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**14 CFR Part 93
Congestion Management Rule for
LaGuardia Airport; Proposed Rule**

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 93**

[Docket No. FAA-2006-25709; Notice No. 06-13]

RIN 2120-A170

Congestion Management Rule for LaGuardia Airport

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA is proposing a rule to address the potential for increased congestion and delay at New York's LaGuardia Airport (LaGuardia) when the High Density Rule (HDR) expires there on January 1, 2007. The rule, if adopted, would establish an operational limit on the number of aircraft landing and taking off at the airport. To offset the effect of this limit, the proposed rule would increase utilization of the airport by encouraging the use of larger aircraft through implementing an airport-wide, average aircraft size requirement designed to increase the number of passengers that may use the airport within the overall proposed operational limits.

DATES: Send your comments on or before October 30, 2006.

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

- *DOT Docket Web site:* Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.

- *Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- *Mail:* Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-0001.

- *Fax:* 1-202-493-2251.

- *Hand Delivery:* Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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

Privacy: We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. For more

information, see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: To read background documents or comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Molly W. Smith, Office of Aviation Policy and Plans, APO-001, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-3275; e-mail molly.w.smith@faa.gov.

SUPPLEMENTARY INFORMATION:**Comments Invited**

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the Web address in the **ADDRESSES** section.

Privacy Act: Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://dms.dot.gov>.

Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We

may change this proposal in light of the comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a pre-addressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

- (1) Searching the Department of Transportation's electronic Docket Management System (DMS) Web page (<http://dms.dot.gov/search>);
- (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.

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. The FAA interprets its broad statutory authority to ensure the efficient use of the navigable airspace to encompass management of the nationwide system of air commerce and air traffic control.

In addition to the FAA's authority and responsibilities with respect to the efficient use of airspace, the Secretary of Transportation is required to consider several other objectives as being in the public interest, including: Keeping available a variety of adequate, economic, efficient, and low-priced air services; placing maximum reliance on competitive market forces and on actual and potential competition; avoiding airline industry conditions that would tend to allow at least one air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation; encouraging, developing, and maintaining an air transportation system relying on actual and potential

competition; encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry; maintaining a complete and convenient system of scheduled air transportation for small communities; ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service; and acting consistently with obligations of the U.S. Government under international agreements. See 49 U.S.C. 40101(a)(4), (6), (10)–(13) and (16), and 40105(b).

I. Background

A. The High Density Traffic Airports Rule at LaGuardia

The FAA manages congestion and delay at LaGuardia by means of the HDR, which is codified under 14 CFR part 93, subpart K. The HDR took effect in 1969 as a temporary rule, but since it was effective in reducing congestion and delays, it became permanent in 1973.

The HDR establishes limits on the number of take-offs and landings during certain hours at five airports, including LaGuardia.¹ In order to operate during the restricted hours, a carrier needs a reservation, commonly known as a "slot." Slots were initially allocated through airline scheduling committees, operating under then-authorized antitrust immunity, and the airlines would agree to the allocation. After the Airline Deregulation Act in 1978, new entrant airlines formed, and the pre-existing legacy carriers sought to expand their operations. This increased competition made it even more difficult for airlines to reach agreement, and the scheduling committees began to deadlock.

In 1985, a new Subpart S was added to Part 93 by the Department of Transportation that established allocation procedures for slots, including Use-or-Lose provisions and permission to buy and sell slots in a secondary market (50 FR 52195, December 20, 1985). These procedures replaced the scheduling committees.

On April 5, 2000, Congress enacted the Wendell H. Ford Aviation Investment and Reform Act of the 21st Century (AIR–21 or the Act). The Act phases out the HDR at three of the covered airports, with the rule scheduled to terminate at LaGuardia on

January 1, 2007. Additionally, AIR–21 expanded existing operations at LaGuardia by directing the Secretary of Transportation to grant exemptions for certain flights from the HDR's operational limits prior to the HDR's termination at that airport. Specifically, AIR–21 authorized exemptions for flights operated by new entrant carriers or certain flights that would serve Small-Hub and Non-Hub Airports as long as the aircraft being used has fewer than 71 seats.

In phasing out the HDR, Congress recognized the possibility that there could be an increase in congestion and delay at the affected airports. Therefore, under the section that phases out the rule, the Act states 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).

B. Resurgence of Unacceptable Levels of Congestion at LaGuardia

As a result of the AIR–21 legislation, the DOT approved more than 600 exemption requests for flights at LaGuardia. By fall 2000, air carriers had added over 300 new scheduled flights at LaGuardia, with plans to operate more in the coming months.

With no new airport infrastructure or air traffic control procedures, overall airport capacity remained the same while the number of aircraft operations and delays soared. The average minutes of delay for all arriving flights at LaGuardia increased 144%: From 15.52 minutes in March 2000 (the month before AIR–21 was enacted) to 37.86 minutes in September 2000.² The increase in delay as a result of AIR–21 was not limited to delays at LaGuardia. Flights that arrived and departed late at LaGuardia affected flights at other airports and in adjacent airspace as well, and by September 2000, flight delays at LaGuardia accounted for 25 percent of the nation's delays, compared to 10 percent for the previous year.³

Concerned about the accelerating levels of congestion, flight delays, and cancellations and the prospects of reaching gridlock, the Port Authority of New York and New Jersey (Port Authority) attempted to impose a temporary moratorium on new flights at LaGuardia and requested the assistance of the FAA. Using its authority under 49 U.S.C. 40103, and pending the development of a longer term solution,

the FAA published a Notice of Intent in the **Federal Register** on November 15, 2000, announcing its intention to temporarily cap AIR–21 slot exemptions at LaGuardia and to allocate them via a lottery (65 FR 69126, November 15, 2000). The lottery, which was conducted on December 4, 2000, was premised on the imposition of an airfield and airspace capacity management limit of 75 scheduled operations per hour (plus 6 unscheduled operations primarily used by the general aviation community) beginning January 31, 2001 (65 FR 75765, December 4, 2000). This limit still allowed a significant increase in operations at the airport above the regulatory limits, thus serving Congressional objectives while stretching capacity to its practical limits. The number of AIR–21 slot exemptions at LaGuardia was restricted to a total of 159 a day between the hours of 7 a.m. and 9:59 p.m. As a result of the hourly restrictions, the average number of aircraft delays at LaGuardia fell from 330 per day in October 2000 to 98 per day in April 2001.

The December 4, 2000, limits on AIR–21 slot exemptions and the lottery allocation has been extended several times to allow the FAA to explore other options to control delay at the airport. Most recently, the FAA announced in the **Federal Register** a fourteen months extension to the current limits and allocation of slot exemptions at LaGuardia through December 31, 2006 (70 FR 36998, June 27, 2005).

Because LaGuardia airport is relatively close to mid-town Manhattan, many travelers prefer it, and airlines wish to meet that demand by operating many flights to LaGuardia. LaGuardia Airport consistently has been one of most congested airports in the nation. These facts, coupled with the inability to expand the physical airspace and airfield capacity of the airport, makes LaGuardia one of the most constrained airports in our national system. Passenger demand for access to LaGuardia exceeds available airspace and airfield capacity at the airport. This proposed rule aims to maximize the utilization of this airport, without generating unacceptable congestion and delay.

C. Research Into Market-Based and Administrative Alternatives at LaGuardia

Over the past several years, the FAA and the DOT's Office of the Secretary of Transportation (OST) have taken a number of steps to identify and develop a market-based mechanism to allocate limited capacity at LaGuardia.

¹ The limits at Newark were suspended in 1970 and were eliminated at Chicago O'Hare International Airport in July 2002.

² Source: FAA's Aviation System Performance Metrics (ASPM).

³ Calculated from FAA's Air Traffic Operations Network Database (OPSNET).

