

**DESCRIPTION OF THE
“AIRPORT AND AIRWAY TRUST FUND
REAUTHORIZATION ACT OF 2011”**

Scheduled for Markup
By the
SENATE COMMITTEE ON FINANCE
on February 8, 2011

Prepared by the Staff
of the
JOINT COMMITTEE ON TAXATION



February 4, 2011
JCX-3-11

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INTRODUCTION

The Airport and Airway Trust Fund provides funding for capital improvements to the U.S. airport and airway system and funding for Federal Aviation Administration (“FAA”) operations and programs, among other purposes. The Internal Revenue Code (the “Code”) contains the provisions that dedicate revenues from certain excise taxes to the Airport and Airway Trust Fund, provide the relevant expenditure provisions governing the purposes for which Airport and Airway Trust Fund monies may be spent, and set the period for when those expenditures may occur. The excise taxes imposed to finance the Airport and Airway Trust Fund are:¹

- ticket taxes imposed on commercial, domestic passenger transportation by air;
- a use of international air facilities tax;
- a cargo tax imposed on freight transportation by air;
- fuels taxes imposed on gasoline used in commercial aviation and noncommercial aviation; and
- fuels taxes imposed on jet fuel (kerosene) and other aviation fuels used in commercial aviation and noncommercial aviation.

Domestic commercial aviation (the use of an aircraft in a business of transporting persons or property for compensation) is subject to the ticket tax and air cargo tax, as well as a 4.3 cent per gallon fuel tax.² Noncommercial aviation is subject only to the fuel taxes, but at higher rates.

With the exception of 4.3 cents per gallon of the fuel tax rates, the taxes imposed and dedicated to the Airport and Airway Trust Fund do not apply after March 31, 2011. The Airport and Airway Trust Fund expenditure authority expires on April 1, 2011. The purposes for which Airport and Airway Trust Fund funds may be expended are fixed as of the date of enactment of the Airport and Airway Extension Act of 2010, Part IV. As a result, the Code provisions must be amended to permit expenditure of Airport and Airway Trust Fund monies for purposes as provided for in any new reauthorization bill, as well as to authorize the imposition of the dedicated taxes beyond March 31, 2011.

On February 1, 2011, the Senate began consideration of S. 223, the “FAA Air Transportation Modernization and Safety Improvement Act.” That bill authorizes appropriations for the FAA through September 30, 2013, among other provisions. The Senate Committee on Finance has scheduled a markup of a bill relating to the Airport and Airway Trust Fund

¹ Sec. 9502(b)(1). The Airport and Airway Trust fund also is credited with interest under sec. 9602(b). Unless otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended.

² The fuel tax consists of two components: 4.3 cents per gallon dedicated to the Airport and Airway Trust Fund and 0.1 cent per gallon dedicated to the Leaking Underground Storage Tank Trust Fund. The higher fuel tax imposed on noncommercial aviation similarly consists of an Airport and Airway Trust Fund component (21.8 cents per gallon for jet fuel, 19.3 cents for aviation gasoline) plus 0.1 cent per gallon for the Leaking Underground Storage Tank Trust Fund.

reauthorization for February 8, 2011. This document,³ prepared by the staff of the Joint Committee on Taxation, provides a description of the present-law taxes dedicated to the Airport and Airway Trust Fund, a summary of the Airport and Airway Trust Fund expenditure purposes, and a description of the bill. The bill reauthorizes the taxes and amends the purposes for which Airport and Airway Trust Fund funds may be expended to include the reauthorization bill, increases the tax rate on aviation-grade kerosene for use in noncommercial aviation, creates a new sub-account within the Airport and Airway Trust Fund for air traffic control modernization, creates a fuel surtax on fuel used in air transportation using fractional ownership program aircraft, repeals the exemption for small aircraft operating on nonestablished lines (other than exclusively for sightseeing), and amends the penalty relating to disclosures in advertising and airline tickets).

³ This document may be cited as follows: Joint Committee on Taxation, “*Description of the Airport and Airway Trust Fund Reauthorization Act of 2011*” (JCX-3-11), February 4, 2011. This document can be found on our website at www.house.gov/jct.

