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EUROPEAN UNION EMISSIONS TRADING SCHEME PROHIBITION ACT OF 2011

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1956



AUGUST 2, 2012.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

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EUROPEAN UNION EMISSIONS TRADING SCHEME PROHIBITION ACT OF 2011

AUGUST 2, 2012.—Ordered to be printed

Mr. ROCKEFELLER, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 1956]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1956) 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, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The European Union Emissions Trading Scheme Prohibition Act of 2011, S. 1956, as reported: (a) would give the Secretary of the Department of Transportation (DOT) the authority to prohibit an operator of civil aircraft in the United States from participating in the European Union (EU) Emissions Trading Scheme (ETS) if the Secretary determines the prohibition to be in the public interest; and (b) would direct the Secretary of Transportation and the Administrator of the Federal Aviation Administration (FAA), and other appropriate officials to enter into international negotiations, including agreements to pursue a worldwide approach to address aircraft emissions, and to take appropriate measures under existing authorities to ensure U.S. air carriers are held harmless from any ETS unilaterally-imposed by the EU.

BACKGROUND AND NEEDS

The EU has instituted a "cap and trade" policy, known as the ETS, in an effort to combat greenhouse gas (GHG) emissions. The

EU implemented the system in 2005, covering approximately 11,000 power stations and industrial plants in 30 European countries. The EU ETS caps the total amount of emissions each year for certain industries and creates "allowances" that permit covered entities to emit a specific amount of GHGs. Each year, each covered industry is allocated allowances to cover a portion of their total forecasted emissions. The remaining allowances are available for purchase through government auction or between participants, creating a "carbon market". At the end of the year, a company must submit enough allowances to the EU to cover all their emissions, or pay penalties to EU member states. The EU's current plan reduces the emissions cap over time to further limit GHGs in the future.

Aircraft operators, including airlines, were incorporated into the EU ETS beginning in January 2012. According to the Congressional Research Service, global aviation GHG emissions account for two to three percent of the world's GHG emissions. Any flight, with limited exceptions, that originates or lands in the EU, including those operated by foreign aircraft operators, are subject to the ETS. The emissions cap for aircraft operators in 2012 has been set at 97 percent of their average emissions from 2004 through 2006. Within this overall emissions cap, aircraft operators have been allocated allowances to cover 85 percent of these emissions. Aircraft operators will have to submit allowances, or pay penalties, for their 2012 emissions in April of 2013. For the 2013 through 2020 time period, the aircraft operator emissions cap has been set at 95 percent of the industry's average emissions from 2004 through 2006. Over this period, the aircraft operators will be allocated allowances for 82 percent of these emissions. Even without traffic growth, the diminishing portion of allowances allocated by the EU will increase the exposure of aircraft operators to increasing costs. Since most airlines expect growth in their operations over this time frame, it is anticipated the allocated allowances will cover an increasingly smaller percentage of the air carriers' actual emissions. The airline industry currently estimates the cost of the EU ETS at $3.1 billion through 2020, but that cost may increase as carbon market prices change.

There has been strong opposition to the inclusion of non-EU aircraft operations in the ETS from the global aviation industry and sovereign countries around the world. A primary concern that has been raised is that the ETS includes emissions produced by foreign flagged aircraft while operating outside the EU's airspace. Opponents argue the EU has no jurisdiction to regulate emissions in foreign or international airspace based on long-standing international obligations established under the Chicago Convention of 1944. Opponents also have significant concern with the eventual costs of complying with the ETS. While proponents of the ETS claim the initial costs to airlines and passengers will be relatively minimal, the airline industry has very thin margins, and the cost of allowances are expected to increase over time as the cap decreases and fewer allowances are provided by the EU. In addition, a July 2012 proposal by the European Commission to increase carbon market prices shows the market is vulnerable to manipulation. Finally, many aviation stakeholders point out that there is no requirement that the proceeds of the EU ETS be used to reduce aviation emis-

sions, such as improvements and modernization of air traffic management; the ETS does not guarantee this. Regardless of the use of the revenues generated from the ETS, U.S. airlines oppose the ETS arguing it is de facto taxation on the industry and other aircraft operators in a manner that is inconsistent with treaty obligations under the Chicago Convention, which was ratified by all 27 EU member states.

On September 30, 2011, 26 International Civil Aviation Organization (ICAO) member countries, including the United States, China, India, Japan, Korea, Russia, Mexico, and several Latin American countries, signed a joint "Delhi Declaration" at the New Delhi meeting of the ICAO Council opposing inclusion of international aviation in the EU ETS. Instead, the declaration supports ICAO efforts to develop meaningful aircraft carbon emissions standards with a target of adopting such standards at the ICAO General Assembly in 2013. It urges the EU to refrain from including non-EU flights in the EU ETS and to work collaboratively with the international community. On November 22, 2011, the ICAO Council approved the opposition to the EU's application of ETS as expressed in the New Delhi declaration.

On December 16, 2011, Secretary of State Hillary Clinton and Secretary of Transportation Ray LaHood sent a letter to European Commission officials expressing strong opposition to the EU ETS stating that "application of the ETS to airlines of non-EU states is inconsistent with the legal regime governing international aviation and with ICAO guidance on emissions trading." They urged the EU to work with the broader international community through the auspices of ICAO to address the challenges of reducing aviation emissions.

In February 2012, representatives of the United States and 22 other countries met in Moscow and produced a joint declaration urging EU member states to cease applying the ETS to civil aviation. These countries unanimously agreed that the EU should instead participate in ongoing efforts within ICAO to address aviation emissions through a global solution that would be adopted worldwide. The next ICAO meeting, the 38th Assembly in September 2013, will review progress toward development of such a global framework to reduce emissions.

