

Introduction and Background

In August 2011, EPA proposed to defer reporting of certain data elements under the mandatory reporting of greenhouse gases rule in response to concerns that public availability of various data elements reported under the mandatory reporting rule could cause substantial competitive harm. EPA deferred reporting data elements that are used as inputs to equations for calendar years 2010 through 2013 for some data elements and until 2015 for other data elements pending further evaluation. See Tables A-6 and A-7 in the final deferral rule: (<http://www.epa.gov/climatechange/emissions/CBI.html>).

The deferral decision arose out of concerns expressed by API and other industry groups regarding EPA's proposed public disclosure of confidential and sensitive business information submitted pursuant to the Greenhouse Gas Reporting Rule ("GHG RP"). To be clear, API takes no issue with and does not debate providing this information to EPA. Rather, API's concerns relate to EPA's position that certain business-sensitive and confidential information should be shared publicly, which could harm the competitive interests of the disclosers and trigger antitrust issues for companies. Specifically, disclosure of certain "inputs to emissions equations" data elements may cause substantial harm to API's members' competitive positions. This is so because public disclosure of confidential information such as production volumes and process-specific data can provide insight to competitors regarding sensitive operational limits and process capabilities. API members each maintain strict confidentiality of precisely this data. Companies often complete analyses of their competitors, including estimates of many of the data elements EPA proposed to actually *release* as not qualifying as CBI. Making this information publicly available would provide precise information about operations that likely will result in competitive harm to businesses.

The "inputs to emissions equations" data has also historically been protected, in part, to address antitrust concerns that arise from disclosing sensitive facility and firm-specific information. Disclosing certain "inputs to emissions equations" data elements raises significant antitrust concerns. The data elements at issue include cost- and output-related information which can influence prices. Antitrust laws generally prohibit competitors from sharing price, output, and other information that could facilitate anticompetitive coordination in pricing or production and, in turn, harm consumers. See *United States v. Container Corp. of America*, 393 U.S. 333 (1969). For these reasons, the FTC specifically commented on the proposed rule and took the position that EPA should not release "inputs to emissions equations" data on production, throughput, raw materials consumption, capacity, and future operations because "[p]ublic disclosure of such facility- and firm-specific sensitive business information may make it easier for reporting companies to either tacitly or explicitly coordinate their pricing decisions."¹

¹ The antitrust laws are designed to promote and preserve the competitive private enterprise system by encouraging free and open competition and the fairest distribution of high quality goods and services at the lowest possible prices. The basic provisions of the antitrust laws are found in the Sherman Act, Clayton Act, Robinson-Patman Act, and the Federal Trade Commission Act. Distilled, these Acts oblige regulated entities to ensure that they do not discuss or exchange information with their competitors on issues such as prices to be charged, division or allocation of markets or customers, distribution of products, profit levels, production of products or level of production, bases for determining prices, exchanges of price information to certain customers, among other issues. Violations of these

Examples of Competitive Positions and Antitrust Concerns for API Members

I. Refining Sector

- Refinery operators have “proprietary knowledge” that they consider “confidential business information” pertaining to their particular refinery units. Disclosure of GHG information under the GHG RP could result in this confidential information becoming available to competitors.
- For example, the GHG RP could require the disclosure of the quantity of each fuel combusted and the HHV, carbon content and molecular weight of each fuel where emission calculation methodology Tier 2 or 3 is used. This information, along with the identification and maximum rate heat capacity of each combustion unit provides competitors valuable trade information by knowing utilization rates of combustion units. Knowing the capacity utilization of energy, competitors could then calculate the production output of production units and of that refinery. Competitors could use this information along with the maximum rated and/or annual throughput required to be reported under some subparts to evaluate whether a refinery has existing capacity available to increase production and market share or is already at its maximum production and would need to invest capital to expand capacity in order to produce more. Having such information could provide competitors insights to make competitive decisions on expanding their own production rates or altering their pricing strategies to the detriment of the reporting company. Further, composition of fuels is sometimes used between fuel producers and customers to determine the value of the fuel and is considered propriety business information.
- For Hydrogen production (Subpart P), the proposed rule would require disclosure of the quantity of each fuel and feedstock, the quantity of hydrogen and ammonia produced, and the carbon content and molecular weight of each fuel and feedstock. Some hydrogen plants are licensed by the hydrogen technology company to the merchant hydrogen producer or refinery, which operates the hydrogen plants required to report under the GHG RP. Such licenses prohibit the owners and operators of the hydrogen plant from divulging certain process information, including: quantity of each fuel and feedstock, quantity of hydrogen and ammonia produced, and the carbon content and molecular weight of fuel and feedstocks. If owners and operators of hydrogen plants are required to report these data elements as non-CBI, they would face the proverbial Catch-22,

Acts can lead to imprisonment, fines, court issued injunctions, treble damage awards, and state penalties. Of relevance here, the Federal Trade Commission submitted comments in EPA’s CBI rulemaking and took the position that EPA’s proposed rule “may allow for the public release of competitively sensitive information” and, in particular, pointed to data under three categories that were at high risk and warrant confidential protection: “inputs to emissions equations,” “unit/process ‘static’ characteristics that are not inputs to emission equations,” and “unit/process operating characteristics that are not inputs to emission equations.” See FTC Comments at 6. With respect to “inputs to emissions equations” the FTC pointed out that “inputs to emissions equations” include annual fuel combustion volume, production/throughput and raw material consumption (such as petrochemical production), characteristics of raw materials, products, and by-products, and facility operating information which, if not characterized as “emissions data” would otherwise be CBI.

having to either risk litigation by the hydrogen technology company for divulging process information, or risk enforcement action by not reporting all required data elements.

- For a Refining Company, “proprietary knowledge” includes, but is not limited to, specific information about production volumes; process-specific parameters; unit data and capacities; sources, quantities and proportions of raw materials and additives; specific product and fuel composition and distribution data; fuel usage; energy and carbon content of input and output materials; operational capabilities; and ability to reconfigure the products slate due to market changes. Disclosure of the data elements which provide this information allows competitors to calculate members’ profit margins and harms their competitive positions. Disclosure of the data and detailed information required by the rule also can be used by competitors to understand a company’s market strategy, market demands for its products and its sources of revenue and profitability.

II. Onshore Oil and Natural Gas Production Sector

- For an onshore oil and natural gas production operator (Subpart W), confidential information that can “harm” its investment if released includes data about exploration or “wildcat” well(s) such as reporting the associated data for completion flow-back. Such harm is especially pronounced if a company drills and completes an exploration well, with hydraulic fracture stimulation, an entirely new area, a new formation in an existing productive basin/area, and (among other things) using a new technique in an existing productive formation in an existing productive basin/area. Because exploration wells are often drilled to gain proprietary information prior to purchasing a land/lease position and the information provides a competitive advantage to the company that drills the well, release of the information harms this competitive knowledge.
- The GHG RP requires that companies report the flow-back/completion gas volume specific to a formation-type/well-type/county combination – hence requiring reporting of the productivity of the exploration well described above. Disclosure of such data provides critical proprietary information to a company’s competitors and negates the competitive advantage that a company gains by risking substantial investment to gain that knowledge. Other government regulatory agencies, such as BOEM, BLM, and State Oil and Gas Commissions have provisions in their regulations that enable companies to designate a confidential well (also referred to as a “tight hole”) for a period of time ranging from 2 years to as long as 5 years with an ability to extend the confidentiality for cause.