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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 93

[Docket No. FAA-2006-25709; Notice No. 08-04]

RIN 2120-A170

#### Congestion Management Rule for LaGuardia Airport

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Supplemental notice of proposed rulemaking (SNPRM).

**SUMMARY:** On August 29, 2006, the Federal Aviation Administration published a notice of proposed rulemaking to address congestion at New York's LaGuardia Airport (LaGuardia), which included a proposal to administratively incentivize carriers to use larger planes. The FAA prefers to use measures that allow carriers to respond to market forces to drive the most efficient airline behavior and is amending its original proposal. To minimize disruption, the FAA proposes to grandfather the majority of operations at the airport and develop a robust secondary market by annually auctioning off a limited number of slots. The FAA is proposing two different, mutually exclusive options. Under the first option, the FAA would auction off and retire a portion of the slots and would use the proceeds to mitigate congestion and delay in the New York City area. Under the second option, the FAA would conduct an auction as it would under the first option, but the proceeds would go to the carrier holding the slot rather than the FAA and no portion of existing slots would be retired. This proposal also contains provisions for use-or-lose, unscheduled operations, and withdrawal for operational need. The FAA proposes to sunset the rule in ten years.

**DATES:** Send your comments on or before June 16, 2008.

**ADDRESSES:** You may send comments identified by Docket Number FAA-2006-25709 using any of the following methods:

• *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow

the online instructions for sending your comments electronically.

• *Mail:* Send comments to Docket Operations, M-30; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.

• *Hand Delivery or Courier:* Bring comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

• *Fax:* Fax comments to Docket Operations at 202-493-2251.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

*Privacy:* We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the electronic form of all comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review Department of Transportation's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://DocketsInfo.dot.gov>.

*Docket:* To read background documents or comments received, go to <http://www.regulations.gov> at any time and follow the online instructions for accessing the docket. Or, go to the Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For technical questions regarding this rulemaking, contact: Molly W. Smith, Office of Aviation Policy and Plans, APO-001, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3275; e-mail [molly.w.smith@faa.gov](mailto:molly.w.smith@faa.gov). For legal questions concerning this rulemaking, contact: Rebecca MacPherson, FAA Office of the Chief Counsel, 800 Independence Ave., SW., Washington, DC 20591; telephone (202) 267-3073; e-mail [rebecca.macpherson@faa.gov](mailto:rebecca.macpherson@faa.gov).

**SUPPLEMENTARY INFORMATION:** Later in this preamble under the Additional Information section, we discuss how you can comment on this proposal and how we will handle your comments.

Included in this discussion is related information about the docket, privacy, and the handling of proprietary or confidential business information. We also discuss how you can get a copy of this proposal and related rulemaking documents.

#### Authority for This Rulemaking

The FAA has broad authority under 49 U.S.C. 40103 to regulate the use of the navigable airspace of the United States. This section authorizes the FAA to develop plans and policy for the use of navigable airspace and to assign the use that the FAA deems necessary for its safe and efficient utilization. It further directs the FAA to prescribe air traffic rules and regulations governing the efficient utilization of the navigable airspace.

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#### I. Background

##### A. History of Congestion Management Initiatives at LaGuardia

The FAA managed congestion at LaGuardia under the High Density Rule (HDR) from 1969 through 2006. 14 CFR part 93 subparts K and S. The FAA first established allocation procedures for slots under the HDR in 1985. 50 FR 52195, December 20, 1985. These procedures included use-or-lose provisions and, while explicitly stating

that the slots were not the carriers' property, allowed carriers to buy, sell or lease the slots on the secondary market. On April 5, 2000, Congress enacted the Wendell H. Ford Aviation and Investment Reform Act of the 21st Century (AIR-21 or the Act). The Act phased out the HDR at LaGuardia effective January 1, 2007. In addition to phasing out the HDR, AIR-21 directed the Secretary of Transportation to grant exemptions from the HDR's flight restrictions for flights operated by new entrant carriers or flights serving Small-Hub and Non-Hub airports as long as the aircraft had less than 71 seats. The Act also preserved the FAA's authority to impose flight restrictions by stating that "[n]othing in this section \* \* \* shall be construed \* \* \* as affecting the Federal Aviation Administration's authority for safety and the movement of air traffic." 49 U.S.C. 41715(b).

The slot exemptions mandated by Congress under AIR-21 resulted in gridlock at the airport as the number of exempted operations soared throughout 2000. Using its authority in 49 U.S.C. 40103, the FAA capped AIR-21 slot exemptions and hourly operations at LaGuardia. On December 4, 2000, the agency conducted a lottery that allocated the limited number of exemptions. While hourly operations were limited at the airport, the new cap at LaGuardia was significantly higher than it had been under the HDR prior to enactment of AIR-21.

Slots allocated under the HDR were scheduled to expire on January 1, 2007. Based on its experience in 2000, the FAA determined that simply lifting the HDR at LaGuardia would have a significantly adverse impact on the airspace around New York City and potentially on the National Airspace System (NAS) as a whole. Accordingly, on August 29, 2006, the FAA published a notice of proposed rulemaking (NPRM) proposing continuation of the cap on hourly operations at the airport as well as a new method of allocating capacity (71 FR 51360). Specifically, the FAA proposed to cap scheduled operations at 75 per hour; cap unscheduled operations at six per hour; impose an average minimum aircraft size requirement for much of the fleet serving the airport; and implement a limit on the duration of operating lives, known as Operating Authorizations, that would assure ten percent of the capacity at the airport would be available annually for reallocation based on an undetermined market mechanism. The average minimum aircraft size proposal was known as the aircraft upgauging proposal. This proposal was designed to maximize airport

throughput consistent with the airport's physical constraints. The comment period closed December 29, 2006.

The FAA recognized that it would be unable to complete its rulemaking by January 1, 2007, when the HDR was scheduled to expire. On December 27, 2006 the agency published an FAA Order *Operating Limitations at New York LaGuardia Airport* (LaGuardia Order) (71FR 77854).<sup>1</sup> The LaGuardia Order retained the existing cap at the airport of 75 scheduled operations and imposed a reservation system for unscheduled operations that permitted six unscheduled operations per hour. The LaGuardia Order did not retain the conditions imposed by Congress on the AIR-21 exemptions; rather, flights conducted pursuant to the exemptions were rolled into the hourly cap without restriction.

The industry response to the new allocation method proposed in the NPRM was universally negative, although very few commenters argued that a cap on operations at the airport was unnecessary. The FAA received comments from 61 different commenters, with some commenters making multiple submissions. The largest group of commenters consisted of Federal, state and local government representatives and community groups who were concerned the FAA's proposal, if adopted, would result in specific communities losing direct service to and from LaGuardia. Fifteen carriers and four of their associations commented on the proposal, as did two airport associations, three other associations, the airport's proprietor the Port Authority of New York and New Jersey (Port Authority), the Canadian Embassy and nine individuals speaking in their private capacity.

In general, the carriers and their associations criticized any attempt by the FAA to regulate beyond the simple imposition of a cap on operations, arguing the proposal was too complicated, would not meet the agency's stated objectives, and would prove disruptive to the airport as a whole. Other commenters questioned the FAA's attempt to impose a market-based solution to fair allocation—not because they deemed the measures unduly oppressive, but because they believed market-based measures could not be implemented in a manner that adequately protected the interests of all affected parties. The American Association of Airport Executives (AAAE) expressed this sentiment most succinctly when it stated that while

market-based solutions are generally preferable (since they are more predictable than administrative solutions), they are not preferable when their outcomes are likely to conflict with public policy goals or when artificial constraints are imposed.

While operations at LaGuardia remained capped throughout 2007, caps were lifted on afternoon operations at John F. Kennedy International Airport (JFK) on January 1, 2007, when the HDR expired at that airport. Operations at JFK had already begun to increase during the morning hours, but the increase in operations in the afternoon hours soon led to system overload. Nationally, the summer of 2007 was the second worst on record for flight delays. On September 27, 2007, the Secretary of Transportation announced the formation of the New York Aviation Rulemaking Committee (ARC) to help the Department of Transportation (Department) and the FAA explore available options for congestion management and how changes to current policy at all three major commercial New York City airports would affect the airlines and the airports.

By design, the ARC provided ample opportunity for extensive input by all stakeholders, having members from every major air carrier in the United States as well as foreign carriers and the Port Authority. Through the ARC process, these stakeholders played a key role in exploring ideas to address congestion and ensuring that any actions contemplated by the Department and the FAA would be fully informed. The ARC worked throughout the fall and submitted a report to the Secretary, dated December 13, 2007, discussing its findings. A copy of the ARC Report may be found at <http://www.dot.gov/affairs/FinalARCReport.pdf>.

#### B. Summary of the SNPRM

Today's proposal considers not only the concerns raised by commenters in response to the NPRM, but also takes into account the extensive discussions and issues raised by the members of the ARC. In response to the concerns and issues raised, the FAA has decided to withdraw both its upgauging proposal and its proposal to have Operating Authorizations that would have expired on a rolling ten-year cycle. In deference to the universal use of the term "slots," the FAA has also decided to return to the use of that term rather than calling the operational authority to conduct scheduled operations at LaGuardia

<sup>1</sup> The LaGuardia Order was amended on November 8, 2007 (72 FR 63224).

Operating Authorizations.<sup>2</sup> Accordingly, for purposes of this rulemaking, a slot is defined as the operational authority assigned by the FAA to a carrier to conduct one scheduled arrival or departure operation at LaGuardia on a particular day of the week during a specific 30-minute period.

Rather than pursue its earlier proposal for allocating capacity, the FAA today proposes to lease the majority of operations at the airport to the historic operators for non-monetary consideration under its cooperative agreement authority. The agency also proposes to develop a robust market by annually auctioning off leases for a limited number of slots during the first

five years of the rule. The FAA plans to evaluate the effects of the slot program proposed today on the distribution of slots and entry into LaGuardia on an ongoing basis. The agency intends to take this experience into account in all congestion management activities.

The FAA is proposing two different, mutually exclusive options. Under the first option, the FAA would auction off or retire a portion of the slots and would use the proceeds to mitigate congestion and delay in the New York City area. Under the second option, the FAA would conduct an auction as it would under the first option, but no slots would be retired and the proceeds would go to the carrier holding the slot

after the FAA recoups the cost of the auction, rather than the FAA. In order to facilitate understanding of how each option would work within the entire regulatory scheme, the complete regulatory text for each option is set out in the "Draft Regulatory Text" section of this document.

Today's proposal also contains provisions for use-or-lose, unscheduled operations, and withdrawal for operational need. The FAA proposes to sunset the rule in ten years.

The following table briefly summarizes today's proposal and identifies differences between the two options.

OPTIONS 1 AND 2 OF PROPOSED REGULATION FOR LAGUARDIA

Feature	Option 1	Option 2
Base Schedule	Week 2 January 2007	Same.
Slot	Defined as right to land or depart (not both) in a 30-minute time window.	Same.
Number of Slots	75/hour + 3 unscheduled less 2% retired and not redistributed	75/hour + 3 unscheduled.
Slot Definitions	Common Slots: The Baseline (up to 20 slots per carrier) plus 90% of slots above 20 have 10 year leases; Limited Slots: 8% above the Baseline would have shorter leases and be auctioned over five years (1.6% each) (after which they convert to Unrestricted Slots); and 2% would have shorter leases & then be retired over 5 years (0.4%/yr).	Common Slots: The Baseline (up to 20 slots per carrier) plus 80% of slots above 20 would have 10 year leases; Limited Slots 20% would have shorter leases and then be reallocated via auction over five years (4%/yr).
Slot Time of Day	6 a.m. through 9:59 p.m., Monday through Friday and Sunday from 12 noon through 9:59 p.m.; no more than 75 in any one hour or 38 in any half-hour.	Same.
Mechanics	"Fair" initial distribution with half of slots with less than 10 years life selected by carriers; the other half selected by FAA according to specified rules.	Same.
Auction	For slots returned to FAA because life has expired, an ascending clock auction among air carriers.	Same.
Auction Proceeds	Auction funds to FAA to defray costs of auction, then to NY capacity/projects.	Auction funds (net of auction costs) to incumbent holder; incumbent cannot bid on own slots.
Use/Lose	Only on grandfathered slots as consideration for slots	Same.
Term	Program is through March 2019; slot lives are whatever proportion of 10 years remain upon reallocation.	Same.
Bidders	Airlines	Same.
Holders	Holders of record (not marketing carrier)	Same.
New or returned capacity	Auctioned	Same.
Secondary market	Transparent not blind: carrier notifies FAA of intent to sell; FAA makes slot availability known; bilateral negotiations; final terms disclosed to OST for monitoring.	Same.
Logistical swaps of slots	Permitted	Same.

**II. Discussion of the NPRM**

*A. Withdrawal of Upgauging Proposal*

In the NPRM, the FAA proposed a requirement that incentivized carriers to upgauge the size of their aircraft based on an average number of seats. The FAA maintained that increasing the overall number of passengers using the airport would constitute a more efficient use of the NAS. In particular, the proposal was

based on the FAA's belief that some of the inefficiencies at LaGuardia are related to the use of smaller aircraft in arguably saturated markets.

Under the NPRM's proposal, if a carrier failed to meet the airport's average aircraft size requirement, it would lose its least productive Operating Authorizations. Each carrier would have been allowed to maintain a baseline of operations of 10 daily

operations without consideration of aircraft size, so as to minimize disruption. Recognizing the importance of service to LaGuardia to and from relatively small communities, the proposal also included special treatment for small communities, which would have permitted carriers serving those communities to continue service on smaller aircraft without the risk of losing an Operating Authorization. The

<sup>2</sup> When discussing comments to the NPRM, the FAA will use the term "Operating Authorization"

since that was the term used in the NPRM. In

discussing today's proposal, the agency will use the term "slots".

FAA has decided against moving forward with a proposal requiring upgauging at this time.

Several carriers and their associations alleged the FAA's upgauging proposal would be overly disruptive. Among the concerns cited were that the withdrawal of any one Operating Authorization would effectively mean the loss of a second one as well; the proposed one year effective date to upgauge was unduly restrictive and did not give carriers sufficient opportunity to change their fleet mix; and the proposal failed to acknowledge existing lease agreements with the Port Authority. United Airlines (United) and the Republic Group questioned how increasing aircraft size would actually lead to greater throughput, since carriers are presumably already using aircraft suitable for the markets they serve. Along with American Airlines (American), these commenters stated that the upgauging proposal was predicated on the premise that ground facilities are inadequately utilized, and that the inadequate utilization is a function of small and medium aircraft being overused. Not only did the FAA provide no data to support its position, they asserted, but in fact the relatively low load factors at LaGuardia indicate that the proper size aircraft are being used.

In addition, the Port Authority and The City of New York noted that gates at LaGuardia are not interchangeable and that many gates (and taxiways) at the airport cannot accommodate larger aircraft. Thus, the proposal would not work because of a fundamental mismatch between the proposal and the management of landside infrastructure. US Airways suggested that if the FAA was committed to upgauging, it could require an increase in the number of available seats, but in a gradual, phased-in manner that is economically sustainable.

Some carriers also opined that the proposal was overly disruptive in that the proposed baseline of operations that would be exempt from the upgauging requirements was too small. While carriers with a smaller presence at the airport like JetBlue Airways (JetBlue) favored an increase in the number of protected operations (e.g., 20 daily operations), US Airways favored a carrier being able to protect at least 11 percent of its fleet, with smaller carriers being able to protect 10 operations.

