



Please contact any of the attorneys in our [Energy Group](#), or the authors below, if you have any questions regarding this Energy Alert.

Authors:

Elias B. Hinckley
ebhinckley@Venable.com
202.344.4639

Brenna V. Greenwald
bvgreenwald@Venable.com
202.344.4013

William R. Nordwind
wrnordwind@Venable.com
202.344.4964

Robert L. Smith, II
rlsmith@Venable.com
202.344.4077

Energy Legislation – Three Critical Weeks

Congress returned this week from the July 4th recess, with Democratic leadership pledging immediate action on energy and climate legislation. Once the procedural issues remaining with the financial reform bill are resolved (which is expected imminently as of this writing), the focus on Capitol Hill will return to energy. Roughly three weeks will remain before the looming August recess, and there is much work left to be done to find an existing legislative vehicle, whether it is a combination of draft bills or some new approach, that can muster enough votes to pass. If legislation is not passed by the start of the August recess, Congressional attention will shift to the mid-term elections. Passage of an energy bill during the post-election “lame-duck” session is possible, but unless something comes together over the next few weeks, the most likely outcome is no significant energy legislation this year.

Energy legislation, especially significant energy legislation as is being discussed in Congress now, has never been an easy or quick process in Washington. Given the unprecedented upheaval in the industry, with issues such as climate change, the Gulf Oil Spill, the related overturning and reissuance of a moratorium on deepwater drilling, the emergence of unconventional shale gas as a significant energy source, and the continued fallout of the financial crisis, an extremely complex policy landscape has become even more difficult to define. In light of these obstacles, the easy projection is that efforts to reach a consensus on energy in the next three weeks will fail. However, with energy’s public profile at or near an all-time high, many members are eager to produce legislation on energy that they can tout on the campaign trail, which means it is possible that some form of energy legislation could still come together.

Senate Democrats emerged from an energy conference last month inspired and hopeful about the prospects of passing some form of meaningful energy and climate legislation, but there does not appear to be an easy path to reconcile the many competing and overlapping legislative options. Senate Majority Leader Harry Reid (D-NV) has said that he will present a package with four areas of focus: (1) offshore drilling reform and raising the spill liability cap; (2) an energy tax package; (3) a green jobs and clean energy package; and (4) a price on greenhouse gas emissions or carbon cap for the electric industry (which appears to be encountering strong resistance from several public utilities).

Meanwhile, Sen. Jeff Bingaman (D-NM) is planning to start a series of mark-ups through the Energy and Natural Resources Committee that he chairs on as many as nine focused bills, some of which are outgrowths of larger pieces of legislation and others that are targeted to specific technologies. Included in these bills will be programs to promote electric vehicles, new nuclear development and almost certainly some form of national clean energy portfolio requirement. Given the range of legislative options available, some of which may be spliced, combined, and negotiated to reach a new compromise, below are summaries of some of the larger initiatives in this very crowded field of legislative possibilities.

- **American Clean Energy and Leadership Act:** The American Clean Energy and Leadership Act introduced by Senators John Kerry (D-MA) and Joe Lieberman (I-CT) has faced significant opposition because of its broad-based carbon cap. While the Kerry-Lieberman bill is still being discussed, the legislative focus has shifted to more narrow carbon cap measures and other alternatives, particularly because Republicans have loudly rebranded cap-and-trade as “cap-and-tax”. Democratic senators, including Sen. Claire McCaskill, have stated that they don’t believe that they could gather the 60 votes required to pass such a carbon cap measure.
- **“Utility-Only” Legislation:** One of the proposed alternatives to the Kerry-Lieberman bill is a cap on emissions produced from the utility sector. A “utility-only” bill, as it has been discussed, may be welcomed by President Obama’s administration, although the President continues to publicly support broader carbon cap legislation. The President’s Chief of Staff, Rahm Emanuel, has expressed support for a utility-only approach, while cautioning that many ideas are being discussed. Sen. Jeff Bingaman (D-NM), who introduced energy legislation from the Senate Energy & Natural Resources Committee in 2009, is now drafting utility-only legislation. Several senators, including Sen. George Voinovich (R-OH) have expressed that Sen. Bingaman’s bill will be the likely front-runner to serve as a basis for energy and climate legislation because it has bipartisan support thus far.
- **Carbon Limits and Energy for America’s Renewal (CLEAR) Act:** Sens. Susan Collins (R-ME) and Maria Cantwell (D-WA) have also thrown their hats into the ring with a pending “cap-and-dividend” bill. The bill proposes to establish a predictable price for carbon associated with fossil

