

**BEFORE THE UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY**

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Proposed Confidentiality Determinations for Data)	Docket No. EPA-HQ-
Required Under the Mandatory Greenhouse Gas)	OAR-2009-0924
Reporting Rule and Proposed Amendment to)	
Special Rules Governing Certain Information)	
Obtained Under the Clean Air Act)	
_____)	

COMMENT OF THE FEDERAL TRADE COMMISSION
September 30, 2010

Introduction

The Federal Trade Commission (FTC) appreciates the opportunity to submit this comment to the Environmental Protection Agency (EPA) on its proposed rule concerning confidentiality determinations for greenhouse gas (GHG) data.¹ On October 30, 2009, the EPA issued rules mandating that certain industries report data related to their GHG emissions.² The EPA now proposes to group that data into 22 categories and designate the confidentiality status of each category through rulemaking.

Three categories of data that the EPA proposes to make public contain potentially sensitive competitive business information: “inputs to emission equations,” “unit/process ‘static’ characteristics that are not inputs to emission equations,” and “unit/process operating characteristics that are not inputs to emission equations.” These three categories include data on production, throughput, raw material consumption, capacity, and future operations. Public disclosure of such facility- and firm-specific sensitive

¹ 75 Fed Reg. 39094 (proposed July 7, 2010), available at <http://edocket.access.gpo.gov/2010/pdf/2010-16317.pdf>.

² Mandatory Greenhouse Gas Reporting Rule, 40 C.F.R. Part 98 (2009).

business information may make it easier for reporting companies to either tacitly³ or explicitly coordinate their pricing decisions. This is especially true when certain market conditions are present, such as transparency, high concentration, impediments to entry, homogeneous products, and low elasticity of demand.⁴

Because many industries subject to the GHG reporting requirements share at least some of these market conditions, making confidential business information (CBI) public may lead to collusion that harms consumers through higher prices, decreased quality, and decreased innovation. Therefore, the FTC recommends that the EPA treat data that is an input to emission equations as confidential. The FTC also recommends that the EPA delay publication of any reported data concerning plant or unit capacity or future operating status until after reporting companies receive sufficient time to apply for confidential treatment. The competitive sensitivity of this data can vary by industry, which suggests that more information is needed to make a confidentiality determination.

Interest of the FTC

The Federal Trade Commission is an independent administrative agency charged with maintaining competition and safeguarding the interests of consumers.⁵ As part of its competition mission, the agency often provides input to federal and state policymakers on

³ Tacit coordination exists without any actual communication among competitors. *See, e.g. In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d. 651, 654 (7th Cir. 2002) (a tacit agreement to fix prices is, “an agreement made without any actual communication among the parties to the agreement.”).

⁴ *See* U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b) (2000) *available at* <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>, [hereinafter FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS].

⁵ Federal Trade Commission Act, 15 U.S.C. § 45.

the competitive implications of proposed laws and regulations.⁶ In its antitrust enforcement role, the FTC reviews mergers and challenges anticompetitive conduct across many industries that would be subject to the EPA's proposed rule on confidentiality, including petroleum refining, petrochemical production, natural gas processing, and other manufacturing industries, such as industrial gases and titanium dioxide production.⁷ In addition, FTC staff regularly studies and reports on competition in the petroleum industry.⁸

In the course of this work, the FTC applies established legal and economic principles as well as empirical analysis and recent developments in economic theory to consider how market structure, transparency, and dynamics affect the ability of rivals to explicitly or tacitly coordinate their competitive responses.⁹ In addition, the FTC has

⁶ See FTC Office of Policy Planning, Advocacy Filings, available at http://www.ftc.gov/opp/advocacy_date.shtml.

⁷ See FTC Competition Enforcement Database, available at <http://www.ftc.gov/bc/caselist/industry/index.shtml>.