Notwithstanding the contemplated carve-out for small community service, United, and to some extent the Regional Airline Association (RAA), argued that requiring upgauging may force a carrier to discontinue service from smaller

communities because the market in that community may only support a smaller aircraft. US Airways noted that these operations can be profitable and are unlikely to be discontinued completely; the carrier also asserted that the proposal would likely have the most adverse impact on medium-sized airports that benefit from multiple daily frequencies on smaller aircraft. Concern over the potential loss of small community service was echoed by the Federal, state and local representatives who wrote to the FAA expressing concern that service to specific communities could be lost.

Finally, United argued that the upgauging proposal was not rationally related to Congressional authorization in 49 U.S.C. 40103(b), because increasing passenger throughput has nothing to do with assigning the use of the airspace or prescribing air traffic regulations. Rather, according to United, the proposal would have mandated which equipment a carrier may use to access the runway at LaGuardia, and was accordingly beyond the FAA's authority. The Port Authority was likewise concerned that the proposal impermissibly infringed on its rights as the airport proprietor.

Based on careful review of the public comments, the FAA has determined that there are simpler, less prescriptive ways to permit airlines to respond more directly to market forces. Given carriers' long-term leasing and purchasing arrangements, the timeframes for implementing the proposal may have been too short; and if adopted, the proposal potentially could have inadvertently disrupted operations at the airport. The FAA recognizes the long-term contractual relationships that exist at LaGuardia. At the same time, the agency prefers that the limited asset that makes up an Operating Authorization be allocated using market principles rather than regulatory or administrative principles. Today's proposal meets that objective without unduly burdening either the airport or the carriers.

At this point in time, the FAA does not believe there is a need to dictate a minimum aircraft size to achieve the overall objective that service to and from LaGuardia be reasonably available to the maximum number of people who wish to use it without undue delay. Accordingly, the FAA is withdrawing its proposal for upgauging.

Nevertheless, the agency believes that the concept behind its upgauging proposal remains valid: capacity cannot be considered merely in terms of the number of aircraft being handled by the FAA's Air Traffic Control system (ATC). The FAA believes United's

interpretation of the FAA's statutory authority to manage the efficient use of the airspace as being limited to the movement of aircraft generically is overly narrow. The characterization of operations in terms of aircraft makes sense to the air traffic controllers, whose job it is to control all aircraft flying under instrument flight rules (IFR) within their sector. United's characterization does not make sense as a matter of policy or statutory interpretation because it ignores the reality that aircraft operations are designed to move people and cargo.

The FAA does not believe the relatively low load factors at LaGuardia support the premise that the market dictates the use of smaller aircraft to many of the markets with service to the airport. It is true that some smaller communities may not be able to support daily operations on larger aircraft. The FAA asserts, however, that certain market patterns, where multiple daily flights on small aircraft are not related to the size of the communities served, indicate an inefficient use of the slot, or behavior that stifles competition. The relatively low load factors in these routes indicate that many of these flights could be combined, resulting in a more efficient use of the system.

The FAA also acknowledges that the use of small aircraft to densely populated communities on a frequent basis is not purely a function of the market. As noted by the Port Authority, excessive use of smaller aircraft is to some degree a combination of customer preference for frequent access, but it is also a function of political concerns and a long-standing regulatory regime that created incentives favoring the use of small aircraft. The expiration of the HDR and AIR-21 exemptions should naturally encourage more efficient use of aircraft because there is no longer a perverse incentive to use smaller aircraft, regardless of the market being served. As to consumer preference for more regular flights, the decision to offer numerous daily flights in any particular market will inevitably be driven by market considerations. The FAA believes that the options being proposed today should reduce delay and permit airlines to respond more freely to market forces, favoring efficiency and aircraft upgauging without the government dictating any particular method of increasing overall passenger throughput and without sacrificing service to small communities.

#### *B. Perimeter Rule*

As an alternative to the upgauging proposal, US Airways suggested the

FAA preempt the Port Authority's Perimeter Rule.<sup>3</sup> It argued the Perimeter Rule drives the use of smaller aircraft because carriers cannot engage in the long-range operations that support the use of larger aircraft. Alaska Airlines also supported lifting the Perimeter Rule.

US Airways maintained there is no justification for retention of the Perimeter Rule. Not only is LaGuardia no longer primarily an airport for business travelers, but JFK no longer needs development, and the introduction of Stage-3 aircraft has sufficiently reduced the airport's overall noise footprint from when the Port Authority established the Perimeter Rule. Thus, according to US Airways, the rationale that the Port Authority provided to the court in *Western Air Lines v. Port Authority of New York and New Jersey* is no longer applicable.

The FAA has decided against addressing the Perimeter Rule in this rulemaking because of the need to explore more fully several operational and policy issues that may be impacted by changes in the Rule, including potential impacts on airport capacity and air services. The FAA intends to monitor the impact of today's proposal, if adopted, as well as the implications of changes to or elimination of the Rule. Should the agency deem that Federal action on the rule is in the public interest, it may choose to preempt.

### C. Finite Operating Lives

The FAA proposed to initially allocate all Operating Authorizations previously allocated under the HDR, and then pull back ten percent of them every year to force an active market for this scarce resource. The Operating Authorizations would have had an initial operating life ranging from three to thirteen years and, once reallocated, would have had a ten-year operating life. While providing a general discussion of how the Operating Authorizations would be withdrawn, the FAA did not provide a discussion of how they would be reallocated, other than to say that the agency was seeking legislation that would provide additional flexibility in allowing the FAA to reallocate via a market-based mechanism such as an auction or

<sup>3</sup> The Perimeter Rule prohibits non-stop flights of more than 1,500 miles into and out of LaGuardia, except for flights in and out of Denver. The Perimeter Rule was first established in the late 1950s under an informal arrangement between the Port Authority and the airlines. It was formalized in 1984 and unsuccessfully challenged in *Western Airlines v. Port Authority of New York and New Jersey*, 658 F. Supp. 952 (SDNY 1986), *aff'd* 817 F.2d 222 (2nd Cir., 1987), *cert. denied*, 485 U.S. 1006 (1988).

congestion pricing. The FAA has decided that a ten percent annual turnover at LaGuardia could be overly disruptive as a first step in applying market principles and has decided to propose a scaled back reallocation mechanism. This scaled back proposal is discussed in detail later in this document.

In general, most commenters characterized the proposal to introduce expiring Operating Authorizations at LaGuardia as unnecessary, unworkable, and unlawful under the Administrative Procedure Act and the Takings Clause of the Fifth Amendment of the US Constitution. Others claimed that the proposal did not go far enough.

American asked why the FAA thought it needed such an intrusive and complicated regulatory scheme to promote access to new entrants. It noted that the agency promoted access to new entrants at Chicago's O'Hare International Airport (O'Hare) by adopting a blind Buy/Sell secondary market. Midwest Airlines, Delta Air Lines (Delta) and the RAA argued that the underlying premise that limited operating lives were required to open up the airport to new entrants was based on a false assumption that the airport would otherwise be shut down to new entrants or carriers with a limited presence at the airport. They argued that slots were successfully purchased under the Buy/Sell rule, and that the secondary market only failed when exemptions to the HDR were given away for free under AIR-21.

Consistent with their comments on the upgauging proposal, most carriers and their associations argued that randomly terminating and reallocating ten percent of Operating Authorizations each year would wreak havoc with the carriers' schedules. They asserted the impact on industry would be so severe and unreasonable as to render the proposal unworkable, creating perpetual instability that could disrupt airport services and traveler expectations. In particular, The City of New York, Delta and US Airways claimed the full operational impact of the rule could make it virtually impossible to operate short-haul shuttles. American, Delta, and AAEE argued the impact could be especially bad on small communities as transfer of Operating Authorizations from carrier to carrier would make consistent service to these communities difficult. As with the upgauging proposal, the Port Authority said it would be difficult to handle gate assignments and leases with an annual turnover of up to ten percent. American claimed the churning of Operating Authorizations would fragment real

estate across the airport over time. The carrier argued this fragmentation would be extremely burdensome for the Port Authority and disruptive to airlines and consumers.

Some carriers noted that the operating lives would actually serve as a damper on the free market, rather than the catalyst that the FAA envisioned. American said the proposal failed to recognize that investment in routes and infrastructure is largely dependent on the ability to continue serving that route. US Airways and Midwest Airlines echoed this sentiment, positing expiring lives would actually act as a disincentive to invest in the airport, because there will be no assurance that investment expectations can be met. The Air Transport Association of America (ATA) queried what impact expiration dates and other restrictions would have on the value of slots in the secondary market.

While many commenters claimed they could not meaningfully comment on the proposal since the FAA did not explain how it intended to reallocate withdrawn capacity,<sup>4</sup> others argued that the proposal would be unlawful even if the reallocation mechanism had been explained. United and Midwest Airlines claimed the proposal did not implicate safety or movement of air traffic and was accordingly beyond the FAA's authority. Assuming the FAA retained its authority to impose caps after AIR-21, the ATA and the Airports Council International—North America (ACI-NA) argued it did not necessarily follow that this authority encompasses "management of the nationwide system of air commerce," as the FAA asserted in the NPRM. They claimed such an assertion connotes the business of air transportation, which exceeds the agency's authority to regulate the safety and movement of air traffic. United asserted that the FAA appeared to rely on the Department's authority in 49 U.S.C. 40101(a), but noted that reliance on that authority was equally misguided since it is limited to the Department's exercise of economic regulation.

While carriers generally claimed the proposed reallocation of Operating

<sup>4</sup> The FAA stated that it did not provide the reallocation mechanism because it did not have the authority to reallocate other than through an administrative mechanism. The FAA's original analysis was overly simplistic. The FAA correctly stated that it did not have the authority to implement a congestion pricing scheme. However, we also said that we did not have the authority to conduct auctions; this statement was incorrect. As discussed more fully later in the document, the FAA has ample authority to lease or otherwise dispose of its property without running afoul of the restriction on user fees, the restriction that the FAA initially believed was problematic.

Authorizations as a confiscation of their respective property rights, some argued the FAA's proposal was in violation of the Takings Clause of the U.S.

Constitution because carriers would be deprived of all beneficial use of the property,<sup>5</sup> and the FAA could not meet the standards set forth in *Penn Central Transportation Co v. City of New York*.<sup>6</sup> In particular, United and US Airways argued that handicapping competitors through a forced transfer of operating rights does not advance a legitimate government interest, particularly when there is no showing that a forced transfer will actually enhance competition or consumer welfare.

In contrast, the Air Carrier Association of America (ACAA) argued that legacy carriers were given large numbers of slots through AIR-21, and did not need the market protection contained within the proposal. It noted that under the LaGuardia Order and the HDR, operating rights were never permanently allocated; nor were carriers offered assurances that they could do whatever they wanted with them. In fact, carriers have always been on notice that the Operating Authorizations and their predecessor slots could be recalled. Accordingly, ACAA urged the FAA to withdraw immediately ten percent of all Operating Authorizations held by carriers holding more than 75 Operating Authorizations and redistribute them to limited incumbents operating larger aircraft. It maintained whatever reallocation mechanism was used should kick in before the proposed three years since that extended timeframe unnecessarily restricts the market. AirTran Airways (AirTran) and WestJet supported the concept of the FAA increasing the number of Operating Authorizations provided to small carriers and immediate implementation of the rule.

The FAA disagrees with American's claim that a staggered withdrawal and reallocation of Operating Authorizations is not needed to protect new entrants. This approach is one of several rational means of ensuring that carriers with modest service, or no access at all, have an opportunity to gain or increase access at one of the most sought-after airports in the country. While a blind secondary market would also facilitate new entrant access, and the FAA uses this method to assist new entrants at O'Hare, the agency also made specific provisions in that rulemaking to make new and returned capacity preferentially available to new entrants

and carriers with a limited presence at the airport. The FAA does not believe a blind secondary market alone is sufficient to provide opportunities for new or increased access.

The FAA agrees that its original proposal could have caused disruption at the airport. The premise underlying the proposal to require a full ten percent turnover at the airport each year was not to force disruption, but rather to ensure the efficient use of a scarce resource and to provide access to new entrants and existing operators in a manner other than creating preferences or exemptions. It is exactly these preferences and exemptions that many commenters claim marginalized the secondary market under the HDR. As the FAA has stated several times over the past few years, its primary goal in addressing congestion is to increase capacity wherever possible. Limiting the number of operations at an airport is a last option because it restricts access to the airport. The FAA also believes the market should play an active role in the allocation of the limited resource whenever it becomes necessary to limit operations for more than a short period of time.

The options being proposed today meet the same policy objective that drove the proposal in the NPRM to have operating lives expire, albeit in a less aggressive manner. The FAA believes this new approach will help foster a vibrant secondary market while maintaining stability at the airport. The legal concerns raised by commenters will be addressed later in this document.

### III. Proposal To Allocate Limited Capacity at LaGuardia Efficiently

#### A. Need for a Cap on Operations

The FAA believes that at least for the next several years, LaGuardia will likely be oversubscribed in terms of its physical ability to handle aircraft. Simply put, expansion of the airport by adding runways is not a viable option given its location. Accordingly, a cap on operations at the airport is necessary to provide for the efficient use of the NAS. In the NPRM, the FAA proposed to cap weekday and Sunday afternoon operations at 81 per hour (75 for scheduled operations and six for general aviation). The airport is already capped under the LaGuardia Order at 81 (75 for scheduled operations and six for general aviation). Today's proposal, if adopted, will replace that order. The FAA does not intend to raise the cap unless new capacity becomes available and has proposed reducing the number of

operations available for general aviation to three per hour.

The Port Authority claimed that 75 scheduled operations per hour was too high, since delays were increasing, and argued that the cap should start at 6 a.m. and cover Saturday mornings because these time periods have operations that exceed runway capacity.

In response to the NPRM, the ATA claimed that the FAA had not presented any new data indicating that a cap is necessary, instead relying on delays during the summer of 2000. The ATA argued that the FAA merely assumed that demand exceeds capacity at LaGuardia, without discussing how the proposal would impact that demand.

The impact of either the NPRM or today's proposal on demand at LaGuardia is difficult to judge because the LaGuardia Order has kept operations from growing since the expiration of the HDR. Accordingly, the comparison in terms of delay reduction should not be between the LaGuardia Order and any final rule, but rather between an unconstrained airport and a final rule. The last time the airport was close to unconstrained was in 2000, which is why the FAA relied on its experience in 2000 in the NPRM.

The FAA believes the summer of 2007 served as a stark reminder that the demand for access to New York City is exceptional. New York City is served by three major airports; theoretically there should be more than enough capacity. However, while LaGuardia remained a constrained airport last summer, JFK and Newark were not constrained and carriers were allowed to add flights at will. As a result, the New York City area airports experienced nearly unprecedented delays last summer, and the level of flight delays were regularly reported in the local and national press. The delay numbers at JFK were so high that the FAA initiated a Scheduling Reduction Meeting in October 2007 and announced a cap at the airport in January of this year. Concerned that those carriers that could not obtain desired access at JFK would quickly oversubscribe Newark, the FAA proposed a cap there in March. Looking forward, all three major airports in the New York City area will be capped.

