

# Alerts & Publications

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## EU Begins Regulation of Aviation Carbon Emissions

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Although Congress continues to debate the merits of “cap-and-trade” legislation to control greenhouse gas emissions, the European Union has had a GHG emissions trading system (“ETS”) in place since 2005.[1] By 2008, the value of EU emissions allowances transacted was almost \$92 billion.[2] But despite its broad reach, the EU system as originally established did not cover the transportation sector, which accounted for approximately 21 percent of EU GHG emissions in 2005.[3]

Recognizing that it would ultimately need to control transportation emissions if it were to continue to reduce its carbon footprint post-2012 (when the second phase of the ETS will end), and that aviation emissions were the fastest growing subset of transport emissions, the EU amended the ETS in November of last year to include the aviation sector (the “Aviation Amendments”).[4] A final list of nearly 4,000 operators subject to the amendments was published on Aug. 22, 2009. With a first deadline of Aug. 31, 2009 (for submission of emissions monitoring plans), the amendments have caught some operators by surprise, particularly non-EU-based operators or smaller operators (such as corporate fleets) that may not have followed the development of amendments closely.

Like the WEEE and RoHS product stewardship directives and the REACH chemicals regulation that have been in effect for several years, the Aviation Amendments regulate EU firms and non-EU firms alike. In the case of the Aviation Amendments, aircraft operators that fly into and out of EU airports will be required to participate in the ETS, and surrender emissions

allowances equivalent to the GHG emissions associated with their flights into and out of EU airports, regardless of whether the emissions occurred in or outside of EU airspace.

As discussed more fully below, the first compliance year for the aviation sector will be 2012. However, emissions monitoring in preparation for compliance is required starting in 2010, and emissions monitoring plans were due for many operators on Aug. 31, 2009 (even though implementing regulations have yet to be put in place by the member states), so time is of the essence for operators on the Aug. 22 list.

### **Member State Assignments**

One of the unique features of the Aviation Amendments is that non-EU aircraft operators are assigned to one EU Member State for regulation, based on where the operator conducts the greatest number of flights. So although an operator may fly to 10 different EU destinations, it will be regulated by only one state, as set forth in the Aug. 22 list.

Notably, although the deadline for monitoring plans set forth in the amendments was Aug. 31, 2009, a number of member states (including the UK and Germany) have extended the deadline, raising serious questions about inconsistent enforcement. This is a significant issue since, under the amendments, operators failing to meet the deadline are not eligible for the large number of free emissions allowances that will be distributed to operators.

### **Monitoring**

As noted above, aircraft operators must begin monitoring emissions in 2010. Operators must submit emissions monitoring and activity (tonne-kilometer<sup>[5]</sup>) monitoring plans to the relevant member state authority by the applicable deadline. These plans outline how the operator will obtain, process, record and monitor its CO<sub>2</sub> emissions, and must include the following information:<sup>[6]</sup>

- Identification and contact details of the aircraft operator.
- A list of aircraft types in its fleet operated at the time of submission of the monitoring plan, and the number of aircrafts per type, as well as the fuel types associated with each aircraft type.
- A description of procedures and systems adopted to track the completeness of the list of aircrafts operating during the reporting year.
- A description of data acquisition and handling and control activities, and quality control and assurance activities, including maintenance and calibration of measuring equipment.
- A description of the chosen methodology for determining tonne-kilometer data.
- A description of the chosen methodology for monitoring and calculating fuel consumption for the aircraft on the list.
- The procedure for measurement of fuel uplifts and emission factors used for each fuel type.

- The procedure and controls for tonne-kilometer data monitoring and reporting.

Beginning in 2010, all operators must begin monitoring and reporting their CO<sub>2</sub> emissions and tonne-kilometer data. The reports must be verified by an independent and accredited verifier prior to submission. The first reports (for 2010 emissions and activities) are due on March 31, 2011.

### **Emission Allowances**

The Aviation Amendments provide that 85 percent of the allowances calculated for the aviation sector will be distributed for free, with the remaining 15 percent being auctioned. The number of free allowances allocated to an aircraft operator is based on the total tonne-kilometers transported by the airline in 2010 (the base year).

For the first compliance period (2012), the total number of allowances issued and auctioned to all operators will be 97 percent of historical (2004-06) aviation emissions. In subsequent years, the allowances will be capped at 95 percent of historical emissions. Operators must purchase allowances to cover any shortfall between free allowances issued and annual emissions.

Beginning in 2013, by April 30 of each year, aircraft operators must surrender emissions allowances equivalent to their emissions for the previous year, as reported in their March 31 annual report. Entities failing to surrender sufficient allowances at the end of the compliance year are subject to penalties of €100 per tonne.

The amendments include a number of exemptions, the most noteworthy being a “*de minimis*” exemption for commercial air transport operators operating (1) fewer than 243 flights per period for three consecutive four-month periods, or (2) flights with total annual emissions lower than 10,000 tonnes per year.

Not surprisingly, the inclusion of international flights in the ETS has been controversial. The International Air Transport Association and the U.S. Air Transport Association view it as a violation of the Chicago Convention governing international air travel and have called for a global approach to aircraft emissions reduction.[7] While the EU has for years regulated products that have been put on the market within its boundaries, no matter where made, it has not directly regulated activities outside of its boundaries, as it will be when it requires aircraft operators to surrender emissions allowances for portions of flights that take place outside EU airspace (consider a flight from Los Angeles to London).

If the U.S. passes GHG legislation such as American Clean Energy and Security Act that covers the aviation sector through the regulation of fuel producers, then a flight from the U.S. to the EU will be doubly “taxed” since it would pay the (presumably) higher price for jet fuel that U.S. legislation would engender, and then have to surrender allowances for the flight under the EU system. In light of this potential conflict and the possible

contravention of international law, a legal challenge to the amendments, or a compromise in connection with global climate change negotiations currently underway, is increasingly likely.

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[1] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

[2] The World Bank, *State and Trends of the Carbon Market 2009*, May 2009

[3] Questions and Answers on Emissions Trading and National Allocation Plans for 2008 to 2012, Memo/06/452, EU November 2006, [ec.europa.eu/environment/climat/pdf/m06\\_452\\_en.pdf](http://ec.europa.eu/environment/climat/pdf/m06_452_en.pdf). In contrast, the American Clean Energy and Security Act of 2009 (HR 2454) (“ACES”), the GHG bill passed by the House of Representatives in July, would address transportation emissions by requiring fuel producers to purchase emissions allowances to cover the GHGs emitted by the products they produce.

[4] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

[5] The term “tonne-kilometer” refers to the weight of passengers and cargo transported over a certain distance, and is calculated by multiplying the weight by the distance.

[6] Commission Decision of 16 April 2009 amending Decision 2007/589/EC as regards the inclusion of monitoring and reporting guidelines for emissions and tonne-kilometre data from aviation activities, OJ 2009 L 103, p. 23.

[7] [www.airlines.org/news/releases/2008/news\\_7-8-08.htm](http://www.airlines.org/news/releases/2008/news_7-8-08.htm);  
[www.iata.org/pressroom/pr/2008-07-16-01.htm](http://www.iata.org/pressroom/pr/2008-07-16-01.htm)

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