On June 12, 2001, the FAA published a variety of congestion management alternatives in the **Federal Register**, including the use of auctions, congestion pricing and administrative alternatives, and sought the public's views on the potential use of each of these mechanisms at LaGuardia (66 FR 31731). Due to the September 11, 2001, terrorist attacks, the immediate need to develop a solution at LaGuardia was tempered because of the corresponding decrease in passenger demand. The FAA still received a substantial number of comments. The comments varied—some supported market-based measures, such as congestion pricing, while others recognized that the best solution might incorporate administrative allocation mechanisms. The FAA and OST have evaluated the comments and considered them in our research initiatives. We also have incorporated the views of the industry in the development of both this proposal and the legislation we intend to seek that would permit a market-based means of controlling congestion and delay at LaGuardia.

1. Auction Roundtable

In July 2004, the FAA held a roundtable to discuss the use of auctions to allocate capacity at LaGuardia. The purpose of the roundtable was twofold. First, the roundtable exposed senior FAA and OST officials to auctions and the issues surrounding their potential implementation at LaGuardia. Second, it served as an initial stakeholder meeting to seek comment on the possible use of auctions.

Several participants pointed to issues that would need to be addressed prior to implementing an auction of take-off or landing authorizations at LaGuardia, including the notion of incumbency; associated property rights and their duration, if any; the impact that auctions may have on airport revenues; predictability of the auction outcome; the impact on small communities; and the financial impact on the air carriers and their customers. Because of these concerns, the air carriers that participated in the roundtable appeared largely unenthusiastic about the potential use of auctions at LaGuardia.

However, several advantages to an auction also were noted. For example, auctions effectively allocate scarce resources under market conditions and thus seem less arbitrary in nature than allocating slots under an administrative solution (such as a lottery). Another benefit to auctions is that they rely on markets, which are more robust and responsive to industry changes than administrative regulations. These

potential benefits have been echoed by the Department of Justice in its comments on another congestion management rulemaking involving operations at Chicago's O'Hare International Airport. In its comments, the Department stated that, "a well-designed slot auction would both assign prices and allocate efficiently scarce airport resources, and limit the maintenance or accumulation of market power by individual carriers."⁴

Thus, if the complexities associated with implementing an auction at LaGuardia can be resolved, an auction could provide an economically efficient mechanism for allocating "Operating Authorizations"⁵ at the airport in the future.

2. Congestion Pricing Forum

The FAA arranged a forum in February 2005 to explore the use of congestion pricing at airports. The series of presentations addressed the applicability of congestion pricing to control aviation capacity, with a focus on LaGuardia, and included presentations on the Massachusetts Port Authority's (Massport) congestion pricing proposal for Logan International Airport, as well as highway and energy peak period pricing programs. Several participants believed that Massport's model could not be successfully deployed at LaGuardia because the level of demand at LaGuardia is perceived to be too high to implement a revenue-neutral congestion pricing policy, as adopted at Boston Logan Airport. However, other participants believed a congestion pricing mechanism was feasible and would provide benefits associated with allowing the market to allocate capacity without the need for government imposed slot restrictions.

3. National Center of Excellence for Aviation Operations Research

The FAA and OST also contracted with the National Center of Excellence for Aviation Operations Research (NEXTOR) to conduct research on various proposals to implement at LaGuardia upon the expiration of the HDR. As part of that research, NEXTOR has conducted a number of strategic simulations with industry in an effort to design and assess the potential effectiveness of various allocation

mechanisms. These mechanisms include auctions, congestion pricing, and various administrative measures.

In November 2004, NEXTOR conducted a 2-day simulation of congestion pricing and various administrative measures at LaGuardia. The FAA, OST, several industry stakeholders and airlines attended the workshop. The simulation measured airline responses to a variety of congestion pricing fees and administrative rules.

In February 2005, NEXTOR conducted a second strategic simulation in which it demonstrated how an auction model could be used to allocate capacity. The simulation was structured around a mock auction for arrival and departure slots at LaGuardia. The purpose of this simulation was to familiarize the relevant industry and government communities with auction processes and the specifics of modern slot auction design. The exercise also elicited views from industry and government representatives on the overall policy of using auctions to allocate arrival and departure capacity. The feedback gathered during this simulation exercise has generated further FAA and OST research on auctions. In particular, more work has been done to better anticipate the impact of aligning "slots" with necessary gate space. Additionally, the FAA and OST have worked with NEXTOR to develop auction rules that could incorporate exemptions for service to small communities.

This information will also be incorporated in a legislative proposal to Congress that will seek authority to utilize market-based mechanisms at LaGuardia in the future. Such legislation would be necessary to employ market-based approaches such as auctions or congestion pricing at LaGuardia because the FAA currently does not have the statutory authority to assess market-clearing charges for a landing or departure authorization. If Congress approves the use of market-based mechanisms as we plan to propose, a new rulemaking would be necessary to implement such measures at LaGuardia.

II. Continued Need To Limit Operations at LaGuardia

Today's proposal anticipates the complete phase-out of the HDR at LaGuardia on January 1, 2007, as required by AIR-21. In response, the FAA could simply allow the HDR to expire and to let events run their course without FAA intervention. This approach would permit each individual airline to manage (and potentially

⁴ Comments of the United States Department of Justice in Docket No. FAA-2005-20704. May 24, 2005, pp. 11-13.

⁵ As proposed, an Operating Authorization is the operational authority assigned to an air carrier by the FAA to conduct one scheduled IFR arrival or departure operation each week on a specific day of the week during a specific 15-minute period at LaGuardia.

increase) its own flights. Air traffic control procedures and traffic management initiatives such as ground delay programs, miles-in-trail restrictions, and aircraft re-routing, would help to ensure that any additional flights did not affect air safety. However, the congestion and delays experienced in the wake of AIR-21 flight additions would likely recur if limitations on the hourly operations at LaGuardia were not adopted. Indeed, because the delays in late 2000 resulted from just two types of operations, it is likely that a complete expiration of the HDR would lead to even greater delays absent a regulation designed to avert precipitous growth in operations.

Because the cost of delays is not fully internalized by any individual carrier, both experience and theory suggest that without any constraint, each carrier would, at least initially, continue adding flights despite an unacceptable level of congestion and delay. This was precisely the situation in 2000, and the airport cannot accommodate, nor can the FAA permit, such unrestrained growth at LaGuardia. Delays at LaGuardia have a significant detrimental impact on the rest of the national airspace system, leading to nationwide delay and inefficiency. Because simply allowing the HDR to expire is not a desirable option at LaGuardia, the FAA believes that some regulatory action to limit congestion at the airport is necessary.

LaGuardia cannot realistically expand its runway infrastructure because it borders on Bowery Bay and Flushing Bay. Thus, an airport expansion project like that proposed for Chicago's O'Hare International Airport is not feasible. Because of these groundside constraints, air traffic management improvements such as airspace redesign or changes to separation standards would permit minimal capacity increases at most. Even if these efficiencies can be realized, operating constraints likely still will be needed at LaGuardia because of its physical limitations, including runway and taxiway constraints.

The FAA is committed to ensuring that excessive delays and congestion do not return at LaGuardia after the HDR expires. The FAA and OST are evaluating appropriate market-based mechanisms, such as auctions or congestion pricing, for allocating capacity at LaGuardia over the long-term. The FAA currently does not have full legislative authority to employ such mechanisms at LaGuardia or at other airports, although the Port Authority could currently implement revenue-neutral congestion pricing or other

mechanisms regarding operating rights so long as such changes did not require a fee or assessment by the Federal Government and the Port Authority's program otherwise would be reasonable, nonarbitrary and nondiscriminatory; would not create an undue burden on interstate or foreign commerce; would maintain the safe and efficient use of the navigable airspace; would not conflict with any existing Federal statute or regulation including Federal grant agreements; and would not create an undue burden on the national aviation system. As discussed above, Massport has developed a revenue-neutral congestion pricing program for use at Boston's Logan airport;⁶ however, we do not believe that a revenue-neutral policy would be effective at LaGuardia. The demand for access at LaGuardia is so high that carriers may simply pay any fee imposed in a revenue-neutral model rather than changing their practices.

