

## Climate Change Regulatory Update: EPA Finalizes Greenhouse Gas Reporting Rule

October 1, 2009

On September 22, 2009, the U.S. Environmental Protection Agency (“EPA”) issued a final rule requiring the mandatory reporting of greenhouse gases (“GHG”) from a wide variety of emission sources in the United States. The GHG reporting rule, which was proposed originally on March 10, 2009, fulfills a mandate set forth in legislation enacted by Congress in the 2008 Congressional Appropriations Act. Facilities subject to the rule must begin collecting GHG data by no later than January 1, 2010. A summary of the final rule and its associated enforcement risks is set forth below.

### Covered Facilities

Under the GHG reporting rule, a broad array of facilities are required to report their annual emissions of the following GHGs: (1) carbon dioxide; (2) methane; (3) nitrous oxide; (4) hydrofluorocarbons; (5) perfluorocarbons; and (6) sulfur hexafluoride and other fluorinated gases. The rule captures within its scope 85 percent of the nation’s GHG emissions and applies to roughly 10,000 facilities. Facilities in the following industrial sectors must report their GHG emissions, with some facilities/sectors only required to report if their GHG emissions are above 25,000 tons of carbon dioxide equivalent (“CO<sub>2</sub>e”) per year while other facilities must report regardless of actual GHG emissions:

- Electricity generators;
- Suppliers of coal-based liquid fuels, petroleum products, natural gas, natural gas liquids, industrial greenhouse gases, and carbon dioxide;
- Petroleum refiners;
- Petrochemical producers;
- Pulp and paper manufacturers;
- Producers and manufacturers of adipic acid, aluminum, ammonia, cement, ferroalloy, glass, iron, steel, lead, lime, nitric acid, phosphoric acid, soda ash, titanium dioxide, and zinc;
- Municipal solid waste landfills; and
- Large-scale farming operations.

Notably, several sources that originally were proposed to be covered in the draft rule are not covered by the final rule:

- Suppliers of coal;
- Underground coal mines;
- Oil and natural gas systems (i.e., offshore oil and natural gas production facilities, onshore natural gas processing and

transmission compression facilities, underground natural gas storage facilities, liquefied natural gas storage and import and export facilities);

- Wastewater treatment facilities;
- Producers and manufacturers of ethanol, electronics, fluorinated GHGs, and magnesium;
- Industrial landfills; and
- Food processors.

It is important to note that EPA reserves the right to expand the scope of the GHG reporting rule to include these and other source categories.

### **Reporting of GHG Emissions to EPA**

Sources covered by the rule are required to begin collecting emission data by not later than January 1, 2010, with the first annual emission report due to EPA on March 31, 2011. In general, reporting of GHG emissions is to occur at the "facility" level, except that certain suppliers of fossil fuels and manufacturers that use GHGs for industrial purposes, along with vehicle and engine manufacturers, will report at the "corporate" level.

One of the more controversial aspects of EPA's draft GHG reporting rule was the mandate for certain facilities to continue reporting even if their GHG emissions dropped below 25,000 tons of CO<sub>2</sub>e per year. The final rule, however, allows a facility to opt out of coverage under the rule if it notifies EPA that any of the following have occurred: (1) five consecutive years of emissions below 25,000 tons CO<sub>2</sub>e per year; (2) three consecutive years of emissions below 15,000 tons CO<sub>2</sub>e per year; or (3) its GHG-emitting processes or operations are shut down.

In addition, acknowledging the short time frame for facilities subject to the rule to begin complying with its data collection and monitoring requirements, which is approaching 90 days, EPA agreed to allow facilities to use "best available monitoring methods" to track GHG emission data through March 31, 2010 in lieu of the monitoring methods specified in the final rule.<sup>1</sup> Facilities also may, upon request and approval by the EPA, use "best available monitoring methods" beyond March 31, 2010. EPA has stated, however, that it will not approve any requests for an extension beyond 2010. The monitoring methods required by the final rule vary depending upon the type of facility, with certain facilities able to calculate their emissions based on fuel source type and other data, while others must install continuous emission monitoring equipment. Most facilities will be required to report annually; however, facilities already reporting emissions under programs such as the Clean Air Act's Acid Rain Program will be required to report quarterly. The rule also establishes record keeping

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<sup>1</sup> Pursuant to Section 98.8 of the final rule, a violation of the rule includes, but is not limited to, "failure to collect data needed to calculate GHG emissions and failure to continuously monitor and test as required."

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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requirements, including that emission records and other information be maintained for a period of three years. EPA plans to verify the data submitted by covered facilities and will not allow for third party verification. Covered facilities are required to self-certify that the data they submit to EPA is accurate.

### **Enforcement by EPA**

EPA Administrator Jackson has made climate change a priority for the EPA. For example, in late August 2009, Cynthia Giles, EPA Assistant Administrator for Enforcement and Compliance Assurance, underscored the role that enforcement of the rule will play, particularly in relation to the development of GHG legislation and regulation, when she stated that, "the initial place where the enforcement office will be a significant participant will be in the enforcement of the greenhouse gas reporting rule...it's really essential, especially if we have a cap-and-trade program, which we expect to get, it's essential the accounting system have real integrity, and it's an important role for us and others in the agency to make sure it does." If the head of EPA's Enforcement Division backs up the rhetoric, facilities that fail to report would be facing enforcement under the Clean Air Act, which can lead to civil penalties of up to \$37,500 per day per violation.

While the final reporting rule itself may not impose a significant additional burden on industry, it does represent the first time that industrial sources beyond the electricity generation sector will be required to monitor and report GHG emission data to the EPA. The imminent deadline for compliance, coupled with what appears to be an aggressive enforcement stance taken by the EPA, is likely to be a challenge for industry.

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