⁸ Representative reviews in the petroleum industry in which FTC determined that a merger presented a competitive problem, and significant structural relief was obtained, include *In re Valero L.P.*, FTC Docket No. C-4141 (July 26, 2005) (divestiture of Kaneb terminal and pipeline assets in northern California, eastern Colorado, and greater Philadelphia area); *In re Phillips Petroleum Co.*, FTC Docket No. C-4058 (Feb. 14, 2003) (divestiture of Conoco refinery in Denver, Phillips marketing assets in eastern Colorado, Phillips refinery in Salt Lake City, Phillips marketing assets in northern Utah, Phillips terminal in Spokane, Phillips propane business at Jefferson City and East St. Louis); *In re Valero Energy Corp.*, FTC Docket No. C-4031 (Feb. 22, 2002) (divestiture of UDS refinery in Avon, California, and 70 retail outlets); *In re Chevron Corp.*, FTC Docket No. C-4023 (Jan. 4, 2002) (divestiture of Texaco's interests in the Equilon and Motiva joint ventures, including Equilon's interests in the Explorer and Delta pipelines); *In re Exxon Corp.*, FTC Docket No. C-3907 (Jan. 30, 2001) (divestiture of all Northeast and Mid-Atlantic marketing operations of the two parties and Exxon's Benicia, California, refinery). A listing of reports and other FTC activities involving the oil and gas industry is available at <http://www.ftc.gov/ftc/oilgas/index.html>.

⁹ See, e.g., U.S. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES §7 (2010) (describing anticompetitive effects of coordination among rivals), available at <http://ftc.gov/os/2010/08/100819hmg.pdf> [hereinafter FTC/DOJ HORIZONTAL MERGER GUIDELINES].

issued guidance addressing the harm to competition that can arise from collusion when competitors share sensitive business information.¹⁰ The agency has raised these issues in antitrust enforcement actions as well.¹¹

The EPA's Proposed Rule Regarding the Confidentiality of GHG Data

The EPA's Mandatory Greenhouse Gas Reporting Rule requires certain industries to submit data related to GHG emissions on an annual basis.¹² This data must include facility and unit identifier information, emissions, unit operating characteristics, unit and facility production, unit and facility inputs and quantities, and unit capacity utilization.¹³ The EPA explains that these comprehensive, nationwide GHG data will provide a better understanding of the sources of GHGs, and will guide development of policies and programs to reduce GHG emissions.¹⁴

The Clean Air Act requires the EPA to make this data public unless they constitute confidential business information (CBI). The Clean Air Act also requires the

¹⁰ FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b) (discussing potential harms to competition when competitors exchange or disclose sensitive business information); *see also* DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, Statement 6 (Aug. 1996) (same); *available at* <http://www.ftc.gov/bc/healthcare/industryguide/policy/hlth3s.pdf>; Letter from FTC Staff to Sen. James L. Seward, New York Senate (Mar. 31, 2009) (disclosure of sensitive business data in one market segment may chill competition in multiple market segments); *available at* <http://www.ftc.gov/os/2009/04/V090006newyorkpbm.pdf>.

¹¹ *See, e.g., In re* National Association of Music Merchants, FTC Docket No. C-4255 (Mar. 4, 2009) (prohibiting information exchanges among music merchant competitors), *available at* <http://www.ftc.gov/opa/2009/03/namm.shtml>.

¹² 40 C.F.R. Part 98 (2009).

¹³ For a complete list of reported categories of data, *see* 75 Fed. Reg. at 39097.

¹⁴ *See* ENVIRONMENTAL PROTECTION AGENCY, FACT SHEET, MANDATORY REPORTING OF GREENHOUSE GASES (40 CFR PART 98), *available at* <http://www.epa.gov/climatechange/emissions/downloads09/FactSheet.pdf>.

EPA to release “emission data” even if that data is CBI.¹⁵ The EPA thus explains that GHG data will fall into one of three confidentiality classes:

- “emission data” as defined by the EPA, which must be publicly released;
- non-emission data that does not amount to CBI and thus must be publicly released; and
- non-emission data that is CBI, which must not be publicly released.

