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ump Administration officials followed up on the President’s June 1 announcement of U.S. withdrawal from the Paris climate accord by announcing that the Administration was reviewing U.S. participation in ICAO’s global aviation emissions offset and trading regime. The Trump Administration’s latest move signals that ongoing EPA rulemaking adopting ICAO aviation carbon emission design standards may be vulnerable as well.

Five months into his administration, President Trump has made good on a number of his promises to roll back his predecessor’s climate initiatives. The President on March 28 issued an executive order initiating the administrative process to roll back the Clean Power Plan, the Obama Administration’s signature domestic climate effort, which candidate Trump had criticized as a “war on coal.” Accordingly, the President announced on June 1 that the United States would be withdrawing from the Paris climate accord on the grounds that it was a “bad deal” for the country.

Obama Administration efforts to reduce greenhouse gas (GHG) emissions in the aviation sector are now

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being revisited as well. A few days after the President’s announcement on the Paris accord, U.S. State Department personnel informed trade press that the Administration had begun a review of U.S. participation in the International Civil Aviation Organization’s (ICAO) global aviation carbon offset and trading regime (the Carbon Offset and Reduction Scheme for International Aviation, or CORSIA). The State Department declined to provide a target date for completion of its review. The Trump Administration’s unwillingness to affirm U.S. commitment to the CORSIA regime is understood to mean that withdrawal from CORSIA is a real possibility.

Those and other developments may portend that another Obama Administration initiative to reduce aviation sector GHG emissions—U.S. Environmental Protection Agency (EPA) rulemaking to adopt ICAO aviation carbon emission design standards (ICAO Standards)—could soon be vulnerable as well.

**The ICAO Standards: A Long Time Coming**

As noted in Pillsbury client alerts published in August 2016 and June 2015, ICAO began developing aviation carbon emission design standards in 2010. That work effort culminated in the issuance of ICAO Standards in draft form in February 2016. Those draft ICAO Standards were in turn endorsed by the 39th Triennial ICAO Assembly in September-October 2016 and subsequently adopted by the ICAO Council in March 2017. The ICAO Standards come into force in July 2017.

The ICAO Standards supplement existing ICAO aviation *engine-specific* fuel efficiency requirements with carbon efficiency requirements governing the *entire design* of civilian aircraft. ICAO Standards assign each aircraft design a minimal carbon efficiency metric based on a multi-variable formula (considering maximum takeoff mass, physical dimensions, and fuel consumption rates).

The ICAO Standards will be phased in over time, applying to new designs initially and other designs thereafter:

**January 1, 2020**

- New subsonic jet designs with max takeoff mass > 60,000 kg
- New subsonic jet designs with max takeoff mass between 5,700 kg-60,000 kg and max capacity ≥ 20 passengers
- New propeller-driven designs with max takeoff mass > 8,618 kg

**January 1, 2023**

- New subsonic jet designs with max takeoff mass between 5,700 kg-60,000 kg and max capacity ≤ 19 passengers
- Significant modifications to existing subsonic jet designs with max takeoff mass > 5,700 kg
January 1, 2028

- Significant modifications to existing propeller-driven designs with max takeoff mass > 8,618 kg
- All newly delivered, legacy-design subsonic jets with max takeoff mass > 5,700 kg
- All newly delivered, legacy-design propeller-driven planes with max takeoff mass > 8,618 kg

The ICAO Standards do not apply to military aircraft, existing civilian aircraft, amphibious aircraft, aircraft designed or modified for firefighting applications, and some special-purpose aircraft designs.

The ICAO Standards will be published in a forthcoming Volume III (Aeroplane CO₂ Emissions) to Annex 16 (Environmental Protection) of the Convention on International Civil Aviation (the Chicago Convention). The ICAO Standards will be periodically reviewed to determine if adjustment is necessary, with the first round of review tentatively scheduled for completion by 2019.

The Original Plan under the Obama Administration: Adopt the ICAO Standards

The Obama Administration EPA was involved in development of the ICAO Standards from the beginning of those efforts. EPA in July 2015 began laying the groundwork for formal U.S. adoption of the ICAO Standards by publishing the following:

- A proposed finding that aviation emissions endangered U.S. public health or welfare under Section 231 of the Clean Air Act. That proposed finding leaned heavily on the EPA’s 2009 finding under Section 202 of the Clean Air Act that greenhouse gasses generally endangered U.S. public health and welfare (2009 Endangerment Finding).
- An advanced notice of proposed rulemaking describing the EPA’s plan to address the harm from aviation emissions by incorporating ICAO Standards within its regulations. Once adopted within EPA regulations the ICAO Standards would in turn inform Federal Aviation Administration (FAA) regulations governing aircraft design certification.