A. Extension of Taxes Funding the Airport and Airway Trust Fund

Present Law

Excise taxes are imposed on amounts paid for commercial air passenger and freight transportation and on fuels used in commercial and noncommercial (i.e., transportation that is not “for hire”) aviation to fund the Airport and Airway Trust Fund. The present aviation excise taxes are as follows:

Tax (and Code section)	Tax Rates
a. Domestic air passengers (sec. 4261)	7.5 percent of fare, plus \$3.70 (2011) per domestic flight segment generally ⁴
a. International travel facilities tax (sec. 4261)	\$16.30 (2011) per arrival or departure ⁵
b. Amounts paid for right to award free or reduced rate passenger air transportation (sec. 4261)	7.5 percent of amount paid
c. Air cargo (freight) transportation (sec. 4271)	6.25 percent of amount charged for domestic transportation; no tax on international cargo transportation
d. Aviation fuels (sec. 4081): ⁶	
i. Commercial aviation	4.3 cents per gallon
ii. Non-commercial (general) aviation:	
Aviation gasoline	19.3 cents per gallon
Jet fuel	21.8 cents per gallon

All Airport and Airway Trust Fund excise taxes, except for 4.3 cents per gallon of the taxes on aviation fuels, are scheduled to expire after March 31, 2011. The 4.3-cents-per-gallon fuels tax rate is permanent.

Description of Proposal

The proposal extends the present-law Airport and Airway Trust Fund excise taxes through September 30, 2013.

⁴ The domestic flight segment portion of the tax is adjusted annually (effective each January 1) for inflation (adjustments based on the changes in the consumer price index (the “CPI”).

⁵ The international travel facilities tax rate is adjusted annually for inflation (measured by changes in the CPI).

⁶ Like most other taxable motor fuels, aviation fuels are subject to an additional 0.1-cent-per-gallon excise tax to fund the LUST Trust Fund.

Effective Date

The proposal takes effect on April 1, 2011.

B. Extension of Airport and Airway Trust Fund Expenditure Authority

Present Law

In general

The Airport and Airway Trust Fund was created in 1970 to finance a major portion of Federal expenditures on national aviation programs. Operation of the Airport and Airway Trust Fund is governed by the Code and authorizing statutes. The Code provisions govern deposit of revenues into the trust fund and approves the use of trust fund money (as provided by appropriation Acts) for expenditure purposes in authorizing statutes as in effect on the date of enactment of the latest authorizing Act. The authorizing Acts provide specific trust fund expenditure programs and purposes.

Authorized expenditures from the Airport and Airway Trust Fund include the following principal programs:

1. Airport Improvement Program (“AIP”) (airport planning, construction, noise compatibility programs, and safety projects);
2. Facilities and Equipment (“F&E”) program (costs of acquiring, establishing, and improving the air traffic control facilities);
3. Research, Engineering, and Development (“RED”) program (FAA research and development activities);
4. FAA Operations and Maintenance (“O&M”) programs; and
5. Certain other aviation-related programs specified in authorizing Acts.

Part of the O&M programs also is financed from General Fund monies. Of the total FAA appropriations, the General Fund contribution has ranged from 15 to 24 percent in recent years.⁷

Limits on Airport and Airway Trust Fund expenditures

No expenditures are currently permitted to be made from the Airport and Airway Trust Fund after March 31, 2011. Because the purposes for which Airport and Airway Trust Fund monies are permitted to be expended are fixed as of the date of enactment of the Airport and Airway Extension Act of 2010, Part IV, the Code must be amended in order to authorize new Airport and Airway Trust Fund expenditure purposes. In addition, the Code contains a specific enforcement provision to prevent expenditure of Airport and Airway Trust Fund monies for purposes not authorized under section 9502. This provision provides that, should such unapproved expenditures occur, no further aviation excise tax receipts will be transferred to the

⁷ Congressional Budget Office, *Financing Federal Aviation Programs: Statement of Robert A. Sunshine before the House Committee on Ways and Means* (May 7, 2009) at 3.

Airport and Airway Trust Fund. Rather, the aviation taxes would continue to be imposed, but the receipts would be retained in the General Fund.

