

EUROPEAN UNION EMISSIONS TRADING SCHEME
PROHIBITION ACT OF 2011

OCTOBER 5, 2011.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. MICA, from the Committee on Transportation and
Infrastructure, submitted the following

R E P O R T

[To accompany H.R. 2594]

[Including cost estimate of the Congressional Budget Office]

The Committee on Transportation and Infrastructure, to whom was referred the bill (H.R. 2594) to prohibit operators of civil aircraft of the United States from participating in the European Union's emissions trading scheme, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE OF THE LEGISLATION AND SUMMARY

H.R. 2594, the European Union Emissions Trading Scheme Prohibition Act of 2011, reports key findings of the Congress regarding the European Union's Emissions Trading Scheme (EU ETS), which will be imposed unilaterally without the consensus of the United States and other members at the International Civil Aviation Organization (ICAO). The bill also directs the Secretary of Transportation to prohibit U.S. aircraft operators from participating in the ETS. Finally, the bill instructs U.S. officials to negotiate or take any action necessary to ensure U.S. aviation operators are not penalized by any unilaterally imposed EU scheme.

BACKGROUND AND NEED FOR THE LEGISLATION

European Union's Emissions Trading Scheme

The European Union's Emissions Trading Scheme (EU ETS) began in 2005 with the capping of emissions of carbon dioxide (CO₂) from more than 10,000 stationary sources within the EU (covered sectors include: power plants; petroleum refining; iron and steel production; coke ovens; pulp and paper; and cement, glass, lime, brick, and ceramics production).¹ Under the ETS, the EU auctions a specified number of emissions allowances for each multi-year period, and distributes a certain number of allowances for free. A covered emitter is required to submit to regulatory authorities one allowance for each ton of CO₂ emitted during the period. There is an active market for allowance trading, in which the emitter may sell unneeded allowances to others or purchase whatever additional allowances it requires.²

Starting in January 2012, civil aviation operators landing in or departing from the EU will be included in the ETS.³ This means that all segments of international flights to, within, and from the EU by U.S. air carriers would be subject to the ETS, including those portions over the United States, Canada, and international waters.

In 2012, the total quantity of emissions allowances would be equivalent to 97% of the aviation sector's average 2004–2006 emissions. In allocating the emissions allowed under the cap, 85% of the sector's 2012 allowances are to be given to aircraft operators at no cost, and 15% of the allowances are auctioned. In 2012, according to the International Air Transport Association (IATA), 212.9 million credits will be issued directly to airlines, 85%, or 181 million, for free, and 15% or 31.9 million will have to be purchased through auction. IATA also indicates that in 2012, airlines will have to purchase an additional 35.5 million allowances in the open market, assuming they are available, to cover growth. With the price of carbon in the EU currently € 11,⁴ the total cost to airlines in 2012 is estimated to be about \$1 billion. The 2012 price of carbon in the EU is depressed due to the current economic crisis and is expected to rise. By 2020, the price is anticipated to reach € 50.

¹ CRS Report RL34150, Climate Change and the EU Emissions Trading Scheme (ETS): Kyoto and Beyond, by Larry Parker (February 2008).

² CRS Report European Aviation Policy Issues, by Bart Elias (June 2011).

³ ETS provides an exception for military aircraft, some small carriers, emergency services, research, and humanitarian flights.

⁴ € = Euros.

In 2013, the cap would be reduced to 95% of the aviation sector's average 2004–2006 emissions, with further reductions to be agreed on as part of the ongoing review of the ETS. The EU Commission has proposed that 80% of the aviation sector's allowances be distributed free of charge in 2013, with 20% being auctioned. The percentage of free allowances is expected to continue declining with a goal of auctioning all allowances in 2020. According to IATA, the cost estimate for the EU ETS goes up to \$3.5 billion in 2020.

Operators emitting more than their allowed cap would need to buy additional allowances on the carbon market and the directive provides sanctions for failure to comply with the scheme. Sanctions include the possibility that a non-complying airline might be banned from operating in the EU.⁵ Airlines will purchase allowances and pay penalties to the EU Member State to which they most frequently fly; the United Kingdom will be the Member State for most U.S. carriers.

Finally, under the EU ETS, if a country can show “equivalent measures” on CO₂ reduction from civil aviation, then airlines operating between the EU and that country would not have to pay the carbon charge for one leg of their European roundtrip. However, the EU has provided no guidance on how to establish “equivalence” or what “equivalent measures” means.

