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Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

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[Docket No. FAA–2008–0517; Amdt. No. 93–88]

RIN 2120–AJ28

Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport

AGENCY: Federal Aviation Administration (FAA).

ACTION: Final rule.

SUMMARY: This rule establishes procedures to address congestion in the New York City area by assigning slots at John F. Kennedy (JFK) and Newark Liberty (Newark) International Airports in a way that allows carriers to respond to market forces to drive efficient airline behavior. The rule also extends the caps on the operations at the two airports, assigns to existing operators the majority of slots at the airports, and develops a robust secondary market by annually auctioning off a limited number of slots in each of the first five years of this rule. Auction proceeds will be used to mitigate congestion and delay in the New York City area. The rule also contains provisions for minimum usage, capping unscheduled operations, and withdrawal for operational need. The rule will sunset in ten years.

DATES: This rule becomes effective December 9, 2008.

FOR FURTHER INFORMATION CONTACT: For technical questions regarding this rulemaking, *contact:* Nan Shellabarger, Office of Aviation Policy and Plans, APO–1, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–7294; e-mail *nan.shellabarger@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*.

SUPPLEMENTARY INFORMATION:

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

This final rule is the latest action in a history of congestion management at New York airports. Access to both John F. Kennedy (JFK) and Newark Liberty International (Newark) airports is highly sought after. These two factors have forced the FAA to address a dilemma: how can the agency reduce delays while providing some measure of access to carriers wishing to operate at the airport, thus ensuring competition? While there are many factors contributing to the delays and congestion at JFK and Newark, demand for the associated airspace has outstripped capacity.

History of Congestion Management at JFK and Newark

The FAA managed congestion during the five hours of peak transatlantic demand (3 p.m. through 7:59 p.m. Eastern Time) at JFK under the High Density Rule (HDR) from 1969 through 2006. 14 CFR part 93 subparts K and S. However, not until deregulation of the airline industry did the FAA need to step in and provide for carrier access to the airspace immediately surrounding the airport. Prior to 1985, the carriers at JFK, operating under antitrust immunity, determined who would be allowed to operate and when. The FAA's role was limited to determining how many operations air traffic control could reasonably handle during congested periods and enforcing operator compliance with the rules. The HDR divided the allowable operations (slots) by categories of users (i.e., carriers other than air taxis, scheduled air taxis, and others). 33 FR 17896 December 3, 1968). In 1982, the FAA imposed a minimum usage requirement for the first time. 47 FR 7816 February 22, 1982). Also in 1982, the FAA implemented an experimental buy-sell rule, under which approximately 190 slots were transferred among carriers over six weeks of the program. 47 FR 29814, July 8, 1982).[1]

The FAA established more permanent allocation procedures for slots under the HDR in 1985 when it adopted the Buy/Sell Rule. 50 FR 52195, December 20, 1985. In a companion rulemaking to the Buy/Sell Rule (SFAR 48), the FAA provided for the withdrawal of up to five percent of the slots at the slot-constrained airports through a reverse lottery so as to provide a pool of slots for new entrants and limited incumbents. SFAR 48, 51 FR 8630, March 12, 1986).[2] The Buy/Sell Rule included use-or-lose provisions and, while explicitly stating that the slots were not the carriers' property and did not constitute a proprietary right, the FAA allowed carriers to buy, sell or lease the slots on the secondary market.

[1] This slot program was not implemented under the HDR, but rather under SFAR 44 and was related to the limitations on air traffic control services resulting from the controller's strike.

[2] Commenters appear to have forgotten this rulemaking action when arguing that the withdrawal of slots for reallocation is unprecedented.

For the next 15 years the agency relied primarily on the secondary market authorized by the Buy/Sell Rule to address access issues at the airport. However, the Buy/Sell Rule created market distortions by creating categories of carriers entitled to preferential treatment under an administrative reallocation mechanism which severely limited access to these carriers other than on the open market. Affected carriers complained to the FAA that by grandfathering 95 percent of the slots at the slot-controlled airports to incumbent carriers, there was insufficient capacity available for reallocation. The Buy/Sell Rule also failed to foster a robust secondary market because it did not require any transparency. Accordingly, carriers were able to keep out competitors by arranging private transactions. This resulted in carriers interested in initiating or expanding service at the airports often being unaware that slots were potentially available for sale or lease. Some carriers also complained that they were effectively being denied access to the airport because their competitors refused to sell slots or provide meaningful lease terms.

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 JFK effective January 1, 2007. 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).

Since the spring of 2006, U.S. air carriers serving JFK have significantly increased their domestic scheduled operations throughout the day. This change in use affected the manner in which the airport's runways could be used. Historically, the air traffic controllers achieved maximum efficiency at JFK by using either two arrival runways and one departure runway, or two departure runways and one arrival runway, to facilitate the transatlantic traffic flows. The increase in domestic traffic—from the two largest operators at the airport, Delta Air Lines (Delta) and JetBlue—affected the efficient use of JFK's four runways.

As a result of the increase in scheduled operations at JFK, the summer 2007 demand exceeded the airport's capacity during many periods of the day. In 2007 flight delays in the New York City metropolitan area soared. Delays impacted all three major commercial airports and cascaded throughout the NAS. The summer of 2007 became the second worst on record nationally for flight delays. On September 27, 2007, the Secretary of Transportation announced the formation of the New York Aviation Rulemaking Committee (NYARC) 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 NYARC provided ample opportunity for extensive input by aviation stakeholders, having members from every major air carrier in the United States as well as foreign carriers, passenger groups, and the Port Authority of New York and New Jersey (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. In addition to holding weekly meetings of the full NYARC, five working groups regularly met to explore ways to address both congestion and allocation of the available airspace. The NYARC worked throughout the fall and submitted a report to the Secretary, dated December 13, 2007, discussing its findings. A copy of the NYARC Report may be found at *http://www.dot.gov/affairs/FinalARCReport.pdf*.

While the NYARC process was underway, in September 2007, the FAA designated both JFK and Newark airports IATA Level 2, Schedules Facilitated Airports for the 2008 summer season. 72 FR 57317 (Sept. 24, 2007). The FAA thereby received summer scheduling information from the carriers for those airports. Based in part on this information, in September–October 2007, the FAA and the Secretary of Transportation decided that it was necessary to invoke the Department's authority to convene a meeting of air carriers to discuss flight reductions at JFK, which was determined to have severe congestion during peak hours of operation. 49 U.S.C. 41722. On October 25, 2007, the FAA designated JFK as an IATA Level 3, Coordinated Airport for summer 2008 in order to address any growth in operations at the airport by foreign-flag carriers.[3] 72 FR 60710.

During the individual air carrier sessions, American Airlines (American), Delta, and JetBlue Airways, which account for over 75% of the total operations at JFK, withdrew their proposed peak-hour schedule increases, and retimed some operations, for the summer of 2008 during the afternoon and early evening peak hours at the airport. The FAA also received comments on the schedule reduction process through the public docket. Docket FAA–2007–29320. On January 18, 2008, the FAA issued an Order temporarily capping scheduled operations at an average of 81 flight operations per hour at JFK and allocating those operations pursuant to the agreements reached at the schedule reduction meeting and after consideration of the comments in the public docket. 73 FR 3510. By its terms, the Order took effect March 30, 2008 and was set to expire at 11 p.m. on October 24, 2009. The Order indicated that the FAA plans to lease any new capacity that becomes available and any allocated Operating Authorizations that are returned to the FAA, for a five year term. The leases would be pursuant to an auction and would be awarded to the highest responsive bidder. The FAA said it would provide additional information about leasing procedures and the relevant statutory authorities before conducting any auction. 73 FR 3510, 3514. On February 14, 2008, the FAA amended the Order to modify the use-or-lose provisions so that they would correspond to those adopted by the International Air Transport Association (IATA) Worldwide Scheduling Guidelines (WSG). 73 FR 8737.

In the autumn of 2007, the FAA also found it necessary to informally discuss summer 2008 schedules with carriers operating at Newark, because it was concerned that the proposed operations would overtax the capacity of the airport system and that limiting operations at JFK would create a spillover effect at Newark. Although some carriers made modest revisions to their proposed schedules, it was clear to the FAA that demand would continue to exceed capacity unless the FAA took further actions. In order to be assured that carriers would not add flights to already oversubscribed hours at Newark, and would refrain from shifting flights from JFK to Newark, the FAA designated Newark as an IATA Level 3, Coordinated Airport effective the summer of 2008. 72 FR 73,418 (Dec. 27, 2007). Some carriers, such as

[3] Under both level 2 and level 3, carriers notify the governmental entity designating the airport of their intended schedules for the affected season and, where possible, the two parties will attempt to resolve each others concerns. However, under a carrier is not obliged to accept the governing authority's position at a level 2 airport.

Continental Airlines (Continental), Newark's primary hub carrier, shifted flights from peak hours to off-peak hours. On March 18, 2008, the FAA proposed to issue an Order to limit hourly scheduled flight operations at Newark and to allocate them pursuant to its informal carrier discussions. 73 FR 14552. The proposal's preamble indicated the FAA's plans to lease new capacity, allocated Operating Authorizations that are returned, and currently unallocated Operating Authorizations, by means of an auction. On May 21, 2008, the FAA adopted the general terms of the proposed Order, effective June 20, 2008, through October 24, 2009. 73 FR 29550. The provisions regarding the use of the IATA WSG for use-or-lose, and the preamble information on the auctions of new and returned capacity, mirrored those in place for JFK.

As indicated in the companion rule addressing congestion and delays at LaGuardia, the FAA determined that it was necessary to cap and allocate flight operations at the three major New York airports operated by the Port Authority. Recognizing the short-term nature of the caps imposed by the Orders for JFK and Newark, on May 21, 2008, the FAA published a notice of proposed rulemaking that sought to provide a longer-term solution and address a number of congestion-related issues. 73 FR 29626. At both JFK and Newark, the FAA proposed to continue the hourly caps on flight operations, and to lease the majority of slots at each airport to the historic operators for non-monetary consideration under its cooperative agreement authority. The agency also proposed to develop a robust market and induce competition by annually auctioning off leases for a limited number of slots during the first five years of the rule.

The FAA proposed two alternatives in the NPRM. Under the first alternative, each carrier operating, respectively, at JFK and Newark would receive a ''baseline'' of up to 20 slots. At each airport, the FAA would auction off ten percent of the total number of slots (above the baseline) to any carrier serving or wishing to serve the airport and would use the proceeds to mitigate congestion and delay in the New York City area (after the FAA recouped the cost of the auction). Under the second alternative, the same auction procedure would apply to Newark as under the first alternative; at JFK, the FAA would conduct an auction of twenty percent of the slots (above the baseline) and the auction proceeds would go to the carrier holding the slot after the FAA recouped the cost of the auction. Given the significant international presence at both airports, the NPRM proposed to substitute IATA WSG procedures for auctions, in the event of new or returned capacity. Additionally, for both alternatives, the NPRM contained provisions for adoption of IATA WSG for use-or-lose, for historic rights, for unscheduled operations, and for withdrawal for operational need. The FAA proposed to sunset the rule in ten years.

On July 17, 2008, the FAA proposed to limit unscheduled operations at JFK and Newark, to two hourly reservations from 6 a.m. through 1:59 p.m., from 10 p.m. through 10:59 p.m., and to one hourly reservation from 2 p.m. through 9:59 p.m. at JFK. At Newark, the limits would be two hourly reservations from 6 a.m. through 11:59 a.m. and from 10 p.m. through 10:59 p.m., and one hourly reservation from 12 p.m. through 9:59 p.m. 73 FR 41156.

The comment period for the NPRM closed July 21, 2008. Despite numerous requests, the FAA decided against extending the comment period, although it noted that it historically has considered comments filed after the end of a comment period as long as such consideration did not lead to delay. In denying these requests, the FAA provided draft copies of the lease agreements that would result from the initial allocation and reallocation of slots in the final rule. The FAA reiterated that any auction would be conducted under the agency's acquisition authority. The agency also reiterated that interested parties to the auction would be afforded the opportunity to comment on any proposed auction procedures within the context of the agency's Acquisition Management System.

Thirty-eight interested parties filed comments to the docket addressing the NPRM. The majority of comments were consistent in rejecting the proposal. Many commenters said that the FAA had failed to demonstrate how the proposal would achieve any significant relief from congestion. Rather, according to the commenters, the NPRM would impose an untested and unproven auction process on airlines that would not address the fundamental airspace congestion issues in the New York metro area.

On September 30, 2008 the FAA's Office of Dispute Resolution for Acquisition (ODRA) issued a decision responding to protests that had been filed by air carriers, the ATA, the Port Authority, and the New York Aviation Management Association challenging the FAA's legal authority to conduct a proposed auction of two slots at Newark. ODRA concluded that the FAA's statutory authority and its Acquisition Management System authorized agency disposal of property rights by way of a lease as well as the use of a competitive auction process to determine who the lessee should be.

On the same day the Government Accountability Office (GAO) released an opinion letter in response to a congressional request that concluded that the FAA currently lacks authority to auction slots under either its property disposition authority or its user fee authority. The issues involved represent novel legal issues upon which reasonable people, and agencies, acting in good faith, have disagreed. The FAA disagrees with the GAO conclusions and has decided to proceed with the adoption of this final rule.

II. Summary of the Final Rule

In the NPRM, we proposed two alternatives for withdrawal and reallocation by auction of slots at JFK and Newark. The rule we are adopting follows the proposal for alternative 1. It will replace the Orders imposing operating limitations at JFK and Newark and establish a rule limiting unscheduled operations at those airports. As proposed, the starting date of leases under the Final Rule will be based on industry scheduling seasons. Leases obtained in the first auction will start on October 25, 2009 (the first day of the winter scheduling season), and will terminate on March 30, 2019. Leases obtained in subsequent auctions will begin on the first day of the relevant summer scheduling season and terminate on March 30, 2019. Although the preamble to the NPRM discussed the possibility of operations for the summer 2009 season, slots awarded through the first auction may be operated by the acquiring carrier as of October 25, 2009, i.e., for the winter scheduling season of 2009/2010.

The other basic outlines of the rule are unchanged from our alternative 1 proposal. A slot is defined as the right to land or depart during a 30-minute window. Limited and Unrestricted slots that are assigned or awarded under this rule will be for every-day operation.[4] Although the FAA retains the right to change the cap, the rule provides for 81 slots per hour for scheduled operations at both JFK and Newark.

Carriers at JFK and Newark will initially be assigned their baseline operations, which is up to 20 slots per

[4] Note that some slots are not currently operated on a daily basis. In those situations carriers would be assigned common slots for only the days they are currently operated.

carrier. Ninety percent of each carrier's slots above its baseline operations will be assigned to the carrier in a lease terminating March 30, 2019. The remaining 10 percent will be designated as limited slots and have shorter leases. Each carrier will identify half of the specific slots that will become its limited slots, and the FAA will select the remaining half. For the first five years of the rule, the FAA will auction one-fifth of the limited slots (approximately two percent of the total number of slots at each airport). Slots awarded through an auction will be designated unrestricted slots after reallocation. Unlike common and limited slots, unrestricted slots will not be subject to withdrawal by the FAA for operational purposes. Unrestricted slots will also not be subject to use-or-lose requirements, although the Office of Aviation Enforcement, within the Office of the Secretary of Transportation, will monitor any anti-competitive activity with respect to the acquisition and use of unrestricted slots.

Carriers will be permitted to buy or sell their lease rights to all types of slots at JFK and Newark, and, as proposed, the final sales terms will be transparent, although actual negotiations will not be disclosed. The FAA intends this rule to provide a means by which the market value of slots can be made clear to all parties. That goal necessitates the disclosure of actual sale prices. The rule also permits the use of the FAA's auction proceedings by any carrier wishing to sell a slot in that fashion. A carrier's decision to use an FAA-operated auction to buy or sell a slot does not change the character of the slot itself. If, for example, a carrier chooses to sell a common slot through an FAA auction, the slot remains a common slot following the purchase. Only limited slots selected for auction by the FAA become unrestricted slots.

We have decided to make final our proposal with respect to the allocation of any new or returned capacity. Any slots that become available in this fashion will be assigned under the procedures of the WSG.