Description of Proposal

The proposal authorizes expenditures from the Airport and Airway Trust Fund through September 30, 2013. The proposal also amends the list of authorizing statutes to include the “FAA Air Transportation Modernization and Safety Improvement Act,” which sets forth aviation program expenditure purposes through September 30, 2013.

Effective Date

The proposal takes effect on April 1, 2011.

C. Modification of Excise Tax on Kerosene Used in Aviation

Present Law

In general

Under section 4081, an excise tax is imposed upon (1) the removal of any taxable fuel from a refinery or terminal,⁸ (2) the entry of any taxable fuel into the United States, or (3) the sale of any taxable fuel to any person who is not registered with the IRS to receive untaxed fuel, unless there was a prior taxable removal or entry.⁹ The tax does not apply to any removal or entry of taxable fuel transferred in bulk by pipeline or vessel to a terminal or refinery if the person removing or entering the taxable fuel, the operator of such pipeline or vessel (excluding deep draft vessels), and the operator of such terminal or refinery are registered with the Secretary.¹⁰ If the bulk transfer exception applies, tax is not imposed until the fuel “breaks bulk,” i.e., when it is removed from the terminal, typically by rail car or truck, for delivery to a smaller wholesale facility or retail outlet, or removed directly from the terminal into the fuel tank of an aircraft.¹¹

The term “taxable fuel” means gasoline, diesel fuel (including any liquid, other than gasoline, that is suitable for use as a fuel in a diesel-powered highway vehicle or train), and kerosene.¹² The term includes kerosene used in aviation (jet fuel) as well as aviation gasoline.

Section 4041(c) provides a back-up tax for liquids (other than aviation gasoline) that are sold for use as a fuel in aircraft and that have not been previously taxed under section 4081.¹³

Kerosene for use in aviation

In general

Present law generally imposes a total tax of 24.4 cents per gallon on kerosene. However, reduced rates apply for kerosene removed directly from a terminal into the fuel tank of an

⁸ A “terminal” is a taxable fuel storage and distribution facility that is supplied by pipeline or vessel and from which taxable fuel may be removed at a rack. A “rack” is a mechanism capable of delivering taxable fuel into a means of transport other than a pipeline or vessel. A terminal can be located at an airport, or fuel may be delivered to the airport from a terminal located off the airport grounds.

⁹ Sec. 4081(a)(1).

¹⁰ Sec. 4081(a)(1)(B).

¹¹ In general, the party liable for payment of the taxes when the fuel breaks bulk at the terminal is the “position holder,” the person shown on the records of the terminal facility as holding the inventory position in the fuel. However, when fuel is removed directly into the fuel tank of an aircraft for use in commercial aviation, the person who uses the fuel is liable for the tax. The fuel is treated as used when such fuel is removed into the fuel tank. Sec. 4081(a)(4).

¹² Sec. 4083(a).

¹³ Sec. 4041(c).

aircraft.¹⁴ For kerosene removed directly from a terminal into the fuel tank of an aircraft for use in commercial aviation, the tax rate is 4.4 cents per gallon.¹⁵ For kerosene removed directly from a terminal into the fuel tank of an aircraft for use in noncommercial aviation, the tax rate is 21.9 cents per gallon. All of these tax rates include 0.1 cent per gallon for the Leaking Underground Storage Tank Trust Fund. For kerosene removed directly from a terminal into the fuel tank of an aircraft for an exempt use (such as for the exclusive use of a State or local government), generally only the Leaking Underground Storage Tank Trust Fund tax of 0.1 cent per gallon applies.

“Commercial aviation” generally means any use of an aircraft in the business of transporting by air persons or property for compensation or hire.¹⁶ Commercial aviation does not include transportation exempt from the ticket taxes and air cargo taxes by reason of sections 4281 or 4282 or by reason of section 4261(h) or 4261(i). Thus, small aircraft operating on nonestablished lines (sec. 4281), air transportation for affiliated group members (sec. 4282), air transportation for skydiving (sec. 4261(h)), and certain air transportation by seaplane (sec. 4261(i)) are excluded from the definition of commercial aviation, and accordingly are subject to the tax regime applicable to noncommercial aviation.

