

Climate Change Legislative Update: Senators Kerry and Lieberman Release Energy and Climate Change Bill

May 25, 2010

On May 12, 2010, Senators Kerry (D-MA) and Lieberman (I-CT) released a discussion draft of their widely anticipated energy and climate change bill, the "American Power Act" ("APA").

Touted initially as a "tri-partisan" bill, the APA became "bi-partisan" when Senator Graham (R-SC) withdrew his support due to differences of opinion with Democrat senators over the 2010 legislative agenda. Many believe that Senator Graham's support is essential for the APA to pass in the Senate in 2010. Prior climate change bills proposed by Senators Lieberman and Warner (D-VA) (S. 2191) in 2007 and Senators Kerry and Boxer (D-CA) (S. 1733) in 2009 received chilly receptions and failed to make it to the Senate floor for a vote. Even with Senator Graham's support, the APA is going to face significant challenges because of the potential adverse economic impacts associated with the bill and the overall state of the US economy, the bill's provisions relating to nuclear energy and offshore oil and gas exploration, mid-term elections which could shift the balance of power, and other legislative priorities before the Senate (e.g., immigration). These factors only serve to compound the debate over whether the United States should enact a comprehensive program to regulate greenhouse gas ("GHG") emissions without concurrent and similar actions by other countries with significant GHG emissions (e.g., China and India).

Notwithstanding these significant issues, the APA is likely to frame the debate on climate change and energy legislation in the Senate for the current and future legislative sessions. We offer the following summary of many of the key provisions of the APA as well as the attached table which compares the APA with H.R. 2454, the "American Clean Energy and Security Act of 2009" (the "House bill"), which was passed by the House of Representatives on June 26, 2009¹ and S. 1733, the "Clean Energy Jobs

¹ Please refer to <http://www.deweyleboeuf.com/en/Ideas/ClientAlerts.aspx> for copies of the following client alerts discussing the development of the House legislation: (1) "Climate Change Legislative Update: House of Representatives Passes Comprehensive Climate and Energy Legislation," dated June 29, 2009; (2) "Climate Change Legislative Update: H.R. 2454 Reported Out of Committee," dated May 22, 2009; and (3) "Legislative Update: Waxman and Markey Introduce Climate Change, Renewable Electricity and Carbon Capture Legislation," dated May 19, 2009.

and American Power Act," which was introduced by Senators Kerry and Boxer in November 2009² (the "Kerry-Boxer bill").

Summary of the APA

The APA's cap-and-trade program, the bill's primary vehicle for curbing GHG emissions, is substantially similar to those in the House bill and the Kerry-Boxer bill. Unlike the previous bills, however, the APA removes refined product providers from the cap-and-trade program and requires the direct purchase of allowances from the Environmental Protection Agency ("EPA"). The APA also settles on the Commodity Futures Trading Commission ("CFTC") as the government entity to oversee the emerging carbon markets. Finally, the APA limits participation in emission allowance auctions to entities subject to the GHG cap-and-trade program (*i.e.*, covered entities) (unless a determination is made to allow others to participate to ensure that the market functions properly) and confines the trading of GHG instruments to regulated exchanges.

In addition to the cap-and-trade program, the APA contains several controversial provisions related to the: (1) reinvigoration of the nuclear power industry; (2) deployment of carbon capture and sequestration; and (3) offshore oil and gas drilling. The APA does not contain a renewable electricity standard mandating the production of certain percentages of electricity from renewable sources. It is anticipated, however, that either: (1) the APA will incorporate the renewable electricity standard, transmission siting requirements, clean energy bank concept, and other provisions contained in S. 1462, the "American Clean Energy Leadership Act" reported out of Senator Bingaman's (D-NM) Environment and Natural Resources Committee last June; or (2) the two bills will be passed concurrently as companion measures.

Notable Provisions

The following provides a summary description of some of the APA's more notable provisions and, where appropriate, identifies differences from the House bill. We recommend that you consult the table attached to this client alert for a more detailed description of the APA and how it compares with both the House bill and the Kerry-Boxer bill.

Cap-and-Trade Program. The APA's cap-and-trade program is in many respects identical to the program in the House bill. Like the House bill, the

² Please refer to <http://www.deweyleboeuf.com/en/Ideas/ClientAlerts.aspx> for a copy of the following client alert discussing the Clean Energy Jobs and American Power Act in greater detail: "Climate Change in the Senate: John Kerry and Barbara Boxer Introduce Greenhouse Gas Cap-and-Trade Bill," dated October 9, 2009.

APA addresses emissions of the same GHGs, sets virtually the same emission targets (the only difference being a 4.75 percent cut by 2013 under the APA instead of a 3 percent cut by 2012 under the House bill), and applies to almost all of the same entities. The APA's program, however, does not become effective until 2013, a year later than the House bill, and most industrial sources would not be regulated until 2016, which is two years later than under the House bill. The APA also incorporates a more substantial "dividend" approach than the House bill whereby, beginning in 2026, a trust fund would be established to pay the majority of allowance auction proceeds to the American consumers. The APA, like the House bill, allows for the use of both domestic and international offsets, as well as international emissions allowances, to achieve compliance.

Refined Product Providers. Providers of "refined products" (e.g., transportation fuels) are not included in the energy/industrial cap-and-trade program but rather must purchase the allowances set aside annually by the EPA for these entities to meet their compliance obligations under the APA. Refined product providers may not trade, bank, or borrow such allowances. Prices for these allowances are set quarterly and are equal to the price from the most recent auction under the energy/industrial cap-and-trade program. This is a substantial change from the House bill, under which refined product providers would have been subject to the daily fluctuation in the price of emission allowances as well as the gradual decline in the emission allowances available for purchase.

Aviation Sector. Unlike the House bill, the APA allows the EPA, in consultation with the Federal Aviation Administration, to establish a program whereby compensatory allowances would be distributed to air carriers engaged in foreign air transportation to the extent that the carriers purchased fuel in the United States (thereby incurring incremental price increases associated with a refined product provider's obligation to purchase emissions allowances) and also incurred costs to comply with a foreign or international GHG emission reduction program.

