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Eric Rothenberg

New York

D: +1-212-326-2003



Aircraft Emissions Controls Due for Adoption, But Potential Court Challenges Loom

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In our September 2014 Alert, we advised that that U.S. Environmental Protection Agency (“EPA”), under pressure from non-governmental organizations (“NGOs”), planned to issue a Clean Air Act Section 231 “endangerment finding” in support of aircraft emission controls to be coupled with an advance notice of proposed rulemaking (“ANPR”) on the same. The finding and ANPR were published in the Federal Register on June 10, 2015. The ANPR indicates EPA’s continued support for standards being developed by the United Nations-based, International Civil Aviation Organization (“ICAO”) and its Committee on Aviation Environmental Protection (“CAEP”), for use in both the U.S. and the EU. The CAEP has the support of the airline industry (which in the meantime notes a 120% improvement in fuel economy since 1980), but environmental groups continue to criticize the standards as too weak.

On February 8, 2016, the CAEP issued proposed standards, which will be considered for final approval by the ICAO’s 36-State Governing Council later this month. The proposed standards would go into effect starting in 2020 for newly designed aircraft, and in 2023 for new deliveries of currently in-production aircraft, with a 2028 cutoff date for production of noncompliant aircraft. The standards are expected to reduce greenhouse gas emissions by as much as 650 million tons between 2020 and 2040, supplementing the commitments reached at the COP 21 Paris conference in December 2015 (airline emissions were not addressed at the

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conference).

Several of the newest aircraft models already exceed the proposed standards, including Boeing's 737 MAX and Airbus' A320neo. Older planes still in production, such as the Boeing 747 and 777, and the Airbus A380 and A330, would either need to be phased out by 2028 or made more efficient, according to published reports.

Environmentalists complain that by exempting thousands of aircraft flying today, the ICAO has set its emissions standards much too low, and that with anticipated fuel efficiency gains for new aircraft types already in development, the standards do little more than prevent backsliding on emissions reductions. Environmental groups are waiting to see what action the ICAO takes on the proposed standards; however, news reports note that these groups have sued and threatened to sue the EPA in the past regarding carbon emissions from aircraft.

The proposed standards are expected to result in a four percent reduction in fuel consumption for new aircraft starting in 2028 compared with 2015 deliveries. Depending on the size of the aircraft, actual reductions would be from zero to 11 percent, with a bigger emphasis on larger commercial airplanes, according to analysts with the International Council on Clean Transportation.

In addition to the carbon dioxide standard, the ICAO is working on a market-based offset mechanism that would levy a fee on international flights to pay for emissions reductions in other sectors. The market-based proposal is intended to build on the EU's decision in 2012 to include domestic aviation emissions in its Emissions Trading Scheme. The EU plan initially included international flights, too, but EU officials decided to suspend that portion of the program to give the ICAO time to develop its own offset scheme. The ICAO's goal with the program is to make growth in the airline industry carbon emissions neutral after 2020. EU officials and environmental groups have expressed concern that any proposal must make a fair contribution to Europe's climate goals. The ICAO Assembly could potentially sign off on the market mechanism at a Sept. 27–Oct. 7 2016 summit, and could take effect beginning in 2020.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Eric Rothenberg, an O'Melveny partner licensed to practice law in Missouri and New York, and Bob Nicksin, an O'Melveny counsel licensed to practice law in California, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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