fuels, require fossil fuel importers and producers to bid at auction for permits or “carbon shares”, regulate carbon production “upstream” where it is produced, and provide monthly dividends to low- and middle-income families to keep the cost of energy down. The dividend structure would return 75% of the resulting revenue from the auction of carbon shares to American consumers while the remaining 25% would be invested in clean technology.

- **Lugar Practical Energy and Climate Plan:** Senator Dick Lugar (R-IN) has offered a Republican-backed energy and climate option. The bill has the support of Republicans such as Sen. Lindsey Graham (R-SC), who co-authored the Kerry-Lieberman bill before stepping away from the measure. Sen. Lugar’s plan does not institute a cap-and-trade system to regulate carbon, but rather it introduces a voluntary renewable energy standard and promotes advanced renewable fuels and energy efficiency measures, such as building retrofits. The bill also proposes to retire the most costly polluting coal plants and expand loan guarantees for nuclear power.
- **Next Generation Energy Security Act:** Senator Richard Burr (R-NC) has provided yet another Republican alternative to the Democratic legislation that has dominated energy and climate discussions thus far. Sen. Burr’s legislation, co-sponsored by Sen. Saxby Chambliss (R-GA), provides a variety of energy tax credits for investment in solar, fuel cell, nuclear, and advanced vehicles. The bill focuses on support for the nuclear energy industry with new loan guarantees and beneficial depreciation for nuclear facilities. Sen. Burr’s bill does not contain other oft-discussed provisions, such as a mandate for clean energy production or energy portfolio standards.
- **Tax Extenders Package:** After three attempts, Senate Democrats failed to pass a \$100 million tax extenders package, which proposed to extend energy credits for a variety of technologies as well as raise the oil spill liability cap. Republicans objected to the cost of the bill, which would have contributed to the deficit by incurring costs that were not otherwise offset. Sen. Reid expressed that he would move on to small business tax relief and loans if the tax extenders package failed.
- **Home Star Energy Retrofit Act of 2010:** Separately from broad-based carbon and climate legislation, other measures are pending in Congress to provide savings and incentives for homeowners to retrofit their homes with renewable and energy-efficient technologies. Sponsored by Rep. Peter Welch (D-VT), the Home Star Energy Retrofit Act of 2010 proposes to provide rebates to contractors to be passed through as discounts to homeowners who retrofit their homes for energy savings and establishes a Federal Rebate Processing System to claim reimbursement.

There is much speculation that Senate Democrats will take a politically high-risk approach to try and tie carbon-pricing legislation, which appears impossible to pass on a stand-alone basis this year, with a measure to overhaul offshore drilling rules, which has very broad support because of the oil spill in the Gulf. It remains to be seen whether such a gamble will carry the support of all Senate Democrats. Sen. Robert Menendez (D-NJ) has questioned the wisdom of this bet, concerned that such an approach could potentially sink both proposed measures and could be disastrous for Democrats heading into mid-term elections.

Regardless of what happens, the next three weeks will provide an unprecedented view into the future of United States energy policy.

For more information on the energy policy landscape, please contact Elias Hinckley at ebhinckley@Venable.com or 202.344.4639, or review our other [energy publications](#).

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