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European Union May Adopt More Stringent Sulfur Content Limits for Marine Fuels

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On May 23, 2012, the European Union (EU) announced that an agreement in principle (strictly, a "compromise proposal") had been reached by the two arms of the EU legislature (the Council of the EU and the European Parliament) on proposed legislation requiring all ships operating in EU waters to meet more stringent limits on the sulfur content in marine fuels. The proposed legislation is similar to United States Environmental Protection Agency ("EPA") regulations addressing marine fuel sulfur content. Implementation of these standards throughout the United States and EU highlights the seriousness with which many nations are addressing the public health implications of particulate emissions from marine vessels. The European Commission estimates that air pollutants from ships cause approximately 50,000 premature deaths each year in Europe. It remains to be seen, however, how difficult it will be for ships to comply with the new standards and how strictly they will be enforced once they go into effect.

Annex VI of the International Convention for the Prevention of Pollution from Ships (a treaty called MARPOL) includes two tiers of standards for marine fuel sulfur limits. While some of the standards, found in Regulation 14, apply globally, the most stringent standards are regionally-based and apply only in designated Emission Control Areas ("ECAs"). ECAs are specific areas designated by the International Maritime Organization ("IMO") as requiring higher levels of protection.

Annex VI was revised in 2008 to limit the global sulfur fuel content to 0.5% by 2020 (down from 3.5% for cargo ships and 1.5% for passenger ships) and ECA sulfur emissions to 0.1% by 2015 (down from 1.0%). Limits could be met by using either 0.1% sulfur content fuel, abatement technology, or a combination of the two. Importantly, the amendments left open the possibility that the global standards could be postponed until 2025 if the signatory nations determine that it is not possible for ships to comply with the 0.5% global fuel standard by 2020.

Because MARPOL is not a self-executing treaty, by its own terms, it requires implementing legislation. As such, signatory nations must enact laws to execute the limits set forth in the treaty. The proposed legislation incorporates the 2008 revisions to Annex VI into EU law by amending Directive 1999/32/EC. Specifically, it adopts Annex VI's 0.5% global sulfur limit (non-ECA waters) by 2020. It also limits the ECA marine fuel sulfur content to 0.1% by 2015. In comparison, the fuel sulfur content limit for land vehicle gasoline is 100 times more stringent than the 2015 ECA standard. "Marine fuel" is defined under the agreement as "any petroleum-derived liquid fuel, as well as bio-fuels, intended for use or in use on board a vessel..."¹

ECAs in the EU region generally include the Baltic and North Seas and the English Channel. The proposed legislation goes even further than Annex VI with respect to passenger ships and ships in port. It applies the 0.1% ECA limit to passenger ships by 2020, which currently operate at a 1.5% limit in EU waters, and maintains a 0.1% limit for ships operating in port. In contrast to Annex VI, the EU standards apply the global standards to all vessels in EU waters by 2020, closing off the possibility of a postponement until 2025 in these areas.

The Commission estimates that the new limits will cost the shipping industry between €2.6 billion and €1 billion (\$3.2 billion-\$14 billion). However, the Commission estimates that the monetary value of

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the health benefits exceed the costs of meeting the reduced marine sulfur limits by a factor of between 2 and 25. The proposed legislation also directs that penalties set by member states should include fines *at least* equivalent to the benefits derived from not complying. The proposed legislation has not yet been formally adopted and is expected to be finalized in autumn 2012. Each EU Member State will then need to pass national legislation implementing its provisions within 18 months after entry into force of the EU legislation.

The EU's approach to limiting the sulfur content in marine fuels is similar to the regulations implemented in the United States. On July 21, 2008, Congress enacted the Maritime Pollution Prevention Act of 2008 ("MPPA"), Pub. L. 110-280, which amended the Act to Prevent Pollution from Ships ("APPS"), 33 U.S.C. §§ 1901, *et seq.* The APPS effectively adopted Annex VI, establishing general requirements for vessels operating in the Exclusive Economic Zone ("EEZ") and navigable waters of the United States, but required Congress to take additional steps to implement and enforce the Annex VI standards in other domestic waters. APPS authorizes EPA to "administer" the relevant provisions of Annex VI, and directs that EPA "shall also prescribe any *necessary or desired* regulations to carry out" those provisions. 33 U.S.C. § 1903(b)(2) (emphasis added).

On April 30, 2010, the EPA published regulations closely mirroring the Annex VI fuel sulfur content limits found in Regulation 14, but on a slightly different schedule. 75 Fed. Reg. 23,013; 40 C.F.R. § 1043.60(b). The more lenient, non-ECA standards are applicable to "all U.S. navigable waters and EEZ" starting in 2012. 40 C.F.R. § 1043.60 at Table 2. EPA applied the more stringent ECA-specific requirements to the North American ECA, U.S. Caribbean ECA, and ECA-associated waters (internal waters navigable from the ECA). The North American ECA will take effect in August 2012 and generally extends 200 nautical miles from the coastal baseline, except where this distance would enter the EEZ of a neighboring country. 75 Fed. Reg. 22,896, 22,924 (April 30, 2010). The U.S. Caribbean ECA first takes effect in 2014. Compliance with the sulfur fuel content requirements applicable to ECAs and ECA-associated areas under EPA's jurisdiction is required within one year after the date the ECA enters into force. 40 C.F.R. § 1043.5. Similar to the proposed EU legislation, EPA's regulations make no mention of postponing the Annex VI standards.

As noted above, should Annex VI be amended in the future, the signatory nations must amend their own laws and regulations to implement and enforce those limits in their waters. Because the Annex VI standards are not self-implementing, by definition, changes to the standards are also not self-implementing. EPA must take affirmative steps, through notice and comment rulemaking consistent with the Administrative Procedure Act, if vessels operating in the EEZ or navigable waters of the United States are to be subject to more stringent Annex VI standards. Similarly, EU nations must also follow their own legislative process to implement and enforce any new standards.

	MARPOL Annex VI		EU		USA	
	2012	2020 ²	2012	2020	2012	2020
Non-ECAs³	3.5%	0.5%	3.5%	0.5%	3.5%	0.5%
Passenger ships	-	-	1.5%	0.1%	-	-
Ships in port	-	-	0.1%	0.1%	-	-

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	MARPOL Annex VI		EU		USA	
	2010	2015	2010	2015	2012 ⁴	2016
ECAs ⁵	1.0%	0.1%	1.0%	0.1%	1.0%	0.1%

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¹ Report on the proposal for a directive of the European Parliament and of the Council amending Directive 1999.32/EC as regards the sulphur content of marine fuels (COM(2011)0439 – C7-0199/2011 – 2011/0190(COD)), at 20, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0038+0+DOC+PDF+V0//EN>.

² MARPOL Annex VI leaves open the possibility of delaying the global standards (non-ECA) until 2025.

³ In the United States, non-ECA limits apply to all navigable waters of the United States and the EEZ.

⁴ The North American ECA takes effect in August 2012 and the U.S. Caribbean ECA in 2014.

⁵ In the United States, the ECA limits also apply to "ECA-associated" areas.