Historically, the EPA evaluated whether information qualified for confidential treatment on a case-by-case basis, upon the request of the reporting company and subject to considerations of whether the disclosure would subject the reporter to business harm.¹⁶ The EPA believes, however, that the volume of GHG data to be reported makes a case-by-case determination unduly burdensome for reporting companies and the agency. Moreover, the EPA states that the amount of time required for the agency to evaluate each confidentiality request would delay making the GHG data public and diminish its usefulness.¹⁷ To address these concerns, the EPA’s proposed rule groups GHG data into 22 data categories and identifies the confidentiality status (emission data, non-CBI, or CBI) of each category.¹⁸

Public Availability of Otherwise Confidential Business Information

¹⁵ 42 U.S.C. §7414(c) (“Any records, reports or information obtained under [the Clean Air Act] shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof, (other than emission data) . . . if made public, would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information or particular portion thereof confidential . . .”).

¹⁶ See 75 Fed. Reg. at 39101.

¹⁷ *Id.* at 39102. Companies must annually report the previous year’s data to the EPA by March 31st. The EPA plans to release public data after verifying it. *Id.* at 39106

¹⁸ *Id.* at 39094.

The FTC commends the EPA's thorough and careful analysis identifying data that should be considered CBI or non-CBI. The FTC is concerned, however, that the proposal may allow for the public release of competitively sensitive information. Specifically, because of the potential risk to competition, we suggest that data reported under three categories – “inputs to emission equations,” “unit/process ‘static’ characteristics that are not inputs to emission equations,” and “unit/process operating characteristics that are not inputs to emission equations,” – may warrant confidential protection.

Inputs to emission equations. The Mandatory Greenhouse Gas Reporting Rule lists methods for calculating GHG emissions depending on the source of the emissions. Many of these methods involve the use of specified emission equations requiring particular data inputs.¹⁹ Inputs to emission equations include, for example, volume of fuel combusted per year; production/throughput and raw material consumption, such as petrochemical production; characteristics of raw materials, products, and by-products; and facility operating information.²⁰

The EPA proposes to designate the data category “inputs to emission equations” as “emission data” under the Clean Air Act²¹ even though the agency recognizes that much of the data falling within this category would otherwise be CBI. For instance, the

¹⁹ 40 CFR Part 98. *See also* 75 Fed. Reg. at 39108. Often, the rule provides more than one calculation method and allows reporting facilities to select their preferred method. The EPA notes that in many cases, use of a “continuous monitoring system” reduces the number of data elements that a company must report compared to use of an emission equation. *Id.* at 39109.

²⁰ *See* 75 Fed. Reg. at 39108-09 (describing types of data that would fall within the “inputs to emission equations” data category).

²¹ EPA regulations define “emission data” as “information necessary to determine the identity, amount, frequency, [and] concentration . . . of any emission which has been emitted by the source” 40 CFR 2.301(a)(2). The EPA considers inputs to emission equations to be “information necessary to determine . . . the amount” of any emission and, therefore, views such inputs as “emission data.” 75 Fed. Reg. at 39109.

EPA has designated data on production, throughput, and raw materials consumed as CBI when not used as an input to an emission equation.²² In doing so, the EPA recognized that an individual company could be harmed if rivals obtained the reported data, which could reveal strategic information on capacity, market position and costs.²³ Nevertheless, because “emission data” must be made public whether CBI or not, the EPA’s classification of inputs to emission equations necessarily precludes protecting this information.

Unit/process “static” characteristics and unit/process operating characteristics that are not inputs to emission equations. By designating “unit/process ‘static’ characteristics that are not inputs to emission equations” as non-CBI, the proposed rule would make certain capacity information public. The EPA explains that much capacity information is already publicly available through other reporting programs, reference materials and industry publications, making its release here not harmful.²⁴ Although that may be true in some industries, there are others in which accurate capacity data is not publicly available. In those cases, capacity information can be competitively sensitive.

