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111TH CONGRESS
1ST SESSION

H. R. 1759

To distribute emission allowances under a domestic cap-and-trade program to facilities in certain domestic energy-intensive industrial sectors and subsectors to prevent an increase in greenhouse gas emissions by manufacturing facilities located in countries without commensurate greenhouse gas regulation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 26, 2009

Mr. INSLEE (for himself and Mr. DOYLE) introduced the following bill; which was referred to the Committee on Energy and Commerce

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A BILL

To distribute emission allowances under a domestic cap-and-trade program to facilities in certain domestic energy-intensive industrial sectors and subsectors to prevent an increase in greenhouse gas emissions by manufacturing facilities located in countries without commensurate greenhouse gas regulation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "EMPLOY Act" or the "Emission Migration Prevention with Long-term Output Yields Act".

SEC. 2. FINDINGS.

The Congress finds the following:

(1) All domestic and foreign industries should contribute to climate stabilization.

(2) Domestic producers of certain energy-intensive products subject to international competition present a unique challenge for United States climate policy because the increased costs associated with compliance may unintentionally cause domestic industry to divert new investments and production to facilities located in countries without commensurate greenhouse gas regulation.

(3) Without exempting any industries, the United States must move forward with economy-wide action on climate change while reducing incentives for producers to relocate to unregulated countries, which could displace both jobs and emissions.

(4) International agreements are the most appropriate means to reduce emissions from energy-intensive industries because unilateral domestic efforts to reduce greenhouse gas emissions could accelerate the relocation of energy-intensive manufacturing abroad.

(5) Carbon leakage can be mitigated substantially through the output-based distribution of emission allowances.

(6) Output-based emission allowance distribution is an appropriate temporary measure that should complement other targeted domestic and international policies and agreements meant to encourage United States trading partners to substantially reduce global greenhouse gas emissions.

SEC. 3. PURPOSES.

The purposes of this Act are as follows:

(1) To compensate the owners and operators of facilities in eligible domestic industrial sectors and subsectors for carbon emission costs incurred under any domestic cap-and-trade program.

(2) To limit compensation to the owners and operators of facilities in eligible industrial sectors and subsectors to an amount of emission allowances that will prevent carbon leakage while also rewarding innovation and facility-level investments in energy efficiency performance improvements.

(3) To provide compensation to the owners and operators of facilities in eligible industrial sectors and subsectors for both the direct and indirect costs of purchasing emission allowances needed for compliance with a domestic cap-and-trade program, but not for costs associated with other related or unrelated market dynamics.

(4) To prevent carbon leakage resulting from direct and indirect compliance costs incurred under a domestic cap-and-trade program.

(5) To eliminate or reduce emission allowance distribution under this Act when such distribution is no longer necessary to prevent carbon leakage from eligible sectors or subsectors.

SEC. 4. DEFINITIONS.

In this Act:

(1) The term ''Administrator'' means the Administrator of the Environmental Protection Agency.

(2) The term ''cap-and-trade program'' means an economy-wide program enacted by Congress that distributes or auctions emission allowances for the control of greenhouse gas emissions under the Clean Air Act.

(3) The term ''carbon dioxide equivalent'' means, for each greenhouse gas, the quantity of greenhouse gas that the Administrator determines makes the same contribution to global warming as 1 metric ton of carbon dioxide.

(4) The term ''carbon leakage'' means any substantial increase (as determined by the Administrator) in greenhouse gas emissions by manufacturing facilities located in countries without com-

mensurate greenhouse gas regulation which increase is caused by an incremental cost of production increase in the United States as a result of a domestic cap-and-trade program.

(5) The term ''covered facility'' means, for each calendar year, a facility that emits greenhouse gases in that year and that has an obligation to submit emission allowances for such greenhouse gas emissions under any cap-and-trade program.

(6) The term ''emission allowance'' means an authorization, under any cap-and-trade program, to emit 1 carbon dioxide equivalent of greenhouse gas.

(7) The term ''facility'' means 1 or more buildings, structures, or installations of an entity on 1 or more contiguous or adjacent properties located in the United States.

