



SENATE REPUBLICAN

POLICY COMMITTEE

## Legislative Notice

No. 56

April 29, 2008

# **H.R. 2881 – The Federal Aviation Administration (FAA) Reauthorization Act of 2008**

Calendar No. 383

*H.R. 2881 was read twice and placed on the calendar on September 24, 2007.*

### **Noteworthy**

- Yesterday, the Senate voted to invoke cloture on the motion to proceed to H.R. 2881, the FAA Reauthorization Act of 2007. The managers of the bill are expected to offer a substitute amendment that will serve as the base text for Senate consideration.
- The substitute contains modified tax related items from S. 2345, the American Infrastructure Investment and Improvement Act of 2007, and significant portions of S. 1300, the Aviation Investment and Modernization Act of 2007.
- The substitute extends the authorization for the Airport and Airway Trust Fund (AATF) through 2011. According to estimates from the Commerce and Finance Committees, the substitute provides \$290 million in new funding for FAA air traffic systems. It also provides \$5 billion in FY 2009 for the Highway Trust Fund, and establishes new procedures for air carriers regarding flight delays and on-board passenger rights. It adopts key improvements to FAA oversight of safety requirements, and makes modifications to programs that provide air service to small communities. The substitute does not include user fees as proposed in S. 1300.
- At press time, there was no official CBO score for the Senate substitute.
- At press time, there was no Statement of Administration Policy (SAP) for the Senate substitute. H.R. 2881 passed the House on September 20, 2007 by a vote of 267-151. The SAP issued for the House version of H.R. 2881 indicated that the President's senior advisors would recommend a veto for that bill, identifying 21 items with specific problems. The SAP noted strong opposition to House proposals to reopen a settled air traffic controller contract, define "actual control" for purposes of aircraft facilities ownership, block the FAA from making certain facility decisions, and requiring the FAA to include employees in the NextGen planning process in their role as union members.

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## **Highlights**

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### Legislative History:

S. 1300 was reported favorably by the Senate Committee on Commerce, Science, and Transportation on May 16, 2007. It reauthorized FAA's major accounts, proposed changes to the Airport Improvement Program (AIP) and passenger facility charge (PFC) programs, established an oversight board to guide FAA modernization, established new air passenger service protections, and made changes to aviation safety and small community air service programs. Funding was obtained through a surcharge of \$25 per flight on commercial and General Aviation (GA) jet and turboprop flights. On November 13, 2007, the Senate Committee on Finance reported S. 2345. The bill made changes to elements of the existing tax and fee structure by raising the jet fuel tax to 36 cents per gallon, increasing the international departure/arrival tax, and creating a new tax system for fractionally-owned aircraft. It did not contain a \$25 per flight surcharge as did S. 1300.

On April 25, 2008, the Senate Finance and Commerce Committees announced details of a bipartisan compromise regarding the contents of the substitute. The agreement includes as much as \$290 million in new funding each year to the Airport and Airway Trust Fund (AATF) to finance the satellite-based NextGen air traffic system, and restores \$5 billion to the Highway Trust Fund for 2009.<sup>1</sup>

### Funding:

Based on preliminary estimates by the Finance and Commerce Committees, funding is obtained as follows:

**General Aviation:** The bill increases the General Aviation jet fuel tax from the current 21.8 cents/gallon to 36 cents/gallon. This will provide approximately \$240 million per year in additional AATF funding.

**Fractionals:** Fractionals are partially (fractionally) owned aircraft, with parties owning shares of a plane. The bill classifies Fractionals as General Aviation jets for tax purposes. This portion of the bill will provide approximately \$50 million per year in additional funding for AATF.

**Tax Exempt Status:** Also included is an \$8 million provision eliminating the tax-exempt status of some light jet aircraft.

