



## CLIMATE CHANGE UPDATE

### Climate Change Practice

Sidley has advised clients on environmental and sustainable development matters for decades. This work includes due diligence for multinational transactions, advising companies on environmental requirements associated with doing business, and assisting clients with designing and implementing environmental management systems. Sidley advises clients on climate change issues such as carbon trading, international trade consequences of various regulatory regimes, and alternative energy projects, and represents clients in related litigation. The group's experience extends to global supply chain management and product stewardship issues, including restrictions on product content, packaging and labeling (e.g., the EU's REACH, ROHS/WEEE and ELV requirements).

**For further information on our Practice, please contact:**

**David T. Buente**  
+1.202.736.8111  
dbuente@sidley.com

**Robert M. Olian**  
+1.312.853.7208  
rolian@sidley.com

**Judith M. Praitis**  
+1.213.896.6637  
jpraitis@sidley.com

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## American Power Act Proposed by Sens. Kerry and Lieberman: Key Preemption Provisions and Differences From Other Proposals

Sens. John Kerry and Joseph Lieberman have released their climate and energy legislation, the "American Power Act" (APA). To view the complete bill, please [click here](#). The 1000-page bill would cap greenhouse gas (GHG) emissions and create GHG allowances and an associated trading system. GHG emissions would be reduced from 2005 levels at increasing rates through 2050. The cap first applies to Electric Generating Units (EGUs), while other energy-intensive industry would be covered starting in 2016.

The Kerry-Lieberman proposal is only one of several major bills before Congress that would make sweeping changes to U.S. energy policy, including the Waxman-Markey bill passed by the House last summer. If any of the bills were to become law, the legislation would have far reaching impacts across the economy. The bills do, however, vary in many important respects. To see a side-by-side comparison of bills – Climate Change Legislation Before Congress: Key Legal Provisions [click here](#).

Even beyond the new programs and mandates, how the bills would preempt existing laws and ongoing litigation related to GHG emissions is critical to understanding their full implications. Here are highlights of the preemption provisions in the proposed American Power Act:

### Federal

**New Source Review** – The bill would amend the Clean Air Act to remove GHGs as a trigger for New Source Review (NSR) for major sources permitted or modified after January 1, 2009. However, while GHGs would not trigger NSR requirements, a best available control technology (BACT) review may be required for GHGs if a source triggered NSR based on non-GHGs.

**New Source Performance Standards** – The effect would vary, depending upon the source.

- **EGUs:** There is no preemption of New Source Performance Standards (NSPS) for EGUs. Instead, EPA may establish NSPS for existing units. The proposal sets performance standards for new units initially permitted after January 1, 2009.

- Industry subject to the GHG emissions cap:
  - The bill preempts NSPS unless EPA “determines that the standards are appropriate because of effects that do not include climate change.”
  - EPA is directed to treat GHGs as a “nonair quality public health and environmental impact” when setting an NSPS for other pollutants.
- Sources not subject to the cap: EPA may impose NSPS limits, but cannot do so before 1/1/2020 if the source is an eligible offset project.

**Title V** – The proposal would remove GHGs as an independent basis for requiring a Title V permit, if the GHG in question is only regulated due to its impact on climate change. However, the proposal allows EPA to incorporate GHGs into Title V permits for impacts other than climate change, including ocean acidification.

**National Ambient Air Quality Standards** – EPA may not list GHGs as a criteria pollutant regulated under the National Ambient Air Quality Standards (NAAQS) on the “basis of the effect of the greenhouse gas on climate change or ocean acidification.” EPA may list GHGs as a NAAQS regulated pollutant due to other impacts of GHGs.

**Hazardous Air Pollutants** – EPA could not list GHGs as a hazardous air pollutant (HAP) unless the GHG qualifies “independent of the effects of the greenhouse gas on climate change or ocean acidification.” EPA could list GHGs as a HAP due to other impacts.

**International Air Pollution** – The proposal would preempt regulation of GHGs under Section 115 of the Clean Air Act if due to climate change or ocean acidification impacts. Again, it leaves open the possibility of regulation due to other impacts of GHGs.

**If you have questions about any of these items, please contact your regular Sidley Austin LLP contact.**

**Other authority** – The proposal does not address regulation under other federal laws, including the Clean Water Act, Endangered Species Act, and National Environmental Policy Act.

### State and Local

**State cap and trade programs** – State cap and trade programs are generally “prohibited” under the bill, although States that had mandatory programs would receive allowances as compensation. The bill does not, however, specifically reference preemption of a regional cap and trade system, such as the Regional Greenhouse Gas Initiative.

**State command and control** – States would retain authority for command and control requirements over GHGs, such as those that set targets or limits other than through a trading program. There may be some challenges in reconciling retention of broad state authority with preemption of state cap and trade systems.

### Public Nuisance Tort Actions

**No statement of express preemption** – The bill does not explicitly preempt common law nuisance claims. Violations of the Act could be enforced, but the bill provides that the specified enforcement remedy “shall not diminish” liability “for owners and operators for the same violation under any other provision of this Act or any other law.”

**Findings** – The proposal would issue Congressional findings that purport to link “each increment of” GHGs and adverse harms to health effects, displacement of populations, damage to property, severe weather and seasonal changes, and other damage.

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Whether some form of this bill will become law remains to be seen. If a new law is enacted, the scope of preemption will shape the full legal and economic impact of any new legislation.