The FAA is unwilling to lift the cap at LaGuardia simply because the last time there was significant growth at the airport was in 2000. Notwithstanding ATA's assertion that perhaps there is no need for a cap, its members appear to support reasonable limits on the number of operations at the airport. When the FAA imposed the cap on LaGuardia after the expiration of the HDR at the

<sup>5</sup> Cf., *Lingle v. Chevron USA, Inc.*, 544 U.S. 528 (2005).

<sup>6</sup> 438 U.S. 104 (1978).

end of 2006, no carrier argued that a cap was inappropriate.

We agree with the Port Authority that operations at the airport should be limited as early as 6 a.m., and the LaGuardia Order limits operations beginning at that hour. Carriers have moved their morning schedules out sufficiently early that the FAA is encountering excess demand by 6 a.m. The agency has tentatively decided against capping operations on all day Saturday and Sunday morning because the level of congestion during these time periods is significantly less than during the workweek and on Sunday afternoons. The Port Authority has not provided data indicating that a cap is needed on Saturday mornings; it has merely asserted that there are runway constraints. Should the Port Authority continue to believe the cap should be expanded, the FAA welcomes an analysis of the capacity problems on Saturday mornings.

#### B. Sunset Provision

The FAA's proposed rule, if adopted, will expire in ten years. To the extent new capacity became available, the FAA could increase the size of the cap and auction off that new capacity for the life of the rule. One of the criticisms of the HDR was that it was a temporary rule that has lasted almost 40 years. As such, it became difficult to manage, particularly as it was amended to address changes in business models. We believe the public interest is better served by directly providing the rule will sunset in ten years. This approach will allow for future determinations by the FAA as to whether a cap is still needed and, if so, whether changes are needed to more efficiently allocate and constrain the scarce resource. At present it is impossible to determine what changes in business models may occur over the next ten years. In addition, full implementation of the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign project and NextGen technologies are expected to mitigate and improve air traffic efficiency within the next ten years, and we should not prejudge the market response.

#### C. Need for More Efficient Allocation

As noted by American in its comments to the NPRM, Congress has directed the Department to place "maximum reliance on competitive market forces and on actual and potential competition" (49 U.S.C. 40101(a)(6)). This maximum reliance means the FAA is obliged not to simply walk away from an airport once it has imposed caps, but rather to take steps to ensure that there are, in fact,

competitive market forces and actual and potential competition. Competition at an airport benefits the flying public by providing price competition and expanded service. The ability of carriers to initiate or expand service at the airport is hindered, in large part, by the imposition of the cap. Accordingly, the FAA believes it must strike a balance between (1) promoting competition and permitting access to new entrants and (2) recognizing historical investments in the airport and the need to provide continuity. It is not the role of the Government either to dictate particular business models or to constrain a market and provide no means for others to enter that limited market.

Not only is the FAA required to assure the efficient use of the NAS, but it must do so in a manner that does not penalize all potential operators at the airport by effectively shutting them out of the market. Accordingly, the FAA believes that it is well within the agency's authority in 49 U.S.C. 40103 to provide some mechanism for reallocation. Today's proposal attempts to strike the appropriate balance by actively developing a robust secondary market that properly values the limited asset that the FAA created.

#### D. Authority To Allocate Slots at LaGuardia

The FAA intends to allocate some portion of the available slots at LaGuardia via an auction process. The FAA would initially allocate the vast majority of slots to incumbents at the airport by entering into a cooperative agreement that would lease the slots for a period of ten years. The remaining slots would revert to the FAA over a five year period for retirement or reallocation via an FAA-sponsored auction. As a result of the auction, the acquiring carrier would enter into a lease agreement with the FAA that would last the remainder of the rule. Leases awarded under the cooperative agreements or awarded pursuant to an auction would be subject to lease terms, and the failure to abide by those lease terms would constitute a default of the lease. Carriers would be allowed to sublease their slots subject to the same terms and conditions imposed by the FAA in the original lease, although new terms and conditions unrelated to the carrier's obligations to the FAA could be added.

Under Option 1, the FAA would retain all auction proceeds and dedicate their use to congestion management in the New York City area. Under Option 2, the carrier that had held the slot would be allowed to keep the proceeds

after the FAA had recouped its costs associated with running the auction.

In the NPRM, the FAA stated that it did not have the authority to reallocate Operating Authorizations via a market-based mechanism. The FAA was concerned that it did not have this authority because of annual appropriations restrictions dating back to 1998 that prohibit the agency from expending funds to "finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of enactment of this Act."<sup>7</sup> The FAA continues to believe that it cannot rely on a market-based allocation method under a purely regulatory approach, which is why it explicitly sought legislation on this matter.

However, the FAA's authority is not limited to regulatory action. The agency has independent authority to dispose of property,<sup>8</sup> and regulatory action is not required prior to the lease of property. The FAA implemented its general authority to dispose of property in its Acquisition Management System, which went into effect on April 1, 1996.

Because of the congressional mandate in 49 U.S.C. 40101(a)(6) to rely to the maximum extent possible on competitive market forces, the FAA has determined that it is appropriate to take a bifurcated approach. Today the agency is requesting comment on an approach whereby the FAA would establish a cap on operations and address which slots would revert to the FAA for reallocation through a regulation, but would use its transaction authority to allow for reallocation of slots via a market-based mechanism.

As discussed below, this approach has the added benefit of clarifying the unsettled issue of the extent to which a slot holding should be imbued with property rights.

#### 1. Authority To Determine the Best Use of the Airspace

The United States Government claimed exclusive sovereignty over United States airspace in 49 U.S.C. 40103. Citizens of the United States have a public right of transit through navigable airspace, but the FAA is authorized to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. To the extent these needs can

<sup>7</sup> In 2006 this provision could be found in Public Law 109-115. For 2008, the same provision may be found in Public Law 110-161.

<sup>8</sup> The FAA has had express authority to lease property to others since 1996, Pub. L. 104-264, and general authority to dispose of an interest in property for adequate compensation for long before that in 49 U.S.C. 40110(a)(2).

be met without specifying which citizen may transit or reserve a particular segment of airspace at a particular time, there was no need for the FAA to place constraints such as slots on the use of the airspace—this remains the case for the vast majority of the NAS.

As described above, however, at LaGuardia and a few other airports, in order to ensure the efficient use of airspace, the FAA has had to impose constraints by assigning to carriers operational authority to conduct a scheduled IFR arrival or departure operation on a particular day of the week during a specified 30-minute period. These reservations of airspace were called slots under the HDR. After the FAA issued the Buy/Sell rule, these slots were treated not only as property of the United States Government, but also as if the carriers had a property interest, albeit an interest that was heavily encumbered by the restrictions imposed by the FAA. The nature of this proprietary interest, however, has always been somewhat unclear. To encourage the most efficient use of constrained airspace the FAA is clarifying the property interest that the FAA is willing to transfer to airlines for a limited period of time. However, the FAA has determined that in order to assure the efficient use of airspace, it cannot simply permit those to whom it grants authority to use the airspace to treat that authority as their own. Such an approach would not only ignore the inherently valuable nature of the airspace usage assignment, but allows a select few to profit from a governmental interest to the detriment of their competitors and the public as a whole. Ultimately, it is the FAA that has sovereignty over and controls the airspace.

## 2. Authority To Enter Into Leases and Cooperative Agreements

The FAA has authority to lease real and personal property, including intangible property, to others. 49 U.S.C. 106(l)(6) and 106(n). When disposing of an interest in property, however, the FAA must receive adequate compensation. 49 U.S.C. 40110(a)(2). The FAA also, however, has broad authority to enter into cooperative agreements on such terms and conditions as the agency may consider appropriate. 49 U.S.C. 106(l)(6). Under the Federal Grants and Cooperative Agreements Act, a cooperative agreement is to be used when the principal purpose of the agreement is to transfer a thing of value to a recipient, either public or private, to carry out a public purpose of support or stimulation authorized by law, instead

of acquiring (by purchase, lease or barter) property or services for the direct use or benefit of the agency, and there is substantial Federal involvement in the activity. The FAA believes this is the appropriate vehicle to use to transfer most of the slots as described in the following options, for a ten year period, to the carriers that currently have Operating Authorizations at LaGuardia. Doing so will recognize these carriers' historical investment in LaGuardia, and the public interest that has been served by that investment. In addition, doing so will prevent the disruption to the national air transportation system described in the comments to the NPRM that might otherwise occur, allowing the public to benefit from continued certainty of readily available air transportation to and from this airport. There will, however, be substantial ongoing Federal involvement with these slots, as the FAA will retain ATC responsibilities for assuring that the use of these segments of airspace for their specified times is done safely and with maximum possible efficiency. It is therefore appropriate to use cooperative agreements to transfer these property interests.<sup>9</sup>

## 3. The FAA's Proposed Actions Do Not Constitute a Taking in Violation of the Fifth Amendment

United's and US Airways' assertion that the imposition of a cap on operations at LaGuardia and any reallocation mechanism that does not give incumbent carriers an unrestricted right to the slots created by the cap constitutes a taking in violation of the Fifth Amendment is simply incorrect. Carriers possess no absolute property interest in slots unless the FAA gives it to them. The FAA has consistently refused to do that under both the HDR and the LaGuardia Order. Indeed, upon the expiration of the HDR, any putative interest in those slots expired on December 31, 2006, and the LaGuardia Order specifically states that carriers have no right to Operating Authorizations after the expiration of the order. If the FAA proceeds with today's proposal, carriers will have some property rights in the resulting slots, but those rights will be limited by

<sup>9</sup> Under the cooperative agreements the FAA will be transferring a leasehold interest in the slots, but it will not entirely dispose of its property. Receiving monetary compensation from these transfers is antithetical to the definition of a cooperative agreement. Nonetheless, to the degree that adequate compensation might be considered required under 49 U.S.C. 40110(a)(2), the compensation will be the carriers' agreement to be bound by the terms in the cooperative agreement as well as FAA's recognition of the public value received by the carriers' historical investment at LaGuardia.

the terms of any final rule and any lease terms that the FAA specifies. Ultimately, it is the FAA that controls the airspace and controls the rights of carriers to use it.

United's reliance on *Lingle* and *Penn Central* in arguing that the annual reversion of Operating Authorizations for reallocation by the FAA would constitute a taking was misplaced, and remains inapplicable to today's proposal.<sup>10</sup> Neither case stands for the proposition that the federal government cannot implement a regulatory scheme like the one proposed here. In *Penn Central* the Supreme Court set forth a general test for determining whether a government regulatory action resulted in a taking of property without just compensation. While noting that such determinations are necessarily fact-specific, the Court set forth three basic criteria to evaluate: (1) The economic impact of the regulatory action on the claimant, (2) the level of interference with reasonable investment-backed expectations, and (3) the character of the governmental action.<sup>11</sup> These standards do not suggest a Takings Clause claim in this instance.

Given the fact that LaGuardia has operated under some type of cap for the past 40 years, no carrier could realistically have investment expectations either that the airport will be unconstrained before sufficient capacity is realized or that it would be granted absolute rights in its historical operating schedule. Indeed, the HDR imposed much more stringent constraints on how carriers could conduct operations at the airport than the FAA is proposing here.

Likewise, there is no evidence that the proposed rule, if adopted, will have an unduly harmful impact on any air carrier. At most, less than 20 percent of any carrier's current operations at LaGuardia will be affected. As stated by the Court in *Penn Central*, "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely

<sup>10</sup> The FAA is puzzled by United's reliance on *Lingle*. The holding in *Lingle* was unrelated to any determination by the Court that there was a "permanent physical invasion of her property." 544 U.S. 528, citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). United has not alleged that the imposition of a slot regime results in its inability to use its property. Rather, it asserts that its flight schedule is an intangible asset, the use of which is critical for utilizing its tangible assets, i.e., its terminal facilities, gates, servicing facilities, and aircraft (United comments at p. 29). The correct analysis is conducted under *Penn Central* and *Connelly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211 (1986).

<sup>11</sup> *Connelly* at 224–225.



abrogated.”<sup>12</sup> When viewed as a whole, the impact of today’s proposal on even the most negatively affected carrier is not sufficient to trigger a plausible takings claim. The vast majority of operations will continue under slots grandfathered to the carriers at no charge. Each carrier will be assured that up to 20 of their operations will be protected from any reversion if it meets the minimum usage requirements, and only ten to twenty percent of its operations above twenty will be subject to reversion to the FAA for retirement or reallocation. In addition, carriers will be allowed to sublease their slots subject to the terms and conditions set forth in the lease agreement, thus potentially avoiding the loss of a slot for inadequate usage.

Nor does the proposed action have the character of a taking as interpreted in well-settled jurisprudence. This rulemaking proposes to minimally adjust the benefits and burdens of the economic life of carriers at LaGuardia in order to promote the common good. The rulemaking proposes to limit flights at LaGuardia in order to relieve congestion that impacts the NAS as a whole and LaGuardia in particular. As such, it will benefit the airline industry, businesses relying on aviation to timely meet their delivery schedules, and the travelling public. The proposed rule anticipates only a modest reduction, under one of two proposed options, in the number of flights currently allowed at LaGuardia under the LaGuardia Order, which has been in place, unchallenged, since January 1, 2007. Unlike the governmental action in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the proposed rulemaking does not single out an air carrier based on conduct far in the past and unrelated to any future commitments or injury it caused.

#### E. Allocation of Slots

The FAA is proposing two different options for allocating slots. Under both options the vast majority of slots would be grandfathered to existing carriers at the airport, with a relatively small minority either retired or auctioned off in the free market. The FAA believes either approach would help stimulate a secondary market and would lead to a proper assessment of the slots’ true value. The agency also believes that either approach would have a minimal impact on operations at the airport and would avoid much of the potential disruption associated with its proposals in the NPRM.

#### 1. Categories of Slots

Under today’s proposal, the FAA would lease carriers property interests in slots to carriers for a period of up to ten years, the date the rule would sunset. There would be three categories of slots: common slots, unrestricted slots, and limited slots.

Common Slots are those slots grandfathered to carriers currently at the airport. They would be awarded to the carriers under a cooperative agreement for the duration of the rule. The cooperative agreement would provide carriers with a ten-year leasehold interest. Once the rule sunsets, all interests would revert to the FAA. Unlike slots allocated under the HDR and Operating Authorizations allocated under the LaGuardia Order, carriers would be granted clear property rights to Common Slots, which could be collateralized or subleased to another carrier for consideration. These property rights, however, would not be absolute. Common Slots would be subject to reversion to the FAA under the rule’s minimum usage provision, and could be temporarily withdrawn for operational reasons.

Those slots not categorized as Common Slots would be categorized initially as Limited Slots and then as Unrestricted Slots once they are reallocated.

Unrestricted Slots are slots that a carrier would acquire as a leasehold under the auction process discussed later in this document. Since a carrier leasing an Unrestricted Slot would be required to do so because of government action, these slots would not be withdrawn by the FAA either under the use-or-lose provisions or for operational reasons. As with Common Slots, Unrestricted Slots would expire when the rule sunsets.

Limited Slots are slots that are identified for retirement or auction and are leased to the carriers under a cooperative agreement for a period of 1–4 years<sup>13</sup> so that they can be retired or reallocated via auction after that period of time. Limited Slots would convert to Unrestricted Slots after they are auctioned off. As with Common Slots, Limited Slots could be withdrawn under the proposed use-or-lose provision, or for operational reasons.