### Airline Passenger Services Protections:

Airline service provisions in the substitute will require airlines to develop contingency plans to address situations in which the departure of a flight is substantially delayed while passengers are

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<sup>1</sup> Information contained herein is based on a joint press release by the Senate Finance and Commerce Committees. <http://finance.senate.gov/press/Bpress/2008press/prb042508.pdf>

confined to an aircraft. The plan must outline how the airline will ensure the passengers are provided:

- Adequate food, potable water, and restroom facilities; and
- Timely and accurate information regarding the status of the flight.

Those plans must be filed with the Department of Transportation (DOT) and if approved by the DOT, the plan must be made the information publicly available. In the absence of such a plan the air carrier must permit passengers to deplane after three hours have elapsed, unless the pilot believes the flight will depart within 30 minutes after the three hour delay, or if it raises significant safety or security concerns.

These service provisions also mandate improved disclosure of flight information to passengers when purchasing tickets. Airlines are required to post the on-time performance of chronically delayed or cancelled flights on their websites—including delays, diversions and cancellations—updated on a monthly basis. Chronically delayed or cancelled flights must also be identified by the airline when a customer is booking a ticket on a website, prior to purchase.

A related provision in the substitute creates an advisory committee for aviation consumer protection to advise the DOT Secretary in carrying out air passenger service improvements. The committee will evaluate existing aviation consumer protection programs and provide recommendations for improvement along with providing additional recommendations for aviation consumer protection programs.

#### Essential Air Service and Small Community Air Service Development Program:

The Senate package also includes improvements to the Essential Air Service program (EAS) and Small Community Air Service Development Programs (SCASDP). Authorized funding for EAS is increased to \$175 million, a \$48 million increase from the current authorized amount. Other provisions aimed at improving service to EAS communities include:

- Incorporation of financial incentives into contracts with EAS carriers to encourage better service;
- Establishment of longer-term EAS contracts if it is determined to be in the public interest;
- Development of a program to create incentives for large carriers to code-share on service to small communities; and
- Requiring large airlines to code-share on EAS flights in up to 10 communities.
- AIP funding for converting EAS airports into GA airports if the EAS airports lose their eligibility;
- Increases in funding for contract towers that benefit small communities; and
- Modifications to language governing disputes between EAS communities and their air service providers.

### Key Safety Improvements:

Recent events have underscored the urgent need for the FAA to address its oversight of required safety inspections and maintenance. Notably, FAA found that certain carriers were not performing required safety inspections. The FAA levied significant fines and air carriers grounded nearly 700 planes after the FAA widened its review across the entire industry.

Subsequent recommendations from the Department of Transportation's Inspector General identified key safety weaknesses at the FAA: The agency's oversight and inspection of air carriers needed to be strengthened, the variety of programs aimed at runway safety needed to be updated and improved, and the recruitment and retention of agency's core safety workforce, its inspectors and air traffic controllers, need to be upgraded. The Senate package largely adopts the recommendations contained in the DOT's IG testimony.

On inspections in particular, the package addresses the FAA's safety inspection process by:

- Making key changes to the Voluntary Disclosure Reporting Process to ensure that air carriers take comprehensive actions to correct the underlying causes of violations identified and implement comprehensive solutions;
- Requiring a "cooling off" period before inspectors may be hired by an air carrier;
- Implementing a process to track field office inspections and notify local, Regional, and Headquarters offices of overdue inspections;
- Establishing an independent body to investigate safety issues identified by FAA employees; and
- Developing a National Review Team that conducts reviews of FAA's oversight of air carriers.

### Additional Items of Note:

#### *GAO Report*

Section 516 requires the Government Accountability Office to initiate a review and investigation within 30 days of enactment on air safety issues identified by FAA employees and reported to the Administrator. The GAO is to issue a report with its findings to the FAA Administrator and congressional committees annually.

#### *Memorandum of Understanding with OSHA*

Section 510 requires the FAA Administrator within 6 months to establish milestones in consultation with the Occupational Safety and Health Administration (OSHA) regarding the August 2000 memorandum of understanding between the FAA and OSHA, and to address issues needing further action following a December 2000 joint report from the Administration. The substitute also requires that development of a policy statement be initiated in which OSHA requirements may be applied to crewmembers while working in the aircraft cabin. Any subsequent standards issues by the FAA in this area shall set forth employer responsibilities under the standard. (Currently, FAA has a broad safety mandate for aircraft and aviation safety. Therefore, crewmember safety falls to the FAA and not OSHA.) In the past, concerns have been

expressed that while OSHA standards serve to address occupational safety on the ground, these same standards could be corrosive or have aviation safety impacts which are not appropriate in the air.