Consequently, we are seeking the legislative authority to conduct auctions or congestion pricing at LaGuardia in the future. If Congress approves the use of market-based mechanisms, a new rulemaking would be necessary to implement such measures at LaGuardia.

The FAA has broad authority under 49 U.S.C. 40103 to regulate the use of the navigable airspace of the United States. This authority is exclusive to the FAA. Section 40103 authorizes the FAA to develop plans and policy for the use of navigable airspace and to assign the use that the FAA deems necessary to 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. The FAA interprets its broad statutory authority to ensure the efficient use of the navigable airspace to encompass management of the nationwide system of air commerce and air traffic control. AIR-21, while phasing out the HDR, did not strip the FAA of its authority to place operating limitations on air carriers to preserve the efficient utilization of the National Airspace System (NAS). Indeed, the FAA has, out of necessity, restricted the number of exemptions to the HDR since 2001 at LaGuardia, and no one has challenged its authority to do so at that airport.

In addition to the FAA's authority and responsibilities over the efficient use of airspace, the Secretary of Transportation is required to consider several other objectives as being in the public interest, including: Keeping available a

⁶ The FAA has not had the occasion to issue a final opinion on Massport's program since the program has not yet been implemented.

variety of adequate, economic, efficient, and low-priced air services; placing maximum reliance on competitive market forces and on actual and potential competition; avoiding airline industry conditions that would tend to allow at least one air carrier unreasonably to increase prices, reduce services, or exclude competition in air transportation; encouraging, developing, and maintaining an air transportation system relying on actual and potential competition; encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry; maintaining a complete and convenient system of scheduled air transportation for small communities; ensuring that consumers in all regions of the United States, including those in small communities and rural and remote areas, have access to affordable, regularly scheduled air service; and acting consistently with obligations of the U.S. Government under international agreements. See 49 U.S.C. 40101(a)(4), (6), (10)-(13) and (16), and 40105(b).

III. Summary of Proposed Rule

The FAA proposes to cap hourly operations at LaGuardia. Under the proposed rule, the FAA would limit the number of scheduled flight arrivals and departures at LaGuardia Monday through Friday from 6:30 a.m. to 9:59 p.m. and Sunday from noon to 9:59 p.m. Similar limits would be placed on unscheduled arrivals and departures, excluding helicopters, conducted under instrument flight rules (IFR). The FAA would create "Operating Authorizations" according to the hourly limit on operations of 75 scheduled operations and 6 "Reservations" for unscheduled operations. The Operating Authorizations would be allocated to carriers at the airport based on historic usage subject to adjustments required to meet the proposed limits. The Operating Authorizations would be allocated in 15-minute increments (i.e., 6:30 a.m. through 6:44 a.m., 6:45 a.m. through 6:59 a.m.), with specified arrivals and departures, in order to minimize congestion from schedule peaking. The FAA believes that the relationship of schedule peaks and delays at LaGuardia is particularly significant since the current airport demand approaches the airport's optimal, good weather capacity. Reservations would be allocated on a half-hourly basis using a reservation system similar to the one currently in effect for unscheduled flights at the high density airports, Chicago O'Hare International Airport,

and at airports under special traffic management programs, whereby an operator may obtain a Reservation beginning 72 hours in advance of the proposed operation.

To encourage efficient use of scarce airspace, holders of Operating Authorizations would be required to meet an airport-wide average aircraft size target annually. Passenger demand for access to LaGuardia airport exceeds the number of passengers being accommodated today. Although the airport cannot currently, or in the foreseeable future, accommodate a greater number of flight operations, the airport's terminal and other groundside facilities could accommodate a greater number of passengers on the existing number of flights.

The use of commuter equipment (aircraft with fewer than 71 seats) arriving at LaGuardia from medium and large hub airports has increased by more than 50 percent since August 2001.⁷ This trend has resulted in the underutilization of airport facilities at LaGuardia.

For example, on April 19, 2005, there were 16 flights to Baltimore, MD (a large hub) on aircraft with an average of 38 seats. Similarly, on the same day, there were 44 operations to Raleigh-Durham, NC (medium hub) on aircraft with an average of 50 seats, and 20 flights to Philadelphia, PA (large hub) on aircraft with an average of 58 seats. While we recognize that service to non-hub and Small-Hub Airports may only support commuter aircraft, serving medium and large hub airports repeatedly throughout the day with the smaller gauge aircraft does not maximize passenger throughput or the use of a constrained resource. For this reason, the proposed rule explicitly encourages the use of larger aircraft within the constrained operating environment.

Through this rule the FAA therefore proposes to encourage airlines to use larger aircraft, on average, than are being operated at the airport now (and in the recent past) so that a larger share of consumer demand will be satisfied. Compliance with the airport-wide target would be enforced through a Use-or-Lose provision, which would require carriers to report the average number of seats offered on all non-exempt Operating Authorizations each year.⁸ Each carrier's annual "average seat size" would have to be equal to or greater

than the airport-wide target or the FAA would withdraw Operating Authorizations from the carrier. The FAA first would withdraw the Operating Authorization(s) operated using the smallest aircraft. The number of Operating Authorizations withdrawn would depend on how far off the target the carrier's operations were over the preceding year. If removing one Operating Authorization was sufficient to raise the carrier's average seat size to the target level, only that Operating Authorization would be withdrawn. If more withdrawals were needed in order to meet the target, additional Operating Authorizations would be withdrawn until the target was met.⁹

While an important goal of this rule is to promote efficiency at LaGuardia, another objective is to avoid the elimination of service to the small and non-hub communities that rely on service at the airport. Accordingly, the FAA proposes that Operating Authorizations used for service to certain small and non-hub communities are exempt from the target aircraft size requirement.

The proposed rule would assign expiration dates to all Operating Authorizations. Operating Authorizations would be allocated in 2007 with expiration dates ranging from 2010 through 2019. As Operating Authorizations expire they would be reallocated with a renewed life span of ten years. Establishing a finite lives for Operating Authorizations can improve efficiency at LaGuardia over time by encouraging all airlines to maximize the use of a scarce resource and to maximize their investment at the airport. The authorization's finite life would influence carriers to recognize the present value of operating at LaGuardia because an Operating Authorization ultimately expires, at which point it would be worth nothing to the existing holder. If a carrier is not able to use an Operating Authorization profitably, the carrier may sell the authorization on the secondary market rather than hold the authorization and operate it at a loss. This incentive, coupled with the Use-or-Lose provision

which enforces usage of Operating Authorizations, would promote efficient use of scarce airport resources because the carriers that value them the most will use the Operating Authorizations.¹⁰

IV. The Proposal To Limit Operations at LaGuardia

A. Initial Allocation of Operating Authorizations

Upon expiration of the HDR on January 1, 2007, slots will no longer exist at LaGuardia. Under today's proposed rule, the FAA would place an hourly cap on operations at LaGuardia to prevent unacceptable delay that would impact the National Airspace System. The proposed number of operations is consistent with the cap that has been in place since January 2001—75 scheduled operations per hour. The FAA's procedures for allocating AIR-21 slot exemptions since January 31, 2001, accommodate some new entrant carriers' operations above the hourly limit. Under this proposed rule, these operations would be "grandfathered" within the allocated hour. However, any Operating Authorizations that revert to the FAA in those hours would be moved to an hour with fewer than 75 operations prior to reallocation and assigned within the adopted 15 and 30 minute limits. Arrival and departure authorizations would be distributed in fifteen-minute time increments, and Reservations would be limited to six per hour.