By designating “unit/process operating characteristics that are not inputs to emission equations” as non-CBI, the proposed rule could make future operating status information public. For instance, companies must report anticipated dates and steps for

²² 75 Fed. Reg. at 39106 (“[r]ecognizing that the Inputs to Emission Equations Data Category may contain data elements that are considered sensitive by many businesses . . .”).

²³ *Id.* at 39115-16.

²⁴ *Id.* at 39112.

installing monitoring equipment.²⁵ This information could be sensitive when it alerts competitors that a production facility will be taken off-line.

The FTC is concerned that the EPA's proposal to designate "inputs to emission equations" data as public "emission data" and the EPA's characterization of certain capacity and operational status information as non-CBI could injure consumers by harming market competition (not merely individual competitors).²⁶ Sharing highly sensitive data under the auspices of a government-mandated reporting program may be as likely to lead to anticompetitive behavior as sharing that data by private agreement.

Competition Policy Concerns When Rivals Share Information

In some cases, sharing information among competitors may increase the likelihood of collusion or coordination on matters such as price or output.²⁷ Coordinated interaction among competitors includes collusive agreements, but it can also include conduct not necessarily condemned by the antitrust laws.²⁸ Firms that engage in coordinated interaction are better able to predict, even absent explicit agreement, how

²⁵ *Id.* at 39113.

²⁶ FTC has recognized that information exchange facilitated by a merger in otherwise concentrated petroleum markets can by itself lead to anticompetitive effects. *See In re TC Group, L.L.C.*, FTC Docket No. C-4183 (Jan. 25, 2007) (acquisition of partial interest in two of three independent terminaling companies in the southwestern United States could cause anticompetitive effects due to information exchange); *In re Chevron Corp.*, FTC Docket No. C-4144 (June 10, 2005) (Chevron's acquisition of Unocal's reformulated gasoline patents would allow Chevron greater opportunity than Unocal would enjoy alone to coordinate with refining competitors to raise the price for reformulated gasoline).

²⁷ FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b).

²⁸ This includes parallel accommodating conduct by rivals in which "each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence, nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms." FTC/DOJ HORIZONTAL MERGER GUIDELINES §7.

rivals will react to price changes.²⁹ The antitrust agencies have explained how coordinated interaction harms consumers: “[c]oordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm’s incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm’s incentive to raise prices by assuaging the fear that such a move would lose customers to rivals.”³⁰

The potential for information disclosure to harm competition will depend on the structure of the affected market and the type of information disclosed.³¹ The ability of rival firms to engage in coordinated conduct depends on the strength and predictability of rivals’ responses to price change or other competitive initiative. Markets are more vulnerable to coordinated conduct if each firm’s rivals can promptly and confidently observe its behavior. Market factors that support this ability and increase the likelihood of coordination include transparency, concentration, entry barriers, homogeneous

²⁹ The FTC recognizes that rivals in the petroleum and other industries collect market intelligence to anticipate and respond to rivals’ output and pricing decisions. *See, e.g., In re Chevron Corp.*, FTC Docket No. C-4023, Analysis of Proposed Consent Order to Aid Public Comment (Sept. 7, 2001) (“Integrated refiner-marketers carefully monitor the prices charged by their competitors’ retail outlets, and therefore can readily identify firms that deviate from a coordinated or collusive price.”).

³⁰ FTC/DOJ HORIZONTAL MERGER GUIDELINES §7.

