

Electricity Generators Must Collect Data on GHG Emissions Starting January 1, 2010

October 23, 2009

Starting on January 1, 2010, electric generating facilities that emit greenhouse gases (GHGs) will be required to collect data on their GHG emissions and to report those findings to the U.S. Environmental Protection Agency (EPA). The first reports to be submitted to EPA under this new program will be due by March 31, 2011. This regulation imposes new requirements for electric generating units that do not already report their carbon dioxide emissions under another program and that emit 25,000 metric tons of GHGs per year.

The GHGs subject to the data collection/reporting requirement include carbon dioxide, methane, nitrous oxide, sulfur hexafluoride, hydrofluorocarbons, perfluorocarbons, and other fluorinated gases. The measurement of the emissions of each of these GHGs is converted to carbon dioxide equivalents (CO₂e) to normalize the amounts of these substances relative to the global warming potential of carbon dioxide.

GHG emission reports are first due March 31, 2011 for calendar year 2010 emissions. Reporting is generally done at the facility level on an annual basis. The reports must contain the aggregated CO₂e for specified source categories and supply categories. The reports must be certified as true and accurate by a designated representative of the owner or operator of the facility, with EPA verification of the reports. Significantly, *EPA has authority to take enforcement action for noncompliance with the rule's requirements.* In separate public comments not part of the rule, *EPA enforcement has emphasized its interest in pursuing enforcement actions targeted at reporting rule violations.*

The rule provides that a facility may be exempt from further reporting if it can demonstrate that reported GHG emissions are either less than 25,000 metric tons of CO₂e per year for five consecutive years, or less than 15,000 metric tons of CO₂e per year for three consecutive years, or if the facility closes all GHG-emitting processes and operations covered by the rule. A facility will need to return to reporting if its GHG emissions subsequently increase to 25,000 metric tons of CO₂e in any year. Thus, *even facilities that expect to be able to avoid reporting because their emissions fall just below the threshold levels may still need to implement careful monitoring practices.*

We strongly encourage those companies for which this rule introduces new data collection requirements to begin developing their data collection and reporting programs now. This preparatory work includes surveying current assets to identify covered facilities or products, developing data collection mechanisms with respect to such facilities, and developing auditing or other techniques to ensure data accuracy and maintenance. Facilities that believe they should not be subject to the reporting requirements because their emissions of GHGs are below the threshold, or that believe they can in the

future reduce their GHG emissions below the applicability threshold, must also ensure that their measurement and reporting systems are fully functional. This will aid them in making a strong case, at the earliest possible time, that they be excluded from coverage.

The regulations will be published shortly in the *Federal Register*, although copies of the rule, as well as additional EPA guidance documents, can be found at:

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

EPA has indicated that it expects data reported under the rule to be publicly accessible. Thus, companies should also consider the possible uses of the data that they will report, and satisfy themselves regarding the data's consistency with any prior public statements related to GHGs.

Morgan Lewis attorneys have had experience with a number of industries and their existing emissions reporting requirements, and can provide assistance in understanding the applicability, potential impact, and compliance requirements of the rule.

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Washington, D.C.

William H. Lewis, Jr.

202.739.5145

wlewis@morganlewis.com

Ronald J. Tenpas

202.739.5435

rtenpas@morganlewis.com

Princeton

Christopher J. McAuliffe

609.919.6619

cmcauliffe@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 22 offices in the United States, Europe, and Asia, Morgan Lewis provides comprehensive transactional, litigation, labor and employment, and intellectual property legal services to clients of all sizes—from global Fortune 100 companies to just-conceived startups—across all major industries. Our international team of attorneys, patent agents, employee benefits advisors, regulatory scientists, and other specialists—more than 3,000 professionals total—serves clients from locations in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered Attorney Advertising in some states.
Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2009 Morgan, Lewis & Bockius LLP. All Rights Reserved.