U.S. Government position on ETS

According to the Department of Transportation (DOT), the Department of State, and the Federal Aviation Administration (FAA), the U.S. is committed to addressing global climate change and believes that the International Civil Aviation Organization (ICAO) policies, standards and recommended practices should provide the framework for measures to address international Greenhouse Gas (GHG) emissions from international civil aviation. The U.S. Government (USG) has made clear to its European counterparts, that it is the USG's responsibility and authority to determine the U.S. response to climate change. Currently, the USG is developing its response to climate change in conjunction with work being done in ICAO.

In June 2011, the United States presented its formal objection to the EU ETS at a half-yearly meeting in Oslo of the U.S.-EU Joint Committee created under the 2007 Air Transport Agreement on the liberalization of air service between the United States and Europe (commonly known as the “Open Skies agreement”), and which meets regularly for discussions on implementation of the agreement. The Open Skies agreement liberalized air service between the United States and Europe by, among other things, permitting U.S. and European air carriers to fly between any point in the European Union and any point in the United States.

USG objects to U.S. operators being subject to the EU ETS without the explicit agreement of the USG for any portion of their flights between airports of Member States of the EU and the U.S., as well as for other flights covered by the U.S.-EU Air Transport Agreement. This includes all preliminary impositions on U.S. operators such as monitoring, reporting and verification of emissions, not just surrendering of permits for such emissions.

⁵ CRS Report European Aviation Policy Issues, by Bart Elias (June 2011).

According to the FAA, in response to a recent ICAO Assembly resolution with respect to aviation and climate change challenges, the USG is undertaking a set of initiatives under the U.S. Next Generation Air Transportation System (NextGen), as well as working at ICAO on such initiatives as the development of a meaningful CO₂ standard. According to FAA, the full implementation of NextGen could reduce greenhouse gas emissions from aircraft by up to 12 percent by 2025.⁶ The USG also points out that the U.S. aviation sector has a strong record of fuel efficiency improvements and greenhouse gas emissions savings and continues to work with the government to advance technological, operational, infrastructure and alternative fuel opportunities for further improvements.

Based on system wide operations (both domestic and international) U.S. aviation fuel consumption and CO₂ emissions have declined 15% between 2000 and 2010.⁷ By comparison, based upon European greenhouse gas inventories submitted to the United Nations, the annual aviation CO₂ emissions for operations within the 27 European Union Member States were 12% lower in 2009 compared to 2000, while CO₂ emissions for flights departing the 27 European Union Member States *grew* by 15%.⁸

Global opposition to the EU ETS

Representatives of Argentina, Brazil, Chile, China, Colombia, Cuba, Egypt, India, Japan, Republic of Korea, Malaysia, Mexico, Nigeria, Paraguay, Qatar, Russian Federation, Saudi Arabia, Singapore, South Africa, the United States of America and the United Arab Emirates met in New Delhi, India and on September 30, 2011, adopted a Joint Declaration with the following declarations included:

1. Call on ICAO to continue to undertake efforts to reduce aviation's contribution to climate change;
2. Intend to collaborate in support of operational changes and improvements to air traffic management and airport systems, which will tend to reduce emissions of the aviation sector;
3. Intend to accelerate the development and implementation of low-carbon aircraft technologies and sustainable alternative fuels, and sharing of best practice;
4. Support ICAO efforts to develop a meaningful aircraft CO₂ standard aiming for 2013;
5. Oppose the EU's plan to include all flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system (EU Directive 2008/10/101/EC), which is inconsistent with applicable international law;
6. Urge the EU and its Member States to refrain from including flights by non-EU carriers to/from an airport in the territory of an EU Member State in its emissions trading system;

⁶ GAO report number GAO-08-706T, "Aviation And The Environment: NextGen and Research and Development Are Keys to Reducing Emissions and Their Impact on Health and Climate" (May 7, 2008).

⁷ U.S. aviation emissions statistics for 2000 through 2010 were generated from FAA modeled data using the Aviation Environmental Design Tool (AEDT).

⁸ The European Environment Agency (EEA) submits greenhouse gas inventories to the United Nations in accordance with the Framework Convention on Climate Change (UNFCCC). The EU27 aviation statistics are from EEA. (see: <http://dataservice.eea.europa.eu/pivotapp/pivot.aspx?pivotid=475>).