The existing cap at LaGuardia represents the FAA's estimate of the maximum number of operations that can be accommodated at the airport with its current configuration and without causing excessive additional congestion and delay. The FAA is not proposing to increase the cap at this time, because it is premised on favorable weather conditions. Furthermore, even with the existing cap of 75 scheduled and 6 unscheduled operations per hour, LaGuardia has consistently been one of the top five delayed airports in the United States. In fiscal year 2005, LaGuardia ranked as the third most delayed airport in the

⁹ For example, if the airport-wide target was 100, and a carrier's average seat size over all its Operating Authorizations was 99 seats then the air carrier would not have met the "target" and FAA would withdraw the Operating Authorization(s) that used the smallest aircraft. If one Operating Authorization was withdrawn and the air carrier's average aircraft size was re-calculated to equal 100 seats or more, that carrier would only lose a single Operating Authorization. If the re-calculation did not result in an average aircraft size of 100 seats or more, the FAA would withdraw a second Operating Authorization. This process would be repeated until the carrier's average aircraft size was equal to or greater than the "target."

¹⁰ The FAA has also proposed a congestion management rule at Chicago O'Hare (Docket No. FAA-2005-20704). This proposed rule differs from that which was proposed at O'Hare because the operational characteristics at LaGuardia and O'Hare are significantly different. The primary differences between these two proposed rules are (1) that the rule at LaGuardia would not be temporary (as is anticipated at O'Hare) because increased capacity is not expected at LaGuardia, (2) Operating Authorizations at LaGuardia would expire and be reallocated, and (3) air carriers would be required to meet an airport-wide "target" aircraft size at LaGuardia.

⁷ Source: OAG, August 2001 and August 2005.

⁸ Average seat size would be equal to the total number of seats offered over the year divided by the total Operating Authorization days in the year. For further detail on the average seat size calculation see the "Use or Lose Requirements" section in the pages below.

nation, with only 71 percent of operations arriving on time.¹¹

Operating Authorizations and Reservations would not be required on Saturdays or Sunday mornings, as there is a significant drop in traffic on those days, and we have not experienced nor do we expect to experience excessive congestion during those times. However, the FAA would consider additional rulemaking to cap operations on those days if traffic and delays become unacceptable.

Although operations would be kept at the current level of service at LaGuardia, the FAA would have the authority under this proposal to retain expired and returned Operating Authorizations, or to retime them to less congested periods, if necessary to reduce congestion and delays. Operational or navigational improvements could mitigate the need to retain or retime expired or returned Operating Authorizations, and the FAA believes that such efficiency enhancements may be possible. However, this authority would enable the FAA to take appropriate action against growing delay and to manage capacity over the life of this rule.¹²

1. "Grandfather" Provision

Operating Authorizations initially would be grandfathered to each carrier at LaGuardia operating slots and slot exemptions based on schedules as of October 1–6, 2006, provided that the published schedules are consistent with the 15 and 30 minute limits in this proposal. Since carriers are currently able to schedule flights anytime within the 30-minute slot window, these schedules may contribute to the current congestion and delays at the airport because this practice occasionally allows operations to exceed the airport's capacity. This is particularly apparent in the peak morning and early evening periods. Further, because we will use October 1–6, 2006, schedules, which are not currently finalized, there is potential for the 15-minute schedule peaks to increase. One objective of this rule is to

improve operational performance at the airport, and we do not believe it would be prudent to grant historic status to schedule levels that are not realistic.

While one way to improve performance would be to reduce the permitted number of hourly scheduled and/or unscheduled operations, we are proposing instead to spread demand in certain peak periods. If it is necessary to de-peak the October 1–6, 2006 schedules to meet the 15 and 30 minute limits in this proposal, we do not propose to require any carrier to reduce overall hourly operations below its initial base or to operate in a different hour from the hour allocated under the HDR. To achieve the necessary de-peak, the FAA proposes to call for voluntary measures to reallocate the grandfathered Operating Authorizations to less congested time periods within the same hour or proposes an administrative mechanism such as a lottery. We seek comment on these options.

In the event that the HDR expires prior to the publication of a Final Rule, the FAA would continue to rely on the October 1–6, 2006 timeframe as the basis for future grandfathering of aircraft Operating Authorizations. If a carrier were using a slot that is "held" by another carrier, the Operating Authorization would be grandfathered to the carrier that actually holds the slot.¹³ Alternatively, if a carrier were using a slot that is held by an entity that is not a certificated carrier, the operating carrier would be grandfathered the Operating Authorization. The FAA proposes grandfathering operating rights to carriers in an effort to preserve service to communities with existing service at LaGuardia and to minimize disruption at the airport and to the traveling public. Although the initial "grandfathering" of Operating Authorizations to incumbent carriers does not provide new entrant carriers with immediate access to the airport, other aspects of this rule, such as finite Operating Authorization lives, would give those carriers not already operating at LaGuardia access to the airport as

Operating Authorizations expire and are reallocated.

2. Finite Operating Authorizations

Under the proposed rule, Operating Authorizations would have finite lives. Operating Authorizations would be allocated initially in 2007 with an expiration date ranging from the year 2010 through 2019. The initial authorizations would be distributed based on actual operations and FAA slot allocation records for LaGuardia by scheduled carriers as of the week October 1–6, 2006. Operating Authorizations would then be divided into regular Operating Authorizations and Operating Authorizations that are exempt from the minimum airport seat targets. Each authorization would then be assigned an expiration date using the method discussed below (see "Schedule of Expiration Dates for Grandfathered Operating Authorizations"). The method for determining when initial allocations expire would ensure that the expiration of Operating Authorizations is evenly distributed among all carriers so that no carrier loses a disproportionate number of Operating Authorizations at any one time.

Operating Authorizations that are initially allocated in 2007 would be granted a life of three to thirteen years. The fourth year after the rule is in effect (2010), 10 percent of the authorizations would expire and be reallocated with a renewed ten-year life. Each year thereafter, 10 percent of the Operating Authorizations would expire and be reallocated for 10 years.

This reallocation approach should encourage dynamic access to air services at LaGuardia. Determining the percentage of capacity that should be subject to reallocation annually requires establishing a balance between exposing airport access to market forces, providing access for new entrants, and preserving stability at the airport. The first three years after the initial grandfathering in 2007 would provide incumbent carriers with a degree of certainty regarding operations at the airport. The FAA believes that after 2009, use of ten-year operating lives would strike an appropriate balance between very large annual withdrawals of Operating Authorizations (which could make it less attractive for carriers to develop service at the airport) and very slow (or no) turnover of Operating Authorizations (which could result in barriers to entry to the airport). Operating Authorizations need to expire at varying times so that air service at LaGuardia remains stable even as some authorizations are subject to reallocation. We expect that any

¹¹ Source: ASPM. The Inspector General's FY 2006 Top Management Challenges also recently highlighted the fact that LaGuardia Airport is severely delayed. The report points out that in the summer of 2005 LaGuardia Airport ranked as the fifth most delayed airport in terms of percentage of delayed flights and had the longest average minutes of delay, with an average of 70.03 minutes of delay (p. 23).

¹² The FAA has determined that delays are not so excessive that it is necessary to reduce the hourly cap at the airport at the outset of this proposed rule but there would be some schedule depeaking required to meet the proposed 15-minute limits. If the FAA reduced hourly operations, this would impede current service levels and disadvantage the carriers as well as the traveling public.

¹³ A slot "holder" is the air carrier that has operational authority, assigned by the FAA, to conduct scheduled arrival or departure operations at LaGuardia on a particular day of the week during a specific time of the day. Each FAA slot under the HDR has both a "holder" status and an "operator" status. The "holder" status typically reflects long-term slot rights and does not need to be an air carrier. The "operator" status reflects which particular carrier is authorized to utilize a slot on a particular day. Operator status commonly differs from holder status to reflect the assignment of slots to a commuter affiliate or partner airline, the lease or transfer of slots for a defined period of time, or one for one trades or swaps of slots with other carriers to accommodate schedule changes.

reallocation process adopted through subsequent rulemaking would provide sufficient lead time for an orderly schedule planning process by the impacted carrier(s). We invite comments and analysis on the appropriate lifespan of Operating Authorizations.

