

Blue skies, green air travel: ESG in the aviation industry

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The future of aviation may see continued technological and operational advancements, innovative solutions to enhance the customers' experiences, customizable menu of options for ticketing and baggage pricing, and a higher priority placed for green air travel. With increasing discussion among industry stakeholders regarding the appropriate role of environmental, social, and governance (ESG) into business operations, we take a look at some of the ways certain actors in the aviation industry are taking steps to enhance their ESG strategies, while managing risks and emerging legal challenges.

Reaching net-zero emissions

Decarbonizing the aviation industry will be challenging due in part by the sheer scale of the issue itself. Airlines will be tasked with balancing profit and growth with expenses for higher-priced, low-carbon fuels, new technologies, and overhauling aircraft design.

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The aviation industry is the third largest contributor of transportation GHG emissions (11% of all emissions). Driven by the United Nations Climate Change Conference (COP26), <https://bit.ly/3DSIfMC>, several airlines, airports, and manufacturers of aircraft and engines committed to net-zero GHG emissions by 2050.

Some corporations have sought to minimize the impact of their carbon footprints through the purchase and sale of carbon offsets. The Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), <https://bit.ly/3qxUQll>, is a global market-based measure designed to offset international aviation CO2 emissions in order to stabilize the levels of such emissions. Offsetting of CO2 emissions will be achieved through the acquisition and cancelation of emissions units from the global carbon market by airplane operators.

The EU issued a set of landmark rules in late April 2023 as part of its climate change legislation requiring airlines to increase their use of sustainable aviation fuels (SAF). All aircraft at EU airports will have

to be blended with a minimum share of 2% of SAF starting in 2025, and rising every five years to 70% by 2050. This is the latest development in the EU's efforts to cut carbon dioxide emissions by 55% by 2030 compared with 1990 levels and to be carbon neutral by 2050.

In the US, the Aviation Climate Action Plan, <https://bit.ly/45DrFfA>, and the Airports Climate Challenge, <https://bit.ly/3qJogwE>, set out to achieve net-zero GHG from the U.S. aviation sector by 2050. Efforts to create a sustainable aviation system would be carried out by an increase in the production of SAF, the elimination of aviation gasoline lead emissions by the end of 2030, the development of new aircraft and engine technologies, and improving the efficiency of operations.

Despite the federal government's expansion of existing laws and policies to incentivize the use of SAF, a lack of a cohesive U.S. federal policy and opt-in or voluntary programs with ranging incentives at the regional, state, and federal level will prove to be legal hurdles for airlines in their efforts to reach net-zero emissions.

Sustainable aviation fuel: a key aviation climate priority

SAF which can be created from renewable or waste materials, have been identified as a viable pathway to rapid decarbonization of the aviation industry. The standard regulating the technical certification of SAF is ASTM D7566, which evaluates the technologies, under specific circumstances and characteristics, that can be used for producing SAF. However, even if SAF meets certification, how sustainable is it?

During the 2021 UN Climate Change Conference, the International Civil Aviation Organization (ICAO) adopted an expanded set of sustainability criteria for SAF ensuring that the SAF airlines will use in international flights is eligible for ICAO's emissions reduction program — the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), a global, market-based measure designed to offset international aviation CO2 emissions.

The SAF Grand Challenge, <https://bit.ly/3K0dBrB>, is a multi-agency effort established by the Biden administration to reduce the cost, enhance the sustainability, and expand the production and use of SAF. This endeavor would contribute towards the targeted goal of achieving a minimum of a 50% reduction in life cycle greenhouse gas emissions compared to conventional fuel and supplying sufficient SAF to meet 100% of aviation fuel demand by 2050.

As part of the Challenge, the U.S. Department of Energy, the U.S. Department of Transportation, and the U.S. Department of Agriculture, along with other U.S. government agency partners, intend to develop a policy framework to enhance the sustainability of SAF.

Key federal actions include bolstering the production of sustainable aviation fuels to at least 3 billion gallons per year by 2030; offering new and ongoing funding opportunities to support sustainable aviation fuel projects and fuel producers totaling up to \$4.3 billion; an increase in research, development, and demonstration (RD&D) activities towards new technologies that can achieve at least a 30% improvement in aircraft fuel efficiency; and efforts to improve air traffic and airport efficiency to reduce fuel use, eliminate lead exposure, and ensure cleaner air in and around airports.

A lack of federal and international standards may pose challenges in compliance, but existing industry guidelines in place offer a road map for airlines to follow to reach their goals.

