

**ENVIRONMENTAL PROTECTION AGENCY'S  
PROPOSED GREENHOUSE GAS REPORTING RULE:  
ANOTHER PIECE OF THE EMERGING FEDERAL REGULATORY  
REGIME ON CLIMATE CHANGE**

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Earlier this year, the U.S. Environmental Protection Agency (“EPA”) issued proposed regulations to require a large number of facilities, manufacturers and product suppliers in the United States to keep track of and report to EPA their emissions of greenhouse gases (“GHGs”). EPA has estimated that these regulations (the “GHG Reporting Rule”) will apply to the sources of approximately 85% of all GHG emissions in the United States. EPA has stated that its goal is to have the recordkeeping requirements be effective on January 1, 2010, with GHG emissions reports to be filed (for most covered facilities and operations) annually starting in 2011. Although these dates may slip before the GHG Reporting Rule is issued in its final form, companies should be aware that this program is on a fast track and that these new requirements are likely to become effective in the near future.

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**Background of the GHG Reporting Rule**

EPA under the Bush Administration declined to regulate carbon dioxide (the principal GHG) as an air pollutant under the Clean Air Act for a number of reasons, including uncertainties in climate science, the economic consequences of mandatory GHG emissions reductions and anticipated regulatory and logistical difficulties of such a GHG regulatory program. However, the U.S. Supreme Court held, in *Massachusetts v. U.S. Environmental Protection Agency*, 127 S. Ct. 1438 (2007), that EPA's stated reasons for refusing to regulate carbon dioxide under the Clean Air Act were arbitrary and capricious. As a consequence, EPA is now required to make a regulatory finding as to whether carbon dioxide is an air pollutant which may be reasonably anticipated to endanger public health and welfare and which is therefore subject to regulation under the Clean Air Act. In April, 2009, EPA issued a proposed endangerment finding to the effect that carbon dioxide and other GHGs endanger public health and the environment because of their contributions to global warming and climate change and are therefore air pollutants subject to regulation under the Clean Air Act. It is expected that EPA will issue this endangerment finding in final form in the near future.

In addition, soon after the Supreme Court's decision in *Massachusetts v. U.S. Environmental Protection Agency*, Congress included in the Fiscal Year 2008 Consolidated Appropriations Act, P.L. 110-161, 121 Stat. 1844, 2128 (2008) (signed into law by President Bush on December 26, 2007), a requirement that EPA must “develop and publish a . . . rule . . . to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States.” The House/Senate Conference Report that accompanied this legislation included an explanatory statement to the effect that EPA should issue this rule using EPA's existing information-gathering authority under the Clean Air Act and that EPA should use its discretion to determine the appropriate emissions thresholds above which reporting is required and the frequency of reporting. Pursuant to this statutory requirement, EPA published the proposed GHG Reporting Rule in the *Federal Register* on April 10, 2009. EPA is now evaluating comments submitted on the proposed GHG Reporting Rule and is expected to issue it in final form in the near future.

**Purpose of the GHG Reporting Rule**

EPA states in its preamble that the purpose of the proposed GHG Reporting Rule is to provide GHG emissions data to EPA that can be used to evaluate the various programmatic and policy options for federal regulation and mandatory reduction of GHG emissions. These options include a GHG “cap and trade” program that is a prominent feature in the proposed American Clean Energy and Security Act of 2009, H.R. 2454, that was passed by the U.S. House of Representatives by a narrow margin on June 26,

2009 (see Ungaretti & Harris white paper entitled “Understanding the Federal Climate Change Legislation: The American Clean Energy and Security Act of 2009, H.R. 2454” available at [http://www.uhlaw.com/aces\\_white\\_paper/](http://www.uhlaw.com/aces_white_paper/)). Similar legislation is now being considered in the Senate, with final legislative action currently scheduled to be taken by Congress by the end of this calendar year. EPA has stated that the GHG emissions data collected by EPA under the GHG Reporting Rule will be useful to establish specific regulatory programs to address and mitigate causes and risks of climate change associated with GHG emissions.

### **GHGs Subject to the Proposed GHG Reporting Rule**

The GHGs that are subject to the proposed GHG Reporting Rule are carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, perfluorocarbons and other fluorinated gases. By far the largest quantities of GHG emissions consist of carbon dioxide, although some of the other GHGs have much more potent global warming potential than an equivalent volume of carbon dioxide. For regulatory purposes, EPA proposes to state the varying global warming potentials of the different GHGs as their “carbon dioxide equivalent.” The threshold volume of GHG emissions that will trigger the applicability of the GHG Reporting Rule to many specific facilities and operations will be stated as their volume of “carbon dioxide equivalent.”