EPA in August 2016 formally adopted its aviation-specific emissions endangerment finding (2016 Aviation Endangerment Finding). That rulemaking repeated the plan to incorporate the ICAO Standards in EPA (and subsequently FAA) regulations once they had been finally approved by ICAO.

Signs of a Different Direction under the Trump Administration

Five months into the Trump Administration, neither the President nor EPA Administrator Scott Pruitt has taken a public position on adoption of the ICAO Standards. But a number of developments may indicate that the original plan for U.S. adoption of the ICAO Standards may be vulnerable:

- The Trump Administration is generally hostile to Obama Administration climate change initiatives—particularly those with an international flavor. President Trump denounced climate
change as a hoax on the campaign trail, and since taking office he has begun rolling back many of the Obama Administration’s signature climate initiatives. International climate change initiatives (such as the Paris climate accord and ICAO’s CORSIA program) seem to be particularly at risk. U.S. adoption of the ICAO Standards could be vulnerable for the same reasons.

- **The Trump Administration is under pressure from its base to scrap EPA’s 2009 Endangerment Finding.** Many conservatives and fossil fuel industry advocates are lobbying aggressively for the EPA to revisit its 2009 Endangerment Finding—which would be a legally complex and time-consuming endeavor. But if EPA were to act on that pressure, the 2016 Aviation Endangerment Finding and the ICAO Standards would be imperiled as well.

- **President Trump’s Executive Orders have imposed additional procedural requirements that would inhibit adoption of the ICAO Standards.** President Trump has issued several Executive Orders that could inhibit EPA from issuing regulations adopting the ICAO Standards (as well as the FAA from subsequently adopting regulations informed by those EPA regulations):
  - **Executive Order 13771 (2-for-1 Order).** This Order requires agencies to identify two existing regulations for repeal before proposing any new regulation. It also requires that any new regulation either impose no net implementation costs or that its implementation costs be offset by the repeal of existing regulations imposing equivalent costs.
  - **Executive Order 13783 (Energy Independence Order).** This Order rescinded a number of Obama Administration climate change policies and initiatives informing agency rulemaking on climate change. It also created a new Federal policy discouraging agency rulemaking that “unduly burdens” U.S. domestic energy interests.

In light of the developments described above, there is a meaningful risk that the Trump Administration may abandon the plan to adopt ICAO Standards either by formally terminating the rulemaking initiated on July 1, 2015 or by simply slow-pedaling that effort into oblivion.

**Walking Away from the ICAO Standards Will Result in Higher Costs to Manufacturers and Operators over Time**

Should the Trump Administration abandon the plan to adopt the ICAO Standards, the short-term consequences to the U.S. aviation industry could be minimal. The ICAO Standards do not begin to be phased in until 2020—and then only for new designs. Further, aviation sector manufacturers and operators may still voluntarily comply with the ICAO Standards in their U.S. operations. This may not be difficult for many manufacturers and operators in the near term, as they would have to comply with the ICAO Standards in their international operations anyway.

But there would be an increasing risk of long-term divergence between U.S. and international efforts to reduce aviation emissions. Indeed, this risk is more than a theoretical possibility: so long as the 2009 Endangerment Finding and the 2016 Aviation Endangerment Finding remain, the Trump Administration is
obliged under the Clean Air Act to do *something* to regulate aviation sector emissions. And insofar as any alternative approach the Trump Administration pursues conflicts or supplements the ICAO Standards, manufacturers and operators could incur additional compliance costs. The longer such divergence continues, the harder it may prove for subsequent U.S. administrations to conform U.S. aviation emissions reduction efforts to international norms.

Divergence between the United States and the rest of the world on the ICAO Standards could also be an occasion for diplomatic tension. European Union policymakers in particular have been aggressive in threatening restricted access for aircraft from countries with less demanding regimes for reducing aviation carbon emissions.

Pillsbury’s Aviation, Energy, and Environmental practice groups will continue to monitor developments on the critical issues raised in this client alert for our aviation industry clients.

*Partner Matthew W. Morrison contributed to this alert.*

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1 ICAO personnel consulted in connection with this Client Alert stated that Volume III will be officially published by early 2018. However, the February 2016 draft version of that document is publicly available. See European Safety Aviation Agency, Notice of Proposed Amendment 2017-01, “Implementation of the CAEP/10 Amendment on Climate Change, Emissions, and Noise” at Appendix 3 (Jan. 2017).