If carriers were granted perpetual operating rights they may not have sufficient incentive to sell or lease Operating Authorizations on the secondary market to a competitor placing a higher value on their use. The expiration and reallocation of Operating Authorizations should drive carriers to maximize the value of their authorization because the authorization would no longer represent an infinite investment interest. The revolving allocation process also would provide new entrant airlines and incumbent airlines wishing to expand service at LaGuardia the opportunity to acquire Operating Authorizations at LaGuardia because there would be a new stock of authorizations available each year after 2010. Establishing finite life for Operating Authorizations also meets the Department's mandate of "placing maximum reliance on the competitive market forces and on the actual and potential competition in airline markets."¹⁴

The first Operating Authorizations would not expire at LaGuardia until 2010. The FAA is planning to seek legislative authority to provide the opportunity for market-based solutions to address congestion at LaGuardia. Should the agency receive this authority, a market-based process would be the agency's preferred reallocation methodology, and we would issue a proposed rule to implement measures

for redistributing expired Operating Authorizations at that time.

3. Schedule of Expiration Dates for Grandfathered Operating Authorizations

On January 1, 2007, when the Operating Authorizations initially are allocated to the carriers, the FAA also would establish a schedule for when each Operating Authorization would expire. This procedure for assigning rolling expiration dates would only occur one time, at the initial grandfathering of Operating Authorizations, because as the grandfathered Operating Authorizations expire each one would be reallocated with a 10-year life.

All "grandfathered" Operating Authorizations would have a minimum life of 3 years. Beginning in 2010, 10 percent of the total Operating Authorizations allocated to all carriers would be withdrawn annually and then redistributed. The life of each "grandfathered" Operating Authorization, anywhere from three to 13 years, would be determined using the methodology explained below.

Under the expiration schedule, each carrier's holdings of Operating Authorizations would satisfy two conditions: (1) The average "life" of the Operating Authorizations would be approximately the same for all carriers; and (2) expiration of Operating Authorizations would be staggered so that no carrier would lose a disproportionate number of Operating Authorizations in a given time period.

In order to assign expiration dates to "grandfathered" Operating Authorizations the FAA would segregate each carrier's schedule. Non-hub and Small Community Operating Authorizations (service to Small-Hub or

Non-Hub Airports) would be separated from the other Operating Authorizations. All Operating Authorizations would be assigned a scheduled expiration date, but segregating the authorizations should ensure that a disproportionate number of Small Community Operating Authorizations do not expire any given year.

Each carrier would be entitled to authorization life (beyond 2009) on average equal to 5.5 years for the Operating Authorizations that they hold. The average life of Operating Authorizations would be equal to 5.5 years because that is the arithmetic mean between one and ten years of life beyond 2009. (If Operating Authorizations expired over 20 years then 5 percent of the Operating Authorizations would expire each year and the average "life" of an Operating Authorization would be 10.5 years.)¹⁵ The expiration dates of the authorizations in each quarter-hour would be assigned as follows:

- (1) The number of Operating Authorizations is equal to the average number of "slot and slot exemption" operations held under the HDR in each quarter-hour time period;
- (2) The average remaining years of life (beyond 2009) for all authorizations is roughly 5.5 years; and
- (3) The total years of remaining life among all authorizations would be distributed so that 10 percent of the total Operating Authorizations at the airport expire each year.

The following example illustrates how an individual carrier's Operating Authorizations would be assigned expiration dates in each quarter-hour time period.

ALLOCATION CARRIER A'S COMMERCIAL OPERATING AUTHORIZATION EXPIRATION DATES

Time window	9:00–9:14	...	14:00–14:14
Carrier A's Operating Authorization (OA) Holdings	4 OAs		2 OAs
Expiration Dates	OA 1—expiration in 2 years. OA 2—expiration in 3 years. OA 3—expiration in 8 years. OA 4—expiration in 9 years. Average = 5.5 years.		OA 1—expiration in 2 years. OA 2—expiration in 9 years. Average = 5.5 years.

In this example, Carrier A has 4 slots in the 9:00 to 9:14 time period and 2 slots in the 14:00–14:14 time period. The carrier would initially be grandfathered these 6 operations (in the

same time periods) as Operating Authorizations under this rule. On average, these new authorizations would have 5.5 years of life remaining after 2009. An equitable allocation for

this carrier's 9:00–9:14 Operating Authorizations that would average 5.5 years of life would be the following years of remaining life beyond 2009: 2, 3, 8, and 9. In this case the four

¹⁴ Federal Register, Vol. 70, No. 57 page 15523: "Congestion, Delay Reduction and Operating Limitations at Chicago O'Hare Airport."

¹⁵ For 10 year Operating Authorizations the average "life" would be 5.5 years. The average

"life" is calculated as follows: (Year 1*10%) + (year 2*10%) + (year 3*10%) + (year 4*10%) + (year 5*10%) + (year 6*10%) + (year 7*10%) + (year 8*10%) + (year 9*10%) + (year 10*10%) = 5.5 years (the first Operating Authorizations expire in 2010

so their "life" after 2009 is zero years. The last Operating Authorizations to expire from the initial grandfathering will expire in 2019 so their "life" is ten years.

operating authorizations would expire at the end of 2011, 2012, 2017, and 2018. Likewise, an equitable allocation for Carrier A's 14:00–14:14 Operating Authorizations would be 2 years and 9 years; therefore these Operating Authorizations would expire in 2011 and 2018.¹⁶ It should be noted that the allocation in this case would depend on: (1) Satisfying this carrier's existing number of both arrival and departure authorizations in each quarter-hour of the day; (2) satisfying all other carriers' existing operations in that quarter-hour; and (3) ensuring that 10 percent of all authorizations expire each year. The FAA is developing a programming tool to solve this allocation process.¹⁷

The same process would be repeated in order to assign expiration dates to the Non-hub and Small Community Operating Authorizations.

The programming tool would use two objective functions to guide the allocation process. The first measures the discrepancy between the total of all authorization lifetimes allocated to each carrier in a quarter-hour and a presumed preferred distribution based on that carrier's current holdings. The second measures the discrepancy between the total of all authorization lifetimes allocated to each carrier over the entire day and the presumed preferred total for the day. By defining two objective functions the procedure is able to compensate in a later period for any discrepancies from the ideal in an earlier period.

B. Congestion Management Upgauging Rule at LaGuardia

1. Average Aircraft Size

To encourage efficient use of scarce air traffic system capacity at LaGuardia, the FAA, in consultation with the Port Authority, intends to set an airport-wide target for the average aircraft size used by carriers on scheduled Operating Authorizations. The size of an aircraft would be measured by the number of seats that are offered for sale on the aircraft. The target for average fleet seat capacity would be based on a passenger throughput target for the airport, based on the limitations on various terminal and ground facilities to handle

passengers. Thus, the target would be based on engineering measures of the capacities of the ground facilities. The target would be phased in so that carriers at LaGuardia would have sufficient time to make adjustments to their fleets and service routes. The target also needs to be consistent with safety issues associated with runway length, takeoff performance, and landing performance.

The proposed target would range from 105 seats to 122 seats per aircraft depending on which alternatives for the proposed exemptions for Non-Hub and Small-Hub Airport services is adopted, as explained below in the discussion of more options. On January 1, 2008, one year after the Final Rule is in effect, carriers would have to report their use of Operating Authorizations over the preceding year.¹⁸ However, the "target" would not be enforced until the following year, January 1, 2009. At that point, any carrier that fails to meet the "target" would be subject to the provisions outlined in the Use-or-Lose requirement. The FAA believes that this phase-in period provides carriers a sufficient amount of time after publication of the Final Rule to adjust their operations as necessary to meet the airport-wide target. An FAA required average aircraft size target would encourage efficient use of the airport facilities by increasing passenger throughput at LaGuardia and by providing incentives for more efficient use of the airport's physical infrastructure.