### **Facilities and Parties Subject to the Proposed Reporting Requirements**

The GHG inventory reporting requirements are proposed to apply broadly to the following five categories of facilities, suppliers and manufacturers:

1. Certain specific GHG source categories. Certain specific types of facilities are proposed to be subject to the GHG Reporting Rule (in some cases without any volumetric threshold) including:
  - + Electric generating facilities that are subject to EPA’s acid rain program or that contain electric generating units that collectively emit 25,000 metric tons of carbon dioxide equivalent per year
  - + Adipic acid production
  - + Aluminum production
  - + Ammonia manufacturing
  - + Cement production
  - + Certain electronics manufacturing facilities
  - + Certain electric power systems that include electrical equipment with capacity above certain thresholds for certain GHGs
  - + HCFC-22 production
  - + Certain HCFC-23 destruction processes
  - + Lime manufacturing
  - + Nitric acid production
  - + Petrochemical production
  - + Petroleum refineries
  - + Phosphoric acid production
  - + Silicon carbide production
  - + Soda ash production
  - + Titanium dioxide production
  - + Certain underground coal mines
  - + Municipal landfills that generate methane in amounts equal to or greater than 25,000 metric tons of carbon dioxide equivalent per year
  - + Manure management systems that emit methane or nitrous oxide in amounts equal to or greater than 25,000 metric tons of carbon dioxide equivalent per year
  
2. Certain additional stationary facilities with carbon dioxide equivalent emissions equal to or greater than 25,000 metric tons per year. Stationary facilities that emit 25,000 metric tons of carbon dioxide equivalent or more per year in combined emissions from stationary fuel combustion units, from miscellaneous use of carbonates and from all of the sources listed below would be subject to the GHG Reporting Rule:
  - + Electricity generation

- + Electronics (photovoltaic) manufacturing
- + Ethanol production
- + Ferroalloy production
- + Fluorinated GHG production
- + Food processing
- + Glass production
- + Hydrogen production
- + Iron and steel production
- + Lead production
- + Magnesium production
- + Oil and natural gas systems
- + Pulp and paper manufacturing
- + Zinc production
- + Industrial landfills
- + Wastewater

Stationary facilities in this category would be required to report their GHG emissions from all covered sources.

3. Certain facilities with stationary fuel combustion sources. EPA proposes a catch-all reporting category for facilities that do not contain any of the sources listed in paragraphs 1 and 2 above but that contain stationary fuel combustion sources if (i) the aggregate maximum rated heat input capacity of the stationary fuel combustion units is 30 mmBtu/hour or greater and (ii) the facility emits 25,000 metric tons or more of carbon dioxide equivalent from all stationary fuel combustion sources. If a stationary fuel combustion source exceeds the stated capacity of 30 mmBtu/hour, then the source will be required to calculate its actual GHG emissions in order to determine whether it is subject to the GHG Reporting Rule. EPA will allow any stationary fuel combustion source with a rating capacity below 30 mmBtu/hour to presume that its annual emissions of carbon dioxide equivalent do not exceed 25,000 metric tons. For facilities in this paragraph 3, GHG emissions reports would be required only for emissions from the stationary fuel combustion sources. Note that while the 25,000 metric ton threshold would exclude individual homes and most office buildings, it may capture some large commercial buildings, hospitals, universities and similarly-sized facilities.
4. Certain suppliers of fossil fuels and industrial GHGs. EPA proposes to require suppliers of fossil fuels and industrial GHGs to report the potential GHG emissions from downstream use of their products. For this purpose, “suppliers” include producers, importers and exporters. Suppliers of the following products are covered in this paragraph 4:
  - + Coal
  - + Coal-based liquid fuels
  - + Petroleum products
  - + Natural gas and natural gas liquids
  - + Industrial GHGs (except that importers and exporters of industrial GHGs would have to report only if their total bulk imports or exports were greater than 25,000 metric tons of carbon dioxide equivalent per year)
  - + Carbon dioxide (except that importers and exporters of carbon dioxide would have to report only if their total bulk imports or exports of carbon dioxide and other industrial GHGs exceed 25,000 metric tons of carbon dioxide equivalent per year)

Natural gas processing plants would be required to report carbon dioxide emissions that would result from complete combustion or oxidation of the annual quantity of propane, butane, ethane, isobutane and bulk natural gas liquids sold or delivered for use off site. Local distributors of natural gas would be required to report the carbon dioxide emissions that would result from the complete combustion or oxidation of the annual volumes of natural gas provided to end-users.

5. Manufacturers of mobile sources (vehicles) and engines. Manufacturers of certain mobile sources (vehicles) and engines would be required to report emissions from the vehicles and engines they produce in terms of an emission rate for carbon dioxide, methane, nitrous oxide and hydrofluorocarbons. Manufacturers of the following types of vehicles and engines are proposed to be subject to this requirement:
- + Passenger cars, light trucks and medium duty passenger vehicles
  - + Highway heavy-duty engines and complete vehicles
  - + Nonroad diesel engines and nonroad large spark-ignition engines
  - + Nonroad small spark-ignition engines, marine spark-ignition engines, personal watercraft, highway motorcycles and recreational engines and vehicles
  - + Locomotive and marine diesel engines
  - + Jet and turboprop aircraft engines

The range of covered facilities and industries is broad. As noted above, EPA estimates that these facilities and industries account for approximately 85% of domestic GHG emissions.

