

## Legal Updates & News

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#### True Confessions: EPA Proposes Mandatory Greenhouse Gas Reporting

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Thousands of U.S. facilities that generate greenhouse gases (GHGs) soon will be required to start reporting their emissions to the Environmental Protection Agency (EPA), if new regulations proposed by the agency become effective. The proposed rule would make annual GHG reporting mandatory for approximately 13,000 facilities across the country beginning in 2011, for emissions occurring in 2010. EPA estimates that the covered facilities and industries are responsible for 85 to 90% of all GHG emissions in the U.S.

Last week, EPA also moved one step closer toward issuing a formal endangerment finding that CO<sub>2</sub> and other GHGs qualify as “pollutants” under the federal Clean Air Act, which would trigger the agency’s authority to regulate emission levels. The finding, which EPA recently submitted to the White House Office of Management and Budget for review, comes nearly two years after the Supreme Court ordered the agency to determine whether GHGs pose a threat to public health, in *Massachusetts v. EPA*.

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#### Background

The main objective of the reporting scheme is to generate an informational baseline for a future cap-and-trade program or other mechanisms to reduce GHG emissions. Although the rule itself would not impose any limitations on facilities’ GHG emissions, it is the first step toward a national emission reduction scheme.

In developing the proposal, EPA drew from existing voluntary and mandatory reporting schemes for GHGs and other air emissions at the state, regional, and national level. In particular, EPA appears to have modeled many aspects of its proposal on the California Air Resources Board’s mandatory reporting regulations, which recently became effective. Although its proposal tries to promote consistency with existing programs, the EPA is also expressly seeking input from the public and the regulated community on whether it has drawn appropriate conclusions about these existing programs and their relationship to the proposed national regulations.

#### Scope of Proposed Rule

The proposed rule would apply broadly across a wide variety of business sectors, including the following:

- Electricity generation (power plants);
- Transportation (vehicle and engine manufacturers);
- Industrial (including metal, mineral, chemical, oil and gas, and electronics manufacturing industries);
- Agriculture (manure management);
- “Upstream” suppliers (petroleum refineries, gas processors, natural gas distribution companies, coal mines, importers, industrial gases); and
- Other (landfills, wastewater treatment, ethanol, food processing).

With the exception of upstream suppliers and manufacturers of motor vehicles and engines, the reporting requirements would generally be triggered for facilities emitting over 25,000 metric tons of CO<sub>2</sub>-equivalent GHGs per year. Although the rule would directly regulate only the businesses in sectors described above, its impacts are likely to be much broader; businesses that rely on covered sectors for energy supplies or other goods and services could see prices go up, and those interested in cap-and-trade programs will want to know how the basic inventory EPA is creating will work.

Facilities would be required to use specified protocols, depending on the sector, for direct measurement and/or facility-specific calculations. In one rather significant departure from other protocols, however, EPA proposes to have itself serve as the verifier of reported emissions data (as opposed to relying on third-party verifiers), in order to promote confidence in the data and form a basis for enforcement action for noncompliance. Potentially regulated facilities should also be aware that under the Clean Air Act, EPA would be authorized to pursue administrative, civil, or criminal penalties for violations of the regulations, as well as injunctive relief.

### **SEC Filing Implications**

The EPA’s mandatory reporting proposal may also influence policymakers who have been considering whether public companies should disclose more about climate change risks in SEC filings. Over the past several years, groups including state officials, state pension fund managers, and environmental organizations have called on the SEC to require that all public companies provide more meaningful information about climate change-related matters such as (1) physical risks arising from climate change that are considered material to a company’s operations or financial condition; (2) financial risks and opportunities associated with present or probable greenhouse gas regulation; and (3) legal proceedings associated with climate change. The SEC has not yet acted on any of these suggestions, but the current EPA proposal and the priorities of the new Administration may encourage regulatory efforts to compel more complete disclosures about greenhouse gas emissions and climate change risks. Even without any regulatory action, public companies increasingly must consider whether disclosure about climate change risks and uncertainties may be necessary under existing SEC disclosure requirements.

### **What happens next?**

The proposed rule should be published in the Federal Register soon. Following publication, the agency will accept public comments for 60 days, and will hold at least two public hearings on the proposal (in Arlington, Virginia on April 6-7, and Sacramento, California on April 16) before taking final action. Morrison & Foerster is currently engaged with businesses likely to be affected by the reporting rule. Our lawyers advise clients not only on compliance with emission reporting programs and sector-specific methodologies, but also with respect to the related corporate and business decisions that may be affected by this coming regulation. Because this rule will be the foundation for national climate change regulation, now is the time to identify whether your facilities are likely to fall within the reporting requirements, and how this rule will affect your business operations. For regulated industries, we recommend you strongly consider submitting comments to the agency. Given the length of the proposed rule—together with its preamble, it weighs in at a hefty 1,400 pages—and level of technical detail involved in the emission measurement methodology, this is not a small task.

EPA Administrator Lisa Jackson is expected to sign the agency’s endangerment finding regarding GHGs within the next few weeks, which would open an additional public comment period. Such an action will place the federal Clean Air Act and its regulatory framework even further into the center of the climate change spotlight. This complicated law has grown and evolved over decades; using it now for climate change will present unique and difficult challenges for regulators and businesses alike. Morrison &

Foerster's extensive experience with the Clean Air Act—from permitting to compliance and enforcement—sets the firm apart from others who have, up until now, only viewed greenhouse gases as a “new” field.

If you would like further information or have questions relating to EPA's proposed reporting program, the anticipated endangerment finding, or other climate change regulations, please contact Michael Steel ([msteel@mofo.com](mailto:msteel@mofo.com) / 415-268-7350) or Bill Sloan ([wsloan@mofo.com](mailto:wsloan@mofo.com) / 415-268-7209) in our San Francisco office. EPA's website on the proposed rule can be found at <http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>.