Refunds and credits to obtain the appropriate aviation tax rate

If the kerosene is not removed directly into the fuel tank of an aircraft, the fuel is taxed at 24.4 cents per gallon. (This is generally the rate applied to diesel fuel and kerosene used in highway vehicles). A claim for credit or payment may be made for the difference between the tax paid and the appropriate aviation rate (21.9 cents per gallon for noncommercial aviation, 4.4 cents per gallon for commercial aviation, and 0.1 cent per gallon for an exempt use).¹⁷

For noncommercial aviation, other than for exempt use, only the registered ultimate vendor may make the claim for the 2.5-cent-per-gallon difference between the 24.4 cents per

¹⁴ If certain conditions are met, present law permits the removal of kerosene from a refueler truck, tanker, or tank wagon to be treated as a removal from a terminal for purposes of determining whether kerosene is removed directly into the fuel tank of an aircraft. A refueler truck, tanker, or tank wagon is treated as part of a terminal if: (1) the terminal is located within an airport, (2) any kerosene which is loaded in such truck, tanker, or wagon at such terminal is for delivery only into aircraft at the airport in which such terminal is located, and (3) no vehicle licensed for highway use is loaded with kerosene at such terminal, except in exigent circumstances identified by the Secretary in regulations. In order to qualify for the special rule, a refueler truck, tanker, or tank wagon must: (1) have storage tanks, hose, and coupling equipment designed and used for the purposes of fueling aircraft; (2) not be registered for highway use; and (3) be operated by the terminal operator (who operates the terminal rack from which the fuel is unloaded) or by a person that makes a daily accounting to such terminal operator of each delivery of fuel from such truck, tanker, or tank wagon. Sec. 4081(a)(3).

¹⁵ Tax is imposed at this rate if the commercial aircraft operator is registered with the IRS, and the fuel terminal is located within a secured area of an airport. The IRS has identified airports with secured areas in which a terminal is located. See Notice 2005-4, 2005-1 C.B. 289, at sec. 4(d)(2)(ii) (2005) and Notice 2005-80, 2005-2 C.B. 953, at sec. 3(c)(2) (2005). If the fuel terminal is located at an unsecured airport, the fuel is taxed at 21.9 cents per gallon if the fuel is removed directly from the terminal into the fuel tank of an aircraft.

¹⁶ Sec. 4083(b).

¹⁷ Sec. 6427(l)(4).

gallon rate and the noncommercial aviation rate of 21.9 cents per gallon.¹⁸ For commercial aviation and exempt use (other than State and local government use), the ultimate purchaser may make a claim for the difference in tax rates, or the ultimate purchaser may waive the right to make the claim for payment to the ultimate vendor.¹⁹ For State and local government use, the registered ultimate vendor is the proper claimant.²⁰

Commercial aviation claimants are permitted to credit their fuel tax claims against their other excise tax liabilities, thereby reducing the amount of excise tax to be paid with the excise tax return.

Transfers between the Highway Trust Fund and the Airport and Airway Trust Fund to account for aviation use

Kerosene that is not removed directly from the terminal into an airplane (e.g., the jet fuel is transferred from the terminal by highway vehicle to the airport) is taxed at the highway fuel rate of 24.4 cents per gallon. The Highway Trust Fund is credited with 24.3 cents per gallon of the 24.4 cents per gallon imposed. The remaining 0.1 cent is credited to the Leaking Underground Storage Tank Trust Fund. If a claim for payment is later made indicating that the fuel was used in aviation, the Secretary then transfers to the Airport and Airway Trust Fund 4.3 cents per gallon for commercial aviation use and 21.8 cents per gallon for noncommercial aviation use. These transfers initially are based on estimates, and proper adjustments are made in amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred. Thus, to the extent claims for credit or payment are not made for the difference between the highway rate and the aviation rate, the Airport and Airway Trust Fund will not be credited for fuel used in aviation that was taxed at the 24.4 cents per gallon rate.

Aviation gasoline

The tax on aviation gasoline is 19.4 cents per gallon (including 0.1 cent per gallon Leaking Underground Storage Tank Trust Fund component). If aviation gasoline is used in commercial aviation, the ultimate purchaser may obtain a credit or payment in the amount of 15 cents per gallon, such that the tax rate on such gasoline is 4.4 cents per gallon.²¹ If aviation gasoline is sold for an exempt use, a credit or refund is allowable for all but the Leaking Underground Storage Tank Trust Fund tax (0.1 cent per gallon).²²

¹⁸ Sec. 6427(l)(4)(C)(ii).