7. Urge the EU and its Member States to work collaboratively with the rest of the international community to address aviation emissions;
8. Intend to continue to work together to oppose the imposition of the EU ETS on our operators;
9. Invite any other State to associate itself with this declaration.

Industry lawsuit

In 2009, American, United, and Continental airlines, along with the Air Transport Association of America, filed a legal challenge to the EU ETS in the United Kingdom. The lawsuit was transferred to the European Court of Justice and arguments in the case began on July 5, 2011.

The U.S. airline industry has requested that the European Court of Justice (ECJ) dismiss the European Union's application of an ETS on international civil aviation. The U.S. air carriers argue that aviation greenhouse gas emissions should be regulated on a global sectoral basis (i.e. only civil aviation sector of industry), and that the EU's unilateral action to regulate emissions of countries violates international law. It is the air carriers' position that the EU is violating international law and several treaty provisions in the Chicago Convention. Pursuant to the Chicago Convention, countries have authority over airlines in their own airspace. Therefore, the air carriers argue that the EU ETS cannot regulate flights to and from Europe when they are not over Europe. The U.S. air carriers also dispute whether Europe can, under the Chicago Convention, regulate U.S. airlines as they fly over the high seas, or if Europe can levy charges on other country's airlines. Finally, air carriers argue that the levies imposed by the ETS violate the Kyoto Protocol which confirms that ICAO has the authority to establish greenhouse gas policy for international aviation.⁹

In its argument before the ECJ, the ATA provided an example of the application of the EU ETS to a flight from San Francisco to London Heathrow. According to ATA, as a percentage of total emissions from this flight, 29% take place in US airspace, including those on the ground at the airport. Another 37% take place in Canadian airspace and a further 25% take place over the high seas. Only 9% of emissions take place in EU airspace (Attachment A provides a visual of this flight). But, the ATA pointed out that the ETS will impose a levy on the air carrier, and may also impose an excess emissions penalty, based on emissions for the entire flight from gate-to-gate.

The EU is defending its ETS and its interpretation of international law. The European Court of Justice is expected to rule at the end of 2011 or in early 2012.

EU position on ETS

The EU indicates that it is leading global efforts to reduce greenhouse gas emissions from human activities and the ETS is the cornerstone of its strategy for cutting its own greenhouse gas emis-

⁹"ATA Calls EU ETS Application to U.S. Airlines Illegal," http://www.airlines.org/News/Releases/Pages/news_07-05-11.aspx (July 5, 2011).

sions cost-effectively.¹⁰ The European Commission believes using emissions trading to tackle emissions from the aviation sector is fully in line with the EU's international obligations and decisions taken by ICAO.¹¹ The European Commission created the Directorate-General for Climate Action ("DG CLIMA") in February 2010. DG CLIMA leads international negotiations on climate, helps the EU to deal with the consequences of climate change and to meet its targets for 2020, and develops and implements the EU ETS.¹² The European Commission would like to build a global carbon market and hopes to link up the ETS with compatible systems around the world to form the backbone of such a carbon market.¹³

The European Commission has estimated that auctioning could raise an EU-wide total of € 30–50 billion depending on the carbon price.¹⁴ EU Member States have agreed that they should use at least 50% of this income to combat climate change, in both Europe and developing countries.¹⁵

ICAO actions on climate change

Over the past few years, the international aviation community has agreed to the following measures to address the challenge of climate change through ICAO:^{16 17}

- A global goal of 2 percent annual improvement in fuel efficiency through 2050, and further exploration of the feasibility of more ambitious medium and long-term goals, including carbon-neutral growth and emissions reductions.
- The development of a global CO₂ standard for aircraft and facilitation of further operational changes to reduce aviation emissions.
- The development of a framework for market-based measures in international aviation.
- Elaboration on measures to assist developing States and to facilitate access to financial resources, technology transfer and capacity building.
- The submission of States' action plans, outlining their policies and actions, and annual reporting of data to ICAO on their aviation fuel consumption. ICAO is currently undertaking work in both these areas to assist ICAO Member States in fulfilling these requirements. This is the first case where a global industry has adopted mandatory emissions reporting requirements across both Annex-1 and non-Annex 1 countries.¹⁸

¹⁰ EU action against climate change. The EU Emissions Trading Scheme, European Commission (2009 edition).