#### 2. Initial Allocation of Capacity

Upon the rule’s effective date, each carrier at LaGuardia would

<sup>13</sup> Twenty percent of the Limited Slots would not be leased to carriers as Limited Slots. This is because the FAA intends to either retire them or auction them as Unrestricted Slots shortly after the final rule, if adopted, takes effect.

automatically be awarded up to 20 common slots, which would constitute the carrier’s base of operations. The FAA believes this is a rational approach to assuring that no carrier is impacted at a level that could seriously disrupt its existing operations. Air Canada would be awarded an additional 22 common slots because of the United States’ treaty obligations with Canada. Under Option 1, 90 percent of the remaining slots would also be grandfathered as Common Slots to the carrier holding the corresponding Operating Authorization under the LaGuardia Order. Under Option 2, 80 percent of the remaining slots would be grandfathered as Common Slots. The determination of which carrier is entitled to any particular slot will be based on which carrier was allocated the corresponding Operating Authorization for that slot during the first full week of January 2007.<sup>14</sup> The FAA is proposing to grandfather the majority of slots at the airport in order to minimize disruption and to recognize the carriers’ historical investments in both the airport and the community. The FAA seeks comment on the percentage of slots that should be available for reallocation under either option.

As noted above, the remaining slots will be categorized as Limited Slots. Limited Slots may either be retired by the FAA or reallocated via auction. Under the proposal, the number of slots that a particular carrier would have classified as Limited Slots would be based proportionally on the carrier’s presence at the airport, taking into consideration each carrier’s base of operations. The FAA would inform all carriers that will be awarded Limited Slots how many Limited Slots they will be entitled to no later than the rule’s effective date.

Under Option 1, the FAA would randomly select operations in excess of 75 in those hours where there are more than 75 scheduled operations.<sup>15</sup> These operations will be designated as Limited Slots and will be retired, so that there are no hours where there are more than 75 scheduled operations. The FAA has tentatively decided to select these slots because the agency believes delay is

<sup>14</sup> US Airways had argued in its comments to the NPRM that looking at a single week did not adequately account for seasonal usage. The FAA has looked at usage patterns at the airport throughout the year, and has not found a significant difference in which carriers are operating at the airport throughout the year. To the extent there is seasonal usage, the FAA believes carriers should be able to lease slots on the secondary market or engage in one-for-one trades.

<sup>15</sup> During the first full week of January, 2007, there were more than 75 hourly operations during the 0900 and 1700 hours.

<sup>12</sup> *Penn Central* at 130.

best mitigated under this proposal by assuring there are no hours with scheduled operations above 75. An affected carrier would then have ten days to classify 50 percent of the remaining slots that will be scheduled to revert to the FAA for auction or retirement. During the following ten days, the FAA would then determine through a randomized process the remainder of slots that will be categorized as Limited Slots. Thus, if a carrier had 200 Operating Authorizations under the LaGuardia Order, it would be notified on the effective date of the rule that 18 of its slots (ten percent of 180) were subject to designation as Limited Slots. The carrier would have 10 days to notify the FAA which nine slots it designated as Limited Slots, and the FAA would designate the remaining nine.

In determining which slots should be designated as limited slots, the FAA would initially exclude from consideration slots held during all hours where carriers have collectively determined two or more slots should be a Limited Slot. This approach will assure slots will be available for auction throughout the day. The FAA would also determine in what year (1–4) each Limited Slot will revert to the FAA for reallocation or retirement. In this way, all carriers would know within 20 days of the rule's effective date what slots will become available for purchase and when. The FAA does not currently intend to target any slots for retirement under Option 2. Otherwise, the process to select limited slots would be the same as under Option 1.

The FAA is concerned that today's proposal is primarily focused on the efficient allocation of slots and does not significantly reduce delay from levels established under the HDR after AIR–21 and the LaGuardia Order. It recognizes that even under Option 1, the level of delay mitigation would be minimal, with only 18 slots retired after five years. The agency anticipates that at the end of the scheduled retirements, the average minutes of delay would be reduced by approximately one minute as the result of scheduled retirements. The FAA believes that it may be appropriate to better address delay mitigation by reducing the overall number of hourly operations at the airport. In contrast to the 78 total hourly operations proposed today, the HDR permitted a maximum total number of operations at LaGuardia of 68 per hour.<sup>16</sup> The numerous exemptions

issued pursuant to AIR–21 effectively increased that hourly rate to approximately 81 operations per hour, with roughly 75 of those operations dedicated to scheduled operations.

Accordingly, the agency specifically requests comment as to whether it should reduce the maximum number of scheduled operations from 75 to a lower number. In addition, the agency seeks comment on whether it should maintain a maximum number of scheduled operations at 75 per hour but increase the number of slots that would be retired. The FAA also requests comment on whether it should retire some percentage of slots under Option 2 and, if so, by how much. Finally, there are a few hours where there are slightly fewer than 75 scheduled operations. The FAA seeks comment on whether these slots should be retired or reallocated via an auction.

The FAA also recognizes that the percentage of slots that the agency proposes to reallocate represents a relatively small percentage of the total number of slots at the airport, particularly since up to 20 of each carrier's slot will not be subject to reversion. Accordingly, the FAA requests comment on whether the percentages proposed under either option are sufficient to ensure the opportunity for new entry and an efficient allocation of slots among all carriers at the airport, such that each slot is allocated to the user who values it the most highly. In addition, the agency seeks input on the appropriate percentages of slots available for auction (both in total and annually) sufficient to assure an efficient allocation of this scarce resource.

Under both options, the time windows for the Limited Slots would be evenly distributed over the day to the extent possible. The duration of each Limited Slot would be assigned by a fair allocation process such that each affected carrier's aggregate lease duration would be approximately equal to that of the other affected carriers. A technical report fully explaining how Limited Slots will be categorized and allocated has been placed in the docket for this rulemaking. Commenters are encouraged to review and comment on that document.

### 3. Market-Based Reallocation of Capacity

For the first five years of the rule the FAA would conduct an auction of Limited Slots on an annual basis. Under option one, 80 percent of the Limited Slots would be auctioned off over five years, with 20 percent retired. Under option 2, 100 percent of the Limited

Slots would be auctioned off over five years. This auction process would guarantee carriers wishing to initiate or extend operations at the airport an opportunity to acquire slots. Each year there would be approximately 14 (option 1) or 36 (option 2) slots available in the auction. Since carriers need pairs of slots, this is equivalent to seven or 18 round-trips per day. Assuming a minimum competitive pattern of service is between two and three round-trips per day, the equivalent of two to nine routes would be available per year. Carriers would be free to supplement their holdings in the secondary market, which the agency believes will be stimulated by this rule.

Under Option 1, the FAA would auction off 16 percent of the Limited Slots annually. Any carrier could bid on the slot, and it would be awarded to the highest responsive bidder. The winning parties could commence operations using the newly acquired slots on the second Sunday of the following March. In the unlikely event no bids were received, the FAA would retire the slot until the next auction. The FAA would retain all auction proceeds. After recouping its costs, the FAA would spend the remainder of the proceeds on congestion and delay management initiatives in the New York City area.

The FAA intends to retire four percent of the Limited Slots annually for the first five years of the rule under this option. Should sufficient efficiencies be realized through delay reduction or capacity enhancing measures, the FAA may decide to auction those Limited Slots rather than retire them. In addition, the FAA may decide to auction slots that had previously been retired as new capacity.

Under Option 2, the FAA would auction off 20 percent of the Limited Slots annually in a blind auction, with the Unrestricted Slots awarded to the highest responsive bidders. The carrier initially holding the Limited Slot would not be able to bid on the slot, and it could not set a minimum bid price. However, that carrier would retain the auction proceeds after the FAA has recouped its costs associated with conducting the auction. As under Option 1, if no bids were received, the FAA would retire the slot until the next mitigation. While carriers would be unable to bid on the slots that they are auctioning, each carrier may negotiate for subleases or transfers from other carriers in the secondary market or by

<sup>16</sup> Of these operations, 48 were allocated to air carriers, 14 were allocated to commuter service, and six were allocated to unscheduled operations.

bidding on other slots concurrently up for auction and held by other carriers.<sup>17</sup>

In response to the NPRM, some carriers urged the FAA to permit complete transparency with respect to the identity of the bidders and their bids in each round of an auction. The FAA believes that such transparency with respect to identity of the bidders and their corresponding bids would encourage gaming of the auction and significantly reduce the economic efficiency of the initial allocation of slots. The FAA also believes that an auction where the identity of the bidders is not known assists new entrants seeking to enter the market.

The FAA does not intend to reallocate slots after the first five years (other than those returned under the rule's use-or-lose provisions) because it believes that ideally slots should transfer from one carrier to another through the secondary market. The FAA is proposing to be actively involved in a limited number of slot transactions during the first five years of the rule to help establish that market. Not only will the auctions help create a market for slots, but all carriers will be able to assess the true market value of a slot. As noted by Delta in its comments to the NPRM, giving carriers with marginally profitable slots a financial incentive to sell (or in this instance sublease) to the highest bidder reduces entry barriers and maximizes the value of the slot. Armed with information on how much a given slot is likely to be worth on the open market, carriers (and their shareholders) will be in a better position to determine whether to continue operating marginally-performing flights or to sublease the corresponding slot. The agency believes that it should not take more than five years for a robust secondary market to develop.

#### 4. New and Returned Capacity

Given the physical constraints at the airport and the carriers' ability to sublease slots if the operations associated with the slots are not financially productive, the FAA anticipates that there will be little new or returned capacity for most of the time the rule is in effect. With the advent of NextGen technology, there may be new capacity in the later years of the rule. To the extent there is any new or returned capacity, the FAA intends to auction off that capacity under both options, and

<sup>17</sup> The FAA will attempt to auction an even number of slots during each hour to provide an opportunity for a carrier to replace a slot that it is auctioning. This may not always be possible.

would categorize the slots as Unrestricted Slots.<sup>18</sup>

#### F. Auction Procedures

The FAA is currently engaged in procuring the services of a contractor to conduct auctions of the proposed Limited Slots.<sup>19</sup> The details regarding the specifics of any potential auction will be disclosed after the contractor has developed and validated an auction process and the FAA is ready to proceed with an auction.<sup>20</sup> In accordance with the agency's Acquisition Management System, the FAA will publicly announce its intent to conduct an auction on a particular date or over the course of a particular period of time. The FAA will also announce its proposed auction procedures and solicit comments on those procedures. The agency will consider the comments and then publish its planned auction procedures. An interested party may protest the procedures up until the date of the auction under 49 U.S.C. 40110(d)(4) and 14 CFR part 17.

The FAA does believe that the auction should be structured to allow for package bidding. With package bidding, each bidder indicates which groups (packages) of slots it wishes to acquire at prices specified by the auctioneer at the beginning of each round of the auction. Given the network nature of the industry, airlines need multiple slots at an airport in order to operate efficiently. Package bidding will ensure that the airlines can use all of the slots that they acquire.

In order to assure that auction participants understand how the auction process works, the FAA anticipates the contractor would have to conduct a training seminar and a mock auction prior to each auction. A single training seminar and mock auction would not suffice since presumably not every carrier will participate in every

<sup>18</sup> If any slots were not bid on in the final year of the annual auction, the FAA would retire those slots until it reallocated new or returned capacity. It is unlikely that enough new or returned capacity would be available to justify an annual reallocation.

<sup>19</sup> As indicated in the *Order Limiting Operations at John F. Kennedy International Airport*, 73 FR 3510 (1/18/08) and the *Notice of Proposed Order Limiting Scheduled Operations at Newark Liberty International Airport*, 73 FR 14552 (3/18/08), the FAA intends to auction new or returned capacity, if any, under those orders. The contract would cover auctions at all possible airports. The FAA is not waiting until this rule is finalized to award the contract, because this proposal and the two orders contemplate potentially conducting the first auction before the end of the year.

<sup>20</sup> Since the auction will address the lease of slots awarded by the FAA under its leasing authority rather than under any administrative allocation, notice to interested parties will be governed by applicable procurement law rather than the Administrative Procedure Act.

auction. The auction will also have to be structured to prevent gaming. This would likely be accomplished through the use of activity rules.

Finally, the contractor would have to provide and maintain a secure communication mechanism for conducting the auction and develop a Web site that provides information on the availability of slots and the logistics of the auction.

At present, the FAA is contemplating requiring bidding carriers to provide upfront payments as a prerequisite to participating in the auction and requiring full payment for the slots at the time of award. The Federal Communications Commission (FCC) has experienced problems with bidders who were not financially secure or who were otherwise unwilling or unable to pay for the awards. The upfront payment could also discourage bid-sniping by preventing carriers from adding slots to their bid package beyond the amount of the upfront payment. The FAA recognizes that paying for the entire lease at one time could be expensive; however, it also believes that serious bidders should be able to obtain the requisite financing.

#### G. Secondary Trading

All slots will have value in the secondary market. To the extent that the secondary market is not mature and the value of slots is not well-known, the auction should inform potential buyers of the value of these slots and stimulate the secondary market. The FAA believes that ultimately the best way to maximize competition is with the development of a robust secondary market. To that end, the agency is not proposing a system of set-asides and exemptions that would be available to new entrants and limited incumbents. We agree with several of the carriers who commented on the NPRM and within the ARC that the system of preferences and exemptions developed under the HDR and AIR-21 may have significantly diluted the viability of the secondary market ostensibly created under the HDR's Buy/Sell Rule. However, we are also unconvinced that these exemptions and set-asides were the only reason the Buy/Sell Rule was less than fully effective. Throughout the years the FAA has received several complaints that carriers were unaware of possible opportunities to buy or lease slots and that incumbent carriers were colluding to keep new entrant carriers out of the airport.

We believe some measures must be taken to assure access to the secondary market. First, we believe all carriers interested in initiating operations at

LaGuardia, or increasing their operations there, should have an opportunity to participate in any transactions. Accordingly, the FAA proposes to (1) permit carriers to include common slots for sale in the auction, organized by the FAA, and (2) establish a bulletin-board system whereby carriers seeking to sublet slots outside the auction process, or to acquire such subleases, would notify the FAA, which would then post the relevant information on its Web site.

If a carrier wishes to include some of its common slots in the auction, these slots will be treated in the same manner as other slots being auctioned by the FAA. The carrier would be able to specify a minimum price for these slots so that it need not give up the slots unless they command a price that the carrier is willing to accept.

The FAA has tentatively decided that transactions via the bulletin-board-system would not have to be blind, and the transaction could include both cash and non-cash payments. While AirTran and ACAA argued in their comments to the NPRM that transparency among parties to the transaction encourages anti-competitive behavior, the FAA finds compelling the comments of other carriers that a blind, cash-only requirement is unduly restrictive. In particular, the FAA agrees with U.S. Airways and Delta that non-cash bids promote competition by enlarging the pool of potential bidders. Thus, non-cash transactions should result in both more bidders and potentially higher bids. However, as noted by United, Northwest Airlines (Northwest), American and Delta, it is critical that the identities of parties be known if non-cash assets are permitted because that is the only way to value those assets. In addition, the non-cash aspect of the transaction would require direct negotiating.