The preference for larger aircraft is a special approach to a unique situation at LaGuardia. Demand at LaGuardia exceeds the airport's capacity for flight operations throughout the day, and there is no prospect for any significant increase in capacity for aircraft operations at the airport because of its physical limitations. On the other hand, the airport's groundside facilities can handle more passengers than now use the airport.¹⁹ Promoting larger aircraft is the only means to increase passenger access to LaGuardia. Accordingly, in these limited circumstances, the increase in passenger throughput can be considered as a measure of efficiency of the use of airspace, and is within the FAA's authority under 49 U.S.C.

¹⁸ Reporting requirements are discussed in the Use-or-Lose section in the pages below.

¹⁹ According to the Port Authority's 2004 Airport Traffic Report, 24.5 million domestic and international passengers flew through LaGuardia in 2004. In various forums the Port Authority has indicated that approximately 28.5 million passengers could be accommodated at the airport on existing facilities and infrastructure.

40103(b) to establish regulations for the efficient use of airspace.

The upgauging policy proposed for LaGuardia is based on the FAA's authority for efficient management of airspace under 49 U.S.C. 40103. This limited application of an upgauging policy under the FAA's airspace management authority is unrelated to airport proprietary authority. The FAA's exercise of its statutory authority for efficient airspace management does not affect the obligation of airport sponsors under Airport Improvement Program (AIP) sponsor assurances to provide access to all types, kinds, and classes of aeronautical use on reasonable and not unjustly discriminatory terms.

The average aircraft size target would be monitored on an annual basis, which would afford carriers the business flexibility to meet the overall average fleet goal with whatever combination of aircraft they determine is right for each route and service over the course of the year. Each year, carriers would be required to operate, on average, aircraft with at least as many seats as specified by the target aircraft size or they would lose one or more Operating Authorizations.

Every twelve months, the FAA, after consultation with the Port Authority, would re-evaluate the target and modify it as necessary to account for changes in the airport's operations or modifications to the capacity at the airport. For example, if gate usage requirements change or airport infrastructure is developed that allows more efficient use (e.g., terminal modifications), the target could be adjusted upward. In fact, the effectiveness of this rule could be augmented by sponsor gate use policies that maximize the potential of the infrastructure. Alternatively, if the operations at the airport were negatively impacted due to an overly optimistic target, the FAA would have the ability to adjust the target downward. Because the target affects carrier planning of fleet mix, routes, staffing requirements, and gate usage, the FAA would limit target increases to no greater than a 3-seat increase in any year.²⁰ On the other hand, a decrease in the "target" would likely only occur if it were necessary to correct unforeseen problems that result from an inflated "target." Carriers would not be penalized from operating aircraft that are larger than the airport-wide target, so a decrease in the target

²⁰ An annual increase to the target aircraft size of up to 3 seats per year provides sufficient flexibility to adjust the target, if necessary. If it were determined that a more significant target increase were appropriate in any given year, FAA would publish the proposed target increase in the **Federal Register** and seek comments on the proposed target.

¹⁶ This illustration provides one possible distribution of expiration dates for the given Operating Authorizations although not the only possible expiration schedule; several combinations of expiration dates could generate the same "remaining life" outcome of 5.5 years.

¹⁷ Anomalies could occur in order to balance these criteria. Rather than 10% of Operating Authorizations expiring in a particular quarter hour it might be 10% plus or minus 1% in order to get the proper total integrated number of Operating Authorizations.

is not expected to have a negative impact on carriers.

To assess the impact of upgauging at LaGuardia, NEXTOR has conducted simulations that examine the behavior of the airport runway, taxiway, and gate operations in the presence of a "high-demand" schedule when 25 percent of the regional jets are upgauged to narrow-body jets. By extending several Official Airline Guide (OAG) schedules to a representative "high-demand" arrival and departure schedule, NEXTOR analyzed the impact of upgauging using Total Airport & Airspace Modeler (TAAM) for LaGuardia. Experts from the FAA air traffic control tower and representatives from the Port Authority validated the operational assumptions regarding gate, taxiway, and runway utilization parameters used in the TAAM simulation model. Results show that representative upgauging by the airlines from regional jets to narrow-body jets could result in increased passenger throughput without negative impact on LaGuardia airport operations, flight delays or passenger delays.

2. Services Not Subject to the Average Aircraft Size Target

a. *Baseline Operations.* Each carrier would be granted a "baseline" of up to 10 Operating Authorizations per day that would not be subject to the target aircraft size requirement in this proposed rule.²¹ The FAA has tentatively determined that each carrier should be assessed a minimum number of takeoffs and landings that are not at risk should its overall operations not meet the airport-wide target. While that number should be sufficiently large to permit minimal fleet and route flexibility, it should not overshadow the goal of increased throughput. A baseline of 10 Operating Authorizations per day should provide carriers with a stable base of operations, minimizing the disruption on carrier schedules and operations at the airport while not compromising the goal of increased passenger throughput at the airport. Each year, carriers would notify FAA which of their Operating Authorizations they intend to designate as "baseline" operations, and these operations would not be subject to the target and Use-or-Lose provisions of the rule based on average aircraft size target.

A baseline is particularly important for carriers that have operated at LaGuardia for decades and developed

²¹ Carriers that have 10 or fewer Operating Authorizations would not be subject to the airport target since all their Operating Authorizations would be considered "baseline" operations.

their networks to include service at the airport. Similarly, carriers with limited ability to adjust their fleet size would be assured that their baseline operations would not be at risk of being withdrawn for non-compliance with the target aircraft size requirement. New entrants and carriers with a limited number of Operating Authorizations at LaGuardia may not have much fleet versatility at the airport, particularly if they do not have excess over-night parking and gate space that can be used to interchange aircraft. Although the airport target would not bind baseline operations, carriers would not be restricted from operating aircraft equal to or larger than the target aircraft size with these baseline Operating Authorizations.

b. *Non-Hub and Small-Hub Airport Services.* While a primary goal of this rule is to promote efficient use of the airport, the DOT's mandate to consider the public interest requires us to encourage the maintenance of scheduled services to small communities. Congress recognized this public interest when it required exemptions from the HDR in AIR-21 for small community service. Because regular demand to and from LaGuardia from these communities may not be sufficient for a carrier to meet the airport-wide target,²² some type of relief may be needed.

In an effort to preserve service to these communities, the FAA is proposing to create a separate pool of Operating Authorizations, to be used to provide service to non-hub and small-hub communities, that would be excepted from the target aircraft size requirement. Unlike the HDR or the AIR-21 slot exemption provisions, air carriers would not be limited to operating aircraft of a certain size.²³ Instead, carriers with Non-Hub and Small-Hub Airport operations would have the flexibility to fly aircraft of whatever size they want to these communities.

The FAA requests comments on the relative merits of three non-hub and small-hub options, as well as any combination of the three:

(1) The FAA would create a pool of Operating Authorizations for service to Non-Hub Airports. These Operating Authorizations would be excused from the target aircraft size requirement. The pool of non-hub Operating

²² Operations to these communities are typically on smaller-sized aircraft.

²³ There are several HDR slot categories that limit aircraft size. For example, Commuter Turboprop Slots require aircraft with less than 75 seats; Commuter Turbojet Slots limit seats to 55 or less; and AIR-21 Small Hub/Non-Hub Airport exemptions require aircraft with 70 seats or less.

Authorizations would be based on the service level to Non-Hub Airports during the week of October 1-6, 2006; although any Non-Hub Airport would be eligible for service under this target exemption.²⁴

(2) The FAA would create a pool of Operating Authorizations for service to Non-Hub Airports and all Small-Hub Airports within 300 miles of LaGuardia²⁵ ("Local Small Communities"). These Operating Authorizations would not be subject to the target aircraft size requirement. The pool of Non-Hub and Local Small Community Operating Authorizations would be based on the service level to Non-Hub and Local Small Communities during the week of October 1-6, 2006. However, any Non-Hub Airport Small-Hub Airport within 300 miles of LaGuardia would be eligible for service under this target exemption.