³¹ *See Todd v. Exxon Corporation*, 275 F.3d 191, 199 (2d. Cir. 2001) (quoting *U.S. v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978)) (“A number of factors including most prominently the structure of the industry involved and the nature of the information exchanged are generally considered in divining the procompetitive or anticompetitive effects of [the information disclosed.]”); *see also* FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b).

products, and low elasticity of demand.³² Many of these market factors are present in industries covered by the EPA's rule.³³

Information disclosures raise particular competitive concerns when the information contains details about output, production capacity, production rates, current price and cost data, and other business plans.³⁴ Disclosure under the proposed rule of the "inputs to emission equations," which can reveal capacity and capabilities, other capacity information, and forward-looking operational status would increase transparency in the affected industries. In many instances, the actual output of a unit could be made public. In other cases, the amount of feedstock used, the intermediate product produced, or the

³² FTC/DOJ HORIZONTAL MERGER GUIDELINES §7.

³³ For instance, in relevant geographic markets with few players, the FTC has expressed concerns about mergers or acquisitions in the petroleum industry that would reduce the number of competitors necessary to engage in tacit or overt collusion. *See, e.g., In re Dan Duncan*, FTC Docket No. C-4173, Consent Agreement and Order (2006) (in merger matter, consent agreement ordering divestiture of certain pipeline assets related to salt dome storage for natural gas liquids in Mont Belvieu, Texas – a concentrated market with high barriers to entry – in order to protect competition in that region), *available at* <http://www.ftc.gov/os/caselist/0510108/0510108.shtm>; *In re Dow Chemical*, FTC Docket No. C-4243 (2009) (consent agreement regarding Dow Chemical's acquisition of Rohm and Haas, which implicated glacial acrylic acid, butyl acid, ethyl acrylate, acrylic latex polymers for traffic paint, and hollow sphere particles throughout North America – all concentrated markets with high barriers to entry), *available at* <http://www.ftc.gov/os/caselist/0810214/index.shtml>; *In re BASF, Inc.*, FTC Docket No. C-4253 (2009) (in a merger involving the production of pigments globally – a concentrated industry with high barriers to entry – FTC ordered BASF to maintain the viability of certain assets so as to preserve competition in the relevant market). Additional examples of FTC orders involving industries subject to the GHG reporting requirements may be obtained through the FTC Competition Enforcement Database, *available at* <http://www.ftc.gov/bc/caselist/industry/index.shtml>.

³⁴ *See* FTC/DOJ GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS §3.31(b) (describing potential harm to competition when firms disclose competitively sensitive data); *see also* Susan S. DeSanti and Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 ANTITRUST L.J. 93 (1994) (describing activities that make it easier for parties to coordinate on price or engage in tacit collusion).

unit's capacity would be made public.³⁵ As a result, collusion or coordination could become more likely as firms are better able to predict one another's behavior.

For example, improved information on the capacity and capabilities of a rival's facility can make it easier for a firm to anticipate how the rival will react to any strategic changes it makes. More information about a rival's output also will increase a firm's ability to detect when a rival deviates from the agreement, which need not be explicit. In contrast, without output information, it would be difficult for a firm to determine whether a price decrease is due to a fall in overall market demand or an increase in output from a rival deviating from the agreement.

Improved information can lead to better coordination even when there is a gap in time between the reported conditions and the availability of the information. Competitors having capacity information that is one or two years old may be able to discern that capacity has not changed significantly in that time. As a result, publishing capacity data that is several years old could improve competitors' estimates of current capacity. The information on operating conditions, inputs, and outputs that would be made public through disclosure of "inputs to emission equations" data could also give a firm added insight into its rivals' cost structures.

In addition to increasing the likelihood of collusion, this information can decrease the competitiveness of a bidding process. In this case, the disclosed information can allow a firm to better anticipate rivals' bids, which may lead it to bid less aggressively, resulting in increased prices. Therefore, disclosed information that would allow rivals to

³⁵ See Memorandum, Data Category Assignments for Reporting Elements, EPA No. EPA-HQ-OAR-2009-0924, available at http://www.epa.gov/climatechange/emissions/downloads/10/CBI_Data-Category.pdf.

learn more about the underlying costs of their competitors has the potential to harm competition and consumers through higher prices. This can be true even when the information is one or two years old in industries where firms do not regularly upgrade their facilities. If a unit has not been upgraded, the underlying economics of the unit are unlikely to change and therefore the public release of older data may still threaten competition.