Market Controls. The APA provides the CFTC with exclusive jurisdiction to regulate the carbon market. The APA also restricts participation in auctions to covered entities unless a decision is made that others should be allowed to participate to ensure that the market functions properly. This is a divergence from the House bill, which allows any "person" to participate in auctions and provides the Federal Energy Regulatory Commission regulatory oversight of the cash market for carbon allowances and offsets, and gives the CFTC regulatory oversight of carbon derivatives.

International Competition. Like the House bill, the APA contains two programs designed to protect domestic manufacturing industries that might be adversely affected by the costs associated with complying with the APA from experiencing a loss of international competitiveness and in so doing prevent outsourcing of production within those industries (*i.e.*, "carbon leakage"). The first such program is a rebate program designed to provide free allowances to "eligible industrial sectors" in order to offset compliance costs incurred by those sectors to maintain their international competitiveness. The second program is an International Reserve Allowance program, designed to require importers of covered goods to obtain carbon allowances for those imported goods. Critics of this approach have argued that the APA's rebate program confers an actionable subsidy to eligible domestic industries. These critics also have asserted that any International Reserve Allowance program that might be implemented could violate Articles I, II, III and/or XI of the General Agreement on Tariffs and Trade ("GATT") and/or spur retaliation on the part of some of the United States' major trading partners. It is, however, by no means clear how those issues would be resolved or if the United States would in fact expose itself to World Trade Organization ("WTO") action and/or retaliation if these measures were implemented. By largely replicating the language in the House bill, the APA does not raise any new international trade-related issues, but instead perpetuates those issues that previously existed.

Carbon Capture and Sequestration. The incentives for carbon capture and sequestration ("CCS") are similar to those found in the House bill. The APA establishes a uniform national strategy to advance development and deployment of commercial-scale CCS projects at both coal- and petcoke-fired power plants and industrial facilities. The APA also requires an assessment of the key impediments to deployment of CCS and the development of regulations to address these challenges (including critical issues such as long-term liability schemes and property rights issues). The APA creates performance standards for new coal- and petcoke-fired power plants based on the date they are initially permitted. In order to satisfy these standards, it is likely that coal- and petcoke-fired power plants initially permitted after January 1, 2009 will have to implement CCS technology. The APA also provides incentives for early CCS deployment in the form of bonus emission allowances. The bonus allowances will be distributed in tranches, with the maximum bonus going to early projects. The APA also has left a placeholder for an accelerated depreciation and investment tax credit program for existing coal-fired power plants that undertake retrofit and replacement activities that result in significant emission reductions. This program appears to be intended as a bridging

measure to improve generation efficiency at existing plants until commercial-scale CCS can be broadly deployed.

Merchant Generator Efficiency Incentives. The APA establishes a program to issue allowances to owners and operators of merchant coal generating plants that close their plants or repower them using a "less emissive" fuel.

General Energy Incentives. The APA creates a category of allowances for "clean energy technology," which includes, among other things, renewable and nuclear energy generation; certain energy transmission, distribution and storage, as well as "smart grid" development; water security; and transportation efficiency projects, including electric vehicles. Clean energy technology allowances are to be distributed on a competitive basis to higher education institutions, companies, and a variety of research organizations and consortia from years 2012 through 2049, taking into account the goals of the Department of Energy's ("DOE") Advanced Research Projects Agency.

Loans for Energy Efficiency. The APA creates a "Rural Energy Savings Program," which provides interest-free loans to public power districts, public utility districts, electric cooperatives and similar entities, and interest-bearing loans to consumers served by these entities, to implement energy efficient measures that reduce energy costs, energy consumption or greenhouse gas emissions.

Nuclear Licensing and Waste Issues. The APA adds a provision not seen in the House bill or previous Senate climate change/energy bills which focuses on expanding the use of nuclear power through reducing initial capital costs and regulatory barriers that impede new reactor construction, while emphasizing that the directives in the bill should not be executed in a manner that jeopardizes health and safety. While the bill does not directly address or resolve radiological waste disposal issues (e.g., approval of a geologic repository), it initiates what could be the first step to reversing a long-standing policy that prohibits recycling of spent nuclear fuel. Specifically, the APA mandates creation of a research and development center for advanced fuel cycles and reduction of nuclear waste produced at nuclear facilities.

Nuclear Loan Guarantees and Tax Incentives. The APA proposes to amend the Omnibus Appropriations Act of 2009 to increase the total funding authorization for energy projects under the Energy Policy Act of 2005 Title XVII Innovative Technology Loan Guarantee Program to \$100 billion, including an increase for nuclear power projects from \$18.5 billion to \$54 billion. In its fiscal year ("FY") 2011 Congressional Budget Request,

DOE requested \$36 billion in additional Loan Guarantee Program authority for nuclear power projects. The APA's proposed increase for nuclear power projects would essentially accelerate the \$36 billion requested by DOE in its FY 2011 budget request. The APA also introduces a nuclear loan guarantee retention fee, ostensibly to encourage such loan guarantee recipients to quickly repay their loans. The APA introduces the following financial incentives to encourage investment in nuclear power projects: (1) a five-year accelerated depreciation period for new advanced nuclear power facilities; (2) a ten percent investment tax credit for certain advanced nuclear power facility construction-related expenditures; (3) an expansion of the Advanced Energy Project Credit program to include advanced nuclear power facilities that produce electricity and an increase of \$5 billion in funding for the program; (4) an amendment to the production tax credit provisions for advanced nuclear power facilities to allow for the allocation of production tax credits entirely to private participants on projects that include taxable and tax-exempt entities; (5) an expansion of the availability of private activity bonds to allow for their use by certain qualified public entities for advanced nuclear power projects; and (6) the availability of grants in lieu of tax credits equal to ten percent of qualified nuclear power facility expenditures for state public utilities with service obligations and cooperative electric companies.

Offshore Drilling. In the wake of recent events, the APA provides a number of offshore drilling protections. The two most notable provisions are: (1) a potential moratorium on new offshore drilling; and (2) the grant of state veto authority for proposed drilling plans for up to 75 miles off state shorelines. In an attempt to garner state support for offshore drilling, the APA mandates that DOE pay coastal states and areas in the Alaska Adjacent Zone a percentage of royalty revenues if drilling is allowed within that limit. The amount of payment that any given area receives is inversely proportional to the relative distance from a leased tract. The APA places a \$500 million cap on this revenue sharing scheme between 2011 and 2055.