III. Authority To Reallocate Capacity

The Air Transport Association of America (ATA), the International Air Transport Association (IATA), the Port Authority, American, Delta and United Airlines (United) asserted that the FAA's proposed methods of allocating slots are not lawful for several reasons including: prior statements by Government officials indicating that the FAA would need additional legislation to be able to auction slots; the FAA cannot create property by exercising its regulatory power to regulate the use of navigable airspace; slots are not property when created and held by the Government but only become property when transferred to a carrier; the proposed lease of slots for fair market value would be a new user fee in violation of an appropriations restriction on using a particular appropriation to finalize or implement a regulation to establish a new user fee and in violation of the Independent Offices Appropriations Act (IOAA) (the latter of which it is asserted is the FAA's only authority to charge for the lease of slots); the leases would be an unconstitutional usurpation of Congress's authority to levy taxes; the return of slots to the Government at the end of the term of their leases would constitute an unconstitutional taking of property; the Federal Grants and Cooperative Agreements Act does not provide authority for the FAA to give slots to carriers through cooperative agreements; and the FAA lacks authority to retain the proceeds from the lease of slots and use those proceeds to improve capacity in the New York airspace area.

In contrast to the criticisms to the proposed auctions, Virgin America, Inc. agreed with the FAA that it possesses legal authority to conduct auctions and to lease the slots to carriers. Virgin America asserted that the FAA may rely on its exclusive sovereignty over the airspace of the United States, under 49 U.S.C. 40103, to withdraw and reallocate slots. The carriers have no current vested property interest in the slots. Virgin America further maintained that the FAA's exclusive sovereignty over navigable airspace, coupled with its authority to lease property or dispose of an interest in property for adequate compensation, under 49 U.S.C. 40110(a)(2), enables it to lease the slots and maintain the proceeds.

The FAA has the authority to dispose of property interests under 49 U.S.C. 40110(a)(2). The FAA also has the authority to ''enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the functions of the Administrator and the Administration.'' 49 U.S.C. 106(l)(6).[5] The FAA has determined that the allocation of a relatively small number of slots via the auction of a leasehold best effectuates the efficient allocation of slots, both through the initial allocation and through the development of a robust secondary market.

An auction is intended simply to distribute slots to the air carriers who value them the most, thus encouraging their most efficient use. An auction also satisfies the direction of Congress to ''place maximum reliance on competitive market forces and on actual and potential competition * * * to provide the needed air transportation system. * * *'' 49 U.S.C. 40101(a)(6)(A).[6] This section of law describes the policies that the Department must take into consideration when issuing economic regulations. This rule is not an economic regulation. However, the statutory provision is a clear statement by Congress of a valid public policy aim that the FAA is permitted to take into consideration when issuing regulations under section 40103. The FAA does not intend to set a reserve price on slots so as to assure itself that it recovers its costs associated with either the auction or with providing air traffic services. The FAA instead aims to allocate all of the slots put up for auction, thus allowing for possible new entrants to compete with the incumbent air carriers at JFK and Newark and to accommodate changes in the business strategies of air carriers using the airports.

A. The FAA Is Legally Authorized To Allocate Slots Through an Auction Mechanism

Several commenters quote a statement made in 1985 that the FAA did not propose an auction mechanism because legislation would be required for the collection and disposition of the proceeds (50 FR 52183 (December 20, 1985)), and a more recent statement in the NPRM for the LaGuardia congestion management rulemaking that the FAA ''currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization''. 71 FR 51360, 51362, 51363 (August 29, 2006).

In 1985, the FAA lacked clear authority to collect and dispose of the proceeds from an auction. Rather, any amounts collected by the agency would need to be deposited into the General Receipts account in accordance with 31 U.S.C. 3302. Additionally, while the FAA had authority to dispose of an interest in property, it was not clear that such interests included leaseholds.

[5] A federal agency's power to dispose of property includes the power to lease that property, even without express Congressional authority. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 331 (1936).

[6] This section of law describes the policies that the Department of Transportation must take into consideration when carrying out its economic regulatory authority over the aviation industry. This section also is a clear statement by Congress of a valid public policy aim that the FAA is permitted to take into consideration.

In the Air Traffic Management System Performance Improvement Act of 1996, Public Law 104–264, the FAA gained express authority to lease property to others. 49 U.S.C. 106(l)(6), 106(n). The same law also gave the FAA an exemption from 31 U.S.C. 3302, and an account was established specifically for all amounts the FAA collects other than the insurance premiums and fees that it is required to deposit into the Aviation Insurance Revolving Fund. 49 U.S.C. 45303(c). This account is available not just for fees assessed under chapter 453, but for ''all amounts'' other than insurance premiums and fees.[7] Thus, the statement made in 1985 is no longer correct.

The commenters also refer to the fact that the FAA sought additional legislative authority to conduct auctions, as part of a comprehensive change to how the FAA would be financed and how market-based mechanisms would be used by both the FAA and congested airports. The FAA recognized that it did not have clear statutory authority to implement a wide array of market-based mechanisms and that absent authority beyond that contained in 49 U.S.C. 40103, any reallocation via a market-based mechanism could lead to a challenge that the FAA had violated the ''user fee prohibition'' attached to the agency's annual appropriations legislation since 1998. The FAA did not address the agency's authority to dispose of property, as provided in the Air Traffic Management System Performance Improvement Act of 1996. Public Law No. 104–264, codified at 49 U.S.C. 106(l)(n). The FAA's proposed reauthorization package, the Next Generation Air Transportation System Financing Reform Act of 2007, would have substituted new user fees for passenger ticket taxes, permitted the airport operators Port Authority at constrained and delayed airports to assess market-based fees and would have also allowed the FAA, under certain circumstances, to impose market-based mechanisms. This legislative proposal, in giving authority directly to airport proprietors to assess and use market-based fees, was profoundly different from the terms of this final rule. This rule, by contrast, relies on the FAA's Acquisition Management System authorities and does not require the FAA to use any of the proposed legislative provisions it sought. The FAA has authority to lease property to others, and to receive adequate compensation for this temporary disposal of property, including the authority to lease the slots at JFK and Newark.

When it published the NPRM for LaGuardia the FAA initially believed that imposing a market-based reallocation mechanism as part of the regulation could be problematic. However, as delays soared in the region in 2007 and Congress failed to pass long-term reauthorization legislation, the FAA reevaluated its options. One option was to impose or continue orders at all three New York metropolitan airports that would last indefinitely. The agency rejected this option because the orders were never intended to be a long-term solution and they perpetuate the inefficiencies contained within the HDR. Likewise, the FAA could have initiated rulemaking that would establish an administrative reallocation mechanism, but the agency concluded that approach also failed to resolve the inefficiencies contained within the HDR. Finally, the FAA could revisit all of its statutory authorities and determine whether it had the ability to allocate slots under its existing legal authorities.

This final approach was the one the agency pursued because the FAA believes it is both legal and best represents the interests of passengers flying in and out of the airport. The FAA also believes this approach best effectuates the FAA's mandate to provide for the efficient use of the NAS, coupled with the Department's mandate to consider competitive effects. The agency can either foster a market-based allocation mechanism and develop a robust secondary market, or it can walk away from the airport after imposing a cap and providing for a very limited administrative reallocation mechanism. It has decided to follow the more free market approach.

The commenters also refer to the fact that the FAA sought additional legislative authority to conduct auctions which it has not yet received. The authority sought by the FAA was part of a comprehensive change to how the FAA would be financed and how market-based mechanisms would be used by both the FAA and congested airports. This rule, however, relies on the FAA's Acquisition Management System authorities and does not require the FAA to use any of the proposed legislative provisions it sought.

1. Slots Are a Form of Property That May Be Leased by the FAA to Others

The Port Authority, the ATA and IATA submit that the FAA has no property rights in the slots the FAA proposes to auction.[8] While the ATA and IATA do not question that the slots are property (they dispute ownership), the Port Authority states that the slots are ''neither physical property, real property, intellectual property, nor an intangible property recognized in common law.''[9]

The Port Authority is incorrect; slots are an intangible form of property that may be leased. On January 18, and May 21, 2008, respectively, the FAA issued Orders limiting operations at JFK, and at Newark, pursuant to its broad authority to regulate the use of navigable airspace under 49 U.S.C. 40103(b). 73 FR 3510; 73 FR 29550. Those Orders define an Operating Authorization[10] as ''the operation authority assigned by the FAA to a carrier to conduct a scheduled arrival or a departure * * *'' *Id.* at 3516; 29554. The Orders expressly allow the trading and leasing of Operating Authorizations. *Id.* at 3516; 29554. Although the Orders do not permit the permanent sale or purchase of Operating Authorizations, they permit any form of consideration to be used in the lease or trade of these Operating Authorizations. *Id.* at 3516; 29554.

These Orders reflect the FAA Administrator's determination that Operating Authorizations are a form of property that may be leased or traded for consideration, and used as collateral. Those determinations have not been legally challenged, and the time period for filing such a challenge has expired. 49 U.S.C. 46110. Indeed, the ATA's and IATA's own members have treated Operating Authorizations, and the HDR

[7] The fact that Congress excluded insurance premiums and fees, which are not amounts assessed under chapter 453 of title 49, expresses Congress' plain and unambiguous intent for the FAA to deposit all amounts it collects into this account, not just the amounts assessed under the user fee provisions of chapter 453.

[8] The Regional Airline Association (RAA) makes a similar argument. In addition, RAA states that the FAA lacks the authority to regulate the types of aircraft and routes to be served in air transportation. The FAA disagrees with the premise of RAA's position, since the FAA may rely on a rational basis to allocate the use of navigable airspace under 49 U.S.C. 40103. Nevertheless, this rule does not attempt to regulate the type of aircraft or the routes served in any manner.

[9] The Port Authority also uses the language in the preamble to the SNPRM as evidence that the slots are not property because the FAA stated that there was no Fifth Amendment Takings issue with the proposed slot auction. The FAA's statement, in context, went to the fact that the air carriers have no property interests in the slots after expiration of the current Order until FAA provides them with new slots. It did not imply that the slots were not property; just that the air carriers possess no property interests beyond those accorded them under the Order.

[10] Both OAs and slots represent property interests, but the FAA has deferred to common usage by reverting to the term ''slots.''

slots that predated them, as a form of at least intangible property: Leasing and trading them for consideration; using them as a form of collateral; and disclosing them as assets on their balance sheets. Bankruptcy courts have held that slots are property.

The Port Authority cites Executive Order 13132 for the proposition that the FAA is ignoring the traditional role of States as sovereigns that can create property and has not closely examined the effect the rulemaking would have on the State instrumentality. The creation of property rights, however, is not the sole responsibility of the states. Federal law determines what constitutes property for the purpose of applying federal statutes. *Ross L. Blair, et al.* v. *United States*, Docket 2007–5049 (Fed. Cir. 2008), citing *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) and *United States* v. *Craft*, 535 U.S. 274, 278–79 (2002). The United States Government, pursuant to 49 U.S.C. 40103, has exclusive sovereignty over the navigable airspace, and the FAA exercises plenary powers over that airspace.

Unlike the Port Authority, the ATA and IATA do not dispute that the slots constitute a property interest; rather they argue that the property interest is not the FAA's, because it is created at or after the transfer to an air carrier.[11] Section 40110(a)(2) does not speak to whether the FAA actually owns property that is being disposed of. It only speaks to the disposal of a property interest. Only the FAA has authority to assign the use of navigable airspace under section 40103. Even assuming that the property interest is created at the time of transference, it is still a property interest that falls within the FAA's authority to dispose of under section 40110(a)(2).

As with certain other valuable public property not expressly owned in fee by the U.S. Government, the Government may allow the use of public property and frequently does so using leases. In fact, the Government routinely ''licenses'' and ''permits'' the use of property over which it exercises exclusive sovereignty. In doing so, unless otherwise specified by law, the Government charges market rates in accordance with OMB Circular A–25. For example, under 36 CFR 251.53—Authorities, the Chief of the Forest Service (USDA) issues special use authorizations (e.g., permits, term permits, leases) for National Forest System land. The USDA also issues grazing permits under the Taylor Grazing Act (TGA) of 1934 to allow the permit/lease holder to use publicly owned forage. The Federal Communications Commission licenses portions of the broadcast spectrum, and since 1993 (four years before Congress mandated the use of auctions) has frequently done so using auctions.[12] The General Services Administration issues licenses and permits for the use of its buildings and property, *see, e.g.*, 41 CFR 101–47.901, 101–47.309; *see also*, GSA form 1582, ''Revocable License for Non-federal Use of Real Property.'' The FAA similarly uses ''licenses'' to, in effect, lease its real property to non-federal users. *See*, 1.3.7 of the FAA's Real Estate Guidance, *http://fast.faa.gov/realestate/index.htm.*

In short, licenses frequently are used to provide non-federal parties access to public property regardless of whether that property be real or personal (including intangible)[13] and whether the Government owns the property in the traditional sense or is simply its guardian. The FAA selected the word ''lease'' rather than ''license'' to describe the documents that will transfer slots to air carriers because the FAA is conveying a longer term interest, with fewer rights by the Government to terminate that interest, than is usually done when the Government licenses a non-federal entity to use public property (licenses of property are usually terminable at will).

2. FAA Leases Are Not Covered by IOAA and This Rule Is Not in Violation of Any Current Appropriations Restriction

The ATA argues that the only authority by which the FAA may charge for the lease of slots is as a user fee under the Independent Offices Appropriations Act (IOAA) and that the only amount that could be charged is the cost of administering the lease. The ATA is incorrect on both points, but the issue is not relevant because the FAA does not rely on IOAA authority to conduct auctions but on its other authorities.

The ATA similarly argues that this regulation falls within the parameters of an appropriation provision that prohibits the FAA from using funds from its operations appropriation to finalize or implement a regulation that establishes a new user fee not specifically authorized by law.[14] Consolidated Appropriations Act, 2008, Public Law 110–161. The ATA and IATA also suggest that the wording of 49 U.S.C. 106(l)(6)[15] means this authority may not be used because the FAA may only enter into leases using this authority if the leases ''may be necessary to carry out the functions of the Administrator and the Administration.'' 49 U.S.C. 106(l)(6). The ATA and IATA argue that the only necessary function is a regulatory function to assign airspace under 49 U.S.C. 40103. However, there are several other statutory functions, such as using procedures that provide for an efficient air traffic system, 49 U.S.C. 44505, and the desirability of placing maximum reliance on competitive market forces and on actual and potential competition to provide the needed air transportation system, 49 U.S.C. 40101(a)(6), that make the use of the FAA's commercial authority to lease property to others appropriate. *See also,* the legislative history and findings of Congress when

[11] The airline commenters agree with ATA's assessment that the slots are property of the airlines not of the FAA. *See*, Comments of US Airways Group, Inc. at 24. *But see*, Comments of American Airlines at 7 stating that the Port Authority holds the property interest.

[12] The FCC, like the FAA, had a statutory preference for competition prior to the requirement that it conduct auctions.

[13] Such as authorized access to particular radio frequencies and authorized use of intellectual property.

[14] ATA also suggests that by finalizing or implementing this rule, the FAA would violate the Anti-Deficiency Act. The Anti-Deficiency Act would only be violated if the FAA obligated or expended funds in excess or in advance of an available appropriation, fund, apportionment or other applicable administrative subdivision of funds. 31 U.S.C. 1341, 1517. The FAA may not use its operations appropriation to finalize or implement a rule to promulgate a new user fee not specifically authorized by law, but this rule simply reduces the number of slots (lowers the cap) at JFK and Newark, defines the different types of slots, establishes a reversion of approximately 10 percent of the slots, and discusses the FAA's intent to auction new or returned slots. This rule does not require or impose on any entity a requirement to pay the FAA to obtain a service or even a slot. If the FAA does conduct an auction as contemplated by this rule, it will do so using its pre-existing authorities and regulation. The use of its operations appropriation to finalize and implement this rule therefore does not violate the Anti-Deficiency Act.

[15] American Airlines reads 49 U.S.C. 106 as more limited in scope regarding the types of property that fall under its purview. The statute does not limit its scope to any particular type(s) of property that fall under its purview. The FAA has for years, without challenge, interpreted its authority broadly under the statute in support of Congress' intention of allowing the Administrator to acquire, lease, enter into cooperative agreements and other transactions as may be necessary to carry out the Agency's functions. This interpretation is known to Congress, which has repeatedly reauthorized the FAA without making a change to this section. Another commenter raised the fact that the heading of section 106(l) refers to ''Personnel and Services'' which the commenter says means that subparagraph (6) of that section does not provide the FAA any contracting or leasing authority. It has been long recognized by the courts, however, that the headings of statutes have little if any weight in statutory interpretation. As other paragraphs of this section deal with personnel matters, the heading is not erroneous, but it does not in any way dilute the broad grant of contracting, leasing, cooperative and other transaction agreement authority Congress gave the FAA in paragraph (6).

it granted the FAA the authority to lease property to others in Public Law 104–264. Having created slots, and determined the number of available slots should be limited because of the resulting strain on the NAS from the scheduling of more flights per hour than can be handled under current conditions at JFK and Newark, the function of disposing of its interest in the slots becomes applicable.