(8) The term ''greenhouse gas'' means any gas designated as a greenhouse gas under a cap-and-trade program.

(9) The term ''output'' means the total tonnage or other standard unit of production (as determined by the Administrator) produced by a manufacturing facility.

(10) The term "vintage year" means the calendar year for which an emission allowance is established under a domestic cap-and-trade program.

(11) The term "NAICS" means the 2007 North American Industrial Classification System.

SEC. 5. DISTRIBUTION OF EMISSION ALLOWANCES TO CERTAIN ENERGY-INTENSIVE MANUFACTURING FACILITIES.

(a) DISTRIBUTION OF EMISSION ALLOWANCES.—

(1) IN GENERAL.—The Administrator shall annually distribute emission allowances, in amounts calculated under subsection (c), to the owners and operators of facilities in eligible industrial sectors and subsectors designated under subsection (b), subject to the maximum quantity limitation established under paragraph (2) of this subsection.

(2) MAXIMUM.—The maximum quantity of emission allowances distributed under paragraph (1) each year shall equal 15 percent of the total quantity of allowances distributed or auctioned during the first year under a cap-and-trade program for which allowances are required to be submitted under such program. If the total allowances calculated under subsection (c) exceed such maximum, the Administrator shall reduce the amount distributed to

owners and operators under paragraph (1) on a pro rata basis.

(b) ELIGIBLE INDUSTRIAL SECTORS AND SUBSECTORS.—

(1) IN GENERAL.—Not later than January 1, 2011, the Administrator shall promulgate a rule designating, based on the criteria under paragraph (2), the industrial sectors and subsectors in which an owner or operator of a facility in such a sector or subsector may receive emission allowances under this Act.

(2) PRESUMPTIVELY ELIGIBLE SECTORS AND SUBSECTORS.—An owner or operator of a facility shall receive emission allowances under subsection (a) if such facility is in a sector or subsector that is included in a six-digit classification of the NAICS and that meets either the energy intensity criteria or greenhouse gas intensity criteria under subparagraph (A) (or both the energy intensity criteria and greenhouse gas criteria under subparagraph (A)) and the trade intensity criteria under subparagraph (B). The Administrator, in consultation with other Federal agencies, as appropriate, may rescind the eligibility of a sector or subsector only if the Administrator determines, after notice and opportunity for

public comment, that such sector or subsector does not meet the energy intensity criteria or the greenhouse gas intensity criteria under subparagraph (A) and the trade intensity criteria under subparagraph (B), and such sector or subsector would not be subject to carbon leakage in the absence of the allowance distribution under this section.

(A) ENERGY INTENSITY OR GREENHOUSE GAS INTENSITY.—

(i) ENERGY INTENSITY.—The sector or subsector has an energy intensity of at least 5 percent, calculated by dividing the cost of the purchased electricity and fuel costs of the sector or subsector by the value of the shipments of the sector or subsector, based on data described in subparagraph (C).

(ii) GREENHOUSE GAS INTENSITY.—The sector or subsector has a greenhouse gas intensity of at least 5 percent, calculated by dividing 40 times the tons of carbon dioxide equivalent greenhouse gas emissions (including direct emissions from fuel combustion, process emissions, and indirect emissions from the generation of electricity used to produce output) of the sector or subsector by the value of the shipments of the sector or subsector, based on data described in subparagraph (C) from the most recent calendar year for which reliable data is available. When calculating the greenhouse gas intensity, the Administrator may, to the extent necessary, use economic and engineering models and the best available information on technology performance levels for such sector or subsector.

(B) TRADE INTENSITY.—The sector or subsector has a trade intensity of at least 15 percent, calculated by dividing the value of the total imports and exports of such sector or subsector by the value of the shipments plus the value of imports of such sector or subsector, based on data described in subparagraph (C).