¹¹ *Id.*

¹² European Commission Climate Action website, http://ec.europa.eu/clima/policies/ets/index_en.htm (November 2010).

¹³ *Id.*

¹⁴ EU action against climate change. The EU Emissions Trading Scheme, European Commission (2009 edition).

¹⁵ *Id.*

¹⁶ Source: Federal Aviation Administration.

¹⁷ With the exception of efforts to address fuel burn reporting, these are aspirational, non-binding measures.

¹⁸ Annex I countries are industrialized countries and economies in transition; Annex II countries are developed countries which pay for costs of developing countries; and Non Annex I countries are developing countries.

Development of legislation

Starting January 2012, the EU will begin unilateral imposition of its Emissions Trading Scheme (ETS) on aviation operators landing in or departing from the EU. The ETS will apply to the entire flight—including those parts outside the EU Member States' airspace including over the U.S., and Canada and international waters. U.S. airlines and operators will be required to pay an emissions tax to the EU Member State to which they most frequently fly. There is no requirement that this revenue go to research and development.

Measures to address the contribution of civil aviation to climate change must be developed through international consensus and agreement. The unilateral imposition of the ETS is a clear violation of international law. In addition, the ETS lacks any transparency and clarity—there is no guidance on how the EU will apply the ETS to international air carriers. Given the lack of transparency, there are legitimate concerns as to whether the ETS will be evenly applied to all international air carriers. The EU could put U.S. air carriers at a competitive disadvantage, resulting in job losses in the U.S. aviation industry. The U.S., China, Australia, Canada, India, and numerous other countries have objected to the application of ETS to their air carriers. Therefore, the bipartisan leadership of the Committee on Transportation and Infrastructure, in consultation with Executive Branch officials, developed and introduced H.R. 2594 which directs the Secretary of Transportation to prohibit U.S. aircraft operators from participating in the EU's Emissions Trading Scheme and directs the Secretary of Transportation, the FAA Administrator, and other appropriate officials of the United States Government to use all authority and tools at their disposal in negotiations with the European Union to hold U.S. interests harmless from the scheme. The bipartisan leadership of the Committee is in agreement that instead of unilaterally imposing a controversial measure upon U.S. and global airlines, the EU should work with its international partners in ICAO to develop a consensual approach to addressing aviation emissions.

LEGISLATIVE HISTORY

On July 20, 2011, Full Committee Chairman John L. Mica introduced H.R. 2594, European Union Emissions Trading Scheme Prohibition Act of 2011. On September 8, 2011, the Committee on Transportation and Infrastructure met in open session to consider H.R. 2594, and ordered the bill reported favorably, without amendment, to the House by voice vote with a quorum present.

HEARINGS

On July 27, 2011, the Subcommittee on Aviation held a hearing to discuss the impacts of the European Union's Emissions Trading Scheme on U.S. interests and to discuss the diplomatic response of the United States Government. The hearing focused on the unilateral actions of the EU in its application of the ETS to all civil aviation operations; the EU's actions and international law; and the impact of the EU's ETS on U.S. operators, the competitiveness of the U.S. aviation industry, and U.S. aviation jobs. Senior officials from the DOT and the Department of State participated in the hearing.

In addition, representatives from both airline and labor sectors of the aviation industry participated in the hearing.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the House of Representatives requires each committee report to include the total number of votes cast for and against on each record vote on a motion to report and on any amendment offered to the measure or matter, and the names of those members voting for and against. During consideration of H.R. 2594, no recorded votes were taken. The bill was reported to the House with a favorable recommendation after a voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Transportation and Infrastructure's oversight findings and recommendations are reflected in this report.

COST OF LEGISLATION

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives does not apply where a cost estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974 has been timely submitted prior to the filing of the report and is included in the report. Such a cost estimate is included in this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee adopts as its own the estimate of new budget authority, entitlement authority, or tax expenditures or revenues contained in the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974, included below.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 2594 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 23, 2011.

Hon. JOHN L. MICA,
*Chairman, Committee on Transportation and Infrastructure,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2594, the European Union Emissions Trading Scheme Prohibition Act of 2011.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

H.R. 2594—European Union Emissions Trading Scheme Prohibition Act of 2011

The European Union (EU) has established the European Union Emissions Trading Scheme (ETS), a regulatory framework related to greenhouse gas emissions. Starting in 2012, the ETS will cover emissions from air carriers that operate flights within, to, and from EU member states. H.R. 2594 would direct the Secretary of Transportation to prohibit U.S. air carriers from participating in the ETS if it is unilaterally imposed on those air carriers by the EU. The bill would direct federal agencies to conduct negotiations and take other actions necessary to ensure that U.S. air carriers are not adversely affected by the ETS. The outcome of any negotiations between the U.S. government and the EU and the effect of those negotiations on U.S. air carriers are unclear.

