

The Oft-Overlooked Importance of Air Emission Credits in Mergers and Acquisitions

Air emission credits often go overlooked in the shuffle of environmental due diligence. This article provides an overview of the air emission credit landscape.

Air emission credits take many shapes and forms but, at bottom, are governmentally issued or approved authorizations to emit air contaminants.

In recent years, air emission credits have expanded beyond facilities to cover emissions linked to the products a company sells.

A first step in addressing air emission credits is to identify the applicable regulatory regimes. In tandem, an evaluation is needed of the target's operations and air emissions.

Market conditions and the structure of the transaction should also inform deal strategy and purchase agreement negotiation.

In the U.S., one of the most frequently encountered air emission credits programs is the federal Clean Air Act's (CAA) New Source Review (NSR) program. The CAA NSR program requires permits prior to the construction or modification of stationary sources of air emissions.

In order to obtain an NSR permit, a facility must purchase air emission credits to offset any increase in emissions in areas where air pollutant concentrations exceed standards set by the EPA.

There are also a number of cap and trade programs that regulate criteria pollutant emissions. These give regulated

entities the option of either reducing their own emissions or buying credits from parties who are able to make more cost-effective emission reductions.

Potential acquirers must identify the applicable regulatory regime and evaluate the steps needed to comply with those regulations.

This task can be complicated when sellers fail to either comply with complex air emission rules or accurately monitor or report their air emissions.

Determining whether emissions have been reported properly can require careful and context-specific diligence. It may be necessary to go beyond an environmental compliance audit and enlist an environmental consultant.

In negotiating a purchase agreement, it may be protective to specify both what kind of and how many credits will be transferred as emission credits vary based on their duration and source of generation.

As to the purchase agreement itself, a key consideration is the extent to which the representations and warranties, indemnities, and other provisions will shift failure to comply with air emission credit requirements.

Another important consideration is how regulators may modify emission credit rules over time.

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