

Updates on greenhouse gas emission disclosure requirements for defense contractors

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APRIL 23, 2024

Class deviation prohibits DoD from requiring contractors to disclose emissions

Over the past two years, the FAR Council has been working to develop a rule that would amend the Federal Acquisition Regulation ("FAR") to require contractors to inventory and report their greenhouse gas ("GHG") emissions and climate-related financial risk in order to be eligible for Federal awards. (Prior posts are available [here](#)¹ and [here](#)².)

The Department of Defense issued a Class Deviation to prohibit DoD contracting officers from requiring defense contractors to disclose their GHG emissions as a condition of contract award.

The FAR Council published a proposed rule in November 2022, in response to which it received over 37,000 public comments. Since then, a FAR Council team has been tasked with considering those comments and drafting a final rule.

Although the final rule has not yet been published, on February 25, 2024, the Department of Defense ("DoD") issued a Class Deviation³ to *prohibit* DoD contracting officers from requiring defense contractors to disclose their GHG emissions as a condition of contract award.⁴

It also prohibits DoD contracting officers from considering information related to a contractor's voluntary disclosure of GHG emission information otherwise provided in annual representations and certifications (e.g., the System for Award Management, or SAM) as a condition of award. The Class Deviation, therefore, effectively nullifies the effect of any FAR final rule on DoD procurements at least for the next year.

The Class Deviation applies indefinitely to nontraditional defense contractors (i.e. companies that have not entered into a contract with DoD for the year prior to the solicitation date that was subject

to full coverage under the cost accounting standards or for which the contractor was required to submit certified cost and pricing data).

This means nontraditional defense contractors will not be required to disclose their GHG emissions in connection with DoD procurements until the Defense Federal Acquisition Regulation Supplement ("DFARS") is updated or this Class Deviation is rescinded. Other defense contractors will not be required to disclose their GHG emissions for DoD procurements at least through December 22, 2024.

An exception to the Deviation may be granted where a contracting official determines disclosure is necessary to verify a contractor's own voluntary disclosure of its GHG emissions or other report. A waiver may be granted where the head of the contracting agency determines disclosure of GHG emission data is *directly related* to contract performance.

The DoD's Class Deviation applies indefinitely to nontraditional defense contractors.

Notably, the Class Deviation applies *only* to DoD agency procurements. Accordingly, it is possible that a final rule will be issued later this year that will require companies that contract with non-DoD (civilian) agencies to comply with mandatory GHG emission disclosure requirements.

If this occurs, companies that contract only with civilian agencies — or with both DoD and civilian agencies — will be required to make climate-related disclosures in response to civilian agency solicitations (even if they are not required to do so for DoD solicitations).

Moreover, while the Class Deviation applies indefinitely to nontraditional defense contractors, the current one-year prohibition on other defense contractors may end up having little impact (if it is not extended) where the proposed rule already anticipates giving contractors a one-year grace period within which to comply with the final rule's disclosure requirements.

SEC eliminates Scope 3 emissions from final rule on climate-related disclosures

In other climate-related disclosure news, the Securities and Exchange Commission (“SEC”) voted on March 6, 2024 to adopt long-awaited final⁵ rules on climate-related disclosures.

While the requirements under the SEC's stayed final rules increase companies' disclosure burden, they are generally less stringent than the requirements in the March 2022 proposed rules.

Less than a month later, however, the SEC issued a stay⁶ of the final rules pending judicial review of a number of petitions from across the political spectrum challenging the SEC’s authority to issue the regulation as well as the regulation’s provisions.⁷

While the requirements under the stayed final rules increase companies’ disclosure burden, they are generally less stringent

than the requirements in the March 2022 proposed rules. The SEC’s change of course is likely due, at least in part, to the SEC’s consideration of over 24,000 comments received in response to the proposed rules, many of which were critical of the SEC’s initial planned approach.

For example, contrary to the proposed rules, the final rules eliminate Scope 3 GHG emissions reporting altogether and limit the disclosure of Scope 1 and Scope 2 GHG emissions to only large accelerated filers and accelerated filers.

Notes:

¹ <https://bit.ly/3Uq7grm>

² <https://bit.ly/4b2PlwA>

³ <https://bit.ly/449EVJm>

⁴ The Class Deviation was issued pursuant to section 318 of the 2024 National Defense Authorization Act (“NDAA”).

⁵ <https://bit.ly/49J4ceq>

⁶ <https://bit.ly/3vWySer>

⁷ The challenges were brought in six federal courts of appeal and were consolidated in the U.S. Court of Appeals for the Eighth Circuit.

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This article was published on Westlaw Today on April 23, 2024.

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