The FAA requests comment on ways that these concerns could be met in a blind secondary market. For example, in the NPRM the FAA proposed a hybrid scheme whereby the initial offer and acceptance would be blind and limited to a cash offer, but the parties could negotiate non-cash assets after the offer had been accepted. The FAA continues to believe that such an approach may be workable. During the posting of the lease and subsequent bidding of the slots, the parties' identities would not be known. Once the auction closed, the FAA would forward the highest bid to the seller without any bidder identification. The seller would have a set number of business days to accept the bid. At that point, the parties' identities would be revealed, and they

would have a set period of time to negotiate the possibility of non-cash assets in lieu of money as consideration for the lease. If the parties were unable to come to an agreement, the lease would have to proceed on a cash basis. Other alternatives may also be viable.

The FAA takes to heart the concern raised by some commenters that non-blind transactions could encourage collusion. Regardless of which approach, if any, is ultimately adopted, the Department already has the authority under 49 U.S.C. 41712 to investigate, prohibit, and impose penalties on an air carrier for an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. The Department has consistently held that this authority empowers it to prohibit anticompetitive conduct (1) that violates the antitrust laws, (2) that is not yet serious enough to violate the antitrust laws but may do so in the future, or (3) that, although not a violation of the letter of the antitrust laws, is close to a violation or contrary to their spirit.<sup>21</sup>

In order to assure that the Department can conduct adequate oversight, today's proposal would require carriers to file with the Department a detailed breakdown of all lease terms and asset transfers for each transaction, and the subletting carrier must disclose all bids submitted in response to its solicitation. The slot could not be operated by the acquiring carrier until all documentation has been received, and the FAA has approved the transfer. Within the context of the proposed auction discussion in the NPRM, United suggested that the FAA could publicly disclose non-confidential business information so that all carriers have an assessment of the relative value of the slots that are being traded. We have not included language to this effect in the proposed regulatory text. However, we seek comment on whether it would be helpful for this type of information to be disclosed.

Trades among marketing carriers and one-for-one trades would not have to be advertised. Marketing carriers should not have to open up transactions to the carrier community as a whole any more than a single carrier should have to

disclose its scheduling decisions with other carriers. The FAA would approve these transactions, as it has done historically. Same day trades among marketing carriers that address emergency situations such as maintenance problems or other unforeseen operational issues could take place without prior approval by the FAA, but carriers must notify the FAA of the trade within five business days. One-for-one trades among carriers would not be subject to the restrictions of the secondary market because they enhance the operational efficiency of the airport. However, the exchange of slots on a one-for-one basis could not be for consideration.

#### IV. Unscheduled Operations

As proposed in the NPRM, the FAA intends to limit unscheduled operations into and out of LaGuardia during the constrained hours. These operations have been restricted via the LaGuardia Order to six per hour, but the FAA has recently proposed to reduce that number to three. Under today's proposal, reservations would be required to use the airport (except for emergency operations) and could be obtained up to 72 hours in advance.

United requested that scheduled carriers be allowed to ferry aircraft out of LaGuardia for maintenance without having to obtain a reservation for an unscheduled operation as long as the FAA was given advance notice. To the extent ATC can handle additional requests (for example in good weather), it will do so without regard to the reason for the request. In addition, ATC may decide that a single additional flight for maintenance purposes would not introduce any additional delay. However, there is no guarantee that the FAA would accept more than three reservations per hour, and the determination to handle more traffic would likely be made on that day. Reservations for all non-emergency flights would still be required.

The FAA originally believed that there was no need to treat public charter operations differently from other unscheduled operations. Based on comments from the National Air Carrier Association (NACA), the agency has reconsidered its position. The FAA proposes to allow public charter operators to reserve one of the three available allowable operations up to six months in advance. If more than one public charter operation is desired for a given hour, the public charter operator without the advance reservation could attempt to secure a reservation within the three-day window that is available for all other unscheduled operations.

<sup>21</sup> See *United Airlines, Inc. v. Civil Aeronautics Board*, 766 F. 2d 1107, 1112, 1114 (7th Cir. 1985) and cases cited therein; see also H.R. Rep. No. 98-793, 98th Cong., 2d Sess. (1984) at 4-5, *Order 2002-9-2, Complaint of the American Society of Travel Agents, Inc., and Joseph Galloway against United Air Lines, Inc., et al.* (Docket No. OST-99-6410) and *Complaint of The American Society of Travel Agents, Inc., and Hillside Travel, Inc. against Delta Air Lines, et al.* (Docket No. OST-02-12004) (September 4, 2002) at 22-23.

## V. Other Issues

### A. 30-Minute Allocations

The FAA had originally proposed allocating Operating Authorizations in 15-minute increments. The agency believed that 15-minute increments would minimize congestion from schedule peaking. Four carriers, United, Delta, Northwest and American, suggested that slots should be assigned within 30-minute periods, which is consistent with current practice. The carriers noted that shrinking the window to 15 minutes would have no meaningful, positive impact on congestion, but would have a tremendous negative impact on the ability of carriers to operate at the airport by unduly complicating scheduling practices. They argued that a 15-minute window would lead to more schedule modifications as seasonal block times change, additional paperwork burden for carriers because more trades would be needed, and additional aircraft holdouts on the ramps leading to increased ramp and taxiway congestion. The FAA agrees with the commenters and now proposes slots be assigned in 30-minute windows. The FAA cautions, however, that peaking within the 30-minute windows could lead to increased congestion. The FAA will continue to monitor operations and will address any significant operational issues through discussions with carriers.

### B. Limit on Arrivals and Departures

In response to the NPRM, American and The City of New York suggested the final rule should regulate arrivals only. American noted that at O'Hare, the FAA determined delays tend to be more disruptive to arrivals, and the carrier suggested regulating arrivals only will adequately address the congestion problem because for each arrival there would generally be a corresponding departure.

American is correct that the FAA determined there was no need to formally limit departures at O'Hare, and both commenters are correct that, in general, for every arrival there is a departure. However, the timing of those departures does not necessarily correlate with arrivals, and the hub scheduling patterns at O'Hare are different from LaGuardia. ATC also has greater flexibility at O'Hare in determining runway configurations to accommodate arrivals and departures. In addition, the sequencing of flights at LaGuardia is so tight that the FAA does not believe it can merely limit arrivals. LaGuardia is constrained, arguably overly so, throughout the day. Simply

limiting arrivals would increase the number of minutes of delay already encountered on a daily basis at the airport. Nor would limiting arrivals ensure that there is relative balance between arrival and departure demand that corresponds to available runway capacity. The agency's experience under the HDR and the LaGuardia Order shows that carriers often make internal scheduling adjustments between arrival and departure slots or trade with other carriers to keep schedules within available capacity. Limiting only arrivals or departures would not promote that balancing of demand. Accordingly, the FAA continues to believe both arrivals and departures should be slot-controlled.

### C. Use-or-Lose

For common and limited slots, the FAA is proposing the same use-or-lose requirement that it proposed under the upgauging proposal in the NPRM and the requirement adopted in the LaGuardia Order. For operations not subject to the proposed minimum aircraft size requirement, the FAA proposed an 80 percent usage requirement over a 60-day period, with the usage requirements not applying to new operations for the first 90 days. If the usage requirement were not met, the slots would revert to the FAA and would be retired or auctioned as unrestricted slots in the next auction. The FAA is proposing that unrestricted slots would not be subject to a usage requirement.

In response to the NPRM, the Port Authority argued that the FAA should adopt a 90 percent usage requirement rather than the proposed 80 percent, because the lower number allows a carrier to schedule operations only four days of the week. The Port Authority argued that this type of scheduling was inefficient and should be discouraged. When looking at cancelled flights, the Port Authority claimed that carriers would have no problem meeting the suggested 90 percent usage requirement. In a similar vein, ACAA said that carriers should be required to release weekend and holiday slots that they did not intend to use. The association also argued that the usage requirement should be tied to each scheduled operation (i.e., each slot would be specifically tied to a particular flight). It maintained that the current system of determining usage allows carriers with larger holdings to manipulate their flights so that they meet the usage threshold even though a significant number of flights are cancelled.

Delta argued that the proposed 90 percent usage requirement would be

unduly restrictive. United suggested the FAA allow carriers to cancel a scheduled operation and substitute an unscheduled operation like a maintenance ferry or a charter flight. The Port Authority suggested a carrier that failed to meet the usage requirement be allowed to continue to operate the affected flight until used by another carrier and the new carrier should be given 120 days to start new service rather than the proposed 90.

While there is a value to ensuring a limited resource like a slot is used, there are certain actions that a carrier must take to realistically initiate new or expanded service. In the case of subleases acquired through the secondary market, carriers have control over the leases' start and end dates. Accordingly, the FAA believes 90 days is sufficient to initiate new service that results from transactions on the secondary market.

Given the conflicting comments on whether the usage threshold should be set at 80 percent or 90 percent, the FAA specifically requests comment on the appropriate threshold. The Port Authority is correct that a more stringent usage requirement would allow fewer instances where a carrier could cancel a flight; however, the FAA believes that the potential problem raised by the Port Authority is less a function of usage requirements and more a function of carriers manipulating how cancelled flights are reported. Since carriers currently decide which flights to report under a particular Operating Authorization, it is possible for them to distribute flights to multiple Operating Authorizations and still meet the usage requirement. For example, four flights could be distributed over five Operating Authorizations and each Operating Authorization would meet the 80 percent usage requirement.

The FAA believes it is more meaningful to address this problem directly rather than by changing the usage requirement. Simply put, each slot should have a corresponding scheduled operation. Under today's proposal, carriers would be required to report a series of flights under a single slot number rather than in the aggregate. Flight number or other changes made primarily to circumvent the usage requirement will apply against the carrier for calculation of Use-or-Lose. Carriers would be permitted to operate a charter, maintenance, or ferry operation in lieu of a scheduled operation and not have that operation discounted as long as they did not abuse the privilege.

## Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, to be the basis of U.S. standards. Fourth, the Unfunded Mandate Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more annually (adjusted for inflation).

In conducting these analyses, FAA has determined this final rule (1) has benefits that justify its costs, is “significant regulatory action” as defined in section 3(f)(1) of Executive Order 12866, which is also known as an “economically significant” regulatory action, and is “significant” as defined in DOT’s Regulatory Policies and Procedures; (2) would not have a significant economic impact on a substantial number of small entities; (3) would not adversely affect international trade; and (4) would not impose an unfunded mandate on State, local, or tribal governments, or on the private sector. These analyses, set forth in this document, are summarized below.

### *The 2006 NPRM Initial Regulatory Evaluation*

Most comments on the Initial Regulatory Evaluation of 2006 NPRM were attributed to cost and benefit estimates of the upgauging requirements and the related analysis of the role of aircraft size in competition and slot allocation. Since the FAA is withdrawing its proposal for upgauging, most of the comments are no longer relevant. See the “Withdrawal of Upgauging Proposal” section in today’s notice for additional discussion of comments on and the withdrawal of the upgauging requirements. There were several policy related comments that were mentioned in tandem with

comments on the regulatory evaluation. We have treated these comments in the “Discussion of the NPRM” and “Proposal to Allocate Limited Capacity at LaGuardia Efficiently” sections of today’s notice.

ATA and Delta commented that the FAA used an unrealistic base case in the 2006 regulatory evaluation. They argued that the FAA used the unlikely assumption that LaGuardia would revert to a situation where there would be no cap on the level of operations and therefore the regulatory evaluation overestimated benefits. They claimed that the realistic baseline from which to estimate costs and benefits would be a cap on LaGuardia operations.

As discussed elsewhere in today’s notice the FAA contends that the LaGuardia Order has kept operations from growing since the expiration of the HDR, but the agency has always been clear that the Order is linked to the publication of a final rule. Therefore, the base case from which to compare the cost and benefits of proposed alternatives in terms of delay reduction should not be between the Order and any final rule, but between an unconstrained airport and a final rule. The airport was close to unconstrained in 2000, which is why the FAA used its experience in 2000 for the 2006 NPRM and today’s notice. In addition, the New York City area airports experienced nearly unprecedented delays last summer, since JFK and Newark were not constrained and carriers were allowed to add flights at will.

### *Total Costs and Benefits of This Rulemaking*

The FAA estimates that this proposed rule would result in a long-term improvement in the allocation of scarce slot resources at LaGuardia. The estimated present value of net benefits of this rule is between \$65 million and \$197 million between 2009 and 2019. The costs of the rule, with a present value between \$12 million and \$23 million, are due to the design, implementation and participation in an auction of slots.<sup>22</sup>

This regulatory impact analysis also assumes as a baseline that in the absence of this rulemaking. The FAA would not otherwise impose a cap on aircraft operations at LaGuardia. Therefore, consistent with the initial Regulatory Evaluation undertaken for the FAA’s 2006 NPRM, the agency estimates that, through the long-term

implementation of a cap on aircraft operations, this rulemaking would result in a 32 percent reduction in the average delay per operation at LaGuardia relative to the situation with no cap. This reduction in average delay would generate present value net benefits of approximately \$2.02 billion between 2009 and 2019. The benefits are estimated by comparing the no-rule scenario (similar to the situation at LaGuardia in 2000) with the proposed cap.

### *Who Is Potentially Affected by This Rulemaking*

- Operators of scheduled and non-scheduled, domestic and international flights, and new entrants who do not yet operate at LaGuardia.
- All communities, including small communities with air service to LaGuardia.
- Passengers of scheduled flights to LaGuardia.
- The Port Authority of New York and New Jersey, which operates the airport.

### *Key Assumptions*

- Base Case: No operating authorizations or caps.
- Cap on operations provides additional delay improvement.
- Option 1: 100 percent of slots held by carriers with fewer than 21 slots would be grandfathered with 10 years of life; for holders with 21 or more slots, 90 percent of slots would be grandfathered with leases of 10 years, two percent would be retired and eight percent would be assigned with shorter leases auctioned over five years.
- Delay improvement in Option 1 due to retirement of approximately one minute per average operation.
- Option 2: Identical to Option 1 except there would be no retirement of slots, and for holders with 21 or more slots, 80 percent would be grandfathered with 10 year leases and 20 percent would be assigned with shorter leases auctioned over five years.
- For the purposes of this evaluation, the effective date is (11/1/08).

### *Other Important Assumptions*

- Discount Rate—7%.
- Assumes 2008 Current Year Dollars.
- Passenger Value of Travel Time—\$30.86 per hour.<sup>23</sup>

<sup>22</sup> Present value costs and benefits use a seven percent discount rate. The draft Regulatory Evaluation in the docket for this rulemaking contains additional valuations using a three percent discount rate.

<sup>23</sup> GRA, Incorporated “Economic Values for FAA Investment and Regulatory Decisions, A Guide” prepared for the FAA Office of Aviation Policy and Plans (October 3, 2007). Value is weighted using LaGuardia shares of 51 percent leisure and 49 percent business travel.

### Alternatives We Have Considered

- No caps (no action): This alternative would have allowed the HDR to expire on January 1, 2007 without replacing it. Based on history, the FAA expected operators would most likely continue to expand operations, further worsening airport delays.

- 2006 NPRM (withdrawal): The 2006 NPRM would have instituted caps, provided for mandatory upgauging, and withdrawn 10 percent of slots annually for reallocation. The FAA is replacing this proposal with the one proposed here.