Even if the only ''necessary function of the Administrator or Administration'' were a regulatory one, the FAA has not violated the appropriations restriction. Simply put, a lease is not a user fee. A user fee is imposed for a particular service the Government provides to a particular party. A lease on the other hand, is a transfer of a possessory interest in real, personal or intangible property that allows the lessee the use of that property to the exclusion of others including the lessor. In transferring slots to air carriers for defined periods of time, the FAA is not providing any air traffic or other service to the recipients. To the contrary, the FAA's air traffic controllers will not be policing or otherwise cognizant of which air carrier owns which slot and will provide their services in accordance with the FAA's Orders and policies (predominantly first come, first served). In transferring slots to air carriers, the FAA is allowing that air carrier to schedule or reserve access to that segment of navigable airspace that is necessary to take off or land an aircraft at the two airports during a particular half hour of time. In short, the FAA is leasing rather than providing a service to air carriers when it transfers slots to them.

A user fee is calibrated to recover the cost to the government of providing a service or specific benefit to an identifiable recipient. See, e.g., *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989); *Seafarers International Union of North America* v. *Coast Guard*, 81 F.3d 179, 182–83 (D.C. Cir., 1996). The assignment of a use of navigable airspace for scheduled flight operations is not a ''user fee'' under the principles articulated in those cases.[16] The cost associated with purchasing a particular slot does not constitute a user fee. First, the cost associated with procuring a slot at auction is not associated with the cost of providing air traffic services for that particular take off or landing. Rather, air traffic services are paid for already through the Airport and Airway Trust Fund receipts. Second, the FAA is not creating assignments of the use of navigable airspace for scheduled flight operations (slots) for the purpose of raising revenue by leasing them to air carriers. More precisely, the FAA has imposed a cap and designated slots for the purpose of allocating the efficient use of navigable airspace. Most of these slots will be awarded to current operators to prevent disruption of air services into and out of JFK and Newark. The FAA is leasing a relatively small number of them, by means of an auction, to air carriers in order to draw in new entrant carriers and provide an opportunity for expansion by carriers already at the airport, thereby inducing airline competition at JFK and Newark and ensuring that airlines winning the slots make the highest and best use of them. The auction is also designed to assure that air carriers will rationalize the use of their slots in accordance with the value attached to them in the auctions, and ultimately, in the secondary market. In the end, the traveling public will benefit.

3. Leases Are Not Taxes

A tax is generally defined as an enforced obligation to support the government. See *United States* v. *La Franca*, 282 U.S. 568 (1931); see also *United States* v. *Butler*, 297 U.S. 1, 61 (1937); *Head Money Cases*, 112 U.S. 580, 596 (1884); *Rural Telephone Coalition* v. *FCC*, 8388 F.2d 1307, 1313 (D.C. Cir., 1988); *United States* v. *City of Huntington*, 999 F.2d 71, 73 (4th Cir., 1993). A lease acquired through a slot auction, however, is not a tax. It is not an amount being levied on all members of the industry nor is it a mandatory payment as a tax would be. Further, the lease is not ''imposed'' as a tax is, and is not designed for revenue-raising purposes.

The auction of a limited number of slots at the airport was never designed to provide the FAA with a new source of revenue. Indeed, in the NPRM, one of the options proposed by the FAA was to allow the carriers at JFK to keep all revenue after covering the FAA's costs in conducting the auction. Rather, the auction mechanism is intended to use market forces to best allocate this limited asset to those carriers who value it the most, placing the asset to its best and highest use. The FAA believes the slots auctions will inform the airlines of the market value of their slots so that slot utilization can be rationalized. While it is true that under today's rule, that the FAA may realize some revenue from the auction, the agency has also committed to putting that revenue back into aviation capacity enhancement and delay mitigation projects in the New York metropolitan area.

Unlike a tax, which imposes an obligation on affected citizens or consumers to pay money to the state, the slot auction imposes no burden on a carrier based on its citizenship or use of the airport. The slot auction lease payments are voluntary: The FAA does not require a carrier to participate in an auction in order to serve JFK or Newark. Carriers serving the airports presently will be given slots through cooperative agreements and slightly less than ten percent of the total number of slots at the airport will be auctioned. Only the carriers winning the bids at the slot auctions will pay for the lease, and that amount of money will have been determined by the free market. The FAA will not have pre-determined a lease amount and will not attempt to cover its costs in conducting the auction by setting a reserve price.[17]

4. The FAA's Authority To Give Slots to Air Carriers Through Cooperative Agreements

A few commenters stated that the Federal Grants and Cooperative Agreements Act does not provide the FAA authority to give slots as cooperative agreements. The Federal Grants and Cooperative Agreements Act defines when a cooperative agreement is to be used. The FAA's broad authority to award cooperative agreements, was given to the FAA in the Air Traffic Management System Performance Improvement Act of 1996, and codified as 49 U.S.C. 106(l)(6). This Act expressly confers on the FAA Administrator the authority to ''enter into and perform such * * * cooperative agreements, and other transactions as may be necessary to carry out functions of the Administrator and Administration. The Administrator may enter into such * * * cooperative agreements, and other transactions with * * * any person, firm, association, corporation * * * on such terms and conditions as the Administrator may consider appropriate.'' 49 U.S.C. 106(l)(6). There are several functions of the Administrator for which it may be ''necessary'' to enter into a cooperative agreement. One such function is to encourage the development of civil aeronautics. 49 U.S.C. 40104. By giving

[16] The FAA implemented its regulation to lease its property to others on April 1, 1996, well prior to the first time a restriction was included in the FAA's appropriation concerning the FAA's ability to use the operations funds appropriated to develop or implement a new user fee.

[17] As discussed in the general discussion of the auction procedures posted under the FAA's Acquisition Management System, the FAA will set a reserve price to assure that, in the event only a single bid is received for a particular slot, the bidding carrier does not actually pay the bid price. In that instance, the winning bidder would pay only the reserve price.

up to 20 slots to all air carriers currently operating at the airport, and 90 percent of the remaining slots to the air carriers currently operating at JFK and Newark in proportion to their current operations, the FAA is encouraging those carriers to continue their development of civil aeronautics at the airport and in the routes served to and from that airport. As several commenters noted, there is substantial economic value both to New York and the communities served by flights from JFK and Newark.

American Airlines raised an additional concern about the use of cooperative agreements, based upon the language in 49 U.S.C. 40110(a)(2) that requires the FAA to receive ''adequate compensation'' for the disposal of property interests. The FAA finds that it is receiving ''adequate compensation'' through the minimum slot usage requirements. In addition, the slots are being given in order to promote civil aeronautics.

5. Leases That Terminate by Their Own Terms Are Not a ''Taking'' of Property

The ATA and the carriers argue that the proposed auctions constitute a taking by the government and that the taking is prohibited for several reasons including that it is not for a legitimate purpose, it lacks due process, and fair value is completely absent in the proposed alternative 1 (as applied to JFK and Newark) and inadequate in alternative 2 (as applied to JFK). The FAA strongly disagrees with the contention that the slot auctions contemplated in this rule are in any way an impermissible taking.[18] First and foremost, in order to be a taking, the carriers would need to have a possessory interest in the slots and they do not. For bankruptcy purposes, carriers may have acquired a property interest in slots, as discussed above, but as also cited in those cases, if that interest expires under the terms under which it was granted, then there has been no property right taken. The Orders establishing Operating Authorizations at JFK and Newark are of a fixed duration and any rights the carriers might have had in those operating authorizations will terminate when the orders end or are superseded. By virtue of today's rule superseding the Orders, the carriers holding the OAs now hold slots and have the same interests and responsibilities in the slots as they did in the OAs. Under today's rule, those carriers whose slot baselines at either Newark or JFK, or both, exceed 20 at either airport, will have a modest portion of their slots designated as Limited Slots and subsequently auctioned Unrestricted Slots. As of October 25, 2009, carriers may begin to operate the Unrestricted acquired at auction.

Slots transferred to carriers using cooperative agreements or leases awarded as the result of auctions will similarly have express automatic termination provisions. For slots transferred using cooperative agreements, the carriers' property interest would automatically terminate if the specified ''use-or-lose'' provisions are not met or one of the other conditions specified in the cooperative agreements arises. If those provisions are satisfied, then most of these slots will terminate in 10 years. A few will have varying termination dates as agreed upon by the FAA and each carrier.[19] When the termination date arrives, any property interest the carrier may have in the slot similarly automatically ends. There is no more a taking of carrier property than there would be in the eleventh year of a ten year lease of FAA real property to a carrier.

The ATA and the carriers provide little support for the proposition that Operating Authorizations or slots awarded to carriers under an order with a fixed duration results in entitlement to those slots in perpetuity.[20] To the extent that these commenters allege harm (such as having made investments in airport infrastructure) based on the unreasonable assumption that the status quo would remain forever even though the Order explicitly said it would expire, that harm is the responsibility of the carriers. These carriers took a risk, for which they have received a return on their investment based on their use of the Operating Authorizations for the period specified in the Order. If these commenters do not wish to incur a significantly smaller risk[21] for a relatively small percentage of the slots that will be initially be transferred to them through cooperative agreements, and then returned to the FAA as those agreements expire in order to be auctioned, the carriers are free not to apply for these cooperative agreements.

The ATA, IATA, and the carriers rely on what they perceive as a three pronged test established in *Penn Central Transp.* Co v. *New York City,* 438 U.S. 104 (1978). In *Penn Central* the Court found that there was no compensable taking when the City's Landmarks Preservation Law would not allow additional stories to be added to Grand Central Station. Even using the three prong test articulated by the commenters, for the reasons stated above, the activities described in this rule would not constitute a Fifth Amendment taking.

The ATA and IATA also overstate the extent of the alleged harm. Under the alternative selected in this rule, carriers will get to keep, at a minimum, more than 90 percent of their current slots. Only seven carriers will lose any slots under this rule and only American, Delta and United will lose slots at both airports.

The Port Authority cites to *Air Pegasus of D.C., Inc.* v. *United States,* 424 F.3d 1206 (Fed. Cir. 2005), for the proposition that the Federal Government's sovereignty over airspace is not ownership in fee, but rather navigational servitude. *Air Pegasus,* however, stands for the proposition that there is no private property right of access to navigable airspace. If the FAA legitimately exercises this authority to prohibit the use of a segment of navigable airspace, there is no property taken for Fifth Amendment purposes. In *Air Pegasus* a heliport operator was found to have no private property rights in its facility even though it lost all opportunity to generate revenue (and went out of business) after the FAA shut down much of the airspace around Washington, D.C. following the attacks of September 11, 2001.

6. The Draft Lease Terms Included in the NPRM Were for Illustrative Rather Than Probative Purposes

The ATA also uses the draft Lease agreement as evidence that the FAA does not have the authority to lease the slots. The ATA places far too much reliance on an early draft document that was provided to give commenters some idea of the type of lease the FAA was considering. For example, the standard clauses in the FAA's Acquisition Management System (AMS) use the word ''contract'' instead of ''lease'' because leases are a form of contract. The AMS, however, by its explicit terms applies to the acquisition and lease of property. *See,* Section 4.2 of the Acquisition Management System, and

[18] The preamble to the LaGuardia NPRM also addresses this issue and provides the Supreme Court decisions supporting the FAA's position. 73 FR 20846, 20850–20854 (April 17, 2008).

[19] Perhaps more accurately, the determination of which of these slots have which of the specified termination dates will follow the process described in this rule.

[20] U.S. Airways Group's main contention is that the slots are property of the airlines because they have held them ''more or less continuously'' for 40 years.

[21] The slots that will be awarded as the result of an auction have a firm term of up to ten years, with little right by the FAA to terminate prior to the end of that term. Most of the cooperative agreements will similarly have a ten year firm term.

Real Estate Guidance, *http://fast.faa.gov/realestate/index.htm* and T3.8.1 of the FAA's Procurement Guidance, also located at *http://fast.faa.gov* The FAA acknowledges that some of the terms in the sample lease that the FAA provided for illustration were not appropriate for a lease of slots, and will modify any proposed leases accordingly. An additional opportunity to comment on these terms will be provided prior to any auction. These sample terms, however correct or incorrect, have no bearing on whether the FAA has the authority to enter into leases. Similarly, because Attachment A was not included in the sample lease, the ATA and IATA argue that is evidence that there is no property the FAA can lease. Attachment A will be the particular slots each carrier receives. Each Attachment A will be unique for each particular airline. Before the slots are given or auctioned, there is no way to tell what any particular Attachment A will look like, therefore no Attachment A was provided. Instead the sample lease simply provided notice that there will be an attachment that will describe which slots the lessee (or cooperative agreement holder) will have.

7. International Obligations

In spite of the FAA's authority to lease slots and this proposal to use the WSG to award all new and returned capacity at JFK and Newark, the IATA, ATA, and numerous carriers assert that the FAA's proposal violates the international obligations of the United States. Specifically, IATA and the airlines [22] make the following assertions: that the slot auction is actually a user charge in violation of bilateral air services agreements; the slot auction is discriminatory in violation of bilateral air services agreements; and, the short comment period did not afford an opportunity for foreign governments to consult with the United States Government on this proposal.

In support of their contention that the slot auction is a user charge [23] that is inconsistent with our bilateral obligations, IATA and the carriers cite the recent U.S.–EU air services agreement, which states (article 12) that user charges must be ''equitably apportioned among categories of users.'' They assert that the costs recovered by auction proceeds are not equitably apportioned. We disagree. We are maintaining the use of WSG procedures, which these commenters support, for all new and returned capacity. Only a select number of slots—the slots that are being withdrawn—will be auctioned. For that category of foreign carrier users that choose not to participate in the auction, the regime that they favor will continue unchanged—the FAA will assign slots from new and returned capacity under the procedures set out in the WSG and they will be able to buy, sell or trade slots in the secondary market. For that category of foreign carrier users that wish to participate in the slot auction, they will be making the business decision that such slots have additional value to them. We do not believe that foreign carriers choosing to participate in an auction, and thereby to have access to slots to which they would not have access under the WSG, are being treated inequitably.

IATA and the carriers also claim that we are not following the requirement in the same bilateral section that user charges ''may reflect, but shall not exceed, the full cost to the competent charging authorities or bodies of providing the appropriate airport, airport environmental, air navigation, and aviation security facilities and services at the airport or within the airport system.'' To the contrary, the proceeds of these auctions will be deposited into a receipt account, and those funds will be dedicated to be used for improvements to New York's airspace and airport system. The proceeds will be used for the airport system they were derived from, and will not go to the general fund. This is not in violation of our bilateral agreements, as the costs are directly related to improving the airport system for which the slots will be used.

Singapore Airlines argues that the auction would affect its ability to exercise the ''fair and equal'' opportunity to compete clause in the bilateral air services agreement. All carriers are afforded fair and equal opportunity to compete, regardless of nationality, because they have the ability to bid for slots under the auction mechanism. There is no guarantee that the slots will be awarded to either a domestic or foreign carrier. Foreign carriers have the same opportunity as domestic carriers to compete for the available slots. Singapore Airlines is also free to participate in the WSG process for allocating new or returned slots, and to participate in the secondary market, just as domestic and other foreign carriers are.

Next, IATA and the carriers argue that the imposition of the slot auction will be discriminatory. The foreign carriers argue that the auction discriminates against them because the domestic carriers are permitted to keep many more slots, and will have an advantage over them. The ATA, United Airlines, and Delta argue that we are being discriminatory against domestic carriers because the foreign carriers have all of their slots preserved and will not be subject to the same withdrawal as the domestic carriers, and that domestic carriers will be forced to pay large sums of money to maintain their current international service, whereas the foreign carriers will not incur the same costs.

Both groups of carriers are incorrect—the Department is acting in a non-discriminatory manner. Because up to twenty slots for each carrier (domestic or foreign) are being preserved, no carrier (domestic or foreign) is in danger of losing access to JFK or Newark. No carrier is being forced to participate in the auction if it chooses not to participate. All new and returned capacity will be allocated by the FAA under WSG procedures. The domestic carriers similarly are not required to participate in the auction, and in most cases, only a select number of slots will be withdrawn. Domestic carriers at JFK and Newark will still have the ability, and available slots, to continue to maintain their international service without necessarily participating in the slot auction. Finally, IATA makes the argument that the comment period was too short to allow for foreign government consultation on the proposal. The proposal, like all proposed rulemakings, was published in the **Federal Register** and all interested parties had ample opportunity to review and comment, and afforded a 60-day comment period to all interested parties. We believe this is a sufficient period for foreign governments, their agencies, or Embassies to provide formal comments or request consultations. In this case, no foreign government has contacted us with either comment or a request for consultations. The consultation language in our bilateral air services agreements does not oblige the United States Government to seek out foreign government comments for every proposal. Rather, the onus is on any foreign government that wishes to consult to make such a request.