Next Steps

It is impossible to predict what will happen in the Senate in 2010 and whether the linkage of the climate initiatives with the more popular energy measures, such as a renewable electricity standard and incentives for transmission siting would be enough leverage to secure a vote on the bill. It should be noted that in the absence of comprehensive federal legislation, the EPA will continue to move forward under the Clean Air Act to regulate GHG emissions. EPA recently finalized a rule that would create permitting requirements for major stationary sources of GHG emissions as early as January 2, 2011. We also expect EPA to float GHG cap-and-trade

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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program design options sometime later this year. It remains to be seen whether Senator Lisa Murkowski's (R-AK) legislative efforts to strip EPA of its authority to regulate GHG emissions will be successful. In addition, state and regional programs will continue to be implemented and/or adopted. These developments beg the question of what represents the lesser of two evils for US businesses – specifically crafted federal legislation which adopts a comprehensive federal control scheme and preempts state/regional GHG cap-and-trade initiatives or a patchwork of regulations adopted by EPA and regional and state programs with potentially conflicting goals and objectives.

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Bill	House of Representatives H.R. 2454 - American Clean Energy and Security Act - Passed June 26, 2009	Senate S. 1733 - Clean Energy Jobs and American Power Act - Reported November 5, 2009 (likely to incorporate portions of S. 1462, "American Clean Energy Leadership Act")	Senate Discussion Draft - American Power Act - Released May 12, 2010 (likely to incorporate portions of S. 1462, American Clean Energy Leadership Act)
PROVISIONS RELATED TO NUCLEAR, RENEWABLE ENERGY, CARBON CAPTURE AND SEQUESTRATION, CLEAN TECHNOLOGY AND TRANSMISSION			
Carbon Capture and Sequestration	Contains a number of incentives and funding programs for carbon capture and sequestration ("CCS") projects, including a bonus emission allowance program that distributes bonus allowances on a sliding scale per ton of carbon dioxide avoided (early projects receive higher allowance values than later projects).	Same as H.R. 2454.	<p>Overall, provisions remained largely the same as H.R. 2454 and S. 1733. Promulgates a strategy to advance deployment of commercial-scale CCS, including assessment of current impediments to broad deployment, analysis of how existing legal and regulatory regimes might apply to CCS, creation of a funding program to identify and fund eligible projects, and creation of an emission allocation program for qualifying electric generating units and industrial sources that achieve a 50% reduction in emissions.</p> <p>Provides incentives for early CCS deployment in the form of bonus emission allowances to be administered in tranches. For the first 10 GW of treated generating capacity, projects achieving a 90% or greater capture and sequestration rate are eligible for a bonus allowance value of \$90/ton. For the second 10 GW of capacity at a 90% capture and sequestration rate, the value is \$85/ton. There also is an additional incentive program that increases the allowance value by \$10/ton for CCS projects that commence commercial operation by January 1, 2017.</p> <p>There also are CCS incentives for industrial sources.</p> <p>Raises the possibility of an accelerated depreciation and investment tax credit program for existing coal-fired power plants for replacements or retrofits that result in significant GHG emission reductions.</p>

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Nuclear	Contains broad provisions for nuclear research and development, including loan guarantees and research into thorium-fueled reactors.	<p>Contains research and development programs for aging nuclear plants and nuclear waste disposal. Establishes a fund for training nuclear workers.</p> <p>The American Clean Energy Leadership Act (S. 1462), which most expected would be packaged with this bill, contained provisions establishing a national commission to examine a range of alternative methods for the disposal of nuclear waste.</p>	<p>The American Power Act contains several new provisions intended to incentivize and expedite the siting and construction of new nuclear power plants.</p> <ul style="list-style-type: none"> ▪ Contains provisions mandating the development of an expedited procedure for the issuance of combined construction and operation licenses for nuclear reactors. ▪ Removes the requirement for an administrative hearing when issues are not contested and allows for environmental impact statement ("EIS") supplementation after the early completion of the site permit process instead of requiring a new EIS. ▪ Provides regulatory risk insurance for delayed reactors and directs that a research center be created for the study of fuel recycling technologies. ▪ Mandates research into methods for lowering the cost of nuclear technology. ▪ Mandates that importation duties on certain components used in nuclear facilities be suspended for another 10 years.

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Tax Provisions (Nuclear)	Does not contain tax provisions related to nuclear energy.	Does not contain tax provisions related to nuclear energy.	<p><i>5-Year Accelerated Depreciation Period:</i> Tangible property (not including a building or its structural components) which is used as an integral part of an advanced nuclear power plant to produce electricity is eligible for a 5-year accelerated depreciation period. To qualify, the plant must be placed in service after the enactment of the American Power Act.</p> <p><i>Investment Tax Credit:</i> A 10% investment tax credit is created for certain expenditures related to the construction of certain new advanced nuclear power facilities that: (1) will produce electricity; and (2) are placed in service by January 1, 2025. As usual, entities cannot elect to receive the production tax credit described below if they claim the investment tax credit.</p> <p><i>Expansion of Advanced Energy Project Credit:</i> The Advanced Energy Project Credit program, which provides up to a 30% tax credit for investments in eligible advanced energy manufacturing projects, would include advanced nuclear power facilities. The American Power Act increases the funding for this program from \$2.3 billion to \$7.3 billion.</p> <p><i>Modification of Existing Production Tax Credit:</i> The production tax credit for advanced nuclear power facilities generally allows for such credit to be allocated to private participants on projects that include taxable and tax-exempt entities. The credit would apply to electricity produced in taxable years beginning after the enactment of the American Power Act.</p>