CBO estimates that enacting H.R. 2594 would have no significant impact on the federal budget. We expect that the bill would not alter the scope of diplomatic efforts currently underway or federal agencies' costs to participate in those efforts, which are subject to appropriation. The bill would not affect direct spending or revenues so pay-as-you-go procedures do not apply.

H.R. 2594 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). H.R. 2594 would impose a private-sector mandate, as defined in UMRA, if U.S. air carriers would be prohibited from participating in the ETS. The cost of the mandate would depend on how the prohibition is administered by the Department of Transportation. Because information about how the prohibition would be implemented is not available, CBO has no basis for estimating the cost, if any, to U.S. air carriers. Consequently, CBO cannot determine whether the cost of the mandate would exceed the annual threshold established in UMRA for private-sector mandates (\$142 million in 2011, adjusted annually for inflation).

The CBO staff contacts for this estimate are Megan Carroll (for federal costs) and Amy Petz (for the impact on the private sector). The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

With respect to the requirement of clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the performance goals and objectives of this legislation are to prohibit U.S. operators' participation in the ill-advised and illegal European Union Emissions Trading Scheme. The legislation also directs the U.S. Government to use all tools at its disposal in negotiations with the European Union to hold U.S. interests harmless from the scheme.

ADVISORY OF EARMARKS

In compliance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2594 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of rule XXI.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act (Public Law 104-4).

PREEMPTION CLARIFICATION

Section 423 of the Congressional Budget Act of 1974 requires the report of any Committee on a bill or joint resolution to include a statement on the extent to which the bill or joint resolution is intended to preempt state, local, or tribal law. The Committee states that H.R. 2594 does not preempt any state, local, or tribal law.

ADVISORY COMMITTEE STATEMENT

No advisory committee within the meaning of section 5(b) of the Federal Advisory Committee Act was created by this legislation.

APPLICABILITY TO THE LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act (Public Law 104-1).

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 of the bill designates the title of the bill as the “European Union Emissions Trading Scheme Prohibition Act of 2011”.

Section 2. Findings

Section 2 relates the following findings of Congress:

(1) The European Union has unilaterally imposed an emissions trading scheme (in this section referred to as the “ETS”) on non-European Union aircraft flying to and from, as well as within, Europe.

(2) United States airlines and other United States aircraft operators will be required under the ETS to pay for European Union emissions allowances for aircraft operations within the United States, over other non-European Union countries, and in international airspace for flights serving the European Union.

(3) The European Union’s extraterritorial action is inconsistent with long-established international law and practice, including the Chicago Convention of 1944 and the Air Transport Agreement between the United States and the European Union and its member states, and directly infringes on the sovereignty of the United States.

(4) The European Union’s action undermines ongoing efforts at the International Civil Aviation Organization to develop a unified,

worldwide approach to reducing aircraft greenhouse gas emissions and has generated unnecessary friction within the international civil aviation community as it endeavors to reduce such emissions.

(5) The European Union and its member states should instead work with other contracting states of the International Civil Aviation Organization to develop such an approach.

(6) There is no assurance that ETS revenues will be used for aviation environmental purposes by the European Union member states that will collect them.

(7) The United States Government expressed these and other serious objections relating to the ETS to representatives of the European Union and its member states during June 2011, but has not received satisfactory answers to those objections.

Section 3. Prohibition on participation in the European Union's emissions trading scheme

Section 3 of the bill directs the Secretary of Transportation to prohibit an operator of a civil aircraft of the United States from participating in any emissions trading scheme unilaterally established by the European Union.

Section 4. Negotiations

Section 4 of the bill directs the Secretary, the FAA Administrator, and other appropriate officials of the United States Government to use all authority and tools at their disposal in negotiations with the European Union to hold U.S. interests harmless from any emissions trading scheme unilaterally established by the EU.

Section 5. Civil aircraft of the United States defined

Section 5 of the bill defines terms used within the legislation.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

H.R. 2594 makes no changes in existing law.