### *FAA Personnel Management System*

Section 313 amends the process used by the FAA to settle contract disputes with its unions. The bill stipulates that if an agreement cannot be reached between the FAA and a bargaining representative, the Federal Mediation and Conciliation Services (FMCS) shall be utilized to reach an agreement. If the FMCS cannot reach an agreement, then the controversial issues shall be submitted to the Federal Services Impasses Panel. The Panel is to order binding arbitration by a private arbitration board consisting of 3 members—one representing the FAA, one representing the union, and a third chosen by the other two arbitrators from a list compiled by the Panel. The arbitration board is to give the parties a full and fair hearing. Decisions by the arbitration board shall be conclusive and binding.

This section changes the contract negotiation process currently used by the FAA and its unions. Under current law, should the FAA and its union fail to reach a collective bargaining agreement, the FAA is to send its final offer to Congress for review. Congress has 60 days to block the final offer or it can be implemented. Such a situation arose in 2006 between the FAA and the National Association of Air Traffic Controllers. Pursuant to current law, the FAA sent its final offer to Congress. Congress did not see fit to block the final offer, and the contract was implemented.

### Notable Exclusions:

The House-passed version of H.R. 2881 contained a number of provisions which were considered objectionable to the Administration. These provisions are not included in the Senate substitute. These provisions are as follows:

### *Repeal of Air Traffic Controllers' Collective Bargaining Agreement*

H.R. 2881, the House-passed FAA reauthorization bill, seeks to cancel retroactively the current collective bargaining agreement in place since 2006 for air traffic controllers and replace it with the prior contract from 1996. It also seeks to change the contract negotiations process between the FAA and the National Air Traffic Controllers Association (NATCA).

Rolling back to the 1996 NATCA contract as H.R. 2881 requires would serve to raise pay for air traffic controllers by 40 percent. There is also concern that reinstating the 1996 agreement could impact all other collectively-bargained agreements the FAA has with NATCA and other unions. The Congressional Budget Office estimates that the permanent impact of re-imposing the 1996 collective bargaining agreement with NATCA over the six-month period between enactment and the final decision by the arbitrators would be approximately a half-billion dollars over the next four years, plus any additional costs imposed by the arbitrators' final decision.

### *New Authority for the National Labor Relations Board*

The House bill contains a provision that changes the labor law that now applies to FedEx Express workers. Currently, FedEx Express, deemed an express carrier, falls under the Railway Labor Act, which allows unionization on a national scale. The House bill instead puts FedEx Express under the National Labor Relations Board, which allows local units to unionize.

Since its inception, FedEx, like all express companies, has been covered under the Railway Labor Act. This designation was erroneously dropped by Congress in 1995. At the request of Senator Fritz Hollings, the 1996 FAA reauthorization re-designated FedEx as an express carrier. Trucking companies are generally governed by the National Labor Relations Act, as is the case with UPS. According to *Congressional Quarterly*, FedEx has argued in the past that its operational structure should not be compared with that of UPS because FedEx began as an air freight line, whereas UPS focused primarily on ground freight until the early 1990s.<sup>2</sup>

### *Foreign Repair Stations*

Section 304 of the House-passed bill requires that each FAA-certified foreign repair station be inspected by safety inspectors at least twice a year. The Administration, however, has raised concerns that the repair station requirement is unsupported by any safety data or other analysis demonstrating that current safety oversight efforts at repair stations are inadequate.<sup>3</sup> The Administration notes that the FAA currently has agreements with France, Germany, and Ireland to perform repair-station inspections on its behalf. Currently, 152 of the approximately 700 currently certificated foreign repair stations are covered by these agreements. Efforts are underway to negotiate similar agreements with the European Aviation Safety Agency (EASA), Australia, China, and New Zealand.