¹⁹ Sec. 6427(l)(4)(C)(i).

²⁰ See secs. 6427(l)(5). Special rules apply if the kerosene is purchased with a credit card issued to a State or local government.

²¹ Sec. 6421(f)(2).

²² Sec. 6416(a); sec. 6420 (farming purposes); sec. 6421(c); and sec. 6430.

Description of Proposal

The proposal creates a separate category of kerosene for tax purposes: aviation-grade kerosene.²³ Aviation-grade kerosene is taxed at 35.9 cents per gallon plus 0.1 cent per gallon for the Leaking Underground Storage Tank Trust Fund. Under the proposal, aviation-grade kerosene used in noncommercial aviation will be taxed at the full rate. The rate of tax for aviation-grade kerosene used in commercial aviation and exempt use remains unchanged.²⁴

Because the tax on aviation-grade kerosene used in noncommercial aviation is equal to the full rate of tax collected, the proposal repeals the ultimate vendor refund provisions for noncommercial aviation. In addition, the proposal eliminates the inter-fund transfers from the Highway Trust Fund to the Airport and Airway Trust Fund for kerosene used in aviation. Instead, the taxes imposed on aviation-grade kerosene will be credited to the Airport and Airway Trust Fund only. The proposal also provides a refund mechanism for aviation-grade kerosene used for a taxable purpose other than in an aircraft and the related-trust fund accounting.

In the case of aviation-grade kerosene held on April 1, 2011, by any person, a floor stocks tax is imposed equal to the tax that would have been imposed if the increased rates had been in effect before such date, less (1) the tax actually imposed on such fuel and (2) for fuel held by a person for his own use, the amount that such person would reasonably expect to be paid as a refund. The tax is to be paid at such time and in such manner as the Secretary shall prescribe.

The floor stocks tax does not apply to fuel held in the fuel tank of an aircraft on April 1, 2011. Nor does it apply to fuel held exclusively for any use to the extent a refund or credit of tax is allowable under the Code. The floor stocks tax does not apply if the amount of fuel held by a person does not exceed 2,000 gallons.

For purposes of the floor stocks tax, a controlled group is treated as one person. “Controlled group” for these purposes means a parent-subsidiary, brother-sister, or combined corporate group with more than 50-percent ownership with respect to either combined voting power or total value. Under regulations, similar principles may apply to a group of persons under common control where one or more persons are not a corporation.

All provisions of law, including penalties, applicable with respect to the taxes imposed by section 4081 also apply to the floor stocks taxes to the extent not inconsistent with the provisions of the proposal. For purposes of determining receipts to the Airport and Airway Trust Fund, the floor stocks tax is treated as if it were a tax listed in section 9502(b)(1) (governing transfers of tax receipts to the Airport and Airway Trust Fund).

²³ Aviation-grade kerosene means, as defined by the Internal Revenue Service, kerosene-type jet fuel covered by ASTM specification D1655, or military specification MIL-DTL-5624 (Grade JP-5) or MIL-DTL-83133E (Grade JP-8). See section 4(b) of Notice 2005-4.

²⁴ Accordingly, commercial aviation use will continue to be subject to a tax of 4.4 cents per gallon and exempt use will be subject to 0.1 cent per gallon.

Effective Date

The proposal is generally effective for fuel removed, entered, or sold after March 31, 2011. The floor stocks tax is effective April 1, 2011.

D. Air Traffic Control System Modernization Account

Present Law

Under present law, there is no special sub-account of the Airport and Airway Trust Fund to which funds are dedicated for air traffic control systems modernization.

Description of Proposal

The proposal creates an Air Traffic Control System Modernization Account (“Modernization sub-account”) within the Airport and Airway Trust Fund to ensure sufficient funding is provided for modernization of the air traffic control system. The Modernization sub-account is supported through annual transfers of \$400 million from the Airport and Airway Trust Fund that are attributable to the taxes on aviation-grade kerosene. The funds are available, subject to appropriation, for expenditures relating to the modernization of the air traffic control system. Use of the funds also may include facility and equipment account expenditures.