- Caps: This alternative would permanently impose caps at 75 scheduled operations and three unscheduled operations per hour. It would grandfather all current Operating Authorizations.

- Option 1 + Caps: This alternative would institute caps as above, retire approximately two percent of eligible slots in the interest of reducing delays and reallocate eight percent of eligible capacity via an annual auction over five years.

- Option 2 + Caps: This alternative would institute caps as above, and reallocate 20 percent of eligible slots via an annual auction over five years.

We are requesting comment from industry on the range of alternatives considered.

### Benefits of This Rulemaking

The primary benefits of this rulemaking will be due to the delay reduction from the caps on operations and an improvement in the allocation of scarce slot resources through the use of an auction mechanism. In Option 1 of the proposed rulemaking, there will also be some additional benefits due to delay reduction associated with retiring approximately 18 slots. Consumers are likely to benefit from the delay reduction associated with the imposition of caps and the additional retirement of slots under Option 1. Consumers would also benefit from any new service resulting from the reallocation of resources.

### Costs of This Rulemaking

The major costs of this proposed rule cover the costs to the public and private sectors of designing, implementing and participating in the auction.

### Paperwork Reduction Act

This proposal contains the following new information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted the information requirements associated

with this proposal to the Office of Management and Budget for its review.

Some of the information requirements in today's notice are similar to those originally proposed in the 2006 notice. The FAA has updated these requirements and summarized them below.

*Title:* Congestion Management Rule for LaGuardia Airport. *Summary:* The FAA proposes to grandfather the majority of operations at LaGuardia and develop a secondary market by annually auctioning off a limited number of slots. This proposal also contains provisions for use-or-lose and withdrawal for operational need. The FAA proposes to sunset the rule in ten years. More information on the proposed requirements is detailed elsewhere in today's notice.

*Use of:* The information is reported to the FAA by scheduled operators holding slots. The FAA logs, verifies, and processes the requests made by the operators.

This information is used to allocate, track usage, withdraw, and confirm transfers of slots among the operators and facilitates the buying and selling of slots in the secondary market. The FAA also uses this information in order to maintain an accurate accounting of operations to ensure compliance with the operations permitted under the rule and those actually conducted at the airport.

*Respondents:* The respondents to the proposed information requirements in today's notice are scheduled carriers with existing service at LaGuardia, carriers that plan to enter the LaGuardia market (by auction or secondary market), and carriers that enter the LaGuardia market in the future. There are currently fourteen (14) carriers with existing scheduled service at LaGuardia.

*Frequency:* The information collection requirements of the rule involve scheduled carriers notifying the FAA of their use of slots. The carriers must notify the FAA of: (1) Its designation of 50 percent of its Limited Slots; (2) request for confirmation to sublease slots; (3) its consent to transfer slots under the transferring Carrier's marketing control; (4) requests for confirmation of one-for-one slot trades; (5) slot usage (operations); and (6) request for assignment of slots available on a temporary basis.

*Annual Burden Estimate:* The annual reporting burden for each subsection of the rule is presented below. Annual burden estimates presented in today's notice are based on burden estimates from the 2006 notice.

The burden is calculated by the following formula:

$$\text{Annual Hourly Burden} = (\# \text{ of respondents}) * (\text{time involved}) * (\text{frequency of the response}).$$

§ 93.64(c)(3) Categories of Slots: 50 Percent Designation of Limited Slots  
(6 carriers) \* (80 hours per submittal) = 480 hours

Based on the current allocation of Operating Authorizations and the proposed level of baseline operations each carrier would be grandfathered under today's proposal, we assumed the 6 carriers with the most operations at LaGuardia would expend up to ten days of planning time each, potentially 80 hours, to develop and submit its designation of 50 percent of its Limited Slots. This designation would occur once, ten days after the final rule effective date.

Sections 93.65(c)-(d) and 93.66(a) Initial Assignment of Slots and Assignment of New or Returned Slots

We assumed the 14 carriers operating at LaGuardia will expend time submitting and collecting information to participate in the proposed auctions for slot assignments. The FAA is currently in the process of procuring auction software and services. The FAA will make available burden estimates for information requirements relating to auction participation in a separate notice.

Section 93.68(b)-(f) Sublease and Transfer of Slots

(14 carriers) \* (1.5 hours per submittal) \* (4 occurrences per year) = 84 hours

Based on burden estimates from the 2006 notice, we assumed the 14 carriers operating at LaGuardia would expend one and one half hours for each occurrence of a lease or transfer of a slot. For each operator, we assumed that a lease or transfer of a slot would occur on average quarterly.

Section 93.69(b) One-for-One Trades of Operating Authorizations

(14 carriers) \* (1.5 hours per submittal) \* (4 occurrences per year) = 84 hours

Based on burden estimates from the 2006 notice, we assumed the 14 marketing carriers operating at LaGuardia expend one and one half hours for each occurrence of a one-for-one trade of a slot. For each operator, we assumed that a one-for-one trade of a slot would occur quarterly.

Section 93.72(a) Reporting Requirements

(14 carriers) \* (1.5 hours per submittal)  
\* (6 occurrences per year) = 126 hours

Based on burden estimates from the 2006 notice, we assumed the 14 carriers operating at LaGuardia expend one and one half hours every two months of the data required by § 93.72(a).

Section 93.73(d)–(e) Administrative Provisions

(14 carriers) \* (1.5 hours per submittal)  
\* (4 occurrence per year) = 84 hours

Based on burden estimates from the 2006 notice, we assumed the 14 carriers operating at LaGuardia expend one and one half hours every quarter for administrative provisions.

Summary

*Total First Year Hourly Reporting Burden—858 Hours.*

*Total Recurring Annual Hourly Reporting Burden (after first year)—378 Hours.*

The agency is soliciting comments to—

(1) Evaluate whether the proposed information requirements are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the agency's estimate of the burden;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirement by [insert date], and should direct them to the address listed in the **ADDRESSES** section of this document. Comments also should be submitted to the Office of Information and Regulatory Affairs, OMB, via facsimile at (202) 395-6974, Attention: Desk Officer for FAA.

According to the 1995 amendments to the Paperwork Reduction Act (5 CFR 1320.8(b)(2)(vi)), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. The OMB control number for this information collection will be published in the **Federal**

**Register**, after the Office of Management and Budget approves it.

*Regulatory Flexibility Determination*

The Regulatory Flexibility Act of 1980 (Pub. L. 96-3540 (RFA) establishes “as a principle of regulatory issuance that agencies shall endeavor, consistent with the objective of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the business, organizations, and governmental jurisdictions subject to regulation.” To achieve that principle, the RFA requires agencies to solicit and consider flexible regulatory proposals and to explain the rationale for their actions. The RFA covers a wide-range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposed or final rule would have a significant economic impact on a substantial number of small entities. If the agency determines that it would, the agency must prepare a regulatory flexibility analysis as described in the Act.

However, if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the 1980 RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear. Such a determination has been made for this proposed rule.

The proposed rule affects all 26 scheduled operators at LGA. Based on a review of the number of employees for each scheduled operator, the FAA found none of the scheduled operators at LGA are considered small entities by Small Business Administration size standards (in this case, firms with 1,500 or fewer employees). In the NPRM, the FAA identified two carriers that it believed could qualify as a small business under the SBA size standards. The agency has reevaluated the size of all carriers currently operating at LaGuardia and has determined that none of them are small businesses.

Using Enhanced Traffic Management System (ETMS) data, FAA has determined that there would be approximately 70 identifiable unscheduled operators at LGA which could be affected by this rule. While some of these operators may be small businesses, we do not believe they would be impacted significantly by the proposed rule. While there would be three fewer slots per hour under our

proposal, these operators seldomly use these slots and typically have greater flexibility to adjust operations than do scheduled operators.

Using 2007 Census data, the FAA also reviewed whether there would be interruptions to service to communities of less than 50,000 in population. We do not know if there would be any service interruptions as a result of the rule. We have reviewed population statistics for every city served from LGA in January 2007 (the base for allocation of slots under the proposed rule) and found none with fewer than 50,000 in population.

Therefore, the FAA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

*International Trade Impact Assessment*

The Trade Agreements Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule and determined that it would impose no costs on international entities and thus have a no trade impact. Canadian entities are the only foreign operators at LaGuardia and their slots are protected by a bilateral aviation agreement and not affected by the rule. They might benefit from the rule if they choose to participate in the proposed auction to acquire additional slots.

*Unfunded Mandate Assessment*

The Unfunded Mandate Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a “significant regulatory action.” The FAA currently uses an inflation-adjusted value of \$136.1 million in lieu of \$100 million. This final rule does not contain such a mandate. The requirements of Title II do not apply.



### Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have federalism implications.

### Environmental Analysis

FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures" identifies FAA actions that are normally categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA) in the absence of extraordinary circumstances. The FAA has determined that this rulemaking qualifies for the categorical exclusions identified in paragraph 312d "Issuance of regulatory documents (e.g., Notices of Proposed Rulemaking and issuance of Final Rules) covering administration or procedural requirements (does not include Air Traffic procedures; specific Air traffic procedures that are categorically excluded are identified under paragraph 311 of this Order)" and paragraph 312f, "Regulations, standards, and exemptions (excluding those which if implemented may cause a significant impact on the human environment)." It has further been determined that no extraordinary circumstances exist that may cause a significant impact and therefore no further environmental review is required. The FAA has documented this categorical exclusion determination. A copy of the determination and underlying documents has been included in the Docket for this rulemaking.

### Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this NPRM under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order because while a "significant regulatory action" under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

### Additional Information

#### Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

#### Proprietary or Confidential Business Information

Do not file in the docket information that you consider to be proprietary or confidential business information. Send or deliver this information directly to the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this document. You must mark the information that you consider proprietary or confidential. If you send the information on a disk or CD-ROM, mark the outside of the disk or CD-ROM and also identify electronically within the disk or CD-ROM the specific information that is proprietary or confidential.

Under 14 CFR 11.35(b), when we are aware of proprietary information filed with a comment, we do not place it in the docket. We hold it in a separate file to which the public does not have access, and we place a note in the docket that we have received it. If we receive a request to examine or copy this information, we treat it as any other request under the Freedom of Information Act (5 U.S.C. 552). We process such a request under the DOT procedures found in 49 CFR part 7.

### Availability of Rulemaking Documents

You can get an electronic copy of rulemaking documents using the Internet by—

1. Searching the Federal eRulemaking Portal (<http://www.regulations.gov>);
2. Visiting the FAA's Regulations and Policies web page at [http://www.faa.gov/regulations\\_policies/](http://www.faa.gov/regulations_policies/); or
3. Accessing the Government Printing Office's web page at <http://www.gpoaccess.gov/fr/index.html>.

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-9680. Make sure to identify the docket number, notice number, or amendment number of this rulemaking.

You may access all documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, from the Internet through the Federal eRulemaking Portal referenced in paragraph (1).

### List of Subjects in 14 CFR Part 93

Air traffic control, Airports, Navigation (air).

### VII. Draft Regulatory Text

In consideration of the foregoing, the Federal Aviation Administration proposes to amend Chapter I of Title 14, Code of Federal Regulations, as follows:

#### PART 93—SPECIAL AIR TRAFFIC RULES

1. The authority for part 93 continues to read as follows:

**Authority:** 49 U.S.C. 106(g), 40103, 40106, 40109, 40113, 44502, 44514, 44701, 44719, 46301.

#### Proposed Amendment—Option 1

2. Subpart C is added to read as follows:

#### Subpart C—LaGuardia Airport Traffic Rules

Sec.	
93.61	Applicability.
93.62	Definitions.
93.63	Slots for scheduled arrivals and departures.
93.64	Categories of Slots.
93.65	Initial assignment of Slots.
93.66	Assignment of new or returned Slots.
93.67	Reversion and withdrawal of Slots.
93.68	Sublease and transfer of Slots.
93.69	One-for-one trade of Slots.
93.70	Minimum usage requirements.
93.71	Unscheduled Operations.
93.72	Reporting requirements.
93.73	Administrative provisions.

## Subpart C—LaGuardia Airport Traffic Rules

### § 93.61 Applicability.

(a) This subpart prescribes the air traffic rules for the arrival and departure of aircraft used for scheduled and unscheduled service, other than helicopters, at LaGuardia Airport (LaGuardia).

(b) This subpart also prescribes procedures for the assignment, transfer, sublease and withdrawal of Slots issued by the FAA for scheduled operations at LaGuardia.

(c) The provisions of this subpart apply to LaGuardia during the hours of 6 a.m. through 9:59 p.m., Eastern Time, Monday through Friday and from 12 noon through 9:59 p.m., Eastern Time, Sunday. No person shall operate any scheduled arrival or departure into or out of LaGuardia during such hours without first obtaining a Slot in accordance with this subpart. No person shall conduct an Unrestricted Operation to or from LaGuardia during such hours without first obtaining a Reservation.

(d) Carriers that have Common Ownership shall be considered a single air carrier for purposes of this rule.

(e) The Slots assigned under this subpart terminate at 10 p.m. on March 9, 2019.

### § 93.62 Definitions.

For purposes of this subpart, the following definitions apply:

*Airport Reservation Office (ARO)* is an operational unit of the FAA's David J. Hurley Air Traffic Control System Command Center. It is responsible for the administration of reservations for unscheduled operations at LaGuardia.

*Base of Operations* are those common slots held by a carrier at LaGuardia on [final rule effective date], that do not exceed 20 operations per day and all slots guaranteed under The Air Transport Agreement between the Government of the United States of America and the Government of Canada.

*Carrier* is a U.S. or foreign air carrier with authority to conduct scheduled service under Parts 121, 129, or 135 of this chapter and the appropriate economic authority for scheduled service under 14 CFR chapter II and 49 U.S.C. chapter 411.

*Common Ownership* with respect to two or more carriers means having in common at least 50 percent beneficial ownership or control by the same entity or entities.

*Common Slot (C-slot)* is a slot that is allocated by the FAA as a lease under its cooperative agreement authority for the length of this rule.

*Enhanced Computer Voice Reservation System (e-CVRS)* is the system used by the FAA to make arrival and/or departure reservations for unscheduled operations at LaGuardia and other designated airports.

*Limited Slot (L-slot)* is a slot, the lease for which expires prior to the expiration of this rule for subsequent allocation by the FAA as an unrestricted slot.

*Public Charter* is defined in 14 CFR 380.2 as a one-way or roundtrip charter flight to be performed by one or more direct air carriers that is arranged and sponsored by a public charter operator.

*Public Charter Operator* is defined in 14 CFR 380.2 as a U.S. or foreign public charter operator.

*Reservation* is an authorization received by a carrier or other operator of an aircraft, excluding helicopters, in accordance with procedures established by the FAA to operate an unscheduled arrival or departure on a particular day of the week during a specific 30-minute period.

*Scheduled Operation* is the arrival or departure segment of any operation regularly conducted by a carrier between LaGuardia and another point regularly served by that carrier.

*Slot* is the operational authority assigned by the FAA to a carrier to conduct one scheduled arrival or departure operation at LaGuardia on a particular day of the week during a specific 30-minute period.

*Unrestricted Slot (U-slot)* is a slot that is allocated to a carrier by the FAA via the auction of a lease.

