

## The PROVE IT Act: Proposed US Legislation Aiming to Collect Product-Level GHG Data Could Have Wider Implications

***Data collected under the PROVE IT Act would measure the carbon emissions of certain goods in the US and other nations.***

On June 7, 2023, US Senators Chris Coons and Kevin Cramer [introduced](#) the bipartisan Providing Reliable, Objective, Verifiable Emissions Intensity and Transparency Act (PROVE IT Act or Bill) to the Senate. The 17-page proposed legislation, if adopted, would direct the Department of Energy (DOE) to conduct a comprehensive study comparing the greenhouse gas (GHG) emissions intensity of certain goods produced in the United States — such as aluminum, cement, crude oil, steel, and plastic — to the emissions intensity of those same goods produced in other countries.

The PROVE IT Act was referred to the Senate Environment and Public Works Committee upon announcement. The Bill immediately received bipartisan support, with US Senators Angus King, Lisa Murkowski, Martin Heinrich, Lindsey Graham, Sheldon Whitehouse, Bill Cassidy, and John Hickenlooper announcing their co-sponsorship of the Bill on the same day it was introduced. The Bill remains before the Senate Environment and Public Works Committee and may see further activity after Congress resumes sessions in September 2023.

This Client Alert provides an overview of the PROVE IT Act and explains why it matters to companies in the US and globally.

### What the DOE Study Would Entail

If signed into law as written, the PROVE IT Act would direct the US Secretary of Energy to conduct a study, alongside the US Departments of Commerce, Homeland Security, and State as well as the US Environmental Protection Agency and the US Trade Representative, to:

- a) Determine the average product emissions intensity of “covered products” (defined below) produced in the United States.
  - o “Average product emissions intensity” is defined as the total GHG emissions associated with the entire extraction or manufacturing process of a covered product. This measurement includes cumulative GHG emissions, meaning that upstream inputs’ associated emissions would be

incorporated into a downstream covered product. Under the Bill, GHG emissions include carbon dioxide, methane, nitrous oxide, and other types of GHGs as defined in the [Energy Independence and Security Act of 2007](#).

- b) Identify gaps in product emissions intensity data for categories of covered products produced in the United States.
- c) Subject to (b), determine the average product emissions intensity of each category of covered products produced in covered countries (defined below).
  - o This determination may incorporate, as the Secretary of Energy determines to be appropriate, findings from the implementation of the measures to expand and improve the international energy data resources of the Energy Information Administration, as described in section 40416(a) of the [Infrastructure Investment and Jobs Act](#).<sup>1</sup>
- d) Identify any issues with verifying the average product emissions intensity data for covered products produced in covered countries.
- e) Determine the relative average product emissions intensity of each category of covered products produced in the United States compared to the average product emissions intensity of each category of covered products produced in covered countries.

The Bill would require the DOE to publish the first study to be completed within two years of the law's passing and updated every five years thereafter.

## Covered Countries and Covered Products Under the Bill

The **covered countries** include:

- (i) G7 countries;
- (ii) US free trade agreement partners;
- (iii) foreign countries of concern, as defined by the [William M. \(Mac\) Thornberry National Defense Authorization Act for Fiscal Year 2021](#)<sup>2</sup>;
- (iv) countries that the Secretary of Energy determines hold more than a de minimis share of the global market share, as measured by official trade statistics, for one or more covered products or upstream inputs for one or more covered products; and
- (v) any other country that the Secretary of Energy determines is a significant producer or exporter of at least one covered product.

The **covered products** include the following 22 categories of US Harmonized Tariff Schedule products:

- aluminum, articles of aluminum, articles of cement, iron and steel, articles of iron and steel, plastics, articles of plastic, biofuels, cement, crude oil, fertilizer, glass, hydrogen, lithium-ion batteries, natural gas, petrochemicals, pulp and paper, refined strategic and critical minerals (including copper, cobalt, graphite, lithium, manganese and nickel), refined petroleum products, solar cells and panels, uranium, and wind turbines.