(C) DATA SOURCES.—

(i) ELECTRICITY AND FUEL COSTS, VALUE OF SHIPMENTS.—For purposes of this subsection, the Administrator shall determine electricity and fuel costs and the value of shipments for data from years

2006, 2007, or 2008 from the United States Census of Mineral Industries and the United States Census Annual Survey of Manufacturers, or, if such data is unavailable, from data from the 2002 or 2006 Energy Information Agency's Manufacturing Energy Consumption Survey and the 2002 or 2007 Economic Census of the United States. The Administrator shall use data from the most detailed industrial classification level if such data is available. If data are unavailable for any sector or subsector at the six-digit classification level in the NAICS, then the Administrator may extrapolate the information necessary to determine the eligibility of a sector or subsector under this paragraph from available data pertaining to a broader industrial category classified in the NAICS.

(ii) IMPORTS AND EXPORTS.—For purposes of this subsection, the Administrator shall establish the value of imports and exports by using United States International Trade Commission data.

(iii) PERCENTAGES.—The Administrator shall round the energy intensity and greenhouse gas intensity percentages under subparagraph (A) and the trade intensity percentage under subparagraph (B) to the nearest whole number.

(iv) GREENHOUSE GAS INTENSITY DATA.—To determine greenhouse gas intensity under subparagraph (A), the Administrator may use the Bureau of Economic Analysis Benchmark Input-Output Accounts or the 2002 or 2006 Energy Information Agency's Manufacturing Energy Consumption Survey. The Administrator shall use emissions data from a United States Registry of Greenhouse Gas Emissions for the purposes of determining eligibility under this subsection when such data becomes available.

(v) METAL PRODUCTION CLASSIFIED UNDER MORE THAN ONE NAICS CODE.—In determining eligibility under this subsection, the Administrator shall—

(I) aggregate data for the beneficiation or other processing of metal ores with subsequent steps in the process of metal manufacturing regardless of the NAICS code under which such activity is classified; and

(II) aggregate data for the manufacturing of steel with the manufacturing of steel pipe and tube made from purchased steel in a non-integrated process.

(3) INDIVIDUAL SHOWING.—Regardless of the section of the NAICS code under which a sector or subsector is classified, the owners or operators of a manufacturing facility (or facilities) in such sector or subsector shall receive emission allowances under subsection (a) if sufficient evidence exists, from sources other than, and in addition to, those described in paragraph (2), that such facility (or facilities) meets either the energy intensity criteria or the greenhouse gas intensity criteria (or both the energy intensity criteria and the greenhouse gas intensity criteria) and the trade intensity criteria under paragraph (2). For the purposes of this paragraph, the Administrator may accept data submitted by the owners or operators of a manufacturing facility (or facilities).

(4) ADMINISTRATIVE DETERMINATION OF ADDITIONAL ELIGIBLE SECTORS OR SUBSECTORS.—Any person may petition the Administrator to designate as eligible under this subsection any sector or subsector that does not meet the criteria under paragraph (2) or (3) but demonstrates to the satisfaction of the Administrator that it is subject to carbon leakage, comparable to that of sectors or subsectors that meet the criteria under paragraphs (2) or (3). In determining whether a sector or subsector is subject to carbon leakage, the Administrator, in consultation with other Federal agencies, as appropriate, shall take into account, in addition to the sector or subsector's energy intensity, greenhouse gas intensity, and trade intensity, as calculated under paragraph (2), each of the following:

(A) The potential for greater foreign sourcing of production or services and the effect of international competition on domestic production.

(B) The effect of international markets on product pricing.

(C) The potential for net imports to increase or exports to decrease (resulting in a loss of market share held by domestic manufacturers to manufacturers located in other countries) caused by the direct and indirect compliance costs under a domestic cap-and-trade program.

(D) The state of international negotiations, agreements, and activities to reduce global greenhouse gas emissions.