*Unscheduled Operation* is an arrival or departure segment of any operation that is not regularly conducted by a carrier or other operator of an aircraft, excluding helicopters, between LaGuardia and another service point. The following types of carrier operations shall be considered unscheduled operations for the purposes of this rule: public, on-demand, and other charter flights; hired aircraft service; extra sections of scheduled flights; ferry flights; and other non-passenger flights.

### § 93.63 Slots for scheduled arrivals and departures.

(a) During the hours of 6 a.m. through 9:59 p.m., Eastern Time, Monday through Friday and from 12 noon through 9:59 p.m., Eastern Time, Sunday, no person shall operate any scheduled arrival or departure into or out of LaGuardia without first obtaining a Slot in accordance with this subpart.

(b) Except as otherwise established by the FAA under paragraph (c) of this section, the number of Slots shall be limited to no more than seventy-five

(75) per hour. The number of Slots may not exceed 38 in any 30-minute period, and 75 in any 60-minute period. The number of arrival and departure slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

(c) Notwithstanding paragraph (b) of this section, the Administrator may increase the number of Slots based on a review of the following:

- (1) The number of delays;
- (2) The length of delays;
- (3) On-time arrivals and departures;
- (4) The number of actual operations;
- (5) Runway utilization and capacity plans; and
- (6) Other factors relating to the efficient management of the National Airspace System.

### § 93.64 Categories of Slots.

(a) Each Slot shall be designated as a Common Slot, Limited Slot or Unrestricted Slot and shall be assigned to the Carrier under a lease agreement. A lease for a Common or Limited Slot shall be assigned via a cooperative agreement. A lease for an Unrestricted Slot shall be awarded via an auction.

(b) *Common Slots.* (1) All Slots within any Carrier's Base of Operations as determined on [final rule effective date] shall be designated as Common Slots.

(2) Ten percent of the Slots at LaGuardia on [final rule effective date] not otherwise designated as Common Slots under paragraph (b) (1) of this section shall be designated as Limited Slots or Unrestricted Slots. All other Slots shall be designated as Common Slots.

(c) *Limited Slots.* Those Slots assigned to a Carrier subject to return to the FAA under § 93.65(c) and (d) shall be designated as Limited Slots until the date of their reassignment by the FAA as Unrestricted Slots or their retirement by the FAA. A Carrier may continue to use a Limited Slot that has reverted to the FAA until the second Sunday in the following March.

(1) In hours where there are more than 75 operations, the FAA shall designate the excess Slots as Limited Slots and will retire them in accordance with § 93.65(d).

(2) Each Carrier with a total number of daily operations at LaGuardia in excess of its Base of Operations, will be notified by [effective date of the final rule] which of its Slots have been designated as Limited Slots under paragraph (c)(1) of this section and how many of its remaining Slots will be designated as Limited Slots pursuant to paragraphs (c)(3) and (4) of this section.

(3) A Carrier shall designate 50 percent of its Limited Slots. The Carrier must notify the FAA of its designation by [date 10 days after the final rule effective date].

(4) The FAA will designate the remaining Limited Slots, excluding those hours in which two or more Slots have been designated as Limited Slots by the Carriers.

(5) No later than [date 20 days after the final rule effective date], the FAA will publish a list of all Limited Slots and the dates upon which they will expire.

(d) *Unrestricted Slots.* Unrestricted Slots are Slots acquired by a Carrier through a lease with the FAA awarded via an auction. Unrestricted Slots are not subject to withdrawal by the FAA.

#### **§ 93.65 Initial assignment of Slots.**

(a) Except as provided for under paragraphs (b) and (c) of this section, any Carrier allocated operating rights under the Order, Operating Limitations at New York LaGuardia Airport, during the week of January 7–13, 2007, as evidenced by the FAA's records, will be assigned corresponding Slots in 30-minute periods consistent with the limits under § 93.63(b). If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned Slots within the same hour to meet the 30-minute limits under § 93.63(b). The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this section.

(b) If a Carrier was allocated operating rights under the Order Limiting Operations at LaGuardia airport during the week of January 7–13, 2007, but the operating rights were held by another Carrier, then the corresponding Slots will be assigned to the Carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) On [date 35 days after the effective date] and every year thereafter through 2012, sixteen (16) percent of the total number of Limited Slots shall revert to the FAA in accordance with the schedule published under § 93.64(c)(5) and be auctioned as Unrestricted Slots by the FAA. Any Slot receiving no responsive bids will be retired until the next auction. An affected Carrier will be allowed to use the Limited Slot until the following second Sunday in March.

(d) Starting March 8, 2009 and on the second Sunday in March every year thereafter through 2013, the FAA will retire four percent of the total number of Limited Slots returned to the FAA under § 93.64(c). Based on the criteria set forth in § 93.63(c), the Administrator may, at his discretion, auction Slots

scheduled for retirement that year or auction retired Slots as new capacity.

#### **§ 93.66 Assignment of new or returned Slots.**

(a) New capacity or capacity returned to the FAA pursuant to the provisions of § 93.70 will be reassigned by the FAA via an auction conducted pursuant to § 93.65(c). Slots acquired from the FAA under the auction proceeding shall be designated as Unrestricted Slots.

(b) The FAA may decide to accumulate a quantity of Slots prior to conducting an auction.

#### **§ 93.67 Reversion and withdrawal of Slots.**

(a) This section does not apply to Unrestricted Slots.

(b) A Carrier's Common Slots or Limited Slots revert back to the FAA 30 days after the Carrier has ceased all operations at LaGuardia for any reasons other than a strike.

(c) The FAA may retime, withdraw or temporarily suspend Common Slots and Limited Slots at any time to fulfill operational needs.

(d) Common Slots and Limited Slots will be withdrawn in accordance with the priority list established under § 93.73.

(e) Except as otherwise provided in paragraph (a) of this section, the FAA will notify an affected Carrier before withdrawing or temporarily suspending a Common Slot or Limited Slot and specify the date by which operations under the Common Slot or Limited Slot must cease. The FAA will provide at least 45 days notice unless otherwise required by operational needs.

(f) Any Common Slot or Limited Slot that is temporarily withdrawn under this paragraph will be reassigned, if at all, only to the Carrier from which it was withdrawn, provided the Carrier continues to conduct Scheduled Operations at LaGuardia.

#### **§ 93.68 Sublease and transfer of Slots.**

(a) A Carrier may sublease its Slots to another Carrier in accordance with this section and subject to the provisions of the Carrier's lease agreement with the FAA.

(b) A Carrier must provide notice to the FAA to sublease a Slot. Such notice must contain: The Slot number and time, effective dates and, if appropriate, the duration of the lease. The Carrier may also provide the FAA with a minimum bid price.

(c) The FAA will post a notice of the offer to sublease the Slot and relevant details on the FAA Web site at <http://www.faa.gov>. An opening date, closing date and time by which bids must be received will be provided.

(d) Upon consummation of the transaction, written evidence of each Carrier's consent to sublease must be provided to the FAA, as well as all bids received and the terms of the sublease, including but not limited to:

(1) The names of all bidders and all parties to the transaction;

(2) The offered and final length of the sublease;

(3) The consideration offered by all bidders and provided by the sublessee.

(e) The Slot may not be used until the conditions of paragraph (d) of this section have been met, and the FAA provides notice of its approval of the sublease.

(f) A Carrier may transfer a Slot to another Carrier that conducts operations at LaGuardia solely under the transferring Carrier's marketing control, including the entire inventory of the flight. Each party to such transfer must provide written evidence of its consent to the transfer and the FAA must confirm and approve these transfers in writing prior to the effective date of the transaction. However, the FAA will approve transfers under this paragraph up to five business days after the actual operation to accommodate operational disruptions that occur on the same day of the scheduled operation. The FAA Vice President, System Operations Services is the final decision maker for any determinations under this section.

(g) A Carrier wishing to sublease a Slot via an FAA auction under § 93.65(c), rather than pursuant to this section may do so. The Carrier shall retain the proceeds and the Slot shall retain the same designation that it had prior to the Carrier placing it up for auction.

#### **§ 93.69 One-for-one trade of Slots.**

(a) A Carrier may trade a Slot with another Carrier on a one-for-one basis.

(b) Written evidence of each Carrier's consent to the trade must be provided to the FAA.

(c) Each recipient of the trade may not use the acquired Slot until written confirmation has been received from the FAA.

(d) Carriers participating in a one-for-one trade must certify to the FAA that no consideration or promise of consideration was provided by either party to the trade.

#### **§ 93.70 Minimum usage requirements.**

(a) This section does not apply to Unrestricted Slots.

(b) Any Common Slot or Limited Slot that is not used at least 80 percent of the time over a consecutive two-month period will be withdrawn by the FAA.

(c) Paragraph (b) of this section does not apply to the first 90-day period after

assignment of a Common Slot or Limited Slot through a sublease.

(d) The FAA may waive the requirements of paragraph (b) of this section in the event of a highly unusual and unpredictable condition which is beyond the control of the Carrier and which affects Carrier operations for a period of five or more consecutive days. Examples of conditions which could justify a waiver under this paragraph are weather conditions that result in the restricted operation of the airport for an extended period of time or the grounding of an aircraft type.

(e) The FAA will treat as used any Common Slot or Limited Slot held by a Carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Sunday of January.

#### § 93.71 **Unscheduled Operations.**

(a) During the hours of 6 a.m. through 9:59 p.m., Monday through Friday, and 12 p.m. through 9:59 p.m. on Sunday, no person may operate an aircraft other than a helicopter to or from LaGuardia unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO) or in the case of Public Charters, in accordance with the procedures in paragraph (d) of this section. Requests for Reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to or departure from LaGuardia. Additional information on procedures for obtaining a Reservation is available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Three Reservations are available per hour, including those assigned to Public Charter operations under paragraph (d) of this section. The ARO will assign Reservations on a 30-minute basis.

(c) The ARO will receive and process all Reservation requests for unscheduled arrivals and departures at LaGuardia. Reservations are assigned on a "first-come, first-served" basis determined by the time the request is received at the ARO. Reservations must be cancelled if they will not be used as assigned.

(d) One Reservation per hour will be available for allocation to Public Charter operations prior to the 72-hour Reservation window in paragraph (a) of this section.

(1) The Public Charter Operator may request a reservation up to six months in advance of the date of flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591.

Submissions may be made via facsimile to (202) 267-7277 or by e-mail to [7-awa-slotadmin@faa.gov](mailto:7-awa-slotadmin@faa.gov).

(2) The Public Charter Operator must certify that its prospectus has been accepted by the Department of Transportation in accordance with 14 CFR part 380.

(3) The Public Charter Operator must identify the call sign/flight number or aircraft registration number of the direct air carrier, the date and time of the proposed operation(s), the airport served immediately prior to or after LaGuardia, and aircraft type. Any changes to an approved Reservation must be approved in advance by the Slot Administration Office.

(4) If Reservations under paragraph (d)(1) of this section have already been allocated, the Public Charter Operator may request a Reservation under paragraph (a) of this section.

(e) The filing of a request for a Reservation does not constitute the filing of an IFR flight plan as required by regulation. The IFR flight plan may be filed only after the Reservation is obtained, must include the Reservation number in the "Remarks" section, and must be filed in accordance with FAA regulations and procedures.

(f) Air Traffic Control will accommodate declared emergencies without regard to Reservations. Non-emergency flights in direct support of national security, law enforcement, military aircraft operations, or public-use aircraft operations may be accommodated above the Reservation limits with the prior approval of the Vice President, System Operations Services, Air Traffic Organization. Procedures for obtaining the appropriate waiver will be available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(g) Notwithstanding the limits in paragraph (b) of this section, if the Air Traffic Organization determines that air traffic control, weather and capacity conditions are favorable and significant delay is unlikely, the FAA may determine that additional Reservations may be accommodated for a specific time period. Unused Slots may also be made available temporarily for Unscheduled Operations. Reservations for additional operations must be obtained through the ARO.

(h) Reservations may not be bought, sold or leased.

#### § 93.72 **Reporting requirements.**

(a) Within 14 days after the last day of the two-month period beginning March 8, 2009 and every two months thereafter, each Carrier holding a Common Slot or Limited Slot must report, in a format acceptable to the

FAA, the following information for each Common Slot or Limited Slot:

- (1) The Slot number, time, and arrival or departure designation;
- (2) The operating Carrier;
- (3) The date and scheduled time of each of the operations conducted pursuant to the Slot, including the flight number and origin/destination;
- (4) The aircraft type identifier.

(b) The FAA may withdraw the Slot of any Carrier that does not meet the reporting requirements of paragraph (a) of this section.

#### § 93.73 **Administrative provisions.**

(a) Each Slot shall be assigned a number for administrative convenience.

(b) The FAA will assign priority numbers by random lottery for Common Slots and Limited Slots at LaGuardia. Each Common Slot and Limited Slot will be assigned a withdrawal priority number, and the 30-minute time period for the Common Slot or Limited Slot, frequency, and the arrival or departure designation.

(c) If the FAA determines that operations need to be reduced for operational reasons, the lowest assigned priority number Common Slot or Limited Slot will be the last withdrawn.

(d) Any Slot available on a temporary basis may be assigned by the FAA to a Carrier on a non-permanent, first-come, first-served basis subject to permanent assignment under this subpart. Any remaining Slots may be made available for Unscheduled Operations on a non-permanent basis and will be assigned under the same procedures applicable to other operating Reservations.

(e) All transactions under this subpart must be in a written or electronic format approved by the FAA.

#### **Proposed Amendment: Option 2**

3. Subpart C is added to read as follows:

Subpart C—LaGuardia Airport Traffic Rules

Sec.	
93.61	Applicability.
93.62	Definitions.
93.63	Slots for scheduled arrivals and departures.
93.64	Categories of Slots.
93.65	Initial assignment of Slots.
93.66	Assignment of new or returned Slots.
93.67	Reversion and withdrawal of Slots.
93.68	Sublease and transfer of Slots.
93.69	One-for-one trade of Slots.
93.70	Minimum usage requirements.
93.71	Unscheduled Operations.
93.72	Reporting requirements.
93.73	Administrative provisions.

#### § 93.61 **Applicability.**

(a) This subpart prescribes the air traffic rules for the arrival and departure of aircraft used for scheduled and

unscheduled service, other than helicopters, at LaGuardia Airport (LaGuardia).

(b) This subpart also prescribes procedures for the assignment, transfer, sublease and withdrawal of Slots issued by the FAA for scheduled operations at LaGuardia.

(c) The provisions of this subpart apply to LaGuardia during the hours of 6 a.m. through 9:59 p.m., Eastern Time, Monday through Friday and from 12 noon through 9:59 p.m., Eastern Time, Sunday. No person shall operate any scheduled arrival or departure into or out of LaGuardia during such hours without first obtaining a Slot in accordance with this subpart. No person shall conduct an Unrestricted Operation to or from LaGuardia during such hours without first obtaining a Reservation.

(d) Carriers that have Common Ownership shall be considered a single air carrier for purposes of this rule.

(e) The Slots assigned under this subpart terminate at 10 p.m. on March 9, 2019.

#### § 93.62 Definitions.

For purposes of this subpart, the following definitions apply:

*Airport Reservation Office (ARO)* is an operational unit of the FAA's David J. Hurley Air Traffic Control System Command Center. It is responsible for the administration of reservations for unscheduled operations at LaGuardia.