Designating Data as CBI

Because the disclosure of competitively sensitive business information can have adverse consequences for consumers, the FTC urges the EPA to consider the implications for competition when it decides what data should be publicly released under the proposed rule. Specifically, the FTC urges the EPA to consider designating as CBI – at least initially – “inputs to emission equations,” which can reveal capacity, capacity information in the data category “unit/process ‘static’ characteristics,” and forward-looking operational information in the data category “unit/process operational characteristics.” The EPA can then determine the confidentiality status of those data elements whose competitive sensitivity varies by industry.

The EPA may wish to consider an interpretation of “emission data,” as that term is used in the Clean Air Act and defined by EPA regulation, that allows the agency to classify inputs to emission equations as CBI.³⁶ EPA regulations define “emission data” as “information necessary to determine the . . . amount . . . of any emission”³⁷

³⁶ The EPA is seeking comment on its proposed interpretation of the term “emission data” to include data that are required to perform emission calculations specified in the Mandatory Greenhouse Gas Reporting Rules. 75 Fed. Reg. at 39101, 39105.

³⁷ 40 C.F.R. 2.301(a)(2). The EPA proposes that the inputs to the equations are “necessary to determine” the amount of emissions. 75 Fed. Reg. at 39105.

Inputs to the emission equations may not be “necessary to determine” the amount of emissions because EPA will be releasing the verified amounts to the public.³⁸ Assuming this interpretation of “emission data” is consistent with the Clean Air Act, classifying inputs to emissions equations as CBI would be an effective way to balance the Act’s policy goals of promoting transparency and protecting competition. Publicly releasing the verified, total amount of emissions by unit would achieve the Act’s purpose regarding public disclosure, while keeping sensitive business information confidential would achieve the Act’s stated goal of protecting CBI. The Commission urges the EPA to interpret the Clean Air Act and related regulations in a way that gives sufficient weight to the Congressionally-authorized goal of protecting market competition for the benefit of consumers.³⁹

Capacity and operational data are also potentially competitively sensitive, but the EPA may need more specific information about how competitors might use such information in a particular industry before determining whether it is CBI. For that reason, the EPA may wish to consider delaying a decision on publication of these categories until reporters can provide better information on the impact of making them public and the need for confidentiality in particular industries. If the EPA were to treat the capacity data as confidential, the information might be made publicly available in

³⁸ See *Natural Resources Defense Council v. Leavitt*, Civ. No. 04-01295, 2006 WL 667327, at *4 (D.D.C. 2006) (“[S]trict interpretation of the ‘necessary to determine’ requirement [for emission data] is warranted in order to ensure that the exception does not swallow the rule.”).

³⁹ The Congressionally authorized goal of protecting competition can be seen in the Clean Air Act’s protection of CBI and the federal antitrust laws’ prohibition against data sharing that facilitates explicit or tacit collusion and harms consumers. See *Todd*, 275 F.3d at 198-99 (explaining that information exchange among competitors can constitute an antitrust violation even absent an explicit agreement among them).

nationally aggregated form.⁴⁰ Delaying release of the data for an extended period could also alleviate competition concerns, but only if the historical data no longer reflected current capacity or current plant capabilities.

⁴⁰ It is important to keep in mind that there may be few firms in some geographic regions or in some industries, which would raise the concern that publishing even aggregate data might decrease competition. The Energy Information Administration developed rules to make the public release of data less likely to lead to such undesirable results. *See* U.S. ENERGY INFORMATION ADMINISTRATION, DISCLOSURE POLICY FOR EIA POWER SURVEYS, (updated June 30, 2010) (explaining that certain firm-specific data will not be disclosed), *available at* <http://www.eia.doe.gov/electricity/forms/sselecpower98.html>.