(c) CALCULATION OF ALLOWANCES.—

(1) COVERED FACILITIES.—Except as provided in subsection (a)(2), the quantity of emission allowances distributed by the Administrator under this section for a calendar year to the owner or operator of a covered facility shall be equal to the sum of the facility's direct compliance allowance factor and the facility's indirect carbon allowance factor. Calculations under this paragraph shall be based on the average of data from the calendar years that are 2 and 3 calendar years prior to the calendar year of distribution. For purposes of determining such amounts for each calendar year:

(A) DIRECT COMPLIANCE ALLOWANCE FACTOR.—The direct compliance allowance factor for a facility for a calendar year is the product of—

(i) the output of the facility; and

(ii) 85 percent of the average tonnage (adjusted on a carbon dioxide equivalency basis) of greenhouse gas emissions per unit of output for all facilities in the sector or subsector, as determined by the Administrator based on reports provided under subparagraph (C).

(B) INDIRECT CARBON ALLOWANCE FACTOR.—The indirect carbon allowance factor for a facility for a calendar year is the product obtained by multiplying the total output of the facility by the fraction set forth in clause (i) (the emissions intensity factor) and the fraction set forth in clause (ii) (the electricity efficiency factor) for the year concerned.

(i) EMISSIONS INTENSITY FACTOR.—

(I) REGULATED ELECTRICITY MARKETS.—In a regulated electricity market, the emissions intensity factor is the average tonnage (adjusted on a carbon dioxide equivalency basis) of greenhouse gas emissions per kilowatt hour of the electricity purchased by the facility, as determined by Administrator based on reports provided under subparagraph (D).

(II) WHOLESALE COMPETITIVE ELECTRICITY MARKETS.—In a wholesale competitive electricity market, the emissions intensity factor is the average tonnage (adjusted on a carbon dioxide equivalency basis) of greenhouse gas emissions per kilowatt hour of the marginal source of supply of electricity purchased by the facility, as determined by the Administrator based on reports provided under subparagraph (D).

(ii) ELECTRICITY EFFICIENCY FACTOR.—The electricity efficiency factor is 85 percent of the average amount of electricity (in kilowatt hours) used per unit of output for all facilities in the sector or subsector concerned, as determined by the Administrator based on reports provided under subparagraph (C).

(C) REPORT TO ADMINISTRATOR.—Each owner or operator of a facility in any sector or subsector designated under subsection (b) and each department, agency, and instrumentality of the United States shall provide the Administrator with such information as the Administrator finds necessary to determine the direct compliance allowance factor and the indirect carbon allowance factor for each facility subject to this section.

(D) GREENHOUSE GASES FROM ELECTRICITY.—Each person selling electricity to the owner or operator of a facility in any sector or subsector designated under subsection (b) shall provide the owner or operator of the facility and the Administrator, on a quarterly basis, such information as is required to determine the emissions intensity factor under subparagraph (B)(i).

(E) EMISSIONS INTENSITY FACTOR REDUCTION.—In calculating the average tonnage (adjusted on a carbon dioxide equivalency basis) of greenhouse gas emissions for the numerator of the emissions intensity factor under subparagraph (B)(i), the Administrator shall reduce the actual, total tonnage (adjusted on a carbon dioxide equivalency basis) used by the tonnage of allowances the Administrator determines are distributed at no cost under any cap-and-trade program to the person making the sale of electricity and are used by such person to prevent electricity rate increases to the owner or operator of the facility.

(F) IRON AND STEEL SECTOR OR SUBSECTORS.—For the purposes of determining the quantity of emission allowances to be distributed under this section to the owner or operator of any iron and steel manufacturing facility in a sector or subsector designated under subsection (b), the Administrator shall consider as in different sectors and subsectors facilities using integrated iron and steelmaking technologies (including coke ovens, blast furnaces, and other iron-making technologies) and facilities using electric arc furnace technologies when calculating sector or subsector averages under subparagraphs (A) and (B).

(2) OTHER ELIGIBLE ENTITIES.—The quantity of emission allowances distributed by the Administrator for a calendar year to an owner or operator of a facility in an eligible industrial sector or subsector that is not a covered facility shall be equal to the indirect carbon allowance factor for the facility,

as determined under paragraph (1)(B). Calculations under this paragraph shall be based on the average of data from the calendar years that are 2 and 3 calendar years prior to the calendar year of distribution.