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Tax Provisions (Nuclear) (Continued)			<p><i>Expansion of Use of Private Activity Bonds:</i> Private activity bonds may be used by qualified public entities (generally governmental entities, mutual or cooperative electric companies, and certain not-for-profit electric utilities) rather than solely by private entities. This change generally would allow for the use of private activity bonds issued after the enactment of the American Power Act in public-private partnerships.</p> <p><i>Grants in Lieu of Tax Credits:</i> Grants in lieu of tax credits are made available in an amount equal to 10% of the qualified nuclear power project expenditures.</p>
Offshore Drilling Protections	Does not contain provisions relating to offshore drilling.	Does not contain provisions relating to offshore drilling.	The American Power Act calls for: (1) a temporary moratorium on new offshore drilling; (2) a liability mechanism that ensures the availability of funds to mitigate economic and environmental impacts of accidents; (3) investments in preparedness; (4) new studies of oil spill mitigation tools; (5) state authority to prohibit oil and natural gas leasing for drilling within 75 miles of the state's coastline; (6) revenue sharing between states engaged in drilling; and (7) investment of drilling revenues in national action plans to restore oceans and coastal areas.
Title XVII Innovative Technology Loan Guarantee Program	Does not contain provisions relating to the innovative technology loan guarantee program.	Does not contain provisions relating to the innovative technology loan guarantee program.	The American Power Act increases the total funding for the Energy Policy Act of 2005 Title XVII Innovative Technology Loan Guarantee Program from \$47 billion to \$100 billion. The share of this funding available for nuclear projects is increased from \$18.5 billion to \$54 billion. A nuclear loan guarantee retention fee is established to encourage recipients to quickly repay loans.

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Renewable Electricity Standard	<p>Of the total electricity sold by a retail electricity supplier, the following percentage must be generated from renewable sources:</p> <ul style="list-style-type: none"> ▪ 2012 - 2013: 6.0% ▪ 2014 - 2015: 9.5% ▪ 2016 - 2017: 13.0% ▪ 2018 - 2019: 16.5% ▪ 2020 - 2039: 20.0% <p>Up to 25% of the required standard can be met through efficiency measures, governors can petition for up to 40% of the standard to be met through such measures.</p>	<p>Of the total electricity sold by a retail electricity supplier, the following percentage must be generated from renewable sources:</p> <ul style="list-style-type: none"> ▪ 2012 - 2013: 3.0% ▪ 2014 - 2016: 6.0% ▪ 2017 - 2018: 9.0% ▪ 2019 - 2020: 12.0% ▪ 2021 - 2039: 15.0% <p>Governors can petition for up to 26.67% of the required standard to be met through efficiency measures. (This provision is not in S. 1733, but rather another Senate bill known as the American Clean Energy Leadership Act (S. 1462) that many anticipate will, at some point, be packaged together with S. 1733.)</p>	<p>Likely that the renewable electricity standard of the American Clean Energy Leadership Act (S. 1462) will be incorporated into the American Power Act.</p>
Transmission Provisions	<p>Does not contain provisions governing transmission siting.</p>	<p>Establishes an "interstate highway system" for electricity transmission, allowing states to take the initial lead in deciding where to build high-priority national transmission projects but ensuring that if an impasse develops over high-priority projects that the projects can proceed under federal authority. (This provision is not in S. 1733, but rather another Senate bill known as the American Clean Energy Leadership Act (S. 1462) that many anticipate would, at some point, be packaged together with S. 1733)</p>	<p>Likely that the transmission provisions of the American Clean Energy Leadership Act (S. 1462) will be incorporated into the American Power Act.</p>

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Natural Gas Incentives	Does not contain incentives for the natural gas industry.	EPA would provide undefined incentives to projects that replace existing coal facilities with natural gas. To qualify for such incentives, projects would have to reduce GHG emissions below 2007 levels by 25%, with the reduction target increasing to 65% by 2030.	Tax incentives are provided for manufacturing of natural gas vehicles. Additional incentives are provided, through the distribution of allowances, to merchant coal generators to repower units with "a less emissive fuel."
Community Protection From Global Warming Impacts	Provides for coordination of activities among federal, state and tribal entities and development of an integrated federal program to protect natural resources and facilitate resilience and adaptation to impacts of climate change. Requires development of natural resource adaptation strategies by federal agencies and states and sets forth required components of the strategy.	Contains provisions similar to H.R. 2454.	Contains provisions similar to H.R. 2454 and S. 1733 bills. Provides for creation of a Natural Resources Climate Change Adaptation Panel (to work closely with the Council on Environmental Quality) to coordinate federal, state and tribal entities concerning protection of natural resources and making them more resilient to climate change impacts. Establishes protocols for government agencies to integrate adaptation strategies into existing natural resource conservation activities and coordinate procedures for advancing technology and research.

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PROVISIONS RELATED TO CAP-AND-TRADE PROGRAM			
GHGs Covered	(1) Carbon dioxide; (2) methane; (3) nitrous oxide; (4) sulfur hexafluoride; (5) hydrofluorocarbons ("HFCs," emitted as a byproduct); (6) perfluorocarbons; and (7) nitrogen trifluoride. EPA may further designate anthropogenic gases for coverage if one metric ton of a gas has an equal or greater contribution to global warming over 100 years compared to carbon dioxide.	Same as H.R. 2454.	Same as H.R. 2454 and S. 1733, except that only perfluorocarbons that are anthropomorphic (and 1 metric ton of which makes the same or greater contribution to global warming over 100 years as 1 metric ton of carbon dioxide) are covered by the American Power Act.
Reduction Goals	<ul style="list-style-type: none"> ▪ 2012: 3% below 2005 level ▪ 2020: 17% below 2005 level ▪ 2030: 42% below 2005 level ▪ 2050: 83% below 2005 level 	<ul style="list-style-type: none"> ▪ 2012: 3% below 2005 level ▪ 2020: 20% below 2005 level ▪ 2030: 42% below 2005 level ▪ 2050: 83% below 2005 level 	<ul style="list-style-type: none"> ▪ 2013: 4.75% below 2005 level ▪ 2020: 17% below 2005 level ▪ 2030: 42% below 2005 level ▪ 2050: 83% below 2005 level
Preemption	Would preempt all state, local and regional cap-and-trade programs for reducing emissions of GHGs between 2012 and 2017. The bill would not preclude other state-based programs.	Same as H.R. 2454, except that preemption is postponed if the federal program is "substantially delayed."	Bars states from implementing or enforcing a cap-and-trade program to control GHG emissions. Preemption of state cap-and-trade programs, however, would not prevent a state from implementing another GHG standard, limit, regulation, or program to reduce GHG emissions that did not involve use of a cap-and-trade program.