### Reporting Frequency

Most facilities and industries subject to the GHG Reporting Rule will be required to submit reports to EPA annually, on March 1 of each year on account of GHG emissions from the previous calendar year. However, some covered facilities are already reporting their carbon dioxide emissions to EPA on a quarterly basis under EPA's acid rain program. For these facilities, EPA proposes to retain their quarterly reporting frequency and expand the reporting requirements to include all covered GHGs. For facilities subject to annual reporting, the proposed GHG Reporting Rule would require the covered facilities and supply operations to commence recordkeeping on January 1, 2010 and to submit the first GHG emissions report on March 1, 2011 (for calendar year 2010). However, EPA states in its preamble that a delay in the issuance of the final form of the GHG Reporting Rule may push back those proposed dates. At this point, it is not clear when the final GHG Reporting Rule will be issued by EPA or when the GHG recordkeeping and reporting requirements will commence. EPA proposes that, once a facility or supply operation is subject to the GHG Reporting Rule, it would continue to submit GHG emissions reports even if it falls below the GHG reporting thresholds for future years (*i.e.*, "once-in, always-in"). Facilities that fall below a reporting threshold in 2010 would be required to reevaluate the applicability of the GHG Reporting Rule in future years to determine whether operational changes (*e.g.*, process modifications, fuel use, *etc.*) had affected their reporting status.

### Reporting Methodology

EPA proposes to prescribe emissions calculation methods for specific GHG emissions sources within each of the covered facilities or industries. This accounts for the bulk of the lengthy GHG Reporting Rule because of the many different types of GHG emissions sources, many of which are industry-specific and each of which is subject to its own calculation methodology.

### Verification and Enforcement

The GHG Reporting Rule would not require third-party verification of emissions but rather would rely upon self-certifications and post-reporting audits by EPA. Violators would be subject to civil and administrative penalties of up to \$32,500 per day per violation. In addition, under the Clean Air Act, EPA may seek injunctive relief and criminal penalties for knowing violations of the proposed regulation. The proposed GHG Reporting Rule provides that a violation may include, without limitation, failure to report emissions, collect underlying data, calculate emissions based upon required methodology or carry out any required emissions monitoring or testing. Each day of non-compliance would be a separate violation.

### General Observations

Although EPA has not yet issued the GHG Reporting Rule in final form, companies may take note of some general observations about it as follows:

- + The scope of coverage of the proposed GHG Reporting Rule is broad. Many facilities and operations that have not previously been subject to these types of EPA air emissions reporting requirements will be subject to them for the first time. For many facilities and supply operations, there will be an institutional learning curve as in-house personnel become familiar with, and develop systems to

comply with, the GHG recordkeeping and reporting requirements. Many companies may find it advantageous to engage outside consultants and advisors to assist them in determining compliance strategies or in determining whether they are subject to the GHG Reporting Rule at all.

- + Some GHG emissions sources may be surprised to find themselves subject to the GHG Reporting Rule. For example, many large office buildings, hospitals, universities or retail facilities could have furnaces and boilers exceeding the threshold Btu capacity (30 mmBtu/hour) and be subject to the GHG Reporting Rule unless they calculate their actual carbon dioxide equivalent emissions to be below the 25,000 metric ton threshold.
- + GHG emissions data developed under the GHG Reporting Rule will probably facilitate a company's compliance with any federal GHG emissions reduction program that may be implemented in the future, whether a "cap and trade" program or otherwise. Many companies may benefit from laying the groundwork for compliance with the coming federal regulation of GHGs so that they are not starting flat-footed when the terms of federal regulation are finalized. The broad outlines of federal GHG regulatory programs are already ascertainable to such an extent that companies can reasonably begin the process of allocating resources to, and developing expertise on, compliance with emerging federal regulation of GHGs.
- + GHG inventory information could also be useful to a company to evaluate its overall energy costs and to design programs to reduce energy consumption and increase energy efficiencies. These strategies could drop to the bottom line of many companies as energy usage becomes more efficient and energy costs are reduced. GHG emissions information could be a key part of the metrics of any such economic analysis. Enhanced energy efficiencies may cause at least some facilities that would otherwise be above the volume thresholds under the GHG Reporting Rule to fall below those thresholds so as to be exempt from the reporting requirements altogether.

Overall, companies that begin the process of implementing internal programs to keep track of and reduce GHG emissions at an early date may be able to identify the specific challenges they face and ways to mitigate risks. Climate change and sustainability assessments are best performed by a team comprised of attorneys, environmental consultants and in-house personnel to understand industry-specific and company-specific factors that allow the business to factor climate change requirements into both near-term and long-term planning.

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