Further, over 1,200 repair stations in the United States are overseen by the FAA on behalf of foreign regulatory authorities, establishing a complimentary efficiency.

### *Open Skies Changes*

In 2007, the United States and the European Union (EU) signed an air transport agreement that permits air carriers in the United States and in the EU to operate from any point within the United States to any point within the EU, and vice versa. As part of the agreement, known as Open Skies, the U.S. permitted foreign airlines to invest in U.S. airlines without gaining “actual control of the U.S. carrier.” H.R. 2881 contains a provision that purports to clarify current law concerning what it means for a foreign ownership entity to exercise “actual control” of a U.S. carrier. There is significant concern that the language is susceptible to an interpretation that would disturb the Open Skies alliance agreement.

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<sup>2</sup> Kathryn A. Wolfe, “AFL-CIO Begins Drive to Repeal Decade-Old Labor Provision Helpful to Fed-Ex,” *Congressional Quarterly*, March 5, 2007.

<sup>3</sup> Statement of Administration Policy on H.R. 2881 – FAA Reauthorization Act of 2007, September 19, 2007. <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2881sap-r.pdf>

## Key Provisions of the Senate Substitute

### Title I: Authorizations and Financing

The substitute reauthorizes all of the FAA's four major accounts: Operations; Facilities & Equipment (F&E); Airport Improvement Program (AIP); and Research, Engineering, and Development (R,E&D), at specific amounts for each of the four years of the authorization. Table 1 provides details of the proposed authorized amounts:

	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>2011</b>
<b>Operations</b>	8,726	8,990	9,330	9,620
<b>Facilities &amp; Equipment</b>	2,572	2,923	3,079	3,317
<b>Research Engineering &amp; Development</b>	140	191	191	194
<b>Airport Improvement Program (AIP)</b>	3,800	3,900	4,000	4,100
<i>- AIP included program expenses</i>	<i>81</i>	<i>85</i>	<i>89</i>	<i>93</i>

According to the bill managers, the authorized amounts for F&E and R, E&D are consistent with the Administration's proposed needs for these accounts. The authorizations for AIP are set at levels higher than the Administration's proposal and consistent with levels authorized in Vision 100 (the 2003 FAA reauthorization bill). The budgetary protections for FAA's authorized budget are also extended through 2011.

### Title II: Airport Improvements

Title II focuses on the AIP and the passenger facility charge (PFC) program, and proposes a number of new initiatives to aid airport development. The first provision streamlines the PFC process by simplifying approval requirements for imposing or amending PFCs, while still retaining audit controls and FAA project and expenditure oversight. Additional requirements are imposed for increasing PFCs or using the revenue for inter-modal projects. This process is based on a successful pilot program for streamlining the PFC process authorized for small airports in Vision 100.

This section also requires the Secretary of Transportation to establish and conduct a pilot program in which an airport may impose a passenger facility charge without regard to dollar amount limitations if that airport collects the charge from a passenger at the airport, via the Internet, or in any other reasonable manner. The same eligibility and oversight criteria applied under the regular PFC authority will still apply to the use of the revenue in this program. The program is limited to six airports, and the airports may not collect the charge through an air carrier.

A second pilot program permits the FAA to transfer to airports responsibility for certain terminal area navigation equipment, such as instrument landing and approach lighting systems. Each airport will be required to operate and maintain all of the covered equipment at the airport in accordance with FAA standards, allow periodic FAA inspections, and replace the equipment

when needed. The provision includes explicit authority for airports to add to their airfield rate base any costs of owning and operating the equipment.

Other provisions include: Expansion of eligibility for the AIP noise set-aside program and establishment of a guaranteed minimum amount of funding; AIP funding is authorized for studies to optimize airport operational procedures.