Effective Date

The proposal is effective on the date of enactment.

E. Treatment of Fractional Ownership Aircraft Programs

Present Law

For excise tax purposes, fractional ownership aircraft flights are treated as commercial aviation. As commercial aviation, for 2011, such flights are subject to the *ad valorem* tax of 7.5 percent of the amount paid for the transportation, a \$3.70 segment tax, and tax of 4.4 cents per gallon on fuel. For international flights, fractional ownership flights pay the \$16.30 international travel facilities tax.

For purposes of the FAA safety regulations, fractional ownership aircraft programs are treated as a special category of general aviation.²⁵

Description of Proposal

Under the proposal, transportation as part of a fractional ownership aircraft program is not classified as commercial aviation for Federal excise tax purposes. Instead, such flights would be subject to the increased Airport and Airway Trust Fund fuel tax rate for noncommercial aviation and an additional fuel surtax of 14.1 cents per gallon. For this purpose, a “fractional ownership aircraft program” is defined as a program in which:

- A single fractional ownership program manager provides fractional ownership program management services on behalf of the fractional owners;
- Two or more airworthy aircraft are part of the program;
- There are one or more fractional owners per program aircraft, with at least one program aircraft having more than one owner;
- Each fractional owner possesses at least a minimum fractional ownership interest in one or more program aircraft;²⁶
- There exists a dry-lease exchange arrangement among all of the fractional owners;²⁷

²⁵ 14 C.F.R. Part 91, subpart k.

²⁶ A “minimum fractional ownership interest” means: (1) A fractional ownership interest equal to or greater than one-sixteenth of at least one subsonic, fixed wing or powered lift program aircraft; or (2) a fractional ownership interest equal to, or greater than one-thirty-second of a least one rotorcraft program aircraft. A “fractional ownership interest” is (1) the ownership interest in a program aircraft, (2) the holding of a multi-year leasehold interest in a program aircraft, or (3) the holding of a multi-year leasehold interest that is convertible into an ownership interest in a program aircraft.

²⁷ A “dry-lease aircraft exchange” means an agreement, documented by the written program agreements, under which the program aircraft are available, on an as needed basis without crew, to each fractional owner.

- There are multi-year program agreements covering the fractional ownership, fractional ownership program management services, and dry-lease aircraft exchange aspects of the program.

The fuel taxes are dedicated to the Airport and Airway Trust Fund. Consistent with the general extension of the taxes dedicated to the Airport and Airway Trust Fund, the proposal sunsets September 30, 2013.

Effective Date

The proposal is effective for taxable transportation provided after, and fuel used after, March 31, 2011.

F. Termination of Exemption For Small Aircraft on Nonestablished Lines

Present Law

Under present law, transportation by aircraft with a certificated maximum takeoff weight of 6,000 pounds or less is exempt from the excise taxes imposed on the transportation of persons by air and the transportation of cargo by air when operating on a nonestablished line. Similarly, when such aircraft are operating on a flight for the sole purpose of sightseeing, the taxes imposed on the transportation of persons or cargo by air do not apply.

Description of Proposal

The proposal repeals the exemption for transportation by small aircraft operating on nonestablished lines. The present-law exemption for flights operated for the sole purposes of sightseeing is unchanged by the proposal.

Effective Date

The proposal is effective for transportation provided after March 31, 2011.

G. Transparency in Passenger Tax Disclosures

Present Law

Transportation providers are subject to special penalties if they do not separately disclose the amount of the passenger taxes on tickets and in advertising. Failure to satisfy these disclosure requirements is a misdemeanor, upon conviction of which the guilty party is fined not more than \$100 per violation.²⁸

There is no prohibition against airlines including other charges in the required passenger taxes disclosure (e.g., fuel surcharges retained by the commercial airline). In practice, some but not all airlines include such other charges in the required passenger taxes disclosure.

Description of Proposal

The proposal 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. Disclosure elsewhere on tickets and in advertising (e.g., as an amount paid for transportation) of charges not payable to a government entity is allowed.

Effective Date

The proposal is effective for transportation provided after March 31, 2011.

²⁸ Sec. 7275.