless of where they were generated in the US. They would only be bankable for up to three years, however, and electric utilities that hold excess credits could only trade them to an affiliated electric utility. No such limitations would exist in the CERES program under Waxman-Markey.

There are several other notable features of the CERES under ACELA. Significantly, electric utilities' baseline amount of electric energy for compliance measurement purposes would not include the following sources of generation: (i) hydropower, other than qualified hydropower; (ii) incineration of municipal solid waste owned by the utility; (iii) fossil-fuel generation to the extent that the GHG emissions are captured and sequestered; (iv) nuclear generation placed in service after the enactment date for the program or due to efficiency improvements or capacity additions at existing nuclear facilities. Also, credit multipliers would be available for generation from facilities on Indian land (2x), small distributed generation (3x), generation of energy from algae (3x); and for biomass combined heat and power facilities (the multiplier varies depending on the efficiency of the system). If a power purchase agreement for a qualifying renewable electricity project does not specify what party receives the environmental attributes from the project, then the federal RECs would be allocated to the purchaser of electric energy. Finally, ACELA provides that the federal CERES would not preempt state renewable portfolio standard programs that may require higher percentages of renewable electricity or proceed on shorter timeframes.

Carbon Capture and Sequestration

Kerry-Boxer would provide more aid to power plants to speed commercialization

of CCS technologies than its House counterpart by greatly increasing the potential amount of allowances and bonus allowances devoted to this issue. As in Waxman-Markey, Kerry-Boxer directs EPA, in consultation with the Department of Energy (DOE) and other agencies, to submit a report to Congress within one year of enactment of the bill setting forth the strategy to address legal and regulatory barriers to the commercial scale deployment of CCS. The bill further directs EPA to promulgate regulations for the certification and permitting of geologic sequestration sites, for maintaining evidence of financial responsibility for geological sequestration wells, and for the distribution of emission allowances to support commercial deployment of CCS technologies in electric power generation and industrial operations.

EPA would distribute emission allowances to electric generating units (EGUs) that implement CCS technology in two phases, the first of which would cover the initial 20 gigawatts (whereas Phase I under Waxman-Markey would only cover the initial six gigawatts) of eligible EGUs and the second of which would require EPA to institute a reverse auction system or alternative method if EPA determines a reverse auction would not be efficient or cost-effective (whereas Waxman-Markey directed the EPA to promulgate additional regulations governing the method of distribution). EGUs would use the allowances to recover the costs of their CCS investments. The first 10 gigawatts of EGUs that capture and sequester a certain amount of their carbon dioxide emissions would receive a bonus allowance value of up to \$96 a ton (whereas Waxman-Markey offered bonus allowances for only the first six gigawatts of up to \$90 a ton). Kerry-Boxer also allows the EPA Administrator and Secretary of Energy to determine jointly that emissions bonuses have been too high or too low "to achieve efficient and cost-effective commercial deployment of carbon capture and

sequestration technology." Emission allowances would also be distributed to industrial sources that implement CCS technology to recover their costs. Such distributions would be limited to no more than 15 percent of the allowances allocated for deployment of CCS technology under the bill.

Just as in Waxman-Markey, Kerry-Boxer also calls for the creation of an independent "Carbon Storage Research Corporation," whose members would consist of investor-owned utilities, state- or municipality-owned utilities, rural electric cooperatives, fossil fuel producers, non-profit environmental organizations, independent power producers and consumer groups. Unlike Waxman-Markey, however, Kerry-Boxer calls for the National Energy Technology Laboratory of the DOE and EPA to be members of the Corporation. The Corporation would issue competitively awarded grants, contracts and other financial assistance to support commercial-scale deployment of CCS and would seek to support at least five commercial-scale demonstration projects integrating CCS or conversion technologies. The Corporation would obtain its funding for these awards via assessments on distribution utilities for all fossil fuel-based electricity delivered directly to retail consumers on a kilowatt-hour basis and would adjust the level of those assessments so as to collect between \$1.0 and \$1.1 billion annually.

Other Energy Efficiency and Clean Energy Provisions

Clean Energy Deployment Administration

ACELA would modify the existing Department of Energy loan guarantee programs under Title XVII of the Energy Policy Act of 2005 and create a new "Clean Energy Investment Fund" to provide credit support for eligible

projects using funds appropriated to carry out Title XVII in addition to an initial investment of \$10 billion by the Treasury. ACELA would also create a new Clean Energy Deployment Administration (CEDA), an independent administration within the DOE, through 2028. CEDA would assume responsibility for the Title XVII loan guarantee programs and provide credit support for clean energy technologies using collected costs deposited in the Clean Energy Investment Fund and \$10 billion from the Treasury (appropriated under ACELA). CEDA could provide credit support for a wide range of clean energy technologies, including those for energy production, energy infrastructure (e.g., transmission, storage), energy efficiency and manufacturing technologies that will reduce the need for additional energy supplies through efficiency, diversify the sources of energy supply in the United States, or contribute to the stabilization of greenhouse gases.