[22] Commenters supporting IATA's submission include: Association of European Airlines (AEA); KLM Royal Dutch Airlines, N.V. (KLM); Malaysia Airlines (Malaysia); Singapore Airlines; Swiss International Air Lines, Ltd.; Deutsche Lufthansa AG (Lufthansa); Air France; All Nippon Airways Co., Ltd.; and, Delta Airlines, Inc.

[23] For purposes of discussing our international obligations, we will assume *arguendo* that auction proceeds are ''user charges''.

B. The FAA Has Authority To Retain the Amounts Received From the Lease and Disposal of Property and To Use Those Proceeds for Congressionally Authorized Purposes

The commenters assert that the FAA has no authority to retain the amounts received from the lease of slots, and that 31 U.S.C. 3302 requires all amounts received by an agency be deposited into the General Receipts account. The FAA, however, has an express exemption from 31 U.S.C. 3302 that it was given in section 276 of the Air Traffic Management System Performance Improvement Act of 1996, Public Law 104–264, codified at 49 U.S.C. 45303(c). Section 276 states that ''Notwithstanding section 3302 of Title 31, all fees and amounts collected'' by the FAA, except for a few specified exceptions such as insurance premiums, ''shall be credited to a separate account established in the Treasury and made available for Administration activities; * * *'' 49 U.S.C. 45303(c). These amounts are available immediately for expenditure for Congressionally authorized purposes and remain available until expended. *Id.*

This paragraph of section 45303, by its unambiguous terms, applies to all amounts collected by the FAA, whether or not they are amounts from fees established under chapter 453. This is in contrast to the first paragraph of this section of law, which only applies to fees and amounts collected under chapter 453.[24] Fees collected under chapter 453 include fees for air traffic control services provided to planes that neither take off from nor land in the United States (overflight fees), and fees for airmen certificates and registration of aircraft.[25] The FAA, however, collects amounts under authorities contained in other chapters of law, such as insurance premiums and other amounts which are collected under chapter 443 of Title 49, amounts from the disposal of an interest in property for adequate consideration under chapter 401, and amounts provided from other air traffic service providers also under chapter 401, as well as federal, state and local governments and private entities under chapter 1 of Title 49.

It is a well established principle of statutory interpretation that laws ought ''to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'' *TRW Inc.* v. *Andrews,* 534 U.S. 19, 32 (2001). Interpretations of statutes should ''give effect, if possible, to every clause and word of a statute.'' *United States* v. *Menasche,* 348 U.S. 528, 538–39 (1955) (citing *Inhabitants of Montclair Tp.* v. *Ramsdell,* 107 U.S. 147, 152 (1883)). Using this principle, effect must be given, if possible, to the words ''all fees and amounts'' except for those specifically excluded, should be deposited into the account established by 49 U.S.C. 45303(c). The only amounts the FAA is expressly authorized under this paragraph to exclude from this account are the insurance premiums and related fees it collects and deposits into the Aviation Insurance Revolving Fund. A plain meaning interpretation which gives effect to all the words in that paragraph is that all fees and other amounts collected by the FAA under authorities contained in other chapters of Title 49 or other titles should be deposited into the account established by section 45303(c). This would include any amounts collected from the lease of FAA property under the authority of 49 U.S.C. 106(n) and 49 U.S.C. 40110(a)(2).

C. The Auction of Slots Does Not Affect the Proprietary Rights of the Port Authority

Similarly, both the Port Authority and the Airports Council International—North America (ACI–NA) as well as American believe that the NPRM impinges on the proprietary rights of the Port Authority. The ACI–NA believes that the FAA's powers under 49 U.S.C. Section 40103 do not allow us to auction slots. In support of its position, the ACI–NA also cites to *Western Air Lines* v. *Port Authority of New York and New Jersey,* 658 F. Supp. 952, 956–57 (S.D.N.Y. 1986), *aff'd,* 817 F.2d 222 (2nd Cir. 1987), *cert. denied,* 485 U.S. 1006. The FAA maintains that *Western* supports its position more than that proffered by the ACI–NA. *Western* concluded that the perimeter rule established by the Port Authority was a valid restraint exercised in accordance with the Port Authority's proprietary interest. *Western* did not suggest that the proprietary interests of the Port Authority take precedence over FAA regulation; instead *Western* explicitly states that ''[t]his Court concludes that, in the absence of conflict with FAA regulations, a perimeter rule, as imposed by the Port Authority to manage congestion in a multi-airport system, serve an equally legitimate local need and fits comfortably with that limited role, which Congress has reserved to the local proprietor.'' *Id.* at 958. Therefore, even if there was a conflict between the proposed rule and the Port Authority's proprietary rights, the FAA's rule would prevail under *Western.*

The establishment of slots under section 40103 is consistent with the authority that the FAA has exercised at JFK, LaGuardia, Chicago O'Hare, and other airports, for the past several decades. *Western* is easily distinguishable from the current rulemaking in that this rulemaking does not affect in any way how the Port Authority deals with its airport including use of its terminals. In fact, there will be 100 percent of the air traffic coming into JFK and Newark during the same time periods as currently exist at the respective airports.

The Port Authority's assertion is that changing the airlines that come in or the number of flights interferes with its proprietary interests. However, through its regulatory process in certifying airlines or capping arrivals and departures, the FAA can and has affected the air traffic in and out of JFK and Newark, and neither the Port Authority nor any other entity has challenged the FAA's responsibility to issue certifications or control the flow of air traffic, much less suggested it affects the proprietary rights of airport authorities. Additionally, the Port Authority has always had to accommodate carriers under the HDR by accommodating airlines that leased, purchased, or traded slots under the HDR; that received slots through FAA-run lotteries; or that were granted slot exemptions under 49 U.S.C. 47174 and 41716. Furthermore, the Port Authority is obliged to file competitive access reports to the Secretary if it denies access to a requesting carrier at JFK and Newark. With respect to Newark, the FAA must ensure that the Port Authority successfully implements its competition plan to enhance opportunities for airline competition and accommodate requesting airlines there. 49 U.S.C. 40117(k), 47106(f). *http://www.panynj.gov/CommutingTravel/airports/html/ewr_comp_plan.html.* (last visited September 6, 2008). Accordingly, the Port Authority may not claim that the fact that a slot is acquired through an auction presents any unusual accommodation issues that it has not routinely dealt with in the past.

[24] Section 45303(a) directs that all fees imposed and amounts collected under chapter 453 are payable to the Administrator of the FAA.

[25] Fees collected under the authority of 49 U.S.C. 45302, namely fees for issuing airmen certifications and registration of aircraft, in accordance with the express language in that section and language that historically has been in each appropriation, are credited to FAA's operations appropriation.

D. The FAA Has Complied With the Administrative Procedure Act

1. The Docket Contained Adequate Information for Meaningful Comment on the Rulemaking Proposal

Several commenters also claimed the FAA failed to meet the requirements of the Administrative Procedure Act (APA) (5 U.S.C. 551, *et seq.*). The Port Authority claimed that relevant documents either were not submitted to the docket at all, or in a form and time insufficient to permit adequate analysis by interested parties. In particular, the Port Authority suggested the draft lease documents were submitted to the docket well after the initiation of the comment period, contained vague terms, and did not adequately set forth the conditions for default. The Port Authority maintained the default conditions are critical because of the impact of a default on the Port Authority's gate leasing agreements.

The ATA commented that the technical report explaining how slots would initially be allocated and designated does not adequately describe how the FAA intends to choose which Common Slots would be designated as Limited Slots.

The FAA believes the docket submissions provided interested parties with sufficient information to meaningfully comment on the proposal. The draft lease agreement for Unrestricted Slots, is directly related to the FAA's potential auctioning of the slots under its acquisition authority. The draft cooperative agreement, which would govern the lease terms of the Common and Limited Slots, is arguably more directly related to the instant rulemaking since they will initially be allocated to carriers under this rule. While the Port Authority questions the comprehensiveness of these draft leases, they are in fact, largely complete. The FAA is intentionally placing only limited constraints on the slots. The goal of this rulemaking is not to impose complicated and intrusive constraints on the slots. Rather it is to allow for a more efficient air traffic system in and around JFK and Newark while permitting some access to new entrants and stimulating the free market. In order to maximize efficiencies, the FAA must assure that the majority of the slots have a usage requirement. That requirement, which is mandated by today's rule, is the primary restriction on the Common Slots. Limited Slots are granted for a shorter period of time, but otherwise largely mimic the Common Slots. The Unrestricted Slots are even less constrained with no usage requirement.

2. The Discussion of the Auction Process Provided Sufficient Detail for Meaningful Comment on the Rulemaking Proposal

US Airways Group (US Airways) argued the FAA provided insufficient time to comment on the details of the auction process. United claimed that the NPRM should have proposed dates as to when the auctions would be conducted and should have committed to providing a certain amount of advance notice. The ATA claimed that the FAA violated the APA by failing to account for carrier's costs in participating in an auction.

In the NPRM the FAA provided only a general discussion of the procedures that would govern any future auction. This general discussion was provided only to give interested parties a context for the rulemaking. The FAA decided to provide a general description of the likely auction procedures to encourage meaningful comment on the underlying proposal, which is that after imposing a ten-year cap to address congestion, a certain number of slots would revert to the FAA for reallocation. The FAA has provided a more detailed discussion of the procedures that would be used in an auction. 73 FR 53477 (September 16, 2008). The agency provided for a 15-day comment period which closed on October 1, 2008. Based on the comment submissions, the FAA may decide to refine any final auction procedures. That refinement, however, does not impact this rule.

Some commenters claimed that because the FAA has not fully developed the auction process, the FAA cannot finalize the proposed rule. Like the ATA's comments on the draft lease documents, these commenters place far too much reliance on procedures unrelated to the rulemaking. The NPRM discussed in detail the process for providing slots at JFK and Newark: Between 80 and 90 percent of them will be provided to incumbent carriers operating at the respective airports through cooperative agreements and the remaining ones will be transferred via lease. The particulars of the auction process (*e.g.*, will it all be via the Internet or will paper bids be allowed, will the help desk be available 24/7 or only during normal business hours, the exact day when the auction will take place, whether successive rounds of bidding will be allowed, whether multiple bids from the same carrier will be permitted) are not relevant to this rule. The FAA will, in accordance with its Acquisition Management System, continue to provide adequate notice of its planned auction procedures and solicit comment on those procedures prior to conducting any auction.

The ATA's claim that not ascribing the costs of the auction to the rule violates the APA likely stems from unclear drafting on the part of the FAA. We have included the auction costs and reallocation benefits in the final regulatory evaluation for this rule.

3. The FAA Adequately Considered Alternatives

Despite the fact that the FAA has proposed two different allocation methods at JFK in this rulemaking, several commenters claimed that the agency failed to adequately explore additional alternatives in violation of the APA. An agency is not required to consider all possible alternatives when engaging in rulemaking. The fact that the commenters dislike the alternatives considered does not mean that the FAA has pre-decided the outcome by failing to recognize that there may be other alternatives. In fact, the agency proposed multiple options. In addition, it has considered many of the alternatives that the commenters recommended in response to the NPRM. As discussed later in this document, the FAA has decided against adopting these approaches in lieu of proceeding with a final rule. However, aspects of many of these recommendations have been incorporated into the rule or are being addressed elsewhere.

IV. Discussion of Final Rule

A. Allocation of Slots at JFK and Newark

The FAA believes that at least for the next several years, JFK and Newark will likely be oversubscribed in terms of their physical ability to handle aircraft. Accordingly, extending the caps on operations at the airports is necessary to provide for the efficient use of the NAS.

American argues for a lower cap at both airports, stating that ''[w]hile JFK and Newark may be able to handle 81 operations per hour in ideal conditions, this limit significantly overstates both airports' *optimal* capacity. Thus, the FAA should revisit the issue of how many operations at JFK and Newark can be accommodated safely and dependably and then set a cap at that level * * *'' [Emphasis in original.] Although American believes 81 operations is above optimal performance, it has failed to identify what it believes to be the appropriate number of slots per hour during restricted periods. Under no circumstances would we allow the number of operations to exceed a safe level. Beyond that, the levels as set in

this rule represent the FAA's best judgment about a reasonable balance between maximizing capacity and minimizing delays. Of course, we have made it clear that we continue to review the caps, and we may withdraw common slots if necessary, or we may increase capacity as circumstances allow.

The dispute surrounding this rulemaking revolves around the FAA's proposal to reallocate slots at the airport. Simply put, incumbents at the airport are largely satisfied with the status quo. The vast majority of carriers opposed any measure that would result in a carrier holding fewer slots under the final rule than it held under the capping Orders.

The Port Authority states in its comment ''The slot retirement system has not been explained with respect to the [sic] specific criteria the FAA will use to choose slots to be withdrawn, and whether, or how, gate-leasing assignments will be taken into account in this process.'' This rule does not provide for any ''retirement'' and we assume that the Port Authority is referring to Section 93.167 which states that the FAA may withdraw limited or common slots as necessary for operational needs. Withdrawal for airport operational needs is not a new concept, and the same idea has applied in our rules for years. The only really new principle that has been added by this rulemaking is that we have committed not to withdraw unrestricted slots. Once they are purchased at an auction, the carrier is assured that they can be used for the life of this rule. In other respects, our procedures and criteria remain the same as they have always been.

Several commenters including the carriers, their associations and the Port Authority noted that the FAA has asserted that the proposed measures were designed to address severe delays, preserve consumer choice, maintain airline competiveness and preserve the affordability of airfares. Most commenters agreed, in some form, with the Port Authority's assessment that the proposal achieved none of these objectives. Rather, most commenters noted that the reallocation mechanism did nothing to address congestion and could have the unintended consequence of harming competition and restricting passenger access because of the loss of service to small communities.

Some carriers and their associations argued that rather than encouraging a market-based allocation method with a robust secondary market, the proposal would have the opposite effect—imposing a new and more market-intrusive regulatory scheme.

Not only is the FAA required to ensure 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. The FAA cannot simply walk away from an airport once it has imposed caps, but rather should 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 airports 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.

The FAA believes that it is well within the agency's authority in 49 U.S.C. 40103 to provide some mechanism for reallocation. The capping Orders at JFK and Newark provide for auctions of new and returned capacity but do not provide for the reallocation of capacity that is actively being used. The FAA believes this allocation method may be justified as a short-term measure, but it is inadequate for any cap intended to last for more than a couple of years. Indeed, Congress appears to have shared similar concerns when it allowed for slot exemptions in AIR–21. 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.

1. Proposed Alternatives

The FAA proposed two different alternatives for allocating slots in the NPRM. Under both alternatives the vast majority of slots would have been grandfathered to existing carriers at the airports, with a relatively small minority auctioned off in the free market. Both alternatives allowed for a carrier baseline operations for which up to 20 slots would be automatically allocated to the carrier as Common Slots. These slots would not count toward the calculation of slots that would revert to the FAA for retirement or reallocation.

Under alternative 1, the FAA proposed to withdraw 10 percent of the Carriers' slots above its baseline operations. The FAA would auction the reverting Limited Slots, with the FAA retaining proceeds of the sale. After recouping its costs, the FAA planned to spend the remainder of the proceeds on aviation congestion and delay management initiatives in the New York City area. Under alternative 1, any Carrier could bid on a slot in an auction blind to the participants and it would be awarded in the form of an Unrestricted Slot to the highest responsive bidder. The winning Carrier could commence operations using the newly acquired slot at the beginning of the next summer scheduling season, except that October 25, 2009, will be the commencement date for slots acquired in the first auction.

Alternative 2 proposed a different auction procedure for JFK that provided that the holder of a Limited Slot would retain the proceeds of its sale in the auction. The only deduction from the sale price would be for the FAA's costs associated with conducting the auction. Under this alternative, the FAA would withdraw 20 percent of the Carriers' slots above the baseline operations at JFK.

The FAA continues to believe that under either alternative a sufficient number of slots would be available for reallocation to permit access to the airports and establish a fair market value for slots that could then translate into a robust secondary market. Although alternative 2 allowed for an even greater number of available slots, it also had the potential to prevent the most interested carrier, i.e., the one initially allocated the slot, from bidding on it. While the FAA anticipated that a carrier could obtain a comparable slot, either through the FAA auction or on the secondary market, there was no guarantee that would happen. This concern was raised by several commenters who noted that the inability for the carrier to bid on its previously held slots is even more troubling because that carrier may have the greatest incentive to retain the slot based on established service.

