

CLIMATE CHANGE & SUSTAINABILITY ALERT

MARCH 13, 2009



Shook, Hardy & Bacon applies a unique multidisciplinary approach to the business challenges, risks and opportunities arising from today's international focus on climate change and sustainability.

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In anticipation of federal climate change legislation, the U.S. Environmental Protection Agency has invoked the authority of the Clean Air Act to propose the first comprehensive national system for reporting emissions of carbon dioxide and other greenhouse gases produced by major sources in the United States.

AIR: EPA PROPOSES FIRST NATIONAL SYSTEM FOR REPORTING GREENHOUSE GAS EMISSIONS

Under the authority of the Clean Air Act, the U.S. Environmental Protection Agency (EPA) has proposed the first comprehensive national system for reporting greenhouse gas emissions (GHG) produced by large sources in the United States. EPA Administrator Lisa Jackson signed the proposed rule Tuesday, March 10, 2009, stating that "efforts to confront climate change must be guided by the best possible information."

With the new reporting system, EPA claims that it will have comprehensive and accurate data about greenhouse gas production. The proposed rule does not require the control of greenhouse gases, but instead requires that sources above certain threshold levels monitor and report emissions.

The new reporting requirements would apply to suppliers of fossil fuel and industrial chemicals, manufacturers of vehicles and engines and large direct emitters of greenhouse gases with emissions equal to or greater than a threshold of 25,000 metric tons per year.

Approximately 13,000 facilities, which are purportedly responsible for 85 to 90 percent of the GHG emitted in the United States, would be covered by the proposed rule. Most small businesses, however, would not be subject to the reporting require-

ments because their emissions would fall well below the threshold. For a list of facilities to which the proposed rule would apply, go to: <http://www.epa.gov/climatechange/emissions/downloads/General-Provisions.pdf>.

The proposed rule would cover carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF₆), and other fluorinated gases including nitrogen trifluoride (NF₃) and hydrofluorinated ethers (HFE). The first annual report would have to be submitted to EPA in 2011 for the 2010 calendar year, although vehicle and engine manufacturers would not begin reporting until model year 2011.

Under the Bush administration, the EPA previously challenged the assumption that greenhouse gases were "air pollutants" regulated under the Clean Air Act. *Massachusetts v. EPA*, 549 U.S. 497 (2007). The U.S. Supreme Court held, however, that the statute authorized the EPA to regulate greenhouse gases if the agency formed a judgment that such emissions contributed to climate change.

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The Court also held that the EPA did not offer a reasoned explanation for its refusal to determine whether greenhouse gases contributed to climate change. In light of the proposed rule, the EPA has apparently decided that global warming does threaten both public health and welfare and that greenhouse gases do contribute to climate change and are therefore pollutants regulated under the Clean Air Act. A formal finding to that effect by the EPA appears to be scheduled for April 16, followed by a 60-day public comment period and two public hearings before the finding becomes final.

The reporting methods on the proposed rule were built extensively on existing GHG reporting programs and guidance documents, including:

- National programs such as DOE's 1605b, EPA's Acid Rain Program, voluntary partnerships such as Natural Gas STAR, and the U.S. Greenhouse Gas Inventory;
- State and regional programs such as The Climate Registry, The Regional Greenhouse Gas Initiative, and GHG programs in states such as California, New Jersey and New Mexico;
- Protocols developed by nongovernmental organizations such as World Resources Institute/World Business Council for Sustainable Development;
- Programs from industrial trade organizations, such as the American Petroleum Institute and the Cement Sustainability Initiative; and
- International programs, including the Intergovernmental Panel on Climate Change, the European Union's Emissions Trading System, and the Environment Canada reporting rule.

The EPA estimates that the expected cost to the private sector to comply with these requirements would be \$160 million in the first year, and approximately \$127 million per year thereafter (or about \$0.04 per metric ton).

The EPA will accept public comments on the proposed rule 60 days after publication in the *Federal Register*. For a copy of the proposed rule, go to: http://www.eenews.net/features/documents/2009/03/10/document_gw_03.pdf. For more information on the proposed rule's general provisions, go to: <http://www.epa.gov/climatechange/emissions/downloads/GeneralProvisions.pdf>.

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CLIMATE CHANGE & SUSTAINABILITY PRACTICE

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Climate change and sustainability initiatives require sophisticated counsel in many disciplines from complex litigation and environmental regulation to intellectual property, corporate governance and document management. Our attorneys are uniquely prepared to assist companies manage their risks, stay ahead of regulatory changes and, if necessary, protect the company's interests in litigation.

SHB provides clients with the tools to develop growth areas, enter new markets and enhance profitability while maintaining a proactive outlook on resolving sustainability issues.

