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*Jenner & Block on***U.S. EPA Proposes Mandatory Greenhouse Gas Emission Reporting Rule for Emissions From Stationary and Mobile Sources**

By Gabrielle Sigel and Michael R. Strong

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Background. On March 10, 2009, U.S. EPA released a 593-page proposed rule for mandatory reporting of greenhouse gas (GHG) emissions. The proposed rule was required in an appropriations bill signed by President Bush in December 2007. As drafted, the rule requires the first annual GHG emission report to be submitted by a wide-range of industries on March 31, 2011, covering emissions for the calendar year beginning January 1, 2010. EPA estimates that its rule will cover 85-90% of total U.S. GHG emissions, from approximately 13,000 facilities, at a cost of 4 cents per metric ton of reported emissions.

The proposed rule requires the following industries to report their emissions:

- Any emitter of a minimum of 25,000 metric tons annually of GHGs;
- Other specified sources, with different, lower or no GHG thresholds;
- Vehicle and engine manufacturers; and
- Suppliers of fossil fuels and industrial GHGs.

The GHGs addressed by the proposed rule are: carbon dioxide (CO₂); methane (CH₄); sulfur hexafluoride (SF₆); nitrous oxide (N₂O); perfluorocarbons (PFC); hydrofluorocarbons (HFC); and other fluorinated gases, including nitrogen trifluoride (NF₃) and hydrofluorinated ethers (HFE). All GHGs will be measured and reported in CO₂ equivalents (CO₂e), based on a conversion table, Table A-1, to the proposed rule.

Reporting Threshold Calculation for Stationary Sources. Unless otherwise addressed, any stationary facility that meets the annual emissions threshold of a total of 25,000 tons of CO₂e must report all GHGs for which there are methods to measure data. Notably, EPA's threshold is higher than the 10,000 ton-CO₂e threshold specified in the 110th Congress' Lieberman-Warner bill. A facility may develop capacity-based thresholds, if feasible. Those facilities in the Acid Rain Program, typically electricity generators and oil refineries, are expected to use capacity-based thresholds. Some facilities will have no threshold or thresholds different from 25,000 tons of CO₂e. The threshold applicable to each source category is provided in the section of the proposed rule entitled "§ 98.2 Do I Need to Report?". EPA also provides tables summarizing the

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threshold triggers in its Fact Sheet for the proposed rule's General Provisions, at: www.epa.gov/climatechange/emissions/downloads/GeneralProvisions.pdf.

All suppliers of fossil fuels, *i.e.*, producers, importers, and exporters, would be required to report the total volume of fuel placed in the economy that year and the emissions associated with complete oxidation of that fuel. EPA recognizes that counting emissions from both suppliers and combustion sources will lead to double-reporting of GHG emissions. However, EPA seeks to obtain this information from both "downstream" and "upstream" sources in order to have a broad database for future policy decisions. (See March 10, 2009, pre-Federal Register publication of proposed rule (Draft), pp. 93-95.)

Suppliers of industrial GHGs, *i.e.*, fluorinated gases, N₂O, and CO₂, would be required to report the annual volume they place in the economy and the emissions associated with a complete release of their products. Suppliers are subject to a threshold of a volume of gases potentially releasing 25,000 tons of CO₂e, annually.

Reporting Methodology for Stationary Sources. The reporting methodology for stationary sources varies depending upon the industry sector, but generally is at the facility, rather than corporate, level. Facilities already required to report and collect data regarding one or more GHG, such as those facilities regulated under the Clean Air Act Acid Rain Program, would report GHG emissions based on direct measurements of emissions from each facility. Facility-specific calculation methods will be used for other sources. The proposed rule provides those calculation methods by industry sector, with sectors defined by their NAICS code, starting at Subpart C.

Reporting by Mobile Sources (Vehicle and Engine Manufacturers). Most mobile source manufacturers already are required to measure and report CO₂ under U.S. EPA and California regulations. Under the proposed rule, these requirements would be expanded to include CO₂, CH₄, N₂O, and HFCs for new engines and vehicles. Emissions would be reported annually, at a rate such as grams/mile, which would make it similar to current reporting requirements. Small manufacturers, as already defined for each mobile source category in [40 C.F.R. Parts 1033](#) through 1065, would be exempt from reporting requirements.

The proposed rule currently does not require that industries or state/local governments with vehicle fleets report their in-use emission data. However, EPA seeks public comment on whether such data should be mandatorily reported. (See Draft, p. 753.)

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Reporting Procedures and Liability. Except for those facilities already required to report a GHG emission more often, such as those reporting GHGs pursuant to the Acid Rain Program, reporting would occur once each year. The beginning of the reporting schedule will be adjusted if the rule is not finalized in time. All reporting would be to a central EPA registry, with electronic forms to be provided by EPA. As in most other EPA reporting regimens, no third-party verification of data would be required. The facility's or supplier's owner/operator will be required to certify the data's accuracy. EPA would be entitled to bring an enforcement action for non-compliance, including inaccurate reporting or failure to report.