(3) INITIAL YEARS OF OPERATION.—The Administrator shall issue regulations governing the distribution of emission allowances to a facility entitled to emission allowances under this Act for such facility's first and second years of operation. These regulations shall provide for—

(A) the distribution of emission allowances to such facilities based on comparable facilities in the same sector or subsector; and

(B) an adjustment in the third year of operation to reconcile the total quantity of emission allowances received during the first and second years of operation to the quantity the facility would have received during the first and second years of operation had the appropriate data been available.

SEC. 6. REPORTS TO CONGRESS.

Not later than one year after the first year in which allowances are distributed pursuant to this Act, and at least every two years thereafter, the Administrator, in consultation with other Federal agencies, as appropriate, shall transmit to Congress a report on the carbon leakage of domestic industrial manufacturers and the effectiveness of the distribution of emission allowances under section 5 in achieving the purposes of this Act. Such reports shall include recommendations on how to better achieve the purposes of this Act.

SEC. 7. MODIFICATION OR ELIMINATION OF DISTRIBUTION OF ALLOWANCES TO ENERGY-INTENSIVE MANUFACTURING FACILITIES.

(a) ANNUAL PHASE DOWN SUBJECT TO REVIEW.—

(1) REDUCTION.—Subject to paragraph (2), beginning in calendar year 2026, and in each calendar year thereafter, the Administrator shall reduce, on a pro-rata basis, the amount of emission allowances distributed under this Act by an amount equal to 10 percent of the amount of emission allowances distributed in calendar year 2025.

(2) REVIEW.—If the Administrator, in consultation with other Federal agencies, as appropriate, determines that less than 90 percent of the global output from a sector or subsector is manufactured in countries subject to commensurate greenhouse gas regulation, then the Administrator shall, by rule, eliminate the reduction under paragraph

(1). The Administrator may eliminate the reduction under paragraph (1) for individual sectors or aggregates of sectors and subsectors, as appropriate. In making such determination, the Administrator shall consider a country to have commensurate greenhouse gas regulation if—

(A) such country's annual greenhouse gas intensity or energy intensity (as described in section (5)(b)) for a sector or subsector is less than the greenhouse gas intensity or energy intensity for such sector or subsector in the United States in the most recent calendar year for which reliable data are available; and

(B) such country has implemented policies, including cap-and-trade systems, export tariffs, electricity generation regulations, and greenhouse gas emission fees, that individually or collectively impose a incremental cost of production increase associated with greenhouse gas emissions from a sector or subsector that is at least 70 percent of the cost of complying with a domestic cap-and-trade program in the United States for comparable facilities in the same sector or subsector, averaged over a two year period.

(b) PRESIDENTIAL DETERMINATION AND MODIFICATION.—Notwithstanding subsection (a), if the President determines that other countries have taken actions that have substantially mitigated the risk that companies in a particular sector or subsector will reduce existing or not initiate new production in the same sector or subsector in the United States due to the costs of complying with a domestic cap-and-trade program, then the President shall so notify the Administrator. Upon such notification, the Administrator, in consultation with other Federal agencies, as appropriate, shall by rule reduce the amount of emission allowances distributed under this Act to reflect the reduced risk. The Administrator shall take no action under this subsection unless the Administrator determines, by clear and convincing evidence, such risk has been reduced. No reduction in the distribution of emission allowances under this paragraph shall be effective before January 1, 2020.

SEC. 8. CESSATION OF QUALIFYING ACTIVITIES.

If, as determined by the Administrator, a facility is no longer in an eligible sector or subsector designated under section 5(b)—

(1) the Administrator shall not distribute emission allowances to the owner or operator of such facility under this Act; and

(2) the owner or operator of such facility shall return to the Administrator all allowances that have been distributed to it for future vintage years and the number of emission allowances equal to the product of—

(A) the number of emission allowances distributed to the facility under this Act for the vintage year in which the facility ceases to be in an eligible sector or subsector designated under section 5(b); and

(B) one-twelfth of the number of months that the facility or entity was in an eligible sector or subsector designated under section 5(b).

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