### **Title III: FAA Organization and Reform**

Title III focuses on FAA management practices. The title establishes the “Air Traffic Control Modernization Oversight Board” to provide specific oversight of the FAA’s modernization activities. The Board’s responsibilities include providing advice on the strategic plan for FAA modernization; approving procurements of air traffic control equipment in excess of \$100 million; and approving selections of the leaders for the Air Traffic Organization and the Joint Planning and Development Office. The Board is proposed to be composed of seven members: the FAA Administrator, a Department of Defense representative, one member representing the public interest, one Chief Executive Officer (CEO) of an airport, one CEO of a passenger or cargo airline, one FAA labor union representative, and one general aviation (GA) representative. This board would replace the Federal Aviation Management Advisory Council and the Air Traffic Services Subcommittee.

To support the implementation of the Automatic Dependent Surveillance-Broadcast (ADS-B) system, which is a key modernization technology, a pilot program is established to allow state and/or local governments (including airports) to purchase, operate, and maintain ADS-B ground equipment. Under this pilot program, acquisition of this equipment will be eligible for AIP grants funded at a 90 percent federal share. The provision includes language to provide flexibility in contracting to the FAA and project sponsors to permit the most efficient acquisition of ground stations funded under the pilot program.

This title also sets up a new process for resolving collective bargaining labor disputes at the FAA that are at an impasse. The Administrator of the FAA or an employees’ union will be required to first use the mediation services of the Federal Mediation and Conciliation Service (FMCS) if an impasse has been reached during the collective bargaining process. If mediation fails, the Administrator and the employees’ union must use the Federal Services Impasses Panel (FSIP) to resolve their issues through binding arbitration by a private arbitration board consisting of three members. The Director of FMCS will identify at least 15 arbitrators from the private sector that have federal government experience from which the Administrator and the employees’ union each choose one. The two arbitrators chosen then select a third arbitrator from the original list. If either the Administrator or the employees’ union fails to choose an arbitrator, or if the two arbitrators are unable to agree on a third arbitrator, the selections shall be chosen randomly. In rendering its decision the arbitration board is required to take into consideration the effect of its arbitration decisions on the FAA’s ability to attract and retain a qualified workforce and the agency’s budget. Decisions of the arbitration board must be reached within 90 days of appointment and are conclusive and binding. Enforcement of the arbitration decisions shall be in the United States District Court for the District of Columbia.



In addition, there are technical changes regarding FAA management, including the ability to enter into reimbursable agreements, acquisition authority, management of property, and employee benefits.

#### **Title IV: Airline Service and Small Community Service Improvements**

Title IV focuses on improving airline service and small community access to air service. The airline service provisions will require airlines to develop contingency plans to address situations in which the departure or arrival at the gate of a flight is substantially delayed while passengers are confined to an aircraft. The plan must outline how the airline will ensure the passengers are provided:

- Adequate food, potable water, and restroom facilities; and
- Timely and accurate information regarding the status of the flight.

This plan must be filed with the Department of Transportation, which must make the information publicly available. In the absence of such a plan the air carrier must permit passengers to deplane after three hours have elapsed, unless the pilot believes the flight will depart within 30 minutes after the three hour delay, or if deplaning raises significant safety or security concerns. These service provisions also mandate improved disclosure of flight information to passengers when purchasing tickets. Airlines are required to post the on-time performance of chronically delayed or cancelled flights on their websites—including delays, diversions and cancellations—updated on a monthly basis. Chronically delayed or cancelled flights must also be identified by the airline when a customer is booking a ticket on a website, prior to purchase.

The remaining provisions propose improvements to the Essential Air Service program (EAS) and Small Community Air Service Development Program (SCASDP). Authorized funding for EAS is increased to \$175 million, a \$48 million increase from the current authorized amount. Other provisions aimed at improving service to EAS communities include:

- Incorporating financial incentives into contracts with EAS carriers to encourage better service;
- Longer-term EAS contracts if it is determined to be in the public interest;
- Developing a program to create incentives for large carriers to code-share on service to small communities; and
- Requiring large airlines to code-share on EAS flights in up to 10 communities.