## The Methodology the DOE May Use to Calculate Emissions Intensity

The Bill does not specify how the DOE should calculate emissions intensity, but it would require the DOE to include in its report a “detailed, specific, and transparent description of the methodology used to determine the average product emissions intensity” of a covered product.

To this end, the Bill permits the Secretary of Energy to consult and enter into agreements with institutions having relevant data or data collection or analysis capabilities, such as the National Laboratories, the National Institute of Standards and Technology, the National Academy of Sciences, the International Energy Agency, the Organisation for Economic Co-operation and Development, and relevant academic and think tank partners. The Bill would require the Secretary of Energy to establish a process to receive data from industry partners (which presumably would include affected industry companies) as well as a process pursuant to which industry may request that a product be included as a covered product under the legislation.

Finally, the Bill provides that the Secretaries of Energy and State as well as the US Trade Representative should make “every effort” to coordinate with the governments of covered countries to advance “common emissions accounting methodologies and data formats and ... to improved overall data availability and quality.”

## Relation to Carbon Border Adjustments

Commentators have suggested that the emissions intensity data from DOE may be used to inform a border-adjusted carbon tax. Indeed, Martin Durbin, Senior Vice President of Policy for the US Chamber of Commerce, [noted](#) that “if enacted, this legislation could establish an important foundation for informed discussions around potential emissions-based border adjustment policies.” Carbon border adjustments are an emerging set of trade policy tools that aim to prevent carbon-intensive economic activity from moving out of jurisdictions with relatively stringent climate policies and into those with relatively lax policies. As part of the European Green Deal, the EU recently enacted the Carbon Border Adjustment Mechanism (CBAM). The transitional phase of CBAM, which will introduce reporting requirements for importers but no levy, will take effect from October 2023. The permanent system of CBAM, which will include financial adjustments, will enter into force on January 1, 2026.

## Potential Implementation Challenges if Enacted

Senator Coons sees the PROVE IT Act as the first step in a larger objective over the next few years to create a “carbon club” of allied countries with ambitious climate laws. However, any such club could require countries to have some form of similar domestic carbon pricing consideration, which would prove politically challenging in the United States. Nevertheless, both Senators Coons and Cramer have highlighted the PROVE IT Act’s potential to provide protective evidence for the US against other trading partners, namely Europe, that have carbon border adjustments and are already conducting similar studies. This potential protective evidence, however, presents its own issue regarding any difference in calculation methodologies used by the US and other jurisdictions. If studies conducted in different jurisdictions yield different results, companies could face difficulties in reconciling GHG emissions and financial accounting for purposes of their relevant business strategies.

The [2021 EU-US trade agreement on steel and aluminum](#) also presents potential implementation challenges for the PROVE IT Act. The agreement includes a plan to establish a system in which members would restrict market access to nonparticipants that do not meet market-oriented conditions or low-carbon intensity standards or contribute to excess capacity.

## Initial Reactions to the Bill

A substantial number of interest groups across the political spectrum have endorsed the Bill so far. These groups focus their endorsements on the positive effects that the PROVE IT Act could have on US consumers and businesses, international trade policy, and emissions reduction goals — with several groups noting the Bill's potential to measure the GHG emissions output of countries that make up a significant share of US imports.

However, other organizations have taken a more negative review, noting that the PROVE IT Act could be detrimental to US businesses and ultimately harm consumers if the costs of tariffs are simply passed down to them.

## Next Steps

The PROVE IT Act is currently before the Senate Environment and Public Works Committee. Now that the Senate has returned from its monthlong State Work Period, the legislation will need to advance for a vote in both chambers of Congress to proceed.

Latham & Watkins will continue to monitor and report on developments related to the PROVE IT Act.

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#### Endnotes

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<sup>1</sup> (42 U.S.C. 18776(a)).

<sup>2</sup> Foreign countries of concern include the Democratic People's Republic of North Korea, the People's Republic of China, the Russian Federation and the Islamic Republic of Iran as well as any country that the Secretary, in consultation with the Secretary of Defense, the Secretary of State, and the Director of National Intelligence, determines to be engaged in conduct that is detrimental to the national security or foreign policy of the United States.