CEDA would be authorized to provide various types of credit support to promote the deployment of clean energy technologies, including direct loans, letters of credit, loan guarantees, insurance products, as well as indirect credit and secondary market support (e.g. securitization). CEDA also would be authorized to provide credit support for riskier breakthrough technology projects with the aim of bridging the so-called "Valley of Death" financing dilemma in which early-stage commercial technologies are too capital intensive to attract the financing from venture capital investors necessary to move to full-scale commercial deployment, but technology and commercial deployment risks are perceived as too high to attract financing from private equity and project finance investors. ACELA would also create an advisory council (appointed by the Secretary of Energy and the Board of Directors for CEDA) to develop a methodology for assessing clean energy technologies and to advise

CEDA on the technologies for which it will provide credit support.

Clean Transportation and Greenhouse Gas Emission Standards for Mobile Sources

Like Waxman-Markey, Kerry-Boxer directs EPA to develop GHG emission standards for heavy-duty and nonroad vehicles and engines. The heavy-duty standards must be promulgated by the end of 2010. With regard to the nonroad standards, EPA first must identify categories of vehicles and/or engines that provide the greatest potential for significant and cost-effective reductions; EPA is required to promulgate standards for these categories by the end of 2012. EPA also must promulgate standards for other categories of nonroad vehicles or engines, but the timing of their promulgation is left to EPA's discretion. Notably, Kerry-Boxer would allow EPA to establish a flexible compliance mechanism, consisting of averaging, banking—and trading of GHG emission allowances within and across classes or categories of vehicles and engines—including onroad, nonroad, marine and aircraft.

Like Waxman-Markey, Kerry-Boxer also acknowledges and addresses the causal relationship between land-use planning and transportation-related GHG emissions. The Kerry-Boxer bill would require states and metropolitan planning organizations to set and achieve reductions in transportation-related GHG emissions via a collaborative planning process overseen by EPA and the Department of Transportation (DOT). Kerry-Boxer charges DOT with providing grants to states and metropolitan planning organizations to help them develop, update and implement their individual emission reduction plans. EPA and DOT would assist the states and metropolitan planning organizations by promulgating, and updating from time-to-time, regulations to establish standardized GHG emission models and methods for

transportation data collection. They also would publish and distribute examples of successful GHG emission reduction strategies previously employed by states and metropolitan planning organizations. The planning process is expected to result in, *inter alia*, increased emphasis on public transit, non-motorized transportation, infill and transit-oriented development and travel demand management programs.

In addition, Kerry-Boxer contains the following provisions aimed at indirectly reducing transportation-related GHG emissions:

- Establishes within EPA a SmartWay Transportation Efficiency Program to quantify, demonstrate and promote the benefits of technologies and strategies that reduce GHG emissions from the mobile source sector.
- Amends the Clean Air Act to allow states and political subdivisions of a state (*e.g.*, cities) to set fuel economy standards for taxicabs and other similar vehicles. These provisions, called the "Green Taxis Act of 2009," are likely responses to failed attempts by Boston and New York to hybridize their taxi fleets.
- Establishes a Clean Vehicle Technology Fund primarily to bankroll efforts by the Secretary of Energy to develop a "national transportation low-emissions energy plan." Such a plan would focus on plug-in electric drive vehicles and supporting infrastructure (*e.g.*, charging stations). The establishment of this technology fund would complement Waxman-Markey's efforts to electrify the nation's transportation system.

Other Energy Efficiency Programs

Kerry-Boxer and ACELA contain multiple other provisions to promote energy efficiency in commercial and residential buildings, as well as lighting and consumer appliances. For example, the Kerry-Boxer directs the EPA Administrator, in consultation with the Secretary of Energy, to establish

“Retrofit for Energy and Environmental Performance” (REEP) programs to retrofit existing residential and commercial buildings across the country to improve their energy efficiency.

Prospects for Passage

Overall, it appears unlikely that climate change legislation will pass the Senate this year. This complex legislation is subject to the jurisdiction of six separate Senate committees, complicating prospects for passage. The current economic climate has (appropriately) made the Senate cautious about imposing potentially significant new costs on industry and consumers, while the health care debate has consumed much of the time of the Senate this fall. This confluence of factors has made even proponents in the Senate acknowledge that passage is unlikely this term.

Meanwhile, however, EPA is moving aggressively to regulate GHGs under the Clean Air Act. The Agency has finalized its GHG Reporting rule,² and has proposed numerous other measures impacting both stationary and mobile sources—making it abundantly clear that if Congress does not act, EPA will. These EPA actions likely will result in further pressure on Congress to act early in the next term to address climate change issues. Kerry-Boxer (and its counterpart in the House, Waxman-Markey) are therefore likely to serve as the blueprints for any action that may be taken in the next Congress.

Endnotes

¹ *Client Alert No. 855*—“Key Provisions of the Waxman-Markey Climate Change and Clean Energy Legislation Discussion Draft” and *Client Alert No. 881*—“American Clean Energy and Security Act of 2009: Update on the Waxman-Markey Climate Change Clean Energy Legislation.”

² *Client Alert No. 943*—“US EPA Mandates Nationwide Greenhouse Gas Reporting Beginning January 1, 2010.”

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