Other provisions in this title include:

- AIP funding for converting EAS airports into GA airports if the EAS airports lose their eligibility;
- Increases in funding for contract towers that benefit small communities; and
- Modifications to language governing disputes between EAS communities and their air service providers.

## **Title V: Aviation Safety**

Title V proposes a number of measures to improve aviation safety. The FAA is required to finalize a rule on fuel tank flammability for commercial air carriers and develop a plan to provide runway incursion information to pilots in the cockpit. Two flight crew fatigue initiatives are proposed. One is a study of pilot fatigue to be conducted by the National Academy of Sciences that will consider the latest research on fatigue, circadian rhythms, and international standards. A second provision will authorize the FAA to implement the findings of a flight attendant fatigue study. Other provisions will ensure FAA could continue to access criminal history databases to perform critical safety and security functions. A series of provisions are also included to improve EMS helicopter operations. Finally, there is language to permit access to abandoned type certificates and supplemental type certificates to improve FAA safety reviews.

Section 510 requires the FAA Administrator within 6 months to establish milestones in consultation with the Occupational Safety and Health Administration (OSHA) regarding the August 2000 memorandum of understanding between the FAA and OSHA, and to address issues needing further action following a December 2000 joint report from the Administration.

## **Title VI: Aviation Research**

This title proposes four research efforts:

- A permanent authorization is provided for the Airport Cooperative Research pilot program, which conducts environmental and other research;
- A Center of Excellence is established to study the use of clean coal technology for aircraft;
- A consortium is established to study the reduction of civilian aircraft noise, emissions, and energy; and
- The “Advisory Committee on the Future of Aeronautics” is established to examine the best governmental and organizational structures for aeronautics research and development.

## **Title VII: Miscellaneous**

Title VII contains the following provisions:

- An extension of the war risk insurance program;
- A human intervention management study for flight crews;
- Staffing and training provisions for the airport concessions disadvantaged business enterprise initiative;
- A requirement for the FAA to update its calculation of overflight fees;
- A required GAO study of technical training for technical specialists; and
- Miscellaneous program extensions and technical corrections.

## **Title VIII: American Infrastructure Investment and Improvement Act**

### **Subtitle A – Airport and Airway Trust Fund Provisions and Related Taxes**

**Extension of Airport Trust Fund Tax and Expenditure Provisions.** The substitute amends the Internal Revenue Code to extend through FY2011 the excise taxes on aviation fuels and the transportation of persons and property by air. The bill also extends through FY2011 the expenditure authority for the Airport and Airway Trust Fund.

**Modification of Excise Tax on Kerosene for Use in Aviation.** The substitute imposes a general aviation excise tax on aviation-grade kerosene of 35.9 cents per gallon, up from the current law of 21.8 cents (4.3 cents per gallon for fuel used in commercial aviation).

**Air Traffic Control System Modernization Account.** The substitute establishes within the Airport and Airway Trust Fund an Air Traffic Control System Modernization Account.

**Treatment of Fractional Aircraft Ownership Programs.** A fractional ownership program allows a single individual or entity to purchase a fractional interest in an aircraft. This guarantees the purchaser on-demand availability of an aircraft involved in the program. The fractional ownership program management handles the safety and maintenance upkeep of the aircraft and is in charge of the pilots, crews, and scheduling. The bill classifies fractional operations as noncommercial. The fractional ownership program management will pay 36 cents for aviation-grade kerosene (Jet A) and a fuel surtax of 14.1 cents on all miles flown on an aircraft involved in a fractional ownership program.

**Termination of Exemption for Small Aircraft Operating on Nonestablished Lines.** The substitute repeals the exemption from air transportation excise taxes for transportation by small aircraft operating on non-established lines. The exemption is retained for small aircraft operating solely for sightseeing purposes.

**Transparency in Passenger Tax Disclosures.** The substitute prohibits all transportation providers from including amounts other than charges payable to a government entity in the required disclosure of passenger taxes on tickets and in advertising.