As noted above, 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. However, the agency is persuaded that alternative 1 maximizes the efficiency of the slot because the carrier who may value it the most may be the one who held it initially.

2. Categories of Slots

Under today's rule, the FAA will lease property interests in slots to carriers for a period of up to ten years, the date the rule sunsets. There will 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 will be awarded to the carriers under a cooperative agreement for the duration of the rule. The cooperative agreement will provide carriers with a ten-year leasehold interest. Once the rule sunsets, all interests will revert to the FAA. Unlike slots allocated under the HDR at JFK, carriers will be granted clear property rights to Common Slots, which could be collateralized or subleased to another carrier for consideration. These property rights, however, will not be absolute. Common Slots will be subject to reversion to the FAA under the rule's minimum usage provision, may be temporarily withdrawn for operational reasons, should the FAA need to reduce the caps.

Those slots not categorized as Common Slots will 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. Unlike slots allocated under a cooperative agreement, these slots will require monetary consideration to the FAA. Since a carrier leasing an Unrestricted Slot will be required to do so because of government action, these slots will not be withdrawn by the FAA under the use-or-lose provisions, for operational reasons or to further reduce the cap should such reductions be necessary. As with Common Slots, Unrestricted Slots will expire when the rule sunsets.

Limited Slots are slots that are identified for auction. Those Limited Slots identified for auction will be leased to the carriers under a cooperative agreement for a period of 1–4 years so that they can be reallocated after that period of time. Limited Slots will convert to Unrestricted Slots as a result of the auction. As with Common Slots, Limited Slots may be withdrawn under the proposed use-or-lose provision, or for operational reasons.

3. Initial Allocation of Slots

No later than this rule's effective date, the FAA will notify all carriers which slots they will initially be allocated under the rule. The FAA will make this determination based on the operating rights held by carriers under the Order limiting operations at JFK or the Order limiting operations at Newark as evidenced by the FAA's records. Carriers will be assigned corresponding slots in 30-minute periods consistent with the limits under § 93.163 (b) and its summer and winter season schedules as approved by the FAA.

Upon the rule's effective date, each carrier at JFK and Newark will automatically be awarded up to 20 Common Slots, which will constitute the carrier's baseline 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. Ninety percent of the remaining slots will also be grandfathered as Common Slots to the carrier holding the corresponding Operating Authorization under the JFK or Newark order. The FAA has decided 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.

As noted above, the remaining slots will be categorized as Limited Slots and will be reallocated via auction over a five-year period. The number of slots that a particular carrier will have classified as Limited Slots is based proportionally on the carrier's presence at the airport, taking into consideration each carrier's baseline operations. The FAA will inform all carriers that will be awarded Limited Slots how many Limited Slots they will have no later than the rule's effective date.

An affected carrier will have ten days to identify 50 percent of the total number of Limited Slots. During the following ten days, the FAA will determine through a randomized process the remainder of slots that will be categorized as Limited Slots, taking into account the need to have capacity available for reallocation throughout the day.

In determining which slots should be designated as Limited Slots, the FAA will initially exclude from consideration slots held during all hours where carriers have collectively determined two or more slots should be Limited Slots. This approach will assure slots will be available for auction throughout the day. The FAA will also determine in what year (0–4) each Limited Slot will revert to the FAA for reallocation, In this way, all carriers will know within 20 days of the rule's effective date what slots will become available for purchase and when.

The time windows for the Limited Slots will be evenly distributed over the day to the extent possible. The duration of each Limited Slot will be assigned by a fair allocation process such that each affected carrier's aggregate lease duration will be approximately equal to that of the other affected carriers.

British Airways asserted that it is overly burdensome to require carriers to track slots and volunteer slots for redistribution each year, and states that such a program is used nowhere else in the world. The FAA believes that the carriers using the system are sophisticated entities capable of tracking the classification of their slots. Furthermore, the requirement that carriers volunteer slots for redistribution is only required one time, at the outset of the rule. It also only affects the seven carriers that will lose slots. Initially FAA considered selecting 100% of the slots for withdrawal but later decided it would benefit carriers and their networks to allow them to select 50% of the slots themselves.

Although most commenters are opposed to any slots being reallocated by auction, Virgin America urged the FAA to expand the number of slots available via auction. The FAA recognizes that the overall number of slots that will be auctioned is relatively small, and a larger auction would not only have assured greater access to the airports, but would arguably maximize the efficiency of the system, assuming no other constraints. However, the FAA understands that the carriers would in fact face other constraints.

The ATA claimed that carriers need to know which of its slots are Limited Slots 90 days before the effective date of the rule in order to be compliant with the rule on the effective date. While the rule becomes effective on December 9, 2008, carriers can continue their operations without change until October 25, 2009, the first day of the winter scheduling season. Accordingly, the FAA believes carriers will have no problems setting a compliant schedule well in advance of the winter scheduling season.

The Port Authority, American Association of Airport Executives (AAAE) and the ATA also express concern about what they consider to be inadequate information regarding the slot auction methodology. The Port Authority says that the terms of the planned slot leases have not been set forth in any meaningful detail, which, it argues, has important effects on their management of airport gates. We agree that it is important for all interested parties to have full information about auction procedures before any auction is conducted. That information will be provided in the appropriate form. This rulemaking, which merely establishes the principles under which slots will be

leased, is not intended to incorporate the technicalities of the auction procedures, a fact that the FAA emphasized in the NPRM.

4. Market-Based Reallocation of Slots

As discussed earlier, the FAA proposed two separate alternatives for reallocating slots at JFK and Newark. The FAA has decided to adopt alternative 1. The commenters have largely combined the two goals of this rulemaking, to address congestion and to provide for a more equitable and efficient allocation of capacity, into a single goal. Many commenters, including carriers (American, British Airways, Continental, Delta, Emirates, and US Airways) and industry associations (AAAE and ATA) said that it is the cap on hourly operations and not auctions that will reduce delays at JFK and Newark. Furthermore, they contended that the cap and the auction are distinct proposals, with distinct costs and benefits; while a cap may reduce delays, an auction will merely add costs to carriers. Some carriers and the ATA claimed that the only congestion-related measure included in this proposal is the cap on operations, which is already in place under the capping orders at JFK and Newark. It also argued that the FAA has not articulated how its auctions will translate into delay mitigation or why the high costs of auctions are worth the burden and risk.

The FAA fully agrees that the reallocation method, regardless of what it is, will not have a direct impact on controlling delays. That type of control is achieved by extending the cap beyond the JFK and Newark Orders. The FAA believes that the reallocation mechanism may lead to an air transportation system that is more efficient for the traveling public, even though that mechanism does not reduce the number of aircraft flying in and out of the airport. It is possible that carriers may decide, at least on some routes, to increase the size of the aircraft they are using. While nothing in today's rule dictates this result, it is certainly at least generally foreseeable.

While most of the carriers were categorically opposed to a market-based reallocation mechanism, that opposition was not universal. The FTC argued in favor of an auction mechanism, recognizing the value associated with providing a carrier with a direct financial incentive to maximize the value of a slot.

The FAA has decided to finalize its proposal because it believes that a market-based mechanism such as an auction is the best way to assure that this scarce resource is allocated to the user who values it the most. As a steward of public property, the FAA has an obligation to strive toward getting the best value for that property. Other Federal agencies have used auctions to determine who values Federal property the highest. In addition, a number of papers regarding the societal value of allocating slots via an auction have been published over the past several years.[26] Simply put, a carrier who is required to purchase a slot, will value it more highly than a carrier who received the slot at no cost. Accordingly, the carrier will ensure the slot's best economic use, i.e., putting it to the use valued most highly by the traveling public. If the carrier cannot profitably use the slot, it will presumably sublease the slot to another carrier who can maximize its efficient use. In addition, a carrier wishing to gain a presence at an airport can purchase the lease from the government directly rather than attempting to obtain slots solely from its competitors, increasing competition at the airport.

The value associated with allocating a scarce government resource via an auction was also recognized by Congress in the telecommunications context when it passed the Licensing Improvement Act of 1993. In the section-by-section analysis of the statute, the committee report specifically references promotion of efficient and intensive use of the electromagnetic spectrum as one of the objectives the committee believed the new legislation would achieve. 1993 USCCAN at 580.

As noted earlier, the agency's own experiences with slot-controlled airports under the HDR are consistent with the observations made in the literature. Under the Buy/Sell Rule, carriers wishing to enter the market complained they were unable to gain market-share, and the underutilization of those slots allocated to the carriers at no cost forced the agency to impose a usage requirement.

The auction process contemplated by today's rule will guarantee carriers wishing to initiate or extend operations at the airport an opportunity to acquire slots. In January 2009 there will be approximately 18 slots available for auction at JFK and 18 slots available at Newark airports. Carriers typically require pairs of slots, so today's rule will provide the equivalent of approximately 9 round trips per day at both airports. In the following four years there will be at least 18 slots available, as well. Assuming a minimum competitive pattern of service is between two and three round-trips per day, the equivalent of three to four 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.

The FAA intends to auction off 20 percent of the Limited Slots annually for the first five years of the rule. Any carrier may bid on the slot, and it will be awarded to the highest responsive bidder. The winning parties may commence operations using the newly acquired slots on the first day of the subsequent summer scheduling season, except for the slots acquired in the first auction. In the unlikely event no bids are received, the FAA will retire the slot until the next auction. Allowing the carrier holding the Limited Slot to retain it, as suggested by some commenters, could encourage the carrier to simply not bid on the slot. The FAA will retain all auction proceeds. After recouping its costs, the FAA intends to spend the remainder of the proceeds on congestion and delay management initiatives in the New York City area. The FAA has already established a receipt account for these proceeds.

The FAA will not 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 has decided to be 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. 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 FAA believes that merely relying on the secondary market to accurately establish the value of slots, as some commenters have suggested, is problematic. A fundamental problem with the secondary market cannot be addressed without first addressing the primary market. Incumbents have significant incentives not to sell or lease out slots to airlines that will compete with their networks to a substantial

[26] Cf., DotEcon Ltd., *Auctioning Airport Slots—a Report for HM Treasury and the Department of the Environment, Transport and the Regions,* April 2001; Whalen and Carlton, *Economic Analysis Group Discussion Paper—Proposal for a Market-Based Solution to Airport Delays,* October 2007; Brueckner, *Slot-Based Approaches to Airport Congestion Management,* May 2008.

degree. Thus, incumbents rationally foreclose entry both to other incumbents and to new entrants. One of our objectives in this rule is to change those incentives and reduce the likelihood that incumbents can foreclose entry and potential competition indefinitely.

In addition, in the secondary market a carrier may rely on tangible assets that do not have the same monetary value for all carriers or even non-tangible assets, such as goodwill or a pre-existing relationship, when evaluating whether to lease a slot. Thus, while the slot may have a real value for the carriers engaged in the negotiations, that value cannot be translated into a ''fair market value'' that can be relied on throughout the industry as a reasonable valuation of the slot. The agency believes that it should not take more than five years for a robust secondary market to develop.

Given 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 will award that capacity in keeping with the WSG.

Although a number of commenters expressed specific support for the use of WSG procedures in assigning new or returned capacity, the National Air Carrier Association (NACA) opposed that approach. It believes that the WSG procedures would not allow new entrant carriers to establish their presence at the airports. Contrary to that assertion, the WSG provides for a preference for new entrants; by providing for withdrawal and auction of additional slots, new entrants will have an even greater opportunity to establish a market presence.

Lufthansa objected to the NPRM's definition of a new entrant as a carrier that has been administratively allocated up to 8 slots during controlled hours. Lufthansa states that the WSG gives new entrant status to airlines ''with less than 2 arrivals and departures'' and makes no separate provision for slots acquired by auction. It argued that the proposal was ''contradictory'' to the WSG process. We are adopting the definition as proposed. As we discussed in the NPRM, the FAA understands that in order to maintain viable operations at JFK or Newark, a carrier would need four to six slots for domestic operations, and at least two slots for an international operation. The five slots contemplated under the WSG provide little opportunity for a new entrant carrier to establish its operations before losing new entrant status and thereafter being able to expand in the New York market only through the purchase of a lease. Setting a limit of eight slots administratively assigned by the FAA as the cut-off for new entrant status allows a carrier to maintain its operations and provides some ability to grow without jeopardizing the carrier's access to slots through the WSG. Furthermore, we note that our decision here to allow carriers with up to 8 slots to retain new entrant status is consistent with our approach at Chicago O'Hare.

a. Impact of Auctions on Competition

The NPRM assumed that auctions will lead to efficient airline behavior. The Port Authority, ACI–NA, NACA and some carriers suggest that auctions may harm competition and could lead to reduced opportunities for new entrant and limited incumbent airlines to enter the airport. They claimed that the large incumbent carriers with the majority of slots at JFK and Newark could use their relatively stronger balance sheets to outbid the smaller, non-legacy airlines that help stimulate competition. The ATA and others suggest that a carrier could obtain a slot through auction and then chose not to operate for anti-competitive purposes.

Offering a different view, American suggests that because the New York market is already sufficiently competitive as a result of the presence of three comprehensive and competing networks, hubs at JFK and Newark, presence of low-cost carriers, and presence of a greater number of foreign flag carriers serving the area than any other area of the country this rule is unnecessary.

The FAA disagrees with the assertion that the limited number of auctions contemplated in this rule will reduce competition at the airport. At JFK, the HDR was criticized for not providing sufficient opportunity for new entrant or limited incumbent carriers to enter or expand service at the airport. We believe there is merit to these criticisms. This rule will provide additional opportunities for new entry at JFK and Newark.

To encourage greater competition and expand opportunities for entry at the airport, the FAA intends to reallocate by auction a portion of existing slots from those carriers who held the majority of slots at JFK and Newark. The auction is designed to provide greater competition at the airport because it uses the market to reallocate limited resources to those who value the asset most.

We understand the concerns of some persons that carriers may attempt to use Unrestricted Slots which are not subject to a usage requirement to monopolize operations at an airport. The Department has the authority to ensure that carriers do not use their ability to permit such slots to remain idle to unlawfully restrict competition. The Department's mandate under 49 U.S.C. 41712 to prohibit unfair methods of competition authorizes it to stop carriers from engaging in conduct that can be characterized as anticompetitive under antitrust principles. If the Department is presented with clear and convincing evidence that a carrier is hoarding slots to monopolize operations at an airport it will pursue enforcement action against the carrier.

b. Impact of Auctions on Carrier Investment

The ATA, Cathay Pacific Airways, Continental, KLM and U.S. Airways noted that carriers have invested in terminal facilities, gates, servicing facilities, aircraft and promotion of flights out of JFK and Newark, with the expectation that they would continue to operate from those airports. They suggest that under this rule, their presence at the airports is threatened. KLM and U.S. Airways further state that airlines that have already significantly invested in their operations at these airports will be, in effect, penalized by having to pay for the privilege a second time.

It is our view that nothing in this rule prejudices the carrier's invested presence at the JFK and Newark. Nothing in this rule bars carriers from providing services to the New York area. To the extent that a carrier may have slots subject to withdrawal, it has equal opportunity to maintain or expand its service through the auction mechanism. We also disagree with the assertion that carriers are being asked to pay a second time for the privilege of serving JFK or Newark because the investments that carriers have made in the airport and near-by services are for the benefit of all flights they offer, not just those that may be subject to reallocation.

c. Alternatives to Reallocation

Many commenters said that the FAA should use other approaches instead of auctions to reduce delays at JFK and Newark. In particular, the FAA should focus on implementing operational procedures and investments to enhance capacity. The AAAE, ACI–NA, the Asociacion de Latinoamericano de Trasporte Aero (ALTA), and the Regional Airline Association (RAA), Boeing, and several carriers said that the FAA should proceed with implementing advanced air traffic control technologies and should focus on completing

NextGen. Similarly, the ATA suggests that the FAA continue to implement the 77 New York Aviation Rulemaking Committee improvements and continue implementing NextGen.

The IATA and the ATA and their member airlines expressed their preference for use of the IATA WSG instead of an auction approach at JFK and Newark. Delta supports WSG because it is a tested process that can be applied fairly without harming U.S. carriers in comparison to other carriers. The IATA asserts that a WSG approach because it is a ''fair, transparent non-discriminatory'' mechanism that is a widely recognized and accepted for distribution of slots at congested airports.

As to the suggestion that the FAA focus on the various technological and physical improvements identified by the NYARC, many of these initiatives are already underway. However, we do not believe that they will address the congestion issues at JFK and Newark sufficiently to merit lifting the caps on operations. It is the caps that create the need for reallocation and the Administration supports a market-based mechanism to soften the impact on the market created by the caps. In the process we will foster the development of a robust secondary market and ensure the opportunity for new entry into the New York area.