To balance the significant cost barriers associated with using alternative fuels, industry participants have advocated for support from policymakers, particularly in defining and classifying “green investments” to help attract private capital as well as incentivizing SAF production through grants and tax credits. In the continental U.S., there currently is no universal “sustainability criteria” for SAF in respect of offsetting CO₂ emissions from aviation. Without a standard, there is increased risk of greenwashing and labelling pollutant planes and fuels as sustainable.

Carbon offsets: growing regulatory oversight and risk

Many companies use carbon offsets to help achieve their emission-reduction goals, and their popularity only continues to rise. Carbon offsets, which represent the permanent reduction or removal of emissions of carbon dioxide or other greenhouse gases (GHGs), are often used to cover the last increment of reduction that companies cannot otherwise achieve through operational changes. While aviation and shipping initially were exempt from global measures aimed at reducing one’s CO₂ footprint, this has since changed as aviation travel has never been more popular.

On the international aviation stage there are a few tools aimed at lowering CO₂ emissions, including CORSIA, as noted above, and the European Union’s Emissions Trading System, <https://bit.ly/44lpzQh>, a cap-and-trade scheme to cost-effectively limit GHG emissions across key sectors. Additionally, the EU has proposed ReFuelEU Aviation, <https://bit.ly/3OBs6ji>, aimed at boosting the supply and demand for sustainable aviation fuels in the EU, and a number of energy taxation directives.

Since this is an emerging area, no universal standard applies to quantify the emissions avoided or reduced of all carbon offsets,

and there is no universal registry that tracks all carbon offsets. This creates exposure for holders of carbon offsets relating to their quality, validity, verification, and use. Companies transacting carbon offsets need to ensure their carbon offsets are valid, verifiable and unclaimed, and that the projects that generated the carbon offsets permanently removed emissions from the atmosphere.

No U.S. federal agency has exercised regulatory oversight over the voluntary carbon markets, but these issues are attracting the attention of regulators. Within the past year, Commodity Futures Trading Commission (CFTC) commissioners have indicated that their agency intends to exercise its anti-fraud and anti-manipulation authority over the voluntary carbon markets.

In early 2022, the U.S. Securities and Exchange Commission issued a rule proposal aimed at the enhancement and standardization of climate-related disclosures for investors. If finalized, the rule would require companies that use carbon offsets as part of its plan to achieve climate-related targets or goals to disclose certain information about the carbon offsets including: the amount of carbon reduction represented by the carbon offsets; the source of the carbon offsets; a description and location of the underlying projects, any registries or other authentication of the offsets; and the cost of the offsets.

Greenwashing and related litigation: next wave of enforcement and class action suits

Environmental justice is a key priority of the Biden administration as well as many state attorneys general and other state officials. Federal and state developments are leading to more stringent reporting requirements and enforcement actions associated with implementing environmental laws, often through the overlay of consumer protection provisions common to key federal agencies, such as the Federal Trade Commission (FTC), and state attorneys general.

This is being played out through increasing regulatory oversight on corporate sustainability, clean technology, energy conservation, and emission reductions. Often styled as nationwide class action lawsuits, greenwashing and other alleged misrepresentations of “sustainability” or being “environmentally friendly” are filed based on unfair or deceptive business practices or unfair competition and false advertising laws.

The FTC’s “Guides for the Use of Environmental Marketing Claims” are widely regarded as the principal source of guidance for environmental marketing in the U.S. Last updated in 2012 and currently under revisions, the Green Guides serve as a de facto road map for companies looking to engage in environmental marketing efforts.

Even though the FTC is a consumer protection agency and these are non-binding guidelines, the Green Guides apply to “business-to-business transactions” and have been used by the FTC and private party litigants to bring enforcement actions or lawsuits related to environmental claims.

State attorney general actions associated with allegations of significant environmental impacts and harm to minority

and economically challenged communities are on the rise. ESG enforcement and class action litigation suits have the potential to harm companies' reputations, negatively impact their board members, call into question their stated core values, and drastically alter their approach to risk management.

Conclusion

As the aviation industry continues to navigate sustainability and ESG objectives, stakeholders will need to balance ESG goals

against risks. A lack of federal and international standards may pose challenges in compliance, but existing industry guidelines in place offer a road map for airlines to follow to reach their goals. As with any emerging space, industry stakeholders should take caution as regulators play catch-up and the first wave of enforcement and private class action lawsuits starts to roll in.

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