**Required Funding of New Accruals Under Air Carrier Pension Plans.** The substitute amends the Pension Protection Act of 2006 to require defined benefit pension plans to fund annual accruals. Under current law, air carriers may restore past underfunding for their pension plans through alternative funding rules, allowing more time to amortize their unfunded liabilities and value their liabilities at a certain interest rate. Specifically, past underfunding of pension plans frozen by an air carrier may be paid over 17 years with an assumption that the pension trust will earn 8.85 percent interest regardless of actual earnings. Conversely, past underfunding for non-frozen pension plans may be paid over 10 years with an assumption that the pension trust will earn 8.25 percent interest regardless of actual earnings.

## **Subtitle B – Increased Funding for the Highway Trust Fund**

**Replenish Emergency Spending from the Highway Trust Fund.** The substitute appropriates \$5 billion to the Highway Trust Fund for replenishment of emergency spending.

**Suspension of Transfers from Highway Trust Fund for Certain Repayments and Credits.** Under present law, transfers are made from the Highway Trust Fund into the General Fund relating to amounts paid with regard to gasoline used on farms, used for some non-highway purposes or by local transit systems, fuels not used for taxable purposes, and income tax credits for certain uses of fuels. The substitute suspends for six months after enactment transfers from the Highway Trust Fund for certain repayments and credits relating to nontaxable uses of fuel.

**Impose Excise Tax on Certain Removals on Taxable Fuel from Foreign Trade Zones.** The substitute defines “United States” for purposes of the excise tax on taxable fuels to include any foreign trade zone or bonded warehouse located in the United States.

**Clarification of Penalty for Sale of Fuel Failing to Meet EPA Regulations.** The substitute expands the penalty for the sale of fuel which does not meet Environmental Protection Agency (EPA) regulations to include any fuel held out for sale that does not meet the standards for distribution to the public.

**Treatment of Qualified Alcohol Fuel Mixtures and Qualified Biodiesel Fuel Mixtures as Taxable Fuel.** The substitute includes in the definition of “taxable fuel,” for excise tax purposes, qualified alcohol and biodiesel fuel mixtures.

**Excluding Volume of Denaturants from the Alcohol Fuel Credit.** The substitute excludes any denaturant added to alcohol from the volume measurements for purposes of the alcohol fuels tax credit.

**Bulk Transfer Exception Not to Apply to Finished Gasoline.** The substitute disqualifies finished gasoline from the tax exemption allowed for certain bulk transfers of taxable fuels.

**Increase and Extension of Oil Spill Liability Trust Fund Tax.** The substitute increases the oil spill tax from five cents a barrel to 10 cents, effective for the first quarter that begins 60 days after date of enactment. The provision sunsets on September 30, 2018.

**Tax Treatment of Certain Inverted Corporate Entities.** Corporate inversions apply when multiple corporations reorganize their structure so that the “parent” element of the group is a foreign corporation rather than a corporation chartered in the United States. Firms engaged in the inversions cite a number of reasons for undertaking them, including creating greater “operational flexibility,” improved cash management, and an enhanced ability to access international capital markets, and tax savings. The provisions of the American Jobs Creation Act taxing these “corporate inversions” applied to inversions occurring after March 4, 2003. The substitute moves the effective date back to March 20, 2002.

**Denial of Deduction for Punitive Damages.** The substitute denies a tax deduction for punitive damages in connection with a judgment or settlement of any claim.

**Motor Fuel Tax Advisory Commission.** The substitute revises requirements for the Motor Fuel Tax Enforcement Advisory Commission established by SAFETEA for the review of motor revenue fuel collections. The Commission must report to Congress, not later than September 30, 2009, on its findings relating to fuel collections. The Commission will then be terminated and must transmit its records to the National Archives.

**Highway Trust Fund Conforming Expenditure Amendment.** The substitute makes conforming amendments to the Highway Trust Fund provisions of the Internal Revenue Code relating to the authorization of funds for emergency repairs and reconstruction of the Interstate I-35 bridge in Minnesota, P.L. 110-56.