The commenters are correct in stating that WSG is a widely recognized and accepted mechanism for distribution of slots at congested airports. As discussed above, we will use WSG to award any new or returned capacity at JFK and Newark, to the extent it does not conflict with U.S. rules, to ensure that even carriers that do not choose to participate in the auctions have another means to access the restricted market. However, the number of slots likely to be available for reallocation from new or returned capacity would be insufficient to stimulate a secondary market or create enough opportunity for new carriers to enter the market. Withdrawal and reallocation of slots via auction ensures the opportunity for new entry and an efficient allocation of slots among all carriers at the airports, such that each slot is allocated to the user who values it the most highly.

B. 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 did not propose a system of set-asides and exemptions that would be available to new entrants and limited incumbents.

We believe some measures must be taken to assure access to the secondary market. The system of preferences and exemptions developed under the HDR and AIR–21 at JFK may have significantly diluted the viability of the secondary market ostensibly created under the HDR's Buy/Sell Rule as several commenters claim, but we do not believe that was the sole culprit. The Buy/Sell Rule permitted transactions that were never advertised and the terms of which were never monitored for anti-competitive behavior.

We believe all carriers interested in initiating operations at JFK or Newark, or increasing their operations there, should have an opportunity to participate in any transactions. Accordingly, the FAA will permit carriers to include Common Slots for sale in the auction organized by the FAA. 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 and it would retain the proceeds.

In addition, the FAA will 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 website. The FAA will post a transaction within two business days of receipt and verification of the request and post the transaction for ten business days. The FAA has decided that transactions via the bulletin-board-system do not have to be blind, and the transaction may include both cash and non-cash payments.

Some carriers noted that the secondary market should be as transparent as possible since even a hybrid system, whereby the lessor would accept the highest cash bid and then negotiate the value of non-monetary assets after the bid was accepted, would close interested lessees out of the transaction.

We continue to have reservations about the adequacy of the value associated with non-monetary assets when the leasing carrier is not a direct competitor versus when the potential lessee competes directly against the carrier offering to lease the slot. However, we also believe non-cash transactions should result in both more bidders and potentially higher bids. Since the non-cash aspect of a transaction would require direct negotiating, parties would need to be disclosed.

In order to preclude the type of collusion that appears to have been present, at least some of the time, under the Buy/Sell Rule, the Department will monitor trades on the secondary market. The Department already has the authority under 49 U.S.C. 41712 to investigate, prohibit, and impose penalties on an 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.[27]

Today's rule requires 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. Lufthansa objects to our plan to publish the sales price for subleases of slots between carriers. It believes that slot lease sales should be conducted in the same way as aircraft sales, i.e., as a private matter between two parties. We hope and expect that transparency in the sublease process will encourage efficiency in the utilization of airport capacity. Lufthansa has not explained any alternative way to create this market information, and we will adopt this provision as proposed. The requirement is also needed so that the Department can adequately monitor the secondary market.

The slot may not be operated by the acquiring carrier until all documentation has been received, and the FAA has approved the transfer. The approval process is required to assure the FAA has up-to-date information on who is operating the flight. The FAA will not limit its approval based on any

[27] *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.

substantive provisions in the document. Although the ATA claimed the provisions governing the secondary market are unduly intrusive and chilling, the FAA believes that even in a robust market it needs to track and provide oversight of the market. This oversight will ensure access remains available to all interested parties and the slots are actually being used in the manner represented to the FAA. Since Common and Limited Slots may be transferred in the secondary market, the underlying policy considerations supporting the FAA's decision to award them under a cooperative agreement rather than for monetary consideration remain, even if the operating carrier has changed.

Trades among marketing carriers and one-for-one trades do 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 to other carriers. The FAA will approve these transactions, as it has done historically. As is the case with longer-term transfers among different carriers, the FAA only approves the transaction to maintain accurate information on which carrier is operating a particular slot.

Same day trades among marketing carriers that address emergency situations such as maintenance problems or other unforeseen operational issues may 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 will 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 cannot be for consideration, since they would then take on the characteristics of lease agreements negotiated in the secondary market. Nonetheless, carriers must notify the FAA of all such trades so that the agency can maintain accurate information on which carrier is operating a particular slot.

United Parcel Service (UPS) expressed its concern that the provisions of section 93.168 must be flexible enough to accommodate its demand peak during the period between Thanksgiving and Christmas. It notes that slot trades among U.S. air carriers with unified marketing control do not need to be advertised, because the carriers are considered to be a single unit for the purposes of this rule. Since UPS enters into contracts with other cargo carries to handle its increased volume, it would like to receive similar treatment for these arrangements. UPS appears to misunderstand the rationale for our proposal. Trades between carriers under the same marketing control are not lease transfers within any common-sense meaning of the term. There is, for these purposes, only a single carrier with multiple operations. That is quite different from the situation UPS describes for its peak period, where it enters into contracts with separately owned and operated carriers that, for much of the year, are its competitors. In any event, our rule should not affect UPS's ability to contract with other carriers to handle its additional cargo, and we believe that no change to the rule language is necessary. Although a carrier seeking to sublet or transfer a slot will be required to post the bid through the FAA Web site, we believe that any additional burden is minimal and outweighed by the value of the of the transparency of the process. In addition, the transaction is not blind; and the carrier is not required to accept the highest submitted bid.

C. Usage Requirements

The FAA is adopting the usage requirements proposed in the NPRM. Specifically, Common and Limited Slots must be used 80 percent of the time over a season unless the FAA waives the usage requirements due to unusual and unforeseeable circumstances beyond the carrier's control. The impact of these events must extend beyond five consecutive days. Unrestricted Slots will not be subject to the usage requirements.

Under this rule each slot will be assigned a corresponding scheduled operation. Carriers will be required to report a series of flights under a single slot number rather than in the aggregate. In this way the FAA will be able to more accurately track a slot's usage with the flight it was scheduled against. Carriers will 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 do not abuse the privilege.

Several commenters, including the ATA, the Port Authority, and several carriers noted that the proposal to exclude Unrestricted Slots from the usage requirement is inconsistent with the current practice of requiring all slots, even those purchased in the secondary market, to be subject to the use-or-lose requirements. These commenters suggested that all slots should be subject to usage requirements. The Port Authority also suggested that the proposal to exclude Unrestricted Slots from the usage requirement could lead to the dominant carriers placing bids with the effect of driving away or blocking new entrants and limited incumbents from JFK and EWR. The price of a slot could be determined by the value that a dominant carrier would assign to eliminating competitors rather than from the use of the slot itself, as there is no usage requirement. The Port Authority added that this could lead to a decrease in the number of airlines and destinations served at an airport, resulting in higher fares.

We understand the concerns of some persons that carriers may attempt to use Unrestricted Slots which are not subject to a usage requirement to monopolize operations at an airport. We do not believe this risk is sufficiently large to attach a usage requirement on Unrestricted Slots. Since the FAA wishes to introduce a market-based means of addressing slot allocation, both initially and in the secondary market, the agency believes the Unrestricted Slot should be just that—unrestricted. Furthermore, slots acquired at auction will have a known and provable market value. That fact will be clear to the carriers' management and stockholders, who are both likely to resist the waste of a valuable (and salable) company asset. Our rule should encourage the use of slots at JFK and Newark for their highest and best purpose. The FAA does not believe there is a need to treat all slots equally when they are not all allocated under the same terms and conditions.[28]

The Department has the authority to ensure that carriers do not use their ability to permit such slots to remain idle to unlawfully restrict competition. The Department's mandate under 49 U.S.C. 41712 to prohibit unfair methods of competition authorizes it to stop carriers from engaging in conduct that can be characterized as anticompetitive under antitrust principles. If the Department is presented with clear and convincing evidence that a carrier is hoarding slots to monopolize operations at an airport it will pursue enforcement action against the carrier. In order to assist the Department in determining whether a carrier is engaging in anticompetitive behavior, we are expanding the requirement in the regulatory text to report usage to include Unrestricted Slots as well as Common and Limited Slots. While a carrier would not risk losing an Unrestricted Slot for failure to report, the FAA could take civil enforcement action consistent

[28] Unrestricted Slots could potentially have a higher value in the secondary market than Common or Limited Slots because they are not subject to the same restrictions.

with its authority to take enforcement action for any violation of a regulatory requirement.

D. Unscheduled Operations

As proposed in the NPRM, unscheduled operations at JFK and Newark will be restricted. Two unscheduled operations will be permitted at Newark between 6 a.m. and 11:59 a.m. and between 10 p.m. and 10:59 p.m.; one operation per hour will be permitted between 12 noon and 9:59 p.m. At JFK, there will be two unscheduled operations permitted per hour between 6 a.m. and 1:59 p.m. and between 10 p.m. and 10:59 p.m. Between 2 p.m. and 9:59 p.m., the limit is one unscheduled operation. Under today's rule, reservations are required to use the airport (except for emergency operations) and may be obtained up to 72 hours in advance. The reservations will be available on an hourly, rather than half-hourly, basis. This will provide additional flexibility with minimal operational impacts overall.

To the extent Air Traffic Control (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 special circumstances justify an additional flight. However, there is no guarantee that the FAA will accept more than one or two 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 will allow public charter operators to reserve up to 25 percent of available allowable afternoon and evening reservations 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.

A large portion of the unscheduled operations comes from general aviation, and Aircraft Owners and Pilots Association (AOPA) stated in its comments that our rule will cause an increase in the number of operations at airports elsewhere in the region, to levels beyond the capacity of those airports. While we agree that there may be some increased demand for other airports, we are aware of no reason to believe this demand will exceed the capacity available. We note that no other airports in the region have expressed any such concerns in comments to this rulemaking.

The FAA does not believe that public charter operators and on demand charter operators should be treated similarly. Unlike on demand charters, public charters may not be marketed until prospectuses are filed with the Department and they are marketed to individual consumers long in advance of the dates of operation. Public charters are also generally limited to operating from larger airports. Thus, in the New York area, public charters cannot be operated from many of the local airports, such as Teterboro, that are available to on demand charter flights. For these reasons, we believe public charter operators should have a significantly earlier opportunity to obtain slots for their operations under this rule than on demand charters.

Additionally, unscheduled flights produce roughly the same delay costs as scheduled flights at the same time. However, unscheduled flights can be accommodated if operators are flexible in their arrival or departure times. In response to public comment we have assessed the impact on business if unscheduled flights are restricted based upon the FAA's record of actual operations in the agency's Enhanced Traffic Management System (ETMS) for year ended May 31, 2008. FAA has indicated that it should be able to accommodate more unscheduled operations in visual meteorological conditions (VMC) (capacity permitting). In the analysis of ETMS, FAA assumes that unscheduled flights would be accommodated in VMC weather or if there is available capacity in an adjacent hour (one hour either side of the actual hour of operation in the data.) based on the year June 1, 2007 through May 31, 2008, ETMS data show the number of unscheduled operations per year where there was insufficient capacity in the adjacent two hours to handle demand beyond the levels specified in today's rule was 87 at Newark and 23 at JFK. This represents well below one operation per day. These flights may have to divert to another airport, change their time of arrival or departure by more than one hour or be cancelled. The concern about peak seasonal demand expressed above by UPS also was raised by comments to this portion of the NPRM. NACA, the Cargo Airline Association, and four carriers believe that the limits in the rule are insufficient to meet demand in the period leading up to the Christmas holiday. With only one reservation per hour during certain hours, Polar and the Cargo Airline Association (CAA) also argue that the rule effectively prohibits any unscheduled cargo flights. Although there are other airports in the region, NACA claims that they do not offer a viable alternative for a commercial service operation.

While we sympathize with these concerns, we do not believe that they will materialize in the dire manner predicted. The FAA has reviewed cargo operations at JFK and Newark during the peak holiday season, and we believe that capacity exists on various days or through temporary returns by other carriers to accommodate some flights above historically operated levels. ETMS data collected during the holiday period November 26, 2007 through December 31, 2007 shows that at Newark 75 percent of the controlled hours had available capacity for unscheduled operations (i.e., at least one available reservation) and at JFK 82 percent of the controlled hours had available capacity for unscheduled operations. In addition, most cargo operators have already received temporary slot allocations from the FAA for the November-December 2008 period under the existing orders and there is no reason to believe this would not remain a viable option under today's rule. Demand for passenger flights is lower in portions of November and December, and the rule allows carriers to return slots to the FAA for a portion of a scheduling season without subjecting the slots to the use-or-lose requirements if they provide notice prior to the commencement of the applicable scheduling season. Additionally, the unscheduled reservation system for JFK and Newark grants authority to the Vice President, System Operations Services, to allow additional reservations for unscheduled operations. These can be authorized if there are available carrier slots, such as those temporarily returned to the FAA, or based on a finding that additional flights would not significantly increase delay. The FAA will regularly assess operations on a daily basis to determine if additional reservations could be made available for unscheduled operations. We note as well that, under the previous rules at JFK and Chicago O'Hare, cargo and passenger carriers routinely requested slots for additional operations. Carriers often have scheduling flexibility, and the FAA has worked with them when possible to time flights during periods of minimal operational impact. Our rule here will provide additional flexibility to carriers, by making it easier for them to purchase or sublease slots to supplement any direct slot allocation from the FAA. Short-term slot trades and leases are common at U.S. slot controlled airports and are often used to accommodate different scheduling patterns by carriers. Therefore, we do

not believe that there is any need to include any special provisions for holiday operations.

E. Sunset Provision

This rule terminates at 11 p.m. on March 30, 2019. As we stated in the NPRM, 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 manage the scarce resource. When the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign project and NextGen technologies are fully implemented, we expect they will significantly alleviate delays and improve air traffic efficiency. When we see the impact of these improvements over the next ten years, we will take that into account along with our experience with effectiveness of the rule on the distribution of slots and entry into JFK and Newark.

This rule will expire in ten years. 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.

The ATA questioned why this rule is implemented on a temporary basis if the agency believes it represents the best solution for the airport. Additionally, several commenters noted that temporary slot lives reduce the value of slots. They argued the short-term nature of the proposal and the uncertainty of future slot operations at JFK and Newark would have a chilling effect on the value given to slots and gates in relation to capital flow and collateralization. Several carriers were concerned that financial institutions would lose confidence in slots as collateral and reduce or eliminate a carrier's ability to fully collateralize the asset.

The FAA believes providing a date certain through which slots will be awarded actually increases the certainty of the holding. The assumption seems to be that regulatory inactivity is the solution to all the carriers' concerns, and that therefore, the FAA should just maintain the status quo. This is not an acceptable solution. The capping orders at JFK and Newark temporarily froze the slot allocations at the airports to serve as temporary solutions. The FAA believes it is important for carriers and those who provide financing to realize that slots at a constrained airport are not intended to be a permanent response to solving congestion, with the incumbents being afforded unlimited rights.

F. Other Issues

1. Withdrawal for Operational Need and for Future Reductions in the Cap

The FAA is adopting its proposal to retain the right to temporarily withdraw Limited and Common Slots for operational need. We requested comment on whether the FAA should establish a level of slots that would not be subject to withdrawal or temporary suspension to fulfill operational needs. We were concerned about the possibility of marginalizing or excluding small operators from the airport. No comments were received on this issue. For that reason, we conclude that it is not necessary to establish such a reserve.

The FAA has historically retained the right to withdraw slots for operational need, although it has rarely, if ever, been exercised. This provision is included to allow the FAA to immediately address a situation where it cannot handle the usual amount of traffic on a temporary basis. This provision would typically be invoked because of problems with the landside infrastructure, such as a closed runway or terminal, or changes to air traffic control procedures that would result in sustained capacity reductions.

The FAA is also retaining the right to further reduce the cap on operations should the airport remain unduly delayed and the Administrator determines that the cap on operations remains too high. The FAA anticipates it would call for a Schedule Reduction Meeting should further reductions be warranted. In any case, the FAA would fully meet its obligations under the APA at that time, and this rule does not provide a means for further cap reductions absent subsequent action on the part of the agency. For the reasons discussed earlier, this provision is limited to Common Slots.

2. Impact of the Final Rule on the Port Authority's Ability To Run Its Airport

The ACI–NA and the Port Authority both claim that the proposal to auction slots interferes with the Port Authority's ability to run the airport and constitutes an impermissible infringement on the Port Authority's right to collect revenue for use of the airport facilities. The ACI–NA believes that market-based access issues should remain within the exclusive purview of the airport's proprietor. The Port Authority expressed similar sentiments in its comments to the NPRM suggesting it develop a method of allocation at the airport.

