

EPA ISSUES FINAL MANDATORY GHG REPORTING RULE

The EPA issued a rule on September 22, 2009 requiring that, beginning in 2010, approximately 10,000 American companies must report annually their emissions of a suite of greenhouse gases (GHGs). The agency issued the final rule pursuant to a directive in the 2008 Omnibus Appropriations Bill (enacted in December 2007).

Many thousands of companies that have never addressed the issue of measuring and reporting their GHG emissions will be required to do so in the next few months. EPA estimates that about 30,000 companies will be required to evaluate whether they have reporting obligations and that approximately 10,000 companies will actually have to report. This is an order of magnitude larger than the total number of companies, such as utilities and power generators, that currently report CO₂ emissions under the Clean Air Act. Some other industrial companies voluntarily report CO₂ emissions under the Energy Department's Section 1605(b) program, but these companies report by corporate entity, not by individual facility as EPA's new mandatory rule will require.

AFFECTED ENTITIES AND REPORTING THRESHOLDS

EPA's reporting requirements will be imposed on a wide range of companies, and the threshold for reporting will be measured by the amount of CO₂-equivalent (CO₂e) emitted. CO₂e describes the quantity of CO₂ for a given mixture and amount of GHGs that would have the same global warming potential when measured over a specified timeframe. The affected entities and processes include:

- Regardless of CO₂e emitted: electricity generation, adipic acid production, aluminum production, ammonia manufacturing, cement production, HCFC-22 production, certain HFC-23 destruction processes, lime manufacturing, nitric acid production, petrochemical production, petroleum refineries, phosphoric acid production, silicon carbide production, soda ash production, titanium dioxide production;
- If the facility emits 25,000 metric tons or more CO₂e per year: ferroalloy production, glass production, hydrogen production, iron and steel production, lead production, pulp and paper manufacturing, and zinc production;
- Municipal solid waste landfills that generate methane in amounts greater than or equal to 25,000 metric tons CO₂e per year and manure management systems with combined methane and nitrous oxide emissions greater than or equal to 25,000 metric tons CO₂e per year;
- Facilities not falling into any of the above categories that emit 25,000 metric tons or more CO₂e per year and have an aggregate maximum rated heat input capacity of the stationary fuel combustion units at the facility of 30 mmBtu/hr or greater;

BEIJING

BRUSSELS

LONDON

NEW YORK

SAN DIEGO

SAN FRANCISCO

SILICON VALLEY

WASHINGTON

WWW.COV.COM

- Suppliers of coal-to-liquid products, petroleum products, natural gas and natural gas liquids, or greenhouse gases; and
- Manufacturers of heavy duty and off-road vehicles and engines, including aircraft, locomotive, and marine diesel engine manufacturers and motorcycle and personal watercraft manufacturing facilities.

No final rule has been issued for the following entities or processes: electronics manufacturing, ethanol production, fluorinated GHG production, food processing, industrial landfills, magnesium production, oil and natural gas systems, sulfur hexafluoride from electrical equipment, underground coal mines, wastewater treatment, or suppliers of coal.

REPORTING TIMETABLE

Measurement requirements will begin in January 2010; the first reports for most entities will have to be filed with EPA at the end of March 2011. Engine reporting requirements begin with model year 2011.

The final rule responds to some of the major concerns raised in stakeholder comments on the proposed rule. For instance, commenters were concerned that affected facilities would have insufficient time to put new measurement systems and procedures in place before the 2010 monitoring period began. In response, EPA is allowing measurements during the first part of 2010 to be made using existing monitoring methods, supplier data, engineering calculations, or other company data, rather than the methods specified in the final rule. If needed, facilities may ask for an extension of these more lenient requirements through the end of 2010.

KEY REPORTING AND RECORDKEEPING REQUIREMENTS

- The GHGs covered by the rule include carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, HFCs, PFCs, and other fluorinated gases.
- Reporting is at the facility level, except that suppliers of carbon fuels and mobile sources will report at the corporate level.
- The final rule provides elaborate methodologies for calculating emissions in the reporting categories.
- Records must be retained for at least three years. Records to be retained include the annual GHG reports as well as the data and methods used to generate them.
- Entities that fail to monitor or report GHG emissions in compliance with the rule may be subject to enforcement action, including administrative, civil, and criminal penalties.

LOOKING FORWARD

The new requirements and increased public attention to GHG reporting by virtually all major U.S. industrial and fuel companies will dramatically enhance public attention to companies' "carbon footprints" and will thus present new challenges to companies in the following areas:

- Increased attention by investors, advocacy groups and regulators to corporate disclosure of the financial implications of climate and carbon risks reflected in financial statements or other SEC disclosures.
- Many companies will be faced not only with new challenges relating to the technology, methodology and auditing of their "carbon footprint", but once they publicly report they may feel more pressure to address carbon risks embedded in their asset and loan

portfolios (including in any M&A transactions), and develop risk mitigation strategies in their corporate planning.

- Significantly-enhanced reputational risk issues will be raised by these new reporting, disclosure and strategic obligations, particularly for consumer-facing organizations. Already, reports based on a combination of voluntary disclosures and estimated data are raising reputational stakes:
 - On September 21, 2009, the Carbon Disclosure Project (CDP) published its 2009 Global 500 Report. The report, produced by PricewaterhouseCoopers, scores companies according to several metrics, including their willingness to disclose emissions data and steps they have taken to combat climate change. This year 332 of the S&P 500 firms submitted data, the highest response rate to date.
 - Also on September 21, 2009, Newsweek released its first Green Corporate Rankings. Like the CDP, Newsweek focused on the S&P 500, scoring companies on environmental impact, green policies, and reputation. Companies that did not comply with disclosure requests were still assigned a rank and emissions data for those companies were estimated by Trucost, an environmental research organization.

The EPA's final rule is available at:

<http://www.epa.gov/climatechange/emissions/ghgrulemaking.html>

If you have any questions concerning the material discussed in this client alert, please contact the following members of our clean energy & climate industry group:

George Frampton	212.841.1260	gframpton@cov.com
Ruben Kraiem	212.841.1002	rkraiem@cov.com
Robert Fleishman	202.662.5523	rfleishman@cov.com
Stuart Irvin	202.662.5129	sirvin@cov.com

This information is not intended as legal advice, which may often turn on specific facts. Readers should seek specific legal advice before acting with regard to the subjects mentioned herein.

Covington & Burling LLP is one of the world's preeminent law firms known for handling sensitive and important client matters. This promotional communication is intended to bring relevant developments to our clients and other interested colleagues. Please send an email to unsubscribe@cov.com if you do not wish to receive future emails or electronic alerts. Covington & Burling LLP is located at 1201 Pennsylvania Avenue, NW, Washington, DC 20004-2401.

© 2009 Covington & Burling LLP. All rights reserved.