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Is a National Energy Efficiency Building Code on the Horizon?

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This week, the U.S. House of Representatives and the U.S. Senate reconvene to finish out the first session of the 111th Congress and consider various legislative items that serve the basis of the Obama Administration's policy agenda. One of the measures that could be considered is legislation passed by the House and approved by a key Senate committee that would establish a national energy efficiency building code (the "National Code"). The National Code would require new residential and commercial buildings to use far less energy than today's typical buildings. If signed into law by President Obama, the legislation would represent a major shift in power from local governments to the federal government in terms of responsibility for setting building codes.

On June 26, the House passed its version of the legislation as part of the larger American Clean Energy and Security Act (H.R. 2454, commonly known as the "Waxman-Markey" or simply the climate change bill), which contains a cap and trade climate change program and major energy provisions. The Senate Committee on Energy and Natural Resources approved its own national code language as part of an energy-only bill on June 17. To become law, the House and Senate would have to agree to the same exact version of the national code provisions before sending the bill to the president for signature. But right now, the House version to which the National Code language is attached takes on the much larger and more controversial issue of climate change that may not be accepted by the Senate.

So, depending on the level of support for the National Code provisions by rank and file members of Congress, key interest groups and the public, the House and Senate Democratic floor leaders and key committee chairmen could decide to remove the National Code provisions from the larger legislation and enact them as part of scaled back, "non-controversial" energy bill. But if the National Code initiative becomes controversial in its own right, or remains part of the larger congressional debate on climate change, then the first session of the 111th Congress could adjourn at year's end without acting on the issue.

In both timing and amount, the energy reduction targets of the House bill and Senate bill are very ambitious and have been criticized by many in the construction community. While there is a good chance the targets may be adjusted or lowered as the bill makes its way through the legislative process, here is a current summary of the legislation:

Establishment of National Code

The National Code will be established within one year of the bill's enactment into law.

The National Code's required Energy Efficiency targets are:

- 30% reduction in energy use as of the date the bill becomes law under the House bill. The Senate bill requires a 30% reduction for 2010 compared to 2006 levels for residential and 2004 for commercial.
- 50% reduction in energy use by 2014 and 2015 for residential and commercial, respectively, under the House version. The Senate bill requires a 50 percent reduction after 2016, but the reduction target can be altered prior to 2016 should DOE determine that such a target is not feasible by 2016.

- 5% additional reduction every three years between 2017 and 2030 under the House bill. For national model codes and standards that have not been updated at least every three years, the Senate bill would require that DOE modify and update such codes and standards.

Energy reduction is measured against two existing codes that serve as baselines:

- Residential - 2006 International Energy Conservation Code (IECC)
- Commercial - ASHRAE Standard 90.1-2004

The Secretary of Energy will either adopt existing codes and standards that will achieve the targeted reductions, or will develop a new code to meet the targets.

Under the House bill, States may either adopt their own codes to achieve the targeted goals, or have the national code imposed on them automatically within one year of its establishment. Under the House and Senate legislation, States that are not in compliance with the standards will not be eligible to receive certain federal funding (SEED funds). It should be noted that local governments within those non-compliant states may still independently comply with the national code requirements and be eligible to receive a portion of the SEED funds.

LEED Certification

While the national code in no ways makes LEED compliance mandatory, there is some overlap. For example, under the House bill, a ten percent reduction in energy usage as measured against the ASHRAE baseline is one of the prerequisites to achieving LEED certification, although LEED 2009 has been updated to ASHRAE Standard 90.1-2007. Further percentage reductions of energy usage under LEED are not mandatory, but are rewarded with increasing points (10 points for a 30% reduction; 19 points for a 48% reduction).

Thus, under the National Code, all new commercial buildings would likely be eligible to receive significant points under LEED, which only requires 40 points to achieve the lowest level of building certification (in addition to certain prerequisites). If passed, the House bill will no doubt significantly increase the usage of the LEED rating system because all new buildings will already be meeting many of its provisions anyway.

Other Provisions Affecting the Construction Industry

There are additional provisions in the House passed version of the climate change bill that will have an impact on the construction industry, such as:

- The establishment of funding mechanisms for green construction;
- Incentives for green construction lenders;
- Incentive programs for retrofits of existing buildings;
- Establishment of a building energy performance labeling program;
- The creation of a tree planting program;
- The creation of a WaterSense program to identify and promote water efficient products and buildings; and
- An increase in efficiency standards for lighting and appliances.

The Senate legislation would also establish a grant program for institutions of higher education to establish building training and assessment centers and a competitive grant program to provide funding for innovative approaches to increase energy efficiency in multifamily buildings and manufactured housing.

Conclusion

Now that Congress is back in session, more will soon be known with regard to the final substance of the pending climate change/energy legislation and its timing for enactment. Baker Donelson will continue to monitor the situation in Washington and the states regarding major legislative and legal developments affecting the construction industry.

For more information, please contact a Baker Donelson attorney in our Construction Practice Group.