The FAA has never proposed to deny carriers gate access at JFK or Newark, nor has it proposed to otherwise address issues associated with the facilities at the airport. The FAA recognizes that the Port Authority bears responsibility for the terminal-side portion of the airport. However, it is the FAA, and not the Port Authority, that has responsibility for managing the airspace. While the Port Authority claims that slot auctions would somehow be disruptive to the airport, it fails to explain how, in terms of making arrangements for gates and other airport facilities, acquiring a slot via an auction is any different from acquiring a slot via the secondary market, or for that matter, via a lottery, as was the case under the HDR.

To the extent public policy goals could arguably be better achieved by an airport proprietor rather than the FAA, the agency notes that this rule provides for no special carve-outs. To the extent an airport could address these policy issues through a market-based, or even administratively based mechanism, it is free to do so consistent with its grant obligations and any other restrictions imposed by Federal law, policy and our international obligations.

3. Minimum Usage Requirements for Slots Acquired Through Sublease

In the NPRM, the FAA proposed to provide for a 90 day waiver of the minimum usage requirement for common and limited slots acquired by sublease. We have subsequently determined that there is no need for such a provision. The starting date of a sublease is fully within the control of the contracting carriers and can be easily negotiated to address any possible concerns related to starting new service. Moreover, in the event of highly unusual or unpredictable circumstances, a carrier may apply under § 93.170(c) for a waiver of the minimum usage requirements.

V. Potential Loss of Service to Small Communities

Several commenters expressed their concern that this rule may adversely affect service to small communities because the rule will make operating at JFK and EWR more expensive. AAAE suggests that this will serve as a disincentive for airlines to bid for slots for flights to small communities because the smaller number of seats that typically fly to small communities. Several foreign carriers further note that a reduction in service to small communities may negatively affect their opportunities to provide a wide variety of services with their U.S. carrier partners. ACI–NA suggests that the FAA take action to protect services to small communities.

Although not directly related to the loss of service to small communities, the FAA notes the Canadian Airports Council (CAC) expressed concern that air service to Canada would be jeopardized because the major Canadian cities are much smaller than their U.S. counterparts and cannot sustain larger aircraft. The CAC further suggests that that we grant an exemption to the rule for international flights, including transborder flights. This rule does not violate our international obligations, we will therefore not grant such an exemption.

The FAA recognizes the importance of small community service at JFK and Newark and believes that this rule will provide adequate opportunity for services to small communities because 90 per cent of slots will not be affected, and the remaining 10 percent of slots will be auctioned over the first five years of the rule. Under these conditions carriers will have the opportunity to adjust their services to continue services as the market warrants. Furthermore, the agency continues to believe that a system whereby upgauging to larger aircraft is completely voluntary decreases the likelihood of a whole-sale withdrawal from smaller markets.

Although there may be a slight reduction to small community service by not dedicating slots for those particular cities, we believe market conditions and fuel prices are the primary motivation for any reduction in service, and not a consequence of federal action in this rule. Due to these facts, and the Administration's decision to rely on the market to allocate slots according to their highest and best use, we do not believe it is appropriate to develop a separate class of slots specifically for use to and from small communities. The FAA wishes to avoid any unintended consequences on a carrier's marketing and network decisions that could result from set asides or exemptions for small communities.

VI. 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. 4 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, the 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 a ''significant regulatory action'' as defined in § 3(f) of Executive Order 12866, which is also known as an ''economically significant regulation 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.

Total Costs and Benefits of This Rulemaking

Through implementation of an auction, FAA estimates that this final rule will result in a long-term improvement in the allocation of scarce slot resources at JFK and Newark. The estimated present value of net benefits of improved slot allocation by auctions is $272 million at JFK and $225 million at Newark from 2009 to 2019. The costs of the rule, with a present value of $34 million at JFK and $20 million at Newark, are due to the design, implementation and participation in an auction of slots. These costs assume that the full cost of setting up the auction mechanism and participating in the auctions are individually borne at each airport; in fact, if auctions are conducted at more than one airport in the New York area, the costs of the setting up and participating in the auctions could be shared among the users of the airports and would be lower on a per airport basis. The net benefits of the auctions are, therefore, $238 million at JFK and $205 million at EWR.

This regulatory impact analysis assumes as a baseline that in the absence of this rulemaking, the FAA would not otherwise impose long-term caps on aircraft operations at JFK and Newark. Therefore, the FAA estimates that, through the long-term implementation of a cap on aircraft operations, this final rule will result in about a 25 percent reduction in the average delay per operation at JFK relative to a situation with no cap. After allowing for the lost consumer and producer surplus due to a reduction in air service caused by the caps, the net value of the savings in average delay attributable to the cap generates a present value net benefit of about $1,629 million from 2009 to 2019. At Newark, this final rule will result in about a 23 percent reduction in the average delay per operation at Newark relative to a situation with no cap, generating a present value net benefit (after deducting lost producer and consumer surplus from reductions in air service) of about $634 million from 2009–2019. The benefits are estimated by comparing the no-rule scenario (similar to the situation at JFK and Newark in August 2007) 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 JFK or EWR.
- All communities, including small communities with air service to JFK or EWR.
- Passengers of scheduled flights to JFK or EWR.
- The Port Authority of New York and New Jersey, which operates the airports.
- Passengers on scheduled and unscheduled flights in New York airspace.

Key Assumptions

- Baseline JFK: No operating authorizations or caps (the rule will generate approximately $1,867 billion in net benefits compared to this case, of

which approximately $238 million is due to reallocation benefits associated with the auctions and the balance due to the caps).

• Baseline EWR: No operating authorizations or caps (the rule will generate approximately $839 billion in net benefits compared to this case, of which approximately $205 million is due to reallocation benefits associated with the auctions and the balance due to the caps).

• A cap on operations from 81 scheduled operations plus one to two unscheduled operations per hour at each airport, which features:

• 100 percent of slots [29] held by carriers with fewer than 21 slots at each airport will be reassigned to the carrier with 10 years of life;

• For holders with 21 or more slots, 90 percent of slots above the baseline of 20 slots will be reassigned to the carrier with leases of 10 years and ten percent of slots above the baseline will be assigned to the carrier with shorter leases and then auctioned over five years.

• For the purposes of this evaluation, the effective date is (11/1/08).

Other Important Assumptions

• Discount Rates—7%

• Period of Analysis—2009 through 2019 (The rule will sunset in ten years)

• Assumes 2008 Constant Year Dollars.

• Passenger Value of Travel Time—$30.02 per hour.[30]

Alternatives We Have Considered

• No caps: The FAA expects that without regulatory caps, operators would expand operations at both airports above current levels, and hence further worsen airport delays.

• Caps without auctions: This alternative would impose caps at 81 scheduled operations plus one to two unscheduled operations per hour; it would implicitly assign operations to current holders of operating authorizations at the airports.

• Caps with auctions: This alternative would permanently impose caps at 81 scheduled operations plus one to two unscheduled operations per hour; it would assign the large majority of operations to current holders of operating authorizations at the airport; and would auction a small but consistent number of slots for the first five years of the rule.

Benefits of This Rulemaking

Since publishing the NPRM, we have updated our benefit estimates, with a significant upward adjustment to the cap benefits at JFK. This adjustment was necessary because the FAA identified a calculation error attributable to an incorrect reference to an output value in the airport delay model. We also made a smaller, downward adjustment to the Newark cap benefits. Finally, we reduced the estimated net benefits of improved slot allocation caused by the auctions at both airports relative to those recorded in the NPRM. These latter reductions resulted from the higher estimates of airline auction participation costs that we used in the final regulatory evaluation for this final rule.

A detailed discussion of the applied methodology as related to consumer and producer surplus can be found in the final regulatory evaluation. The primary benefits of this rulemaking are due to the delay reduction from the caps on operations and an improvement in the efficiency of allocation of scarce slot resources through the use of an auction mechanism and secondary slot subleasing markets characterized by clearly defined property rights.

Costs of This Rulemaking

The major costs of this final rule are the costs to the public and private sectors of designing, implementing and participating in the auction. Additionally, the implementation of caps under this rulemaking will lead to a reduction in flights into JFK and Newark compared to what would occur without the caps. The FAA has estimated the value of these scheduled flight reductions and has deducted them from the delay benefits of the caps at each airport to calculate overall net benefits of the caps.

Paperwork Reduction Act

This proposal contains the following new information collection requirements. As required by the Paperwork Reduction Act of 1995 (PRA) (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.

The ATA claimed that the FAA's estimate of the paperwork burden of the rule is ''totally flawed'' and understated. It cited what it believed to be an inconsistency in the PRA estimates for both JFK and EWR in which the first year burden hours were not added to recurring annual hours in the NPRM. In fact, the FAA believed it was clear in its presentation that the first year and annual recurring numbers were additive for the first year. However, to avoid misunderstanding, the combined first year and recurring year burdens for both airports are given a separate line item in this final rule.

The ATA claimed that realistically, management of this program will take at a minimum 50% of a management employee's time and could require a full time employee, depending on the final rule. The FAA notes that the analysis of paperwork burden does not attempt to include the time required to participate in auctions, only the reporting requirements to the government. The full assessment of time that an airline might spend in its voluntary participation in an auction is provided in the Final Regulatory Evaluation of this rule. However, the FAA has added a significant recurring burden of 32 hours per carrier per year at each airport in which an auction occurs (inserted in the paperwork requirements of Section 93.165(c) below). The FAA made this change to reflect the paperwork required if a carrier actually participates in an auction. This addition of time to the PRA estimate leads to a considerable increase in the total labor hours assigned to PRA purposes under this rule.

The ATA also noted that there will be significant legal fees associated with negotiating, drafting, executing and monitoring the secondary market. The FAA believes that the reporting labor requirements estimated under Section 93.168 for the PRA reflect the actual reporting requirement burden, noting that the negotiating of the sublease itself is not an activity involving reporting to the government. The FAA reemphasizes that participation in the auction and secondary market are not requirements of this rule. A carrier with existing slots at JFK and EWR is permitted to continue operations at the airport using the common slots provided to them as part of this final rule. Carriers will only need to engage in the secondary market and auctions if they choose to buy, lease or sell slots.

The information requirements in today's rule are similar to those specified in the just-issued final rule for congestion management at LaGuardia Airport. The FAA has modified these requirements for JFK and EWR and summarized them below.

Title: Congestion Management Rule for John F. Kennedy International Airport and Newark Liberty International Airport.

[29] A ''slot'' is defined as the right to land or depart (not both) in IFR conditions in a 30-minute time window.

[30] GRA, Incorporated ''Economic Values for FAA Investment and Regulatory Decisions, A Guide'', prepared for FAA Office of Aviation Policy and Plans, (October 3, 2007). The passenger value of time reflects a mix of business and leisure travel developed for the New York area.

Summary: The FAA is assigning the majority of operational slots at JFK and Newark to current occupants and developing a secondary market by annually auctioning off a limited number of slots at each airport. This rule also contains provisions for use-or-lose and withdrawal for operational need. The rule will sunset in ten years. More information on the requirements adopted today is detailed elsewhere in today's notice.

Use of: The information is reported to the FAA by scheduled operators holding slots at JFK and Newark. 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 transfer 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 airports.

Respondents: The respondents to the information requirements in today's rule are scheduled carriers with existing service at JFK and Newark, carriers that plan to enter the JFK and Newark markets (by auction or secondary market), and carriers that enter the JFK and Newark market in the future. There are currently seventy-seven (77) carriers with existing scheduled service at JFK and thirty-nine (39) carriers with existing scheduled service at Newark. Various carriers included in these totals have service at both airports.

Frequency: The information collection requirements of the rule involve scheduled carriers notifying the FAA of their use of slots. Each carrier must notify the FAA of its: (1) Designation of 50 percent of its Limited Slots, if applicable, as well as auction paperwork requirements; (2) request for confirmation to sublease slots; (3) 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); (6) request for assignment of slots available on a temporary basis; and (7) usage rate as detailed in the rule.

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 final rule ''Congestion Management Rule for LaGuardia Airport'' (Docket No. FAA–2006–25709; Notice No. 08–04).

The burden is calculated by the following formula:

Annual Hourly Burden = (# of respondents) * (time involved) * (frequency of the response).

§ 93.164(c)(2) Categories of Slots: A Carrier shall designate 50 percent of its Limited Slots

JFK

(4 carriers with Limited Slots) * (80 hours per submittal) = 320 hours.

Based on the current allocation of Operating Authorizations and the level of baseline operations each carrier would be assigned under today's proposal, we assumed the four carriers with the most operations at JFK would expend up to ten days of planning time each, potentially 80 hours, to develop and submit their designations of 50 percent of its Limited Slots, for a total of 320 hours. This designation would occur once, ten days after the final rule effective date.

Newark

(1 carrier) * (240 hours per submittal) = 240 hours.

(5 carriers) * (80 hours per submittal) = 400 hours.

Total Annual Hourly Burden = 640 hours.

Based on the projected allocation of Operating Authorizations and the level of baseline operations each carrier will be assigned under today's rule, we assumed that one carrier, Continental Airlines, with the most operations at Newark would expend up to 30 days of planning time, potentially 240 hours, to develop and submit its designation of 50 percent of its Limited Slots. The remaining five carriers required to designate Limited Slots would each expend up to 10 days of planning time, potentially 80 hours each, to develop and submit their designation of 50 percent of their Limited Slots. These five carriers would therefore need 400 hours. In total, the six carriers at Newark required to designate Limited Slots would require 640 hours of effort to make the designation. This designation would occur once, ten days after the final rule effective date.

Section 93.165(c) Initial Assignment of Slots

JFK

(77 carriers) * (32 hours per carrier) * (1 occurrence per year) = 1,462 hours

Whereas the FAA does not believe that all carriers, or even a majority, will participate in each auction, we have assumed for this exercise that the 77 carriers operating at JFK will expend be required to allocate some time to develop and submit the paperwork required if a carrier actually participates in an auction. Specifically, this paperwork includes the Auction Expression of Interest and the bid file to FAA auction system. These paperwork submission requirements will be filed electronically. Note that the estimate below does not include auction participation labor and costs. Participation in auctions is voluntary and these hours and costs (which encompass those for paperwork requirements) are quantified and treated as a cost of the rule in the Final Regulatory Evaluation.

Newark

(39 carriers) * (32 hours per carrier) * (1 occurrence per year) = 1,248 hours

Section 93.166(b)–(c) Assignment of New or Returned Slots

We made no assumptions about additional workload for carriers at either airport associated with the IATA-like administrative process for assigning new or returned slots. Workload would vary depending on how many (if any) new or returned slots were to develop at either airport over the 10 year period of the proposed rule. In any case, carriers are already familiar with and use IATA-like allocation methods and would handle them in the course of normal operations at JFK and Newark.

Section 93.168 (b),(d),(f) Sublease and Transfer of Slots

JFK

(18 carriers) * (1.5 hours per submittal) * (4 occurrences per year) = 108 hours.

(59 carriers) * (1.5 hours per submittal) * (2 occurrences per year) = 177 hours.

Total Annual Hourly Burden = 285 hours.

Based on burden estimates from ''Congestion Management Rule for LaGuardia Airport,'' we assumed the 77 carriers operating at JFK would expend one and one half hours for each occurrence of a lease or transfer of a slot. For each operator with 6 or more slots (18 carriers total), we assumed that a lease or transfer of a slot would occur on average quarterly. For each operator with fewer than 6 slots (59 carriers total), we assumed that a lease or transfer of a slot would occur on average biannually. The total annual hourly burden for all carriers collectively would be 285 hours.

Newark

(1 carrier) * (1.5 hours per submittal) * (16 occurrences per year) = 24 hours.

(12 carriers) * (1.5 hours per submittal) * (4 occurrences per year) = 72 hours.

(26 carriers) * (1.5 hours per submittal) * (2 occurrences per year) = 78 hours.

Total Annual Hourly Burden = 174 hours.

As with JFK, we assumed the 39 carriers operating at Newark would expend one and one half hours for each occurrence of a lease or transfer of a slot. For the largest operator, we assumed that a lease or transfer of four slots would occur on average quarterly. For those operators at Newark with 6 or more slots (12 carriers total, excluding Continental Airlines), we assumed that a lease or transfer of a slot would occur on average quarterly. For each operator with fewer than 6 slots (26 carriers total), we assumed that a lease or transfer of a slot would occur on average biannually. The total annual hourly burden for all carriers collectively would be 174 hours.

Section 93.169 (b), (d) One-for-One Trades of Slots

JFK

(18 carriers) * (1.5 hours per submittal) * (4 occurrences per year) = 108 hours.

(59 carriers) * (1.5 hours per submittal) * (2 occurrences per year) = 177 hours.

