■ FEDERAL ENERGY REGULATION

Legal News™

FOLEY

FOLEY & LARDNER LLP

■ DECEMBER 21, 2007

Legal News is part of our ongoing commitment to providing legal insight to our clients and our colleagues.

Please contact your Foley Energy attorney if you have any questions about these topics or want additional information regarding energy matters. Authors and editors:

Joseph L. Colaneri
202.672.5471
jcolaneri@foley.com

Robert C. Geist, Jr.
202.295.4090
rgeist@foley.com

Harry J. Katrichis
202.295.4072
hkatrichis@foley.com

Philip G. Kiko
202.672.5509
pkiko@foley.com

Mark A. Thimke
414.297.5832
mthimke@foley.com

Summary of Energy Independence and National Security Act of 2007 (H.R. 6) as Enacted Into Law December 19, 2007 (Public Law No: 110-140)

Corporate Average Fuel Economy

Corporate Average Fuel Economy, or CAFE, refers to the 1975 federal fuel-efficiency mandate (required miles per gallon (mpg)) on car makers for their cars and light trucks sold in the United States. CAFE is calculated as an average per manufacturer. As of early 2004, CAFE for cars has been 27.5 mpg, and CAFE for light trucks has been 20.7 mpg. Trucks weighing less than 8,500 pounds must average 22.5 mpg in 2008, 23.1 mpg in 2009, and 23.5 mpg in 2010. Specifically, H.R. 6 mandates the following:

- Beginning in 2011, the National Highway Traffic Safety Administration (NHTSA) must annually increase CAFE to at least 35 mpg by 2020 for new cars and light trucks and to the "maximum feasible average" by 2030 — a **27.2-percent increase** for cars and a **69-percent increase** for light trucks
- Beginning in 2011, each domestically manufactured car must achieve at least 27.5 mpg (or 92 percent of the CAFE standard for that year, whichever is greater)
- NHTSA must establish a program for medium- and heavy-duty trucks, under which fuel economy standards would improve at the "maximum feasible" rate
- The creation of a credit-trading program (within certain limitations) so that manufacturers that exceed CAFE can sell credits to manufacturers that fall short, and so that manufacturers can transfer credits within their own fleets as needed to avoid CAFE noncompliance penalties
- A decrease over time (through 2019) in the portion of a manufacturer's average fuel economy that may be attributable to dual-fueled vehicles
- The creation of a consumer information program to convey information about the above mandates in an easy-to-understand manner
- The creation of a national consumer education program about the effects of tires on fuel efficiency

Interestingly, although not a specific provision in the bill, the U.S. Environmental Protection Agency justified its denial of California's request to regulate greenhouse gas emissions from automobiles based upon the bill's increase in the CAFE standard. The rationale is that H.R. 6 establishes a national program for reducing greenhouse gas emissions by increasing mileage standards as opposed to the state-by-state approach being pursued by California.

The denial of the California waiver on the basis of H.R. 6 is controversial, with congressional hearings and litigation to follow in 2008.

Renewable Fuel Standard

The Renewable Fuel Standard (RFS) refers to the federal mandates on gasoline sold at market by energy companies and the extent to which gasoline must contain renewable components (like ethanol made from corn). The RFS program would have to increase the volume of renewable fuel required to be blended into gasoline to 9.0 billion gallons by 2008, 15.2 billion gallons by 2012, 22.3 billion gallons by 2016, and 36 billion gallons by 2022, with several sub-mandates along the way for biodiesel, advanced biofuel (defined as essentially anything other than corn starch), and cellulosic ethanol. This mandate excludes such alternative fuels as coal-to-liquids, compressed natural gas, electricity, oil shale, and biomass from overgrown, fire-prone forests on federal land. RFS contains mandatory greenhouse gas reduction requirements for new ethanol facilities, but excludes all existing ethanol facilities from this requirement. RFS also allows for credits for refining, blending, or importing renewable fuels in excess of the mandated levels.

Tax Increases

The House amendment to H.R. 6 contains **$2.1 billion in assorted tax increases over 10 years** (to offset the lost gasoline taxes from CAFE increases).

One such tax increase in the bill would be the extension — from five years to seven years — of the **amortization of geological and geophysical expenditures for certain large oil companies** for the purposes of calculating a tax deduction (and thereby making the resulting tax deduction smaller each year). Such expenditures are exploratory costs for gathering data (e.g., seismic surveys) on where resources are and how best to extract them. According to the Joint Committee on Taxation, this provision would amount to a $103 million tax increase on oil and gas companies over 10 years.

Additionally, H.R. 6 would **extend the current-law 0.2-percentage-point surtax on the unemployment insurance tax**, which is about a $2 billion tax increase over 10 years.

Commercial Products Mandates

H.R. 6 would implement a variety of new mandates on commercial products:

- Requires new energy-efficiency standards (to vary by region) for home appliances such as dehumidifiers, residential clothes washers, residential dishwashers, refrigerators, freezers, electric motors, and residential boilers
- Requires that certain consumer appliances and industrial equipment, when in standby mode, would operate with not more than one watt of electric power (subject to exceptions)
- Prohibits the sale of certain light bulbs after December 31, 2011 and includes dozens of pages of new regulations on light bulbs and lamps

Federal Buildings

H.R. 6 would create a slew of new building and energy-use mandates for federal agencies. For example, the Secretary of Energy would have to promulgate energy-efficiency standards for new (and renovated) federal buildings so that such buildings could reduce their fossil-fuel-generated energy consumption by certain percentages (as detailed in the bill), resulting in a 55-percent reduction by 2010 and a **100-percent reduction** by 2030. New-building leases on buildings that are not Energy Star compliant would be prohibited (beginning three years after this bill's enactment and subject to exception).

Private Building Mandates

The General Services Administration would be directed to produce a national standard so that all commercial buildings are net-zero-energy commercial buildings by 2050 (new buildings by 2030).

Expansion of the Davis-Bacon Act

H.R. 6 would expand the Davis-Bacon Act's prevailing wage requirements, which provide a higher pay rate for labor related to certain federally funded construction projects, in two respects:

- Applying Davis-Bacon to the railroad improvements grant program
- Applying Davis-Bacon to the carbon sequestration program

Smart Grid

The bill would establish a task force to facilitate the adoption of "investment" programs in "smart grid" standards, technologies, and practices (i.e., modernizing, digitizing, and automating the nation's electricity grid).

Pool and Spa Safety

H.R. 6 now includes the text of the Pool and Spa Safety Act, H.R. 1721, as it passed the House in October 2007 (except with somewhat lower authorizations). It would establish a swimming pool safety grant program (to be administered by the Consumer Product Safety Commission) to encourage states to improve pool and spa safety laws.