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<p>Covered Entities/ Compliance Deadlines</p>	<p>Electricity sources; refiners; providers/importers of petroleum-based liquid fuels; large industrial sources and other sources/equipment that have the potential to emit over 25,000 tons per year of carbon dioxide equivalent (“CO2e”); certain natural gas local distribution companies; and certain industrial and chemical sectors, regardless of annual CO2e emissions (e.g., primary aluminum, ammonia, cement, petroleum refining, acrylonitrile, methanol).</p> <p>Compliance Deadlines:</p> <ul style="list-style-type: none"> ▪ January 1, 2012: Electricity generators, producers and importers of petroleum-based and other specified liquid fuels, and fluorinated gas manufacturers. ▪ January 1, 2014: Industrial sources (e.g., refineries, aluminum and cement producers). ▪ January 1, 2016: Local natural gas distribution companies. 	<p>Same as H.R. 2454.</p>	<p>Covers the same sources as H.R. 2454 with some critical changes. Creates a separate compliance program for “refined product providers” (i.e., sellers of refined petroleum products). Oil/distillate fuel-fired electricity generators and large industrial units are now obligated to acquire emission allowances to comply with the program (whereas under H.R. 2454 and S. 1733, that obligation was on the provider of the fuel).</p> <p>Compliance Deadlines:</p> <ul style="list-style-type: none"> ▪ January 1, 2013: Electricity generators (including those burning fuel oil), refined product providers, providers of other specified liquid fuels, and fluorinated gas manufacturers. ▪ January 1, 2016: Industrial sources (e.g., refineries, aluminum and cement producers). ▪ January 1, 2016: Local natural gas distribution companies.

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Allowance Allocation	<p>A tradable allowance system (i.e., cap-and-trade program) is created whereby covered entities are required to submit allowances by April 1 to account for their GHG emissions from the preceding year.</p> <p>Allowances allocated early in the program gradually phase out to a full auction. Initially, 85% of allowances are allocated for free. The remaining 15% will be auctioned. Roughly 80% of allocated allowances are distributed for the benefit of energy consumers. The remaining 20% of allocated allowances inure to the benefit of private industry and other special interests.</p> <p>Generally allowances are allocated for the benefit of: electricity consumers; natural gas consumers; home heating oil and propane consumers; low-income consumers; trade-exposed industries; refiners; investment in carbon capture and sequestration deployment; investment in energy efficiency and renewable energy; Clean Energy Innovation Centers; early action, clean vehicle technology; domestic fuel production; workers; domestic, wildlife and natural resources adaptation; international adaptation; international clean technology transfer; deficit reduction; and consumer refunds.</p>	<p>The allocation of emission allowances largely mirrors that of H.R. 2454. One major difference is that the number of allowances available for distribution to covered entities is significantly lower. S. 1733 dedicates a larger number of allowances to deficit reduction.</p>	<p>The allocation percentages in the American Power Act are different from those of H.R. 2454 and S. 1733.</p> <p>Slightly more emission allowances are made available for distribution to covered entities than under H.R. 2454 and S. 1733.</p> <p>Electricity consumers (through retail electricity providers) and refineries will receive a higher percentage of total allowances, while natural gas consumers (through local distribution companies), home heating oil/propane consumers (through the states), and trade-exposed industries generally receive the same percentage of emission allocations as under H.R. 2454. The method for distributing allowances to retail electricity providers also has changed. 75% of allocations will be based upon historic GHG emissions whereas 25% will be based upon the amount of electricity delivered (H.R. 2454 and S. 1733 had a 50/50 split). Merchant coal generators would be entitled to up to 14.3% of all allocations to the electric sector (capped at 10% under H.R. 2454 and S. 1733). With respect to long-term contract generators, the American Power Act allows for borrowing from future vintage years in the event there is a shortage of free allowances available in a particular year.</p> <p>In general terms, allowances under the American Power Act are allocated to the same or very similar categories as H.R. 2454 and S. 1733 with some key exceptions. For example, beginning in 2026, under the American Power Act allocations will be given to a Universal Trust Fund (beginning at 8.1% and increasing to 77.8%), the proceeds of which will be used for consumer rebates (75%) and deficit reduction (25%). In addition, a cost containment reserve would be established at the outset of the cap-and-trade program (1.5% in the early years increasing to 5% between 2030 and 2050).</p>

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Allowance Allocation (Continued)			<p>The bill also would create “clean energy technology” allowances to be distributed on a competitive basis to various educational and private entities for development of technology for renewable energy; transmission, distribution, and storage of electricity; water security; transportation (e.g., electric vehicles); and other technology that would reduce foreign energy dependence, reduce pollution/GHG emissions, or improve energy efficiency.</p> <p>Merchant coal generators (up to 35 GW) would be eligible to receive allowances if they shut down or repower with a less emissive fuel.</p> <p>An unspecified amount of allowances also would be dedicated to addressing the impacts of the bill on the coal industry.</p>

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<p>Transportation Fuels/Refined Petroleum Products</p>	<p>Importers of petroleum-based liquid fuel, coal-based liquid fuel, petroleum coke, or natural gas liquid subject to economy-wide cap and trade program.</p>	<p>Same as H.R. 2454.</p>	<p>There are significant changes in how "refined product providers" are regulated under the American Power Act.</p> <p>Refined products include finished motor gasoline, distillate fuel oil, kerosene, aviation fuel, emissive natural gas liquid, residual oil, and coal-based liquid fuel (but does not include petroleum coke, distillate fuel or residual oil used by or sold to covered entities, distillate fuel or residual oil used to power ocean-going vessels, aviation fuel (but only if an international agreement is reached to address the emissions of the fuel), any refined product used for chemical or industrial manufacturing feed stock and not emitted, any renewable fuel component of a refined product, and any refined product that is exported or sold for export).</p> <p>Refined product providers are not included in the energy/industry cap-and-trade program. EPA is directed to set aside (annually) the number of emission allowances needed by refined product providers to cover emissions related to the combustion of the refined products. The price of the allowances is determined by the average price paid in the auctions in the energy/industry cap-and-trade program. Refined product providers only can use the emission allowances it purchases from the EPA for compliance purposes and cannot sell or trade these emission allowances.</p> <p>Another significant change from H.R. 2454 and S. 1733 is that refined product providers are not required to acquire emission allowances to offset emissions from entities subject to the cap-and-trade program (i.e., covered entities).</p> <p>Finally, importers/providers of petroleum coke would not be subject to the cap-and-trade program (instead, covered entities that combust these products would be regulated).</p>