(3) The FAA would create a pool of Operating Authorizations for service to Non-Hub Airports, Small-Hub Airports that have existing service at LaGuardia, and Small-Hub Airports within 300 miles of LaGuardia ("Local Small Communities"). The pool of Non-Hub and Local Small Community Operating Authorizations would be based on the service level to Non-Hub and Small-Hub Airports during the week of October 1-6, 2006. However, any Non-Hub Airport or Small-Hub Airport would be eligible for service under this target exemption.

Under the first option, the FAA would exclude operations arriving and departing from Non-Hub Airports from the proposed target aircraft size requirement. The number of Operating Authorizations that would be excluded from the target for Non-Hub Airport service would be based on level of operations to non-hub cities during the week of October 1-6, 2006.²⁶ Although we cannot fully anticipate what may be the level of operations for October 1-6, 2006, we believe the levels during the twelve month period of April 2004 through March 2005 are representative. Over the twelve-month period of April 2004 through March 2005 there was an

²⁴ A Non-Hub Airport is a commercial service airport that has more than 10,000 annual passenger boardings but less than 0.05% of the total United States annual passenger boardings.

²⁵ Small-Hub Airports are locations with at least .05%, but less than .25% of annual passenger boardings. Small Hub Airports that are within 300 miles of LaGuardia and have existing service include: Albany, Burlington, Portland, Richmond, Rochester, Syracuse, and Newport News/Williamsburg. Source: T-100 Data, April 2004-March 2005.

²⁶ Nantucket, Bangor, Charlottesville, Hyannis, Wilmington, Ithaca, Lebanon, and Martha's Vineyard are Non-Hub Airports with existing service at LaGuardia. Source: T-100 Data, April 2004-March 2005.

average of forty-five operations arriving and departing to Non-Hub Airports per day.²⁷ Although the pool of Operating Authorizations that would be excluded from the target aircraft size requirement would remain fixed, any Non-Hub Airport could be served through these target exclusions. Additional flights to or from these non-hub cities (beyond the fixed number of Operating Authorizations that are excluded from the target) would be subject to the target aircraft size requirement. This approach maintains a level of service to Non-Hub Airports (that typically do not support operations on large aircraft) while preserving the possibility for other Non-Hub Airports that do not currently have service at LaGuardia to gain this same access to the airport.

The pool of Operating Authorizations that would be excluded from the target for service to non-hub communities would be allocated in the same manner as the other Operating Authorizations. Air carriers currently providing service to non-hub communities would be allocated Operating Authorizations for "Non-hub" service at the October 1–6, 2006, level. If an air carrier with a Non-hub Operating Authorization wanted to sell or lease the Operating Authorization in the secondary market, it could do so, but the Operating Authorization would have to be sold or leased as a "Non-hub" Operating Authorization. Therefore, the pool of "Non-hub" exemptions would remain fixed throughout the life of the rule.

The second option is similar to the first; however, it provides a larger pool of Operating Authorizations that would be excused from the average aircraft size target. The pool of Operating Authorizations in this option would be equivalent to the October 1–6, 2006, level of service to Non-Hub Airports and to Small-Hub Airports within 300 miles of LaGuardia.²⁸ Over the twelve-month period of April 2004 through March 2005 there was an average of 121 operations arriving and departing to these airports per day.²⁹ Although the pool of exempt Operating Authorizations would be fixed to October 1–6, 2006, level of service, air carriers could use these Non-hub and Local Small Community Operating Authorizations to provide service to any Non-Hub Airport or any Small-Hub

airport within 300 miles of the airport; they would not be restricted to serving just the non-hub and small-hub cities that have service at LaGuardia as of October 1–6, 2006.³⁰

However, as under the first option, the number of target-exempt flights to Non-hubs and Local Small Communities would be limited to the number of Operating Authorizations in the Non-hub and Local Small Community pool. Additional flights to or from these cities would be subject to the seat size requirement of this rule.

Because the pool of Non-hub and Local Small Community Operating Authorizations would remain fixed, if an air carrier wanted to start new service to a qualified Small or Non-Hub Airport it could do so using these excluded Operating Authorizations, but it would have to forego another Non-Hub or Small-Hub Airport. As a result, the amount of service to or from a particular non-hub or small-hub community might vary over time, but the total number of exempt operations to such communities would remain the same.³¹

Operating Authorizations for service to non-hub and Local Small Communities would be allocated in the same manner as described in the first option. Similarly, if an air carrier wishes to sell or lease a Non-hub and Small Community Operating Authorization on the secondary market, it would be leased or sold as such.

The third exemption option would provide the greatest number of exemptions to small and non-hub communities. The FAA would exempt flights to all Non-Hub Airports, all Small-Hub Airports that have service at LaGuardia as of October 1–6, 2006, and any Small-Hub Airports within 300 miles of LaGuardia.³² Operating

³⁰ FAA believes that there is merit in preserving nonstop service to non and small hub cities within 300 miles of LaGuardia. If passengers in these cities had to make a connection in order to fly into LaGuardia, they likely would fly further away from LaGuardia to reach the connecting airport.

³¹ Non Hub and Small Hub Operating Authorizations could only be used for service to qualifying airports; service to medium and large hubs would not be permitted with this pool of Operating Authorizations.

³² The following non hub and small hub airports have existing service to and from LaGuardia: Nantucket, MA; Bangor, ME; Charlottesville, VA; Hyannis, MA; Wilmington, NC; Ithaca, NY; Lebanon, NH; Martha's Vineyard, MA; Albany, NY; Burlington, VT; Portland, ME; Richmond, VA; Rochester, NY; Syracuse, NY; Newport News/Williamsburg, VA; Birmingham, AL; Columbia, SC; Akron/Canton, OH; Charleston, SC; Dayton, OH; Greensboro, NC; Greenville-Spartanburg, SC; Lexington Blue Grass, KY; Myrtle Beach, SC; Roanoke, VA; Savannah, GA; Knoxville, TN; and Fayetteville, AR. Source: T–100 Data, April 2004–March 2005.

Authorizations would be "grandfathered" to carriers that provide service to these airports as October 1–6, and the transfer of these Non-hub and Local Small Community Operating Authorizations in the secondary market would be subject to the same type of restrictions as described in the two previous alternatives. The total number of such exemptions would be fixed but the number of operations to any one Non-Hub or Small-Hub Airport might vary over time.

The pool under this third exemption option would be equal to the October 1–6, 2006, level of service from LaGuardia to Non-Hub and Small-Hub Airports. Over the twelve-month period of April 2004 through March 2005 there was an average of 200 operations arriving and departing to these airports per day.³³ This approach would maximize service to small communities, but could remove as much as 30 percent of the overall fleet from the population of aircraft required to meet a minimum average seat size.³⁴ In order to increase passenger throughput, the airport-wide target may be so large as to be impractical because the higher the airport-wide target, the more gate limitations (certain gates can only accommodate small to medium sized aircraft). Additionally, the FAA is aware that fewer markets support operations on large aircraft than on small-medium sized aircraft.

The FAA seeks comment on the merits and practicality of the three non-hub and small-hub exemption alternatives outlined above. We want to make clear in any event that we are not proposing to limit service to non-hub or small communities with aircraft meeting the targeted size.

3. Calculation of the Average Aircraft Size Target

The airport-wide target for the average aircraft size at LaGuardia is dependent on which of the Non-hub and Small-hub alternatives is ultimately adopted in the Final Rule. The target would vary because the number of exempt Operating Authorizations is different in each scenario. The first scenario, which only provides target exemptions for Non-Hub Airports, would produce the lowest airport-wide target since there would only be a limited number of

³³ Source: T–100 Data, April 2004–March 2005.

³⁴ This Non Hub and Small Hub option would provide the greatest number of target-exemptions for service to small communities (approximately 200 per day). These Non Hub and Small Community Operating Authorizations combined with the target-exemptions for "baseline" operations would equate to approximately 30% of the Operating Authorizations at the airport.

²⁷ Source: T–100 Data, April 2004–March 2005.