If an agreement cannot be reached in advance of April 2013, when the first submission of aviation allowances come due for the aviation sector, the issue may be elevated to the ICAO Council through an Article 84 proceeding under the Chicago Convention treaty. This is the formal process to resolve aviation disputes between two or more states subject to the Convention.

SUMMARY OF PROVISIONS

S. 1956, as reported: (a) would give the Secretary of Transportation the authority to prohibit an operator of civil aircraft in the United States from participating in the EU ETS if the Secretary determines the prohibition to be in the public interest; and (b) would direct the Secretary of Transportation, the FAA Administrator, and other appropriate officials, to enter into international negotiations, including agreements to pursue a worldwide approach to address aircraft emissions, and to take appropriate actions to en-

sure U.S. air carriers are held harmless from any ETS unilaterally imposed by the EU.

LEGISLATIVE HISTORY

Senator Thune introduced S. 1956 on December 7, 2011. The Committee conducted a hearing on June 6, 2012, to consider S. 1956, which has twelve bipartisan cosponsors. The Secretary of Transportation, the European Commission, the Airline Pilot Association, the National Business Aviation Association, the Environmental Defense Fund, and Airlines for America testified. The House of Representatives passed a companion bill, H.R. 2594, the European Union Emissions Trading Scheme Prohibition Act of 2011, on October 24, 2011, by a voice vote. In addition, the FAA Modernization and Reform Act of 2012 (126 Stat. 11), included a Sense of Congress that application of the EU ETS to civil aviation is contrary to international law and that EU member states should work through ICAO to address aviation emissions. The FAA Modernization and Reform Act of 2012 directs the Executive Branch to "use all political, diplomatic, and legal tools at the disposal of the United States to ensure that the European Union's emissions trading scheme is not applied to [U.S.] aircraft."

On July 31, 2012, the Committee met in Executive Session during which S. 1956 was considered. One amendment, in the nature of a substitute, was offered by Senators Thune and McCaskill during the Executive Session that incorporated a number of modifications offered by Members and technical changes suggested by DOT, FAA, and the Department of State. The bill, as amended, was ordered reported by voice vote.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

AUGUST 1, 2012.

Hon. JOHN D. ROCKEFELLER IV,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1956, 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.

S. 1956—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. Currently, the ETS covers emissions from air carriers that operate flights within, to, and from EU member states. Negotiations between the U.S. government and the EU

about the applicability of the ETS to U.S. air carriers are ongoing, and the potential outcome of those negotiations is unclear.

S. 1956 would direct the Secretary of Transportation to prohibit U.S. air carriers from participating in the ETS if the Secretary believes such a prohibition to be in the public interest. The bill would direct federal agencies to continue negotiations in pursuit of a worldwide approach to addressing aviation-related emissions and would authorize the Secretary to use existing authorities to ensure that U.S. air carriers are held harmless for any costs they incur if they participate in the ETS.

CBO estimates that enacting S. 1956 would have no significant impact on the federal budget. We expect that the bill would not alter the scope of diplomatic efforts currently under way or federal agencies' costs to participate in those efforts, which are subject to appropriation. The bill would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 1956 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

S. 1956 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 ($146 million in 2012, adjusted annually for inflation).

On September 23, 2011, CBO transmitted a cost estimate for H.R. 2594, the European Union Emissions Trading Scheme Prohibition Act of 2011, as ordered reported by the House Committee on Transportation and Infrastructure on September 23, 2011. The two bills are similar, and the CBO cost estimates are the same.

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.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

The reported bill would be consistent with the current operation of the air transportation system, thus the number of persons covered should be consistent with the current levels of individuals impacted under the existing aviation system.

ECONOMIC IMPACT

S. 1956 is expected to have a positive impact on the U.S. economy. The transportation system is a key component of the Nation's

economy. Provisions in this legislation aim to ensure the transportation system continues to facilitate commerce.

PRIVACY

The reported bill is not expected to have any impact on the privacy rights of individuals.

PAPERWORK

It is not anticipated that there will be a major increase in paperwork burdens resulting from the enactment of S. 1956.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.

This section cites the short title of the Act as the "European Union Emissions Trading Scheme Prohibition Act of 2011".

Section 2. Prohibition on Participation in the Europeans Union's Emissions Trading Scheme.

This section would direct the Secretary of Transportation, upon a finding that it is in the public interest to do so, to prohibit civil aircraft of the United States from participating in the European Union Emissions Trading Scheme, codified in EU Directive 2003/87/EC of October 13, 2003, as amended.

The factors that would be considered in determining the public interest are: (1) the impacts on U.S. consumers, U.S. carriers, and U.S. operators; (2) the impacts on the economic, energy, and environmental security of the United States; and (3) the impacts on U.S. foreign relations, including existing international commitments.

Prior to taking any action, but after the Secretary of Transportation determines it may be in the public interest to take some action, the Secretary must hold a public hearing at least 30 days before any such action is taken.

Section 3. Negotiations.

This section would direct that the Secretary of Transportation, the FAA Administrator, or any other appropriate office of the United States Government should, as appropriate, use their authority to conduct international negotiations to pursue a worldwide approach to address aircraft emissions, and shall, as appropriate, use their authority to hold operators of civil aircraft of the United States harmless from the European Union Emissions Trading Scheme, codified in EU Directive 2003/87/EC of October 13, 2003, as amended.

Section 4. Definition of Civil Aircraft of the United States.

This section would define the term "civil aircraft of the United States" as that term is defined in section 40102(a) of title 49, United States Code, which "means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation."

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

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