### **Subtitle C – Additional Infrastructure Modifications and Revenue Provisions**

**Restructure New York Liberty Zone Tax Credits.** The substitute allows a tax credit against payroll liabilities of New York Liberty Zone governmental units (i.e., New York State, the City of New York, or any agencies or instrumentalities thereof) for expenditures involving transportation infrastructure projects in or connecting with the Zone. It requires annual reports to the Secretary of the Treasury by the Governor of New York and the Mayor of New York City on project expenditures. The credit is terminated after 2025.

**Option to Treat Elective Deferrals as After-Tax Contributions.** The substitute allows participants in certain deferred compensation plans (Section 457 plans) to treat elective deferrals as Roth individual retirement account (IRA) contributions.

**Increase in Information Return Penalties.** The substitute increases penalties for failure to file correct information tax returns, for failure to furnish correct payee statements, and for failure to comply with other information reporting requirements.

**Exemption of Certain Commercial Cargo from Harbor Maintenance Tax.** The substitute exempts commercial cargo (other than bulk cargo) loaded or unloaded at U.S. ports in the Great Lakes Saint Lawrence Seaway System from the harbor maintenance tax. The substitute defines the “Great Lakes Saint Lawrence Seaway System” as the waterway between Duluth, Minnesota and Sept-Îles, Quebec, Canada, encompassing the five Great Lakes, their connecting channels, and the Saint Lawrence River.

**Tax Exempt and Tax Credit Bonds for Rail Infrastructure.** The substitute allows holders of qualified rail infrastructure bonds a tax credit for 25 percent of the annual credit amount for such bonds as determined by the Secretary of the Treasury.

**Repeal of suspension of Interest and Penalties Where IRS Fails to Contact Taxpayer.** The substitute repeals provisions providing for a 36-month suspension of interest and penalties on tax underpayments for taxpayers who had not been notified of a tax deficiency by the IRS.

**Denial of Deduction for Certain Fines, Penalties and Other Amounts.** The substitute revises the rule denying a tax deduction for fines and penalties paid to a government for the violation of any law to provide that no deduction shall be allowed for any fine or penalty paid (whether by suit, agreement, or otherwise) to, or at the direction of, a government or nongovernmental

regulatory entity for a violation of law or for the investigation or inquiry into such a violation. However, the substitute does allow exceptions to the general rule of nondeductibility for: (1) certain restitution payments or payments required to come into compliance with applicable law; (2) court-ordered payments not involving a government or nongovernmental regulatory entity; and (3) amounts paid or incurred as taxes due. The substitute also requires governmental agencies involved in a settlement with a taxpayer to report to the Secretary of the Treasury and the taxpayer information about such settlement, including the amount of the settlement, the amount paid as restitution or remediation of property, and the amount paid to come into compliance with law.

**Revision of Tax Rules on Expatriation of Individuals.** The substitute sets forth additional rules for the tax treatment of high-income individuals who relinquish U.S. citizenship or residency to avoid U.S. taxation (expatriates). The language treats all property of expatriates as sold for its fair market value on the day before the expatriation date and includes gain (over \$600,000) or loss from such sale in the gross income of such expatriates. The substitute allows expatriates to elect to defer payment of any tax resulting from expatriation if adequate security for payment of such tax is given.

Furthermore, the substitute requires 30 percent withholding of tax for certain items of deferred compensation payable to expatriates, and imposes a separate tax on gifts and bequests from expatriates exceeding \$10,000, payable by the recipient of such gift or bequest.

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## **Administration Position**

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At press time, there was no Statement of Administration Policy (SAP) for the Senate substitute to H.R. 2881.

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## **Cost**

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At press time, there was no official score for the Senate substitute to H.R. 2881.

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## **Possible Amendments**

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Amendments are expected concerning:

- Additional passenger service protections for flight cancellations and delays;

- Additional affirmative rights for passengers;
- Peanuts ban;
- Banning certain medical devices on planes;
- NATCA staffing levels;
- Additional changes to miscellaneous safety provisions;
- Climate change;
- Renewable fuel requirements; and
- Repair stations.