The Business Council

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S.2192 (Krueger) / A.3351 (Dinowitz)

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BILL
S.2192 (Krueger) / A.3351 (Dinowitz)
SUBJECT
Climate change adaptation cost recovery program
DATE
March 02, 2023
OPPOSE

The Business Council strongly opposes this bill that would impose $75 billion in “liability” on oil, natural gas and coal companies for damages related to greenhouse gas emissions.

In sum, this bill would mandate “compensatory payments” from any fuel producer whose products were determined to be responsible for 1 billion tons or more of greenhouse gas emissions during the period 2000 to 2018, with entity specific assessments calculated based on its share of aggregate emissions during that time period multiplied by $75 million.

It is ironic that this legislation is likened by its sponsors to the “superfund” program, the federal program to address the cleanup of inactive hazardous waste disposal sites, which since its adoption in 1980 has been widely seen as an expensive, inefficient if not also ineffective, and very slow-moving program rife with litigation.

In part, this legislation is designed to mask the cost impact that implementation of New York’s aggressive greenhouse gas emission reduction law will have on the state’s residents and businesses, by declaring the petroleum and natural gas industries (and other fuel providers) as the sole “responsible parties” for global climate change, and directly charging them $75 billion, based on product sales and their related emissions. We see this avoidance of true cost impact assessments as common in the state’s overall climate change planning efforts; the final CLCPA “scoping plan,” issued in December 2022, provides no indication of the impact its recommended policies would have on energy prices paid by individual or business consumers.

This bill implies that the fossil fuel industry is solely responsible for climate change, and that the industry was the prime beneficiary of society's widespread use of fossil fuels in housing, transportation, production feedstocks and for other purposes.

Interestingly, this legislation invokes only one component of superfund liability, strict liability, i.e., liability regardless of fault. However, it conveniently leaves out the second prong of superfund liability, joint and several liability, i.e., where all parties with any level of responsible for damages can be held liable for any amount up to the entire amount of damages.

In its application under the superfund program, strict, joint and several liability is applied not just to the generator of hazardous waste, but also to entities that transported, managed, dispose of or owned property on which disposal occurred.

In the context of greenhouse gas emissions, the application of a strict, joint and several liability standard would apply liability not just to the entities that extracted and processed fuels, but also to those entities which transported, marketed and – importantly – consumed the fuels and in doing so, were directly responsible for GHG emissions. Even if fuel producers were the only direct target of such litigation, those target entities undoubtedly – as in the case of superfund litigation – would pursue contribution claims from other responsible parties.

In other words, under superfund-style liability, these costs would be partially born by all individuals and businesses that benefited from the consumption of fossil fuels, just as they would be if this legislation proposed a more straightforward tax or assessment on carbon.

Advocates for this legislation point to legal analysis conducted by the Institute for Policy Integrity at the New York University School of Law intended to justify the legal basis for this type of claim for compensatory, and to argue against possible legal challenges to this legislation. In summary, that report argues that states could file a valid legal claim against a "responsible party" as defined in S.2129.

However, rather than actually pursuing a legal claim, this legislation attempts to avoid the need for litigation by, in effect, declaring a specific set of entities legally liable. In litigation, the state would also have to successfully argue for a specific level of damages. Instead, this legislation would impose a damage claim that is inherently arbitrary, as it would require “responsible parties” to pay a proportionate share of a $75 billion claim, while the 2022 version of this bill (S. 9417/A.10556) claimed “only” $30 billion in damages. Did the risk of climate-related damages more than double since May 25, 2022 when this legislation was initially introduced?

Ironically, there is business support for carbon pricing, i.e., including some share of the cost of environmental externalities into the price of carbon containing fuels (see for example, the Business Roundtable’s position paper, which “supports a market-based emissions reduction strategy that includes a price on carbon”), albeit most support a national, rather than state-level carbon pricing mechanism. Even so, there has been business support for the New York ISO’s proposal to include pricing in wholesale electric markets, and businesses are actively engaged with the Hochul administration on the Climate Action Council’s recommendation for a “cap and invest” program imposing emission allowance pricing on greenhouse gas emissions.

Meeting New York State’s greenhouse gas emissions reduction and renewable energy product targets will be costly and disruptive, regardless of any long-term benefits, so it is essential that the state’s implementation efforts are cost-effective, workable, and avoid significant damage to the state’s economic climate. We believe there are many reasonable measures that can be part of the state’s implementation plan, and that a broadly applicable carbon pricing mechanisms can be part of that effort.

Even so, we strongly oppose the current proposal, which is disingenuous in its presentation, and impractical in its implementation.

For these reasons, The Business Council strongly opposes adoption S.2129/A.3351.