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<p>Additional Measures to Achieving "Fast Mitigation"</p>	<p>Amends the Clean Air Act by adding a new section to phase down consumption and importation of HFCs to 15% of baseline by 2032 beginning in 2013 through a market-based cap-and-trade program. Baseline is to be determined by averaging quantity of HFCs consumed/imported in 2004, 2005, and 2006.</p> <p>Directs the EPA to conduct study of black carbon emissions, report on existing efforts to reduce domestic black carbon pollution, and in coordination with the Secretary of State, to report to Congress on current and potential future assistance to foreign nations to help reduce black carbon pollution.</p>	<p>Same as H.R. 2454.</p>	<p>Same as H.R. 2454 and S. 1733 with respect to HFCs. With respect to black carbon, in addition to the study required by H.R. 2454 and S. 1733, the American Power Act would amend the Clean Air Act to require the EPA to, not later than 2 years after enactment, propose regulations applicable to emissions of black carbon under existing Clean Air Act authorities.</p>

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<p>Offsets/ Alternative Compliance</p>	<p>Allows covered entities to satisfy their compliance obligations through the surrender of acquired offset credits generated by projects that capture and store GHGs. The bill establishes a preliminary list of projects that would qualify for the generation of offset credits, with particular focus on agricultural and forestry initiatives. Authority over the generation of agricultural/forestry credits is given to the Department of Agriculture and authority over all other projects is granted to the EPA.</p> <p>The maximum number of offsets that may be used to satisfy compliance obligations in a given year is limited to two billion. Half of the two billion credits must be internationally sourced. The bill distributes the ability to use offset credits on a pro rata basis among all covered entities based on the relative percentage of offsets to the GHG cap in a given year. As a result of this distribution, covered entities may initially satisfy approximately 30% of their compliance obligation through the use of offsets, with this figure rising to approximately 65% by 2050.</p> <p>Early offset credits can be gained for qualified projects established by a state or tribal government, or otherwise recognized by EPA and that commenced operation prior to 2009 but no earlier than 2001.</p> <p>Foreign allowances and offset credits also may be used to satisfy compliance obligations. The exchange rate for foreign allowances and all offsets is initially set at a 1:1 ratio with domestic allowances. Beginning in 2018, the value of international offsets is reduced to a 5:4 ratio with domestic allowances.</p>	<p>The provisions governing offset credits are substantially the same as H.R. 2454 with two notable exceptions: (1) S. 1733 does not designate jurisdictional authority over the offset program to any specific agency; and (2) S. 1733 uses a formula to determine the maximum number of offset credits that may be used to satisfy compliance that is based on the emissions of the covered entity divided by the overall number of allowances multiplied by the maximum number of offsets (i.e., 2 billion offsets). Additionally, S. 1733 appears to have a strong preference for the use of domestic offset credits for compliance purposes (requiring the makeup of offsets in a covered entity's annual compliance account to be made up of 75% domestic offsets and 25% international offset).</p>	<p>All covered entities except refined products producers are allowed to use offsets to satisfy their compliance obligations.</p> <p>Like H.R. 2454, the Secretary of Agriculture would have authority over any "domestic agriculture or forestry offset projects" and EPA has authority over "all other offset projects."</p> <p>The American Power Act requires the Department of Agriculture and EPA to adopt regulations governing the domestic offset program. EPA is charged with adopting regulations governing the international offset program (in consultation with various federal governmental bodies). The American Power Act identifies a preliminary list of projects that would qualify for the generation of offsets and directs EPA and the Department of Agriculture to maintain a list of eligible offset projects. Foreign allowances and offset credits also may be used to satisfy compliance obligations.</p> <p>The maximum number of offsets that may be used to satisfy compliance obligations in a given year is limited to two billion. Half of the two billion offsets must be internationally sourced (similar to H.R. 2454 and S. 1733). The American Power Act also uses the same formula as S. 1733 for determining the maximum number of offsets that may be used by a covered entity to satisfy its annual compliance obligation.</p> <p>Early offset credits can be obtained for qualified projects. These projects do not need to be established by the government, but must have commenced prior to 2009 and no earlier than 2001.</p> <p>The exchange rate for foreign allowances is the same as in H.R. 2454 and S. 1733.</p>

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<p>Rebate Program Relating to Trade Competition</p>	<p>Creates a rebate program directed at energy/GHG-intensive, trade-exposed industries harmed by the costs of implementing the cap-and-trade program.</p> <p>Requires EPA to publish a list of "eligible industrial sectors" and amount of allowances to be rebated per unit of production. Presumptively eligible industrial sectors would be determined at the six-digit classification level within Codes 31-33 of the 2002 North American Industrial Classification System. As determined by EPA, "presumptively eligible sectors," are those that either: (1) meet energy or GHG criteria (for which energy or GHG costs are at least 5% of the value of their shipments) and trade exposure criteria (for which the combined value of imports and exports are at least 15% of the sector's total value of domestic shipments and imports); or (2) have an energy or GHG intensity of at least 20%. Petroleum Refining is excluded from being an eligible industrial sector.</p> <p>EPA would provide rebates based on a two-part formula: (1) 100% of the industry's annual average emissions per unit of output over the most recent four years multiplied by the company's annual average output over the preceding two years (direct emissions); and (2) average emissions per kw-hour of electricity purchased multiplied by the average electricity used per unit of output over the preceding two years multiplied by an electricity efficiency factor to be determined by EPA (indirect emissions).</p> <p>Energy-intensive, trade-exposed industries would be allocated 2% of available allowances in 2012 and 2013, 15% of available allowances in 2014, and 13.4% of available allowances from 2015 through 2025. Beginning in 2026, allowances would phase out in a linear fashion over a 10-year period, such that by 2036 there would no allowances provided under this program.</p>	<p>Same as H.R. 2454.</p>	<p>Generally, the rebate program created for energy-intensive trade exposed industries is similar to H.R. 2454 and S. 1733.</p> <p>There are several changes from H.R. 2454 and S. 1733 related to the program worth noting:</p> <ul style="list-style-type: none"> ▪ EPA's initial list of emission allowance rebate amounts covers the four years after 2011 (rather than the two years after that date). In addition, when determining a sector's GHG intensity, 5 years worth of data would be used, rather than four, and data from up to 7 years prior may be used. Moreover, when determining a sector's average GHG intensity, the averages exclude data from individual years with the highest and the lowest direct GHG emissions per unit of output and electricity efficiency factors. ▪ New language added requiring EPA, in determining the sectors for purposes of calculating sectoral averages, to examine the intermediate and final products produced by each sector. ▪ The limit on the electricity emission intensity calculation for any sector is changed from "not greater than any prior year" to "not greater than in any previous year after the enactment of the Act." <p>Energy-intensive, trade-exposed entities are allocated 2% of available allowances in 2013 to 2015, 15% of available allowances in 2016 to 2025, 12% of available allowances in 2026, 9% of available allowances in 2027, 6% of available allowances in 2028 and 3% of available allowances in 2029.</p>