*Base of Operations* are those common slots held by a carrier on [final rule effective date], that do not exceed 20 operations per day and all slots guaranteed under The Air Transport Agreement between the Government of the United States of America and the Government of Canada.

*Carrier* is a U.S. or foreign air carrier with authority to conduct scheduled service under Parts 121, 129, or 135 of this chapter and the appropriate economic authority for scheduled service under 14 CFR chapter II and 49 U.S.C. chapter 411.

*Common Ownership* with respect to two or more carriers means having in common at least 50 percent beneficial ownership or control by the same entity or entities.

*Common Slot (C-slot)* is a slot that is allocated by the FAA as a lease under its cooperative agreement authority for the length of this rule.

*Enhanced Computer Voice Reservation System (e-CVRS)* is the system used by the FAA to make arrival and/or departure reservations for unscheduled operations at LaGuardia and other designated airports.

*Limited Slot (L-slot)* is a slot, the lease for which must be transferred to another carrier by the holder of the limited slot as an unrestricted slot prior to the expiration of this rule.

*Public Charter* is defined in 14 CFR 380.2 as a one-way or roundtrip charter flight to be performed by one or more direct air carriers that is arranged and sponsored by a public charter operator.

*Public Charter Operator* is defined in 14 CFR 380.2 as a U.S. or foreign public charter operator.

*Reservation* is an authorization received by a carrier or other operator of an aircraft, excluding helicopters, in accordance with procedures established by the FAA to operate an unscheduled arrival or departure on a particular day of the week during a specific 30-minute period.

*Scheduled Operation* is the arrival or departure segment of any operation regularly conducted by a carrier between LaGuardia and another point regularly served by that carrier.

*Slot* is the operational authority assigned by the FAA to a carrier to conduct one scheduled arrival or departure operation at LaGuardia on a particular day of the week during a specific 30-minute period.

*Unrestricted Slot (U-slot)* is a slot that is assigned to another carrier by the holder of a limited slot pursuant to the mandatory lease transfer provisions of this subpart.

*Unscheduled Operation* is an arrival or departure segment of any operation that is not regularly conducted by a carrier or other operator of an aircraft, excluding helicopters, between LaGuardia and another service point. The following types of carrier operations shall be considered unscheduled operations for the purposes of this rule: public, on-demand, and other charter flights; hired aircraft service; extra sections of scheduled flights; ferry flights; and other non-passenger flights.

#### § 93.63 Slots for scheduled arrivals and departures.

(a) During the hours of 6 a.m. through 9:59 p.m., Eastern Time, Monday through Friday and from 12 noon through 9:59 p.m., Eastern Time, Sunday, no person shall operate any scheduled arrival or departure into or out of LaGuardia during such hours without first obtaining a Slot in accordance with this subpart.

(b) Except as otherwise established by the FAA under paragraph (c) of this section, the number of Slots shall be limited to no more than seventy-five (75) per hour. The number of Slots may not exceed 38 in any 30-minute period,

and 75 in any 60-minute period. The number of arrival and departure Slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

(c) Notwithstanding paragraph (b) of this section, the Administrator may increase the number of Slots based on a review of the following:

- (1) The number of delays;
- (2) The length of delays;
- (3) On-time arrivals and departures;
- (4) The number of actual operations;
- (5) Runway utilization and capacity plans; and
- (6) Other factors relating to the efficient management of the National Airspace System.

#### § 93.64 Categories of Slots.

(a) Each Slot shall be designated as a Common Slot, Limited Slot or Unrestricted Slot and shall be assigned to the Carrier under a lease agreement. A lease for a Common Slot or Limited Slot shall be assigned via a cooperative agreement. A lease for an Unrestricted Slot shall be awarded via an auction.

(b) *Common Slots.* (1) All Slots within any Carrier's Base of Operations, as determined on [final rule effective date], shall be designated as Common Slots.

(2) Twenty percent of the Slots at LaGuardia on [final rule effective date] not otherwise designated as Common Slots under paragraph (b)(1) of this section shall be designated as Limited Slots or Unrestricted Slots. All other Slots shall be designated as Common Slots.

(c) *Limited Slots.* Those Slots assigned to a Carrier subject to return to the FAA under § 93.65(c) shall be designated as Limited Slots until they are transferred to another Carrier under those provisions. A Carrier may continue to use a Limited Slot until reassigned to another Carrier as an Unrestricted Slot.

(1) Each Carrier with a total number of daily operations at LaGuardia in excess of its Base of Operations, will be notified by [effective date of the final rule] how many of its slots will be designated as Limited Slots pursuant to paragraphs (c)(2) and (3) of this section.

(2) A Carrier shall designate 50 percent of its Limited Slots. The Carrier must notify the FAA of its designation by [date 10 days after the final rule effective date].

(3) The FAA will designate the remaining Limited Slots, excluding those hours in which two or more Slots have been designated as Limited Slots by the Carriers.

(4) No later than [date 20 days after the final rule effective date], the FAA

will publish a list of all Limited Slots and the dates by which they will expire.

(d) Unrestricted Slots are those Slots acquired by a Carrier through a lease with the FAA awarded via an auction. Unrestricted Slots are not subject to withdrawal by the FAA.

**§ 93.65 Initial assignment of Slots.**

(a) Except as provided for under paragraphs (b) and (c) of this section, any Carrier allocated operating rights under the Order, Operating Limitations at New York LaGuardia Airport, as amended during the week of January 7–13, 2007, as evidenced by the FAA's records, will be assigned corresponding Slots in 30-minute periods consistent with the limits under § 93.63(b). If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned Slots within the same hour to meet the 30-minute limits under § 93.63(b). The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this section.

(b) If a Carrier was allocated operating rights under the Order Limiting Operations at LaGuardia airport during the week of January 7–13, 2007, but the operating rights were held by another Carrier, then the corresponding Slots will be assigned to the Carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) On [date 35 days after the effective date] and every year thereafter through 2012, twenty (20) percent of the total number of Limited Slots identified on [date 20 days after the effective date] shall revert to the FAA in accordance with the schedule published under § 93.64(c)(4) and be auctioned as Unrestricted Slots by the FAA and subsequently transferred to another Carrier, effective no later than the following second Sunday in March.

(1) The auction shall be blind, and only cash may be bid.

(2) The holder of a Limited Slot may not bid on its own Slots.

(3) The holder of a Limited Slot shall retain all proceeds from the transaction.

(4) The auction shall be conducted by the FAA, which will dictate all procedures related to the auction, including but not limited to the requirement that the Carrier may not specify a minimum bid price.

(5) In the event no Carrier bids on the Slot, the FAA will retire it until the next auction.

(6) The Carrier holding a Limited Slot will be allowed to use the Slot until the following second Sunday in March.

**§ 93.66 Assignment of new or returned Slots.**

(a) New capacity or capacity returned to the FAA pursuant to the provisions of § 93.70 will be reassigned by the FAA via an auction conducted pursuant to § 93.65(c). Slots acquired from the FAA under this section shall be designated as Unrestricted Slots.

(b) The FAA may decide to accumulate a quantity of Slots prior to conducting an auction.

**§ 93.67 Reversion and withdrawal of Slots.**

(a) This section does not apply to Unrestricted Slots.

(b) A Carrier's Common Slots and Limited Slots revert back to the FAA 30 days after the Carrier has ceased all operations at LaGuardia for any reasons other than a strike.

(c) The FAA may retime, withdraw or temporarily suspend Common Slots and Limited Slots at any time to fulfill operational needs.

(d) Common Slots and Limited Slots will be withdrawn in accordance with the priority list established under § 93.73.

(e) Except as otherwise provided in paragraph (b) of this section, the FAA will notify an affected Carrier before withdrawing or temporarily suspending a Common Slot or Limited Slot and specify the date by which operations under the Common Slot or Limited Slot must cease. The FAA will provide at least 45 days notice unless otherwise required by operational needs.

(f) Any Common Slot or Limited Slot that is temporarily withdrawn under this paragraph will be reassigned, if at all, only to the Carrier from which it was withdrawn, provided the Carrier continues to conduct Scheduled Operations at LaGuardia.

**§ 93.68 Sublease and transfer of Slots.**

(a) Carriers may sublease Slots to another Carrier in accordance with this section and subject to the provisions of the Carrier's lease agreement with the FAA.

(b) A Carrier must provide notice to the FAA to sublease a Slot. Such notice must contain: The Slot number and time, effective dates and, if appropriate, the duration of the lease. The Carrier may also provide the FAA with a minimum bid price.

(c) The FAA will post a notice of the offer to sublease the Slot and relevant details on the FAA Web site at <http://www.faa.gov>. An opening date, closing date and time by which bids must be received will be provided.

(d) Upon consummation of the transaction, written evidence of each Carrier's consent to sublease must be

provided to the FAA, as well as all bids received and the terms of the sublease, including but not limited to:

(1) The names of all bidders and all parties to the transaction;

(2) The offered and final length of the sublease;

(3) The consideration offered by all bidders and provided by the sublessee.

(e) The Slot may not be used until the conditions of paragraph (d) of this section have been met, and the FAA provides notice of its approval of the sublease.

(f) A Carrier may transfer a Slot to another Carrier that conducts operations at LaGuardia solely under the transferring Carrier's marketing control, including the entire inventory of the flight. Each party to such transfer must provide written evidence of its consent to the transfer and the FAA must confirm and approve these transfers in writing prior to the effective date of the transaction. However, the FAA will approve transfers under this paragraph up to five business days after the actual operation to accommodate operational disruptions that occur on the same day of the scheduled operation. The FAA Vice President, System Operations Services is the final decision maker for any determinations under this section.

(g) A Carrier wishing to sublease a Slot via an FAA auction under § 93.65(c), rather than pursuant to this section may do so. The Carrier shall retain the proceeds and the Slot shall retain the same designation that it had prior to the Carrier placing it up for auction.

**§ 93.69 One-for-one trade of Slots.**

(a) A Carrier may trade a Slot with another Carrier on a one-for-one basis.

(b) Written evidence of each Carrier's consent to the transfer must be provided to the FAA.

(c) Each recipient of the trade may not use the acquired Slot until written confirmation has been received from the FAA.

(d) Carriers participating in a one-for-one trade must certify to the FAA that no consideration or promise of consideration was provided by either party to the trade.

**§ 93.70 Minimum usage requirements.**

(a) This section does not apply to Unrestricted Slots.

(b) Any Common Slot or Limited Slot that is not used at least 80 percent of the time over a consecutive two-month period will be withdrawn by the FAA.

(c) Paragraph (b) of this section does not apply to the first 90-day period after assignment of Common Slots or Limited Slots through a sublease.

(d) The FAA may waive the requirements of paragraph (b) of this section in the event of a highly unusual and unpredictable condition which is beyond the control of the Carrier and which affects Carrier operations for a period of five or more consecutive days. Examples of conditions which could justify a waiver under this paragraph are weather conditions that result in the restricted operation of the airport for an extended period of time or the grounding of an aircraft type.

(e) The FAA will treat as used any Common Slot or Limited Slot held by a Carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Sunday of January.

#### § 93.71 **Unscheduled Operations.**

(a) During the hours of 6 a.m. through 9:59 p.m., Monday through Friday, and 12 p.m. through 9:59 p.m. on Sunday, no person may operate an aircraft other than a helicopter to or from LaGuardia unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO) or in the case of Public Charters, in accordance with the procedures in paragraph (d) of this section. Requests for Reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to or departure from LaGuardia. Additional information on procedures for obtaining a Reservation is available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Three Reservations are available per hour, including those assigned to Public Charter operations pursuant to paragraph (d) of this section. The ARO will assign Reservations on a 30-minute basis.

(c) The ARO will receive and process all Reservation requests for unscheduled arrivals and departures at LaGuardia. Reservations are assigned on a "first-come, first-served" basis determined by the time the request is received at the ARO. Reservations must be cancelled if they will not be used as assigned.

(d) One Reservation per hour will be available for allocation to Public Charter operations prior to the 72-hour Reservation window in paragraph (a) of this section.

(1) The Public Charter Operator may request a Reservation up to six months in advance of the date of flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591. Submissions may be made via facsimile

to (202) 267-7277 or by e-mail to [7-awa-slotadmin@faa.gov](mailto:7-awa-slotadmin@faa.gov).

(2) The Public Charter Operator must certify that its prospectus has been accepted by the Department of Transportation in accordance with 14 CFR part 380.

(3) The Public Charter Operator must identify the call sign/flight number or aircraft registration number of the direct air carrier, the date and time of the proposed operation(s), the airport served immediately prior to or after LaGuardia, and aircraft type. Any changes to an approved Reservation must be approved in advance by the Slot Administration Office.

(4) If Reservations under paragraph (d)(1) of this section have already been allocated, the Public Charter Operator may request a Reservation under paragraph (a) of this section.

(e) The filing of a request for a Reservation does not constitute the filing of an IFR flight plan as required by regulation. The IFR flight plan may be filed only after the Reservation is obtained, must include the Reservation number in the "Remarks" section, and must be filed in accordance with FAA regulations and procedures.

(f) Air Traffic Control will accommodate declared emergencies without regard to Reservations. Non-emergency flights in direct support of national security, law enforcement, military aircraft operations, or public-use aircraft operations may be accommodated above the Reservation limits with the prior approval of the Vice President, System Operations Services, Air Traffic Organization. Procedures for obtaining the appropriate waiver will be available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(g) Notwithstanding the limits in paragraph (b) of this section, if the Air Traffic Organization determines that air traffic control, weather and capacity conditions are favorable and significant delay is unlikely, the FAA may determine that additional Reservations may be accommodated for a specific time period. Unused Slots may also be made available temporarily for Unscheduled Operations. Reservations for additional operations must be obtained through the ARO.

(h) Reservations may not be bought, sold or leased.

#### § 93.72 **Reporting requirements.**

(a) Within 14 days after the last day of the two-month period beginning March 8, 2009, and every two months thereafter, each Carrier holding a Common Slot or Limited Slot must report, in a format acceptable to the

FAA, the following information for each Common Slot or Limited Slot:

(1) The Slot number, time, and arrival or departure designation;

(2) The operating Carrier;

(3) The date and scheduled time of each of the operations conducted pursuant to the Slot, including the flight number and origin/destination;

(4) The aircraft type identifier.

(b) The FAA may withdraw the Slot of any Carrier that does not meet the reporting requirements of paragraph (a) of this section.

#### § 93.73 **Administrative provisions.**

(a) Each Slot shall be assigned a number for administrative convenience.

(b) The FAA will assign priority numbers by random lottery for Common Slots and Limited Slots at LaGuardia. Each Common Slot and Limited Slot will be assigned a withdrawal priority number, and the 30-minute time period for the Common Slot or Limited Slot, frequency, and the arrival or departure designation.

(c) If the FAA determines that operations need to be reduced for operational reasons, the lowest assigned priority number Common Slots or Limited Slots will be the last withdrawn.

(d) Any Slot available on a temporary basis may be assigned by the FAA to a Carrier on a non-permanent, first-come, first-served basis subject to permanent assignment under this subpart. Any remaining Slot may be made available for Unscheduled Operations on a non-permanent basis and will be assigned under the same procedures applicable to other operating Reservations.

(e) All transactions under this subpart must be in a written or electronic format approved by the FAA.

Issued in Washington, DC, on April 14, 2008.

**Nan Shellabarger,**

*Director of Aviation Policy and Plans.*

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