Total Annual Hourly Burden = 285 hours.

Based on burden estimates from ''Congestion Management Rule for LaGuardia Airport,'' we assumed the 77 carriers operating at JFK would expend one and one half hours on paperwork for each occurrence of a one-for-one trade of a slot. For each operator with 6 or more slots (18 carriers total), we assumed that a one-for-one slot trade would occur on average quarterly. For each operator with fewer than 6 slots (59 carriers total), we assumed that a one-for-one slot trade would occur on average biannually. The total annual hourly burden would be 285 hours.

Newark

(1 carrier) * (1.5 hours per submittal) * (16 occurrences per year) = 24 hours.

(12 carriers) * (1.5 hours per submittal) * (4 occurrences per year) = 72 hours.

(26 carriers) * (1.5 hours per submittal) * (2 occurrences per year) = 78 hours.

Total Annual Hourly Burden = 174 hours.

As with JFK, we assumed the 39 carriers operating at Newark would expend one and one half hours on paperwork for each occurrence of a one-for-one trade of a slot. For the largest operator, we assumed that a one-for-one trade of four slots would occur on average quarterly. For those operators at Newark with 6 or more slots (12 carriers total, excluding Continental Airlines), we assumed that a one-for-one slot trade would occur on average quarterly. For each operator with fewer than 6 slots (26 carriers total), we assumed that a one-for-one slot trade would occur on average biannually. The total annual hourly burden would be 174 hours.

Section 93.172(a)–(b) Reporting Requirements

JFK

(77 carriers) * (1.5 hours per submittal) * (4 occurrences per year) = 462 hours

This estimate is based on burden estimates from the ''Congestion Management Rule for LaGuardia Airport'' (Docket No. FAA–2006–25709; Notice No. 08–04). We assume the 77 carriers operating at JFK would expend, on average, one and one half hours two times per summer and winter season to submit the data required by § 93.172.

Newark

(39 carriers) * (1.5 hours per submittal) * (4 occurrences per year) = 234 hours.

This estimate is based on burden estimates from the ''Congestion Management Rule for LaGuardia Airport'' (Docket No. FAA–2006–25709; Notice No. 08–04). We assume the 39 carriers operating at Newark would expend, on average, one and one half hours every two months to submit the data required by § 93.172.

Summary

JFK

Total First Year Hourly Burden—320 Hours.

Total First Year Hourly Burden Plus Recurring Cost in First Year—3,816 Hours.

Total Recurring Annual Hourly Burden (per year for 10 years)—3,496 Hours.

Newark

Total First Year Hourly Burden—640 Hours.

Total First Year Hourly Burden Plus Recurring Cost in First Year—2,470 Hours.

Total Recurring Annual Hourly Burden (per year for 10 years)—1,830 Hours.

The burden estimates for JFK and Newark do not include the time required to participate in the annual auctions. The FAA provides participation hour and cost estimates in its Final Regulatory Evaluation for this rule.

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 (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. The basis for such FAA determination follows.

The final rule most directly affects four scheduled operators at JFK (Delta Air Lines, JetBlue Airways, American Airlines, and United Airlines) and six scheduled operators at Newark (Continental Airlines, American Airlines, United Airlines, Delta Air Lines, U.S. Airways, and Northwest Airlines). These carriers will receive one or more Limited Slots. None of these carriers are small businesses. However, the FAA considered that some small regional operators affiliated with these carriers and using slots provided by these carriers could be affected. Based on a review of the number of employees for each scheduled operator, the FAA

found that only one scheduled operator (CommutAir) at JFK, and none at Newark, are considered small by Small Business Administration size standards (in this case, firms with 1,500 or fewer employees). CommutAir operates under the name Continental Connection for Continental Airlines. Continental Airlines has fewer than 20 operations per day at JFK and therefore neither it nor CommutAir is affected by this rule.

As discussed in more detail in the final rule, several commenters expressed their concern that this rule may adversely affect service to small communities because the rule will make operating at JFK and EWR more expensive, particularly because such communities are served by smaller aircraft with higher per seat costs.

The FAA believes that this rule will provide adequate opportunity for services to small communities because more than 90 percent of slots at JFK and EWR will not be affected, and the remaining less than 10 percent of slots will be auctioned in 2 percent increments over the first five years of the rule. Moreover, once auctioned, a carrier may or may not upgauge a slot. The agency believes that a system whereby upgauging to larger aircraft is completely voluntary decreases the likelihood of a wholesale withdrawal from smaller markets.

There may be a slight reduction in small community service by not dedicating slots for those particular cities, but we believe market conditions and fuel prices are the primary motivation for any reduction in service rather than a consequence of federal action in this rule. We believe market forces will generate appropriate allocations of slots and do not believe it is appropriate to develop a separate class of slots specifically for use to and from small communities.

Using Enhanced Traffic Management System (ETMS) data, the FAA has determined that there are approximately 54 identifiable unscheduled operators at JFK and 61 identifiable unscheduled operators at Newark who could be affected by this rule. While some of these operators may be small businesses, the FAA does not believe they will be significantly impacted by this rulemaking. These operators typically have greater flexibility to adjust operations and carry out very few operations during peak hours compared to scheduled opearators. During peak hours in the summer of 2007, there were fewer than two average unscheduled operations per hour at each airport, whereas the proposed rule would allow 1 to 2 operations per hour. In summary, while the final rule reduces the number of unscheduled operations per hour, it does not significantly affect the overall number of current unscheduled operations that take place at each airport.

Using 2007 Census data, the FAA has also reviewed whether there would be interruptions to service to communities with a population of less than 50,000. We do not know if there will be any service interruptions as a result of the rule. In the IRE, we reviewed population statistics for every city served from JFK and Newark in August 2007 (the base for initial allocation of slots under the proposal) and found none with a population of less 50,000. The ATA, however, identified two cities—Bangor, Maine, and Burlington, Vermont—that it stated fell below 50,000 in population. The FAA notes, however, that the metropolitan areas of these cities are well above 50,000, with Bangor at 91,000 as of 2000 and Burlington at 169,000.

The ATA identified an inconsistency in the definition of small community that was used in the NPRM and the IRE. The FAA concedes that the definition of a small community used in the IRE was too expansive, involving any community served by a small or non-hub airport. The correct definition for this rulemaking is the 50,000 threshold value used in the NPRM.

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

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards or engaging in related activities is not considered as creating unnecessary obstacles to the foreign commerce of the United States, so long as the standards and activities have a legitimate domestic objective, such as the protection of safety, and do not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA notes the rule to establish slots and limited auctions of slot leases at JFK and Newark is necessary for the efficient utilization of the national airspace system, and has assessed the effects of this rulemaking to ensure that the final rule will not impose costs or barriers to international entities within the national airspace system.

Foreign entities at both JFK and Newark will not have any slots classified as Limited Slots. Foreign carriers might benefit from the rule if they choose to participate in the proposed auction to acquire additional slots or to sublease slots in the secondary market. Several foreign carriers further note that a reduction in service to small communities could negatively affect their opportunities to provide a wide variety of services with their U.S. carrier partners. As explained above, the FAA believes that this rule will provide adequate opportunity for services to small communities. Foreign trade will not be adversely affected.

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 final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will 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. FAA received no comments explicitly addressing the documented categorical exclusion. Minor changes have been made to the documentation that was available for the NPRM. 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 will be included in the Docket for this rulemaking. FAA received no comments explicitly addressing the documented categorical exclusion. Minor changes have been made to the documentation that was available for the NPRM.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this rule 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.

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/*; 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 final rule, including economic analyses and technical reports, from the internet through the Federal eRulemaking Portal referenced in paragraph (1).

VII. Regulatory Text

List of Subjects in 14 CFR Part 93

Air traffic control, Airports, Navigation (air).

■ In consideration of the foregoing, the Federal Aviation Administration amends 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.

■ 2. Part 93 is amended by adding Subpart N to read as follows:

Subpart N—John F. Kennedy International Airport and Newark Liberty International Airport Traffic Rules

Sec.

Subpart N—John F. Kennedy International Airport and Newark Liberty International Airport Traffic Rules

§ 93.161 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 John F. Kennedy International Airport (JFK) and Newark Liberty International Airport (Newark).

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

(c) The provisions of this subpart apply to JFK and Newark during the hours of 6 a.m. through 10:59 p.m., Eastern Time. No person shall operate any scheduled arrival or departure into or out of JFK or Newark during such hours without first obtaining a slot in accordance with this subpart. No person shall conduct an unscheduled operation to or from JFK or Newark during such hours without first obtaining a reservation.

(d) A U.S. Air Carrier conducting operations solely under another carrier's marketing control with unified inventory control shall not be considered a separate carrier for purposes of this rule.

(e) The slots assigned under this subpart terminate at 11 p.m. on March 30, 2019.

§ 93.162 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 JFK and Newark.

Baseline operations are those common slots held by a carrier at JFK or Newark on December 9, 2008, that do not exceed 20 operations per day.

Carrier is a U.S. or foreign 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 401, 411 and 413.

Common slot is a slot that is assigned 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 or departure reservations for unscheduled operations at JFK, Newark, and other designated airports.

Limited slot is a slot held every day, the lease for which expires prior to the expiration of this rule for subsequent award by the FAA as an unrestricted slot.

New Entrant is any carrier that is administratively allocated a total of 8 or fewer slots on any day of the week at JFK or Newark, respectively, during controlled hours at any point during the duration of the 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 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 60-minute period.

Scheduled operation is the arrival or departure segment of any operation regularly conducted by a carrier between either JFK or Newark and another point regularly served by that carrier.

Slot is the operational authority assigned by the FAA to a carrier to conduct one scheduled operation or a series of scheduled operations at JFK or Newark on a particular day(s) of the week during a specific 30-minute period.

Summer Scheduling Season begins on the last Sunday of March.

Unrestricted slot is a slot that is awarded 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 JFK or Newark 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.

Winter Scheduling Season begins on the last Sunday in October.

§ 93.163 Slots for Scheduled Arrivals and Departures.

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person shall operate any scheduled arrival or departure into or out of JFK or Newark 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 eighty-one (81) per hour at JFK and eighty-one (81) per hour at Newark. At JFK, the number of slots may not exceed 44 in any 30-minute period, and 81 in any 60-minute period. At Newark, the number of slots may not exceed 44 in any 30-minute period and 81 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.

§ 93.164 Categories of Slots.

(a) *General.* Each slot shall be designated as a common slot, limited slot or unrestricted slot and shall be allocated 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 baseline operations, as determined on December 9, 2008, shall be designated as common slots.

(2) Ten percent of the slots at JFK and Newark on December 9, 2008 not otherwise designated as common slots under paragraph (b)(1) of this section shall be designated as limited 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 § 93.165(c) shall be designated as limited slots until the date of their reallocation by the FAA as unrestricted slots. A carrier may continue to use a limited slot that has reverted to the FAA until the date of its reallocation.

(1) Each carrier with a total number of daily operations at JFK or Newark in excess of its baseline operations will be notified by no later than December 9, 2008 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 determination by December 19, 2008.

(3) The FAA will designate the remaining limited slots initially excluding those hours in which two or more slots have been designated as limited slots by the carriers.

(4) No later than December 29, 2008, 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.

§ 93.165 Initial assignment of slots.

(a) Except as provided for under paragraphs (b) and (c) of this section, any carrier utilizing operating rights allocated under the Order limiting operations at JFK or the Order limiting operations at Newark as evidenced by the FAA's records, will be assigned corresponding slots in 30-minute periods consistent with the limits under § 93.163(b) and its summer and winter season schedules as approved by the FAA. 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 § 93.163(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 JFK or the Order limiting operations at Newark, 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) Starting January 13, 2009, and every year thereafter through 2013, one-fifth of the total number of Limited slots shall revert to the FAA in accordance with the schedule published under

§ 93.164(c)(4) 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 date of its reallocation by the FAA as an unrestricted slot.

§ 93.166 Assignment of new or returned slots.

(a) This section describes the process by which the FAA assigns new slots, as well as slots returned to the FAA pursuant to the provisions of § 93.170. These slots will be assigned by the FAA to requesting carriers for the summer and winter scheduling seasons.

(b) Requests for the new slots or returned slots or both must be submitted to the Federal Aviation Administration, Slot Administration Office, AGC–200, 800 Independence Avenue, SW., Washington, DC 20591 (Facsimile: (202) 267–7277; e-mail: *7-awa-slotadmin@faa.gov*), by the deadline as published by the FAA in a **Federal Register** notice for each summer and winter scheduling season. The requesting carrier must submit its entire schedule at JFK and Newark for the particular season, noting which requests are in addition to, or changes from, the previous corresponding season at the respective airports.

(c) Before assigning new or returned slots under this section, the FAA will first accommodate carrier requests to retime slots for operational reasons or to bring the flight time closer to the time originally requested by the applicant carrier in previous corresponding seasons, as reflected in FAA records.

(d) After accommodating carrier requests for retiming of slots, the FAA will assign 50% of the new slots and returned slots to new entrants, unless requests by new entrants constitute fewer than 50% of available slots.

(e) With the remaining available slots, if all requests for slots under this section cannot be accommodated, the FAA will give priority to requests to introduce year-round service or to extend an existing operation to a year-round operation.

(f) Thereafter, the FAA will assign slots considering all relevant factors including:

(1) The effective period of operation;

(2) The extent and regularity of intended use of a slot;

(3) Schedule constraints of carriers requesting slots.

§ 93.167 Reversion and withdrawal of slots.

(a) This section does not apply to unrestricted slots.

(b) A carrier's common slots or limited slots at JFK or Newark revert back to the FAA 30 days after the carrier has ceased all operations at the respective airport(s) 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 temporarily withdrawn for operational need will be withdrawn in accordance with the priority list established under § 93.173 and international obligations.

(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 the respective airport.

(g) Should the Administrator determine that the cap on scheduled operations at Newark or JFK is too high, he may withdraw common slots to reduce the cap. Any such action by the Administrator shall be subject to the notice and comment provisions of the Administrative Procedure Act.

§ 93.168 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. The character of the slot (e.g., common slot) will not change.

(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) Slots may be transferred among a U.S. carrier and another carrier that conducts operations at JFK or Newark 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 § 93.165, 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.

§ 93.169 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) No recipient of the trade may 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.

§ 93.170 Minimum usage requirements.

(a) This section does not apply to unrestricted slots.

(b) Any common slot or limited slot included in a summer or winter season schedule approved by the FAA that is not used at least 80 percent of the time during the period for which it is assigned will be withdrawn by the FAA.

(c) 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.

(d) 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.

§ 93.171 Unscheduled operations.

(a) During the hours of 6 a.m. through 10:59 p.m. Eastern Time, no person may operate an aircraft other than a helicopter to or from JFK or Newark 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 JFK or Newark. Additional information on procedures for obtaining a reservation is available on the Internet at *http://www.fly.faa.gov/ecvrs.*

(b) Reservations, including those assigned to public charter operations under paragraph (d) of this section, will be available to be assigned by the ARO on a 60-minute basis as follows:

(1) At JFK, two reservations per hour between 6 a.m. and 1:59 p.m. and between 10 p.m. and 10:59 p.m. and one reservation per hour between 2 p.m. and 9:59 p.m.

(2) At Newark, two reservations per hour between 6 a.m. and 11:59 a.m. and between 10 p.m. and 10:59 p.m. and one reservation per hour between 12 noon and 9:59 p.m.

(c) The ARO will receive and process all reservation requests for unscheduled arrivals and departures at JFK and Newark. 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 assignment to public charter operations prior to the 72-hour reservation window in paragraph (a) of this section. No more than 25 percent of the reservations available from 12 noon through 9:59 p.m. will be made available to public charter operations under this paragraph.

(1) The public charter operator may request a reservation up to six months in advance of the date of the 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.*

(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 JFK or Newark, aircraft type, and the nature of the operation (e.g., ferry or passenger). 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 assigned, 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.

§ 93.172 Reporting requirements.

(a)(1) No later than September 1 for the summer scheduling season and February 1 for the winter scheduling season, each carrier holding a common slot or limited slot must submit an interim report of slot usage for each day of the applicable scheduling season. (2) No later than 30 days after the last day of the applicable scheduling season, each carrier must submit a final report of the completed operations for each day of the entire scheduling season.

(b) Such reports, in a format acceptable to the FAA, must contain 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, and aircraft type identifier; and

(4) Whether a flight was actually operated.

(c) The FAA may withdraw the slot of any carrier that does not meet the reporting requirements of paragraph (a) of this section.

§ 93.173 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 JFK and Newark. 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.

Issued in Washington, DC, on October 6, 2008.

Robert A. Sturgell,

Acting Administrator.

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