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<p>International Reserve Allowance Program Relating to International Trade</p>	<p>Unless a multilateral agreement on reducing GHG emissions is in force prior to January 1, 2018, the President would be required to establish an International Reserve Allowance ("IRA") program for all eligible sectors. This IRA program would require all importers of GHG-intensive, trade-exposed products to obtain such allowances, thereby creating a border adjustment mechanism.</p> <p>The sole exception to this requirement would be if both the President and the Congress concur that inclusion of a particular sector in the IRA program would not be in the country's economic or environmental interest.</p> <p>Beginning on June 30, 2018 and every four years thereafter, the President would be required to determine for every eligible industrial sector whether more than 85% of US imports of "covered goods" are produced or manufactured in countries that meet one of the following three criteria: (1) the country is party to an international agreement that imposes on that country economy-wide GHG reduction standards that are at least as stringent as those imposed on the United States; (2) the country is party to a sector-specific multilateral or bilateral emission reduction agreement; or (3) the country has annual energy or GHG intensity within the sector that is comparable to or less than that in the United States.</p> <p>If the 85% threshold is met, then the President is precluded from imposing an IRA program for the sector.</p>	<p>Only states that "[i]t is the sense of the Senate that this Act will contain a trade title that will include a border measure that is consistent with our international obligations and designed to work in conjunction with provisions that allocate allowances to energy-intensive and trade-exposed industries."</p>	<p>Similar to H.R. 2454 with certain changes:</p> <ul style="list-style-type: none"> ▪ Congressional approval would not be required for the President's determination that an IRA would not be in the national interest. If the President certifies to Congress that such is the case, then the President may refrain from implementing an IRA program. However, if the President elects not to establish an IRA program for an eligible sector, the President shall provide "additional emission allowance rebates to the sector in a quantity necessary to mitigate or address carbon leakage." ▪ With respect to the presidential determination, the initial determination date is moved back to June 30, 2023, but frequency of determinations increased to every two years (rather than every four years). ▪ The 85% of imports threshold requirement in H.R. 2454 has been changed to 70% of the global output of the sector. This change is likely to make it more difficult to impose an IRA program as imports are far easier to measure than is global output and unless the President could be certain that this threshold was not met the President is likely to refrain from imposing an IRA program. Moreover, even if measurement difficulties could be overcome, the 70% of output standard may be easier to meet than the prior 85% of import standard, making it easier to meet the threshold required to preclude the imposition of an IRA program.

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Auction	<p>Establishes single-round, sealed-bid, uniform-price auction procedures, which may be modified by EPA. Auctions are to be held quarterly and are open to any person. No person may purchase more than 5% of the allowances offered for sale at any quarterly auction.</p> <p>Initially, the minimum reserve price for allowances is \$10 (in constant 2009 dollars) for the first auction (i.e., 2012), and increases at a rate of 5% plus the rate of inflation for each year thereafter.</p>	<p>Same as H.R. 2454.</p>	<p>Establishes uniform-price auction procedures, which may be modified by EPA. Auctions are to be held quarterly and are open only to covered entities and "regulated greenhouse gas market participants" (defined as "a person other than a compliance entity as specified in regulations promulgated by the CFTC, in conjunction with the EPA and the Treasury Secretary, based on an assessment of the market structure and a determination that additional participants are necessary for a liquid and well-functioning market that would ensure not more than a reasonable rate of economic return.").</p> <p>Purchase limits to be set as necessary to prevent manipulation of prices. Initially, the minimum reserve price for allowances is \$12 (in constant 2009 dollars) for the first auction (i.e., 2013), and increases at a rate of 3% plus the rate of inflation for each year thereafter.</p>
Safety Valve/ Price Collar	<p>Additional allowances would be made available from a strategic reserve through auctions performed by EPA if the cost of auctioned allowances reached the "minimum strategic reserve auction price."</p> <p>The initial minimum strategic reserve auction price is \$28 (in constant 2005 dollars) for the auctions held in 2012. The minimum strategic reserve auction price increases by 5% per year in addition to inflation for auctions held in 2013 and 2014. For auctions held in 2015 and beyond, the minimum strategic reserve auction price is 60% above a rolling 36-month average of the daily closing price for that year's emission prices. Only covered entities would be allowed to participate in auctions from strategic reserves.</p>	<p>Additional allowances would be made available from a strategic reserve if the cost of auctioned allowances reached the "minimum market stability reserve auction price." The initial minimum market stability reserve auction price is \$28 (in constant 2005 dollars) for the auctions held in 2012. The minimum market stability reserve auction price increases by 5% per year in addition to inflation from 2013 to 2017 and then begins increasing at a rate of 7% plus inflation after 2017. Only covered entities would be allowed to participate in auctions from the market stability reserve.</p>	<p>Substantially more allowances are placed in the "cost containment reserve" than under the reserves established in H.R. 2454 and S. 1733. The auction price for allowances from this reserve is \$25 (in constant 2009 dollars) for the first auction (i.e., 2013), and increases at a rate of 5% plus the rate of inflation for each year thereafter. Only covered entities (but excluding refined product producers) are allowed to participate in auctions from the cost containment reserve.</p> <p>Allowance prices during the first year of the program would range from \$12 (minimum reserve) to \$25 (price ceiling).</p>