Record Retention. A facility or supplier subject to this rule would be required to maintain, for five years, records with the following information:

- The annual GHG emission reports;
- A list of all units, operations, processes, and activities for which GHG emissions are calculated;
- The data used to calculate GHG emissions for each unit, operation, process, and activity, categorized by fuel or material type;
- Documentation of process used to collect the data for GHG emission calculations;
- GHG emission calculations and methods used;
- All emission factors used for GHG emissions calculations;
- Facility operating data or process information used for GHG emission calculations;
- Names and documentation of key facility personnel involved in calculating and reporting GHG emissions;
- A log book documenting any procedural changes to the GHG emission accounting methods and any changes to the instrumentation critical to GHG emission calculations

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- Missing data computations;
- A written quality assurance performance plan; and
- All other data specified in any applicable subpart of the rule.

Finalizing the Rule. The proposed rule, when finalized, will be codified at [40 C.F.R. Part 98](#). The Draft and comprehensive information on the proposed rule can be found at: www.epa.gov/climatechange/emissions/ghgrulemaking.html.

Practice Pointers

1. Comments on the proposed rule must be submitted 60 days after the Draft's publication in the Federal Register. Public hearings will be held on April 6 and 7, 2009, in Washington, D.C., and on April 16, 2009, in Sacramento, California. Be aware of these deadlines if you are considering submitting comments.
2. If the rule goes into effect according to U.S. EPA's proposed timetable, regulated industries now have less than 9 months to begin gathering data for reporting. Therefore, the regulated community should start planning now, including by reviewing carefully the effect of the proposed rule on their industry sector(s).
3. If your industry sector may be required to report GHG emissions, you should begin drafting the necessary procedures to accurately collect the data, generate necessary documentation, retain documents, determine quality assurance, and certify accuracy. Although U.S. EPA may not require third-party verification, because of the compliance obligations associated with the rule, an audit function of some type should be implemented before a facility owner/operator signs the certification of accuracy required by the reports.
4. When the rule is finalized, companies that determine that the rule does not require them to report — because of emissions below the threshold or otherwise — should document and retain the bases for that determination.

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5. GHG emission reporting should be considered the first step towards GHG emission reduction regulations. Those regulations likely will follow Congressional action. However, the proposed reporting rule's broad scope — both in GHGs and in sources required to be reported — indicates that the Obama Administration is preparing for comprehensive GHG emission reduction rules.

For complete coverage of greenhouse gases and global climate change, see [Environmental Law Practice Guide Ch. 17C](#); [Treatise on Environmental Law Ch. 1A](#).

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About the Authors. [Gabrielle Sigel](#), a partner in Jenner & Block's Environmental Practice, is Co-Chair of her Firm's [Climate and Clean Technology Law Practice](#).

Ms. Sigel's national practice focuses primarily on environmental, safety and health litigation and counseling, toxic tort defense, and insurance coverage litigation and counseling. She recently concluded several toxic tort lawsuits concerning a contaminated site located in a residential area. A significant portion of Ms. Sigel's litigation practice involves representing employers in matters concerning work-related injuries, including OSHA proceedings, personal injury lawsuits, criminal investigations, workers' compensation hearings and insurance coverage claims.

In addition to her litigation practice, Ms. Sigel advises clients on a variety of counseling, regulatory, and transactional issues. For example, she currently is advising a multinational corporation on how to address climate change issues, including working to develop definitions, inventory, and programs for greenhouse gas emission reduction. Her transactional experience has included due diligence investigations of environmental, safety and health issues nationwide, in Europe, and in Canada, in preparation for both sales and acquisitions of manufacturing concerns.

Ms. Sigel has been an adjunct professor, teaching environmental law at Northwestern University School of Law. She is active in the American Bar Association, Sections of Litigation and Environment, Energy and Resources. The Illinois State

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Bar Association appointed her to its Environmental Law Section Council. Ms. Sigel began developing her diverse legal practice when she joined Jenner & Block in 1983, immediately after graduating cum laude from Boston University School of Law. Ms. Sigel is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability.

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About Jenner & Block. Jenner & Block LLP is a national law firm with over 450 lawyers experienced in virtually every area of the law. Jenner & Block's reputation as one of the country's most successful law firms has been established by consistently delivering excellent legal counsel to clients in the boardroom and the courtroom, from the trial level through the United States Supreme Court. In keeping with the Firm's tradition of proactively addressing the needs of the global business community, Jenner & Block's Climate and Clean Technology Law Practice takes a unique, holistic and cross disciplinary approach to addressing its clients' needs in this rapidly evolving area of the law.

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