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Banking & Borrowing	Unlimited banking of allowances and offsets for use during future compliance years would be allowed. Borrowing allowances from allocations one year ahead is allowed without penalty. Up to 15% of an entity's obligation can be satisfied with allowances borrowed from a vintage two to six years ahead at an 8% interest rate.	Same as H.R. 2454.	Same as H.R. 2454 and S. 1733, except that, as noted, allowances purchased by "refined product providers" for compliance purposes may not be traded, banked or borrowed.
Market Oversight	The Federal Energy Regulatory Commission would be given oversight of the cash market in allowances and offsets. The Commodity Futures Trading Commission ("CFTC") would be given initial oversight of the allowance derivative market, but an "interagency working group on carbon market oversight" may be convened in order to propose regulations for the establishment, operation and oversight of the market in regulated allowance derivatives.	Contains a placeholder for a "single integrated carbon market oversight program."	<p>The American Power Act would give the CFTC exclusive jurisdiction to regulate the carbon market.</p> <p>The Commodity Exchange Act ("CEA") would be amended to establish the requirements for the trading of so-called "greenhouse gas instruments," which include "greenhouse gas allowance[s]" and "any other type of instrument or subset of such instrument" that the EPA designates as a GHG instrument.</p> <p>The American Power Act would permit the CFTC to regulate greenhouse gas instrument swap transactions in the same manner as agricultural commodities, and the CEA's anti-fraud and anti-manipulation provisions would apply to greenhouse gas instruments.</p> <p>The market for greenhouse gas instruments would be restricted by limiting both the participants in the market (specific entities that are registered with the CFTC) and the "location" of the market (trading conducted on a regulated exchange and cleared through a carbon clearing organization). Also, the American Power Act would require the CFTC to establish rules for registration and operation of greenhouse gas instrument trading organizations.</p>

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Holders of Regional Program Allowances	Compensates those with California, Regional Greenhouse Gas Initiative, and Western Climate Initiative allowances in the amount that is sufficient to cover for the cost of obtaining and holding such state and regional allowances.	Same as H.R. 2454.	Same as H.R. 2454 and S. 1733. In addition, states implementing cap-and-trade programs would be eligible to receive allowances for reductions achieved prior to the adoption of the American Power Act.
New Source Performance Standards/Clean Air Act Provisions/New Source Review	<p>Certain non-covered entities (i.e., those not covered by the emission trading scheme) would be subject to standards of performance for new stationary sources. Both covered and non-covered entities would not be subject to the Clean Air Act's provisions governing hazardous air pollutants, new source review, and Title V permits solely on the basis of their GHG emissions.</p> <p>The bill also includes emission performance standards for new coal-fired power plants that likely would require the use of CCS technology.</p>	Grants EPA the authority to promulgate new source performance standards for GHG emissions from non-covered entities, but the agency may not promulgate such standards until 2020. Does not contain exemptions from the Clean Air Act's provisions governing hazardous air pollutants, new source review, and Title V permitting.	<p>Similar to H.R. 2454 with some critical changes.</p> <p>Provides that GHGs may not be added to the list of criteria pollutants or hazardous air pollutants under the Clean Air Act on the basis of their contribution to climate change or ocean acidification.</p> <p>Grants EPA the authority to promulgate New Source Performance Standards for GHG emissions from non-covered entities.</p> <p>Prohibits EPA from issuing New Source Performance Standards for covered entities unless the standards are "appropriate because of effects that do not include climate change."</p> <p>Provides that New Source Review shall not apply to a major emitting source that is initially permitted or modified after January 1, 2009, on the basis of its GHG emissions and provides that GHGs are not to be considered when determining if a stationary source is required to obtain a Title V permit.</p> <p>Establishes emission performance standards for coal-fired power plants based on when they are initially permitted. Plants initially permitted on or after Jan. 1, 2020 must achieve a 65% reduction in emissions; plants permitted between Jan. 1, 2009 and Dec. 31, 2019 must achieve a 50% reduction (deadline for compliance is the earlier of January 1, 2020 or the commercial deployment of carbon capture and sequestration ("CCS") (to be determined by a number of specified criteria). These performance standards likely will require the use of CCS.</p> <p>Clarifies that § 115 of the Clean Air Act (International Air Pollution) cannot be used to address air pollutants that contribute to climate change or ocean acidification.</p>

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Role of Public Utility Commissions	As a predicate to the distribution of emission allowances to electricity and natural gas local distribution companies in a given state, the state regulatory authority with ratemaking authority over those local distribution companies must promulgate a regulation or complete a rate proceeding that fully implements the requirements outlined in the bill. In order to prevent any “windfall” to the retail suppliers, these regulations must ensure the value of emissions allowances allocated to local distribution companies is used to the benefit of ratepayers.	Same as H.R. 2454.	Same as H.R. 2454 and S. 1733.
Renewable Fuels	Prohibits EPA from imposing indirect land use change metrics on biofuels under the Renewable Fuels Standard for 5 years while research is conducted by the National Academies of Science on the issue. Requires emission allowances to be held either: (1) for the carbon dioxide generated by a covered entity that is used for growing the algae; or (2) the portion of the carbon dioxide emitted from the combustion of fuel product from algae, but not for both.	Does not contain provisions with respect to indirect land use change. Requires emission allowances to be held either: (1) for the carbon dioxide generated by a covered entity that is used for growing the algae; or (2) the portion of the carbon dioxide emitted from the combustion of fuel product from algae, but not for both.	Same as S. 1733. Generally speaking, the America Power Act resolves ambiguities in H.R. 2454 that S. 1733 as it related to the combustion of renewable fuels (including various types of biomass) and confirms that covered entities do not need to acquire emission allowances for emissions associated with combustion of biofuels (including various types of biomass).
Penalties for Noncompliance	Entities failing to meet their compliance obligation are subject to the penalties of the Clean Air Act (i.e., \$37,500 per day per violation) as well as an obligation to pay twice the fair market value of the allowance deficit, plus an additional obligation to “true-up” the deficit by submitting additional allowances in the following year.	Same as H.R. 2454.	Same as H.R. 2454 and S. 1733.