²⁸ Small Hub Airports that are within 300 miles of LaGuardia and have existing service include: Albany, Burlington, Portland, Richmond, Rochester, Syracuse and Newport News/Williamsburg. (Non-Hub Airports with existing service are listed in footnote above). Source: T–100 Data, April 2004–March 2005.

²⁹ Source: T–100 Data, April 2004–March 2005.

Operating Authorizations exempt from the target. Alternatively, the third scenario, which would also exempt all Small-Hub Airports that have existing service at LaGuardia and Local Small Communities, produces the largest target because roughly 30 percent of the daily operations would be removed from the target requirement at the airport. The targets under each of these three scenarios are presented in the table below.

The FAA computed the target aircraft size for LaGuardia using an airport passenger throughput target, as determined by the Port Authority, of 28.5 million passengers per year.³⁵ T-100 data from April 2004 through March 2005 reports roughly 372,000 commercial operations over the twelve-month period.³⁶ In order to calculate the target size, the FAA assumed the number of commercial operations at LaGuardia would remain constant at 75 per hour. Using T-100 data to track historic usage patterns and service routes, the FAA has tentatively determined that the following airport-wide targets are appropriate, depending on which small community exemption alternative is ultimately adopted. Currently, aircraft operating at LaGuardia have 98 seats, on average.

Option 1: Non-Hub Airports and up to 10 Baseline Operations per Carrier would be Exempt

Target Average Aircraft Size = 105 Seats

Option 2: Non-Hub Airports, Small-Hub Airports < 300 Miles and up to 10 Baseline Operations per Carrier would be Exempt

Target Average Aircraft Size = 116 Seats

Option 3: Non-Hub Airports, Small-Hub Airports with Existing Service, Small-Hub Airports < 300 Miles and up to 10 Baseline Operations per Carrier would be Exempt

Target Average Aircraft Size = 122 Seats

³⁵ The Port Authority has indicated that passenger demand for access to the airport is forecasted at 30 million annual passengers (FAA's Terminal Area Forecast (TAF) concurs that passenger demand at LaGuardia will reach 30 million annual passenger in the next couple of years). However, landside limitations on the terminals and roadways of the airport restrict passenger throughput to approximately 28.5 million passengers per year.

³⁶ Part 121 and scheduled Part 135 departure data is submitted by carriers to the Office of Airline Information (OAI) within the Bureau of Transportation Statistics (BTS) under 14 CFR Parts 241 and 298, respectively. The airlines submit the data on Form 41, Schedule T-100 "U.S. Air Carrier Traffic and Capacity Data By Nonstop Segment and On-flight Market and Form 41, Schedule T-100 (f)—Foreign Air Carrier Traffic and Capacity Data by Nonstop Segment and On-flight Market.

The FAA seeks comments on each of the non-hub and small-hub exemption alternatives and the corresponding airport-wide targets.

4. Use-or-Lose Requirements

a. *Use-or-Lose Requirement Based on Average Aircraft Size.* The FAA is proposing a requirement to obtain compliance with the "target" aircraft size requirement at the airport. The FAA would administer the requirement on an annual basis. Carriers would be required to submit annual reports of usage, including a record of (1) the FAA assigned priority number, time, and arrival or departure designation; (2) the operating carrier; (3) the aircraft-type; (4) the number of passenger seats on the aircraft for each operation; (5) the date and time of each of its operations using an Operating Authorization, including flight number, and origin/destination; and (6) the average number of seats flown for all operations over the year. Statistics on the use of baseline authorizations and target exclusions for service to Non-Hub and Small-Hub Airports would be required in the report, although the number of seats flown on these operations would not be included in the carrier's average seat size calculation. The annual report would be due to the FAA no later than March 1st of each year, starting March 1, 2008.

The average seat size would be computed by totaling the number of seats flown over the year (on each Operating Authorization, excluding baseline operations and operations that serve Non-Hub and Small-Hub Airports), divided by the total number Operating Authorization days.³⁷ Operating Authorizations that are not used on any given day would be presumed to have a zero seat capacity.³⁸ A carrier's average number of seats on all Operating Authorizations combined during the year must meet the annual airport-wide for the carrier to be in compliance with the utilization requirement.³⁹

³⁷ Operating Authorization days would be Monday through Friday and Sunday afternoons.

³⁸ Because unused Operating Authorizations must be included in the average seat size calculation the Use-or-Lose requirement ensures Operating Authorizations are used and not sitting idle.

³⁹ The following example illustrates the average seat size computation for an air carrier that holds three evening Operating Authorizations that are not excluded from the target.

Each year there would be approximately 313 Operating Authorization days for each of the Operating Authorizations (365 days - 52 Saturdays).

*If the carrier offered a total of 33,000 seats over the year on the first Operating Authorization the average seat size on that Operating Authorization would be: 33,000/313 days = 105 seats per aircraft;

If a carrier fails to meet the average seat size requirement for the year, it would be required to give up sufficient Operating Authorization(s) beginning with those that use the smallest average aircraft size until the remainder meet the target from the preceding year. (If two or more Operating Authorizations have the same average aircraft size and are tied as having the smallest average seat size, the carrier could choose which of those Operating Authorization(s) would be withdrawn unless the FAA determines that there is an operational need to withdraw one Operating Authorization over another.) The FAA would provide 45 days notice to the carrier prior to withdrawing Operating Authorization(s). The Use-or-Lose requirement would be waived during the Thanksgiving, Christmas, and New Year's holiday periods. The Use-or-Lose requirement could also be waived during a strike, or in other circumstances outside a carrier's control, as determined by the FAA.

b. *Use-or-Lose Requirement for "Baseline" and "Small Community" Operating Authorizations.* The FAA believes that a minimum usage requirement is appropriate for Operating Authorizations excluded from the target aircraft requirement. Although these operations are not subject to the upgauging aspect of the rule, these resources should be used effectively. Depending on which non-hub and small-hub exemption scenario is selected in the final rule, a significant number of Operating Authorizations may not be subject to the airport-wide target. Therefore, the omission of a Use-or-Lose requirement on these exempt Operating Authorizations as well as the Baseline Operations would pose a risk that a sizable number of Operating Authorizations could be used inadequately.⁴⁰

*If the carrier offered a total of 40,000 seats over the year on the second Operating Authorization the average seat size on that Operating Authorization would be: 40,000/313 days = 128 seats per aircraft; and

*If the carrier offered 27,000 seats over the year on the third Operating Authorization the average seat size on that Operating Authorization would be: 27,000/313 days = 86 seats per aircraft.

*The air carrier's average seat size over all three Operating Authorizations would be equal to: 100,000 seats/939 Operating Authorization Days = 107 seats per aircraft.

⁴⁰ It should be noted that several airlines that responded to the Chicago O'Hare Notice of Proposed Rulemaking (Docket No. FAA-2005-20704) supported a Use-or-Lose requirement at O'Hare when presented with the option of not having a usage requirement at the airport. It was generally suggested that a minimum usage requirement should be included to prevent carriers from retaining Arrival Authorizations for which they have no use.

The FAA proposes to adopt a Use-or-Lose provision that would require air carriers to utilize each authorization they hold at least 80 percent of the time over a two-month reporting period. Any Operating Authorization used less frequently would be withdrawn after notice to the holder. Under this alternative, the 80 percent usage requirement would apply only during the restricted hours (*i.e.* Saturdays and Sunday mornings would be excluded from the usage requirement). The Thanksgiving, Christmas, and New Year's holiday periods could also be excluded. The Use-or-Lose requirement would also be waived during a strike, or in other circumstances as determined by the FAA.

This proposed Use-or-Lose requirement mirrors one of the minimum usage alternatives presented in the Chicago O'Hare NPRM and widely supported by the commenters. Nevertheless, FAA seeks comment regarding the appropriate minimum usage requirement for Operating Authorizations that are not subject to the aircraft size target at LaGuardia.

5. Lottery for the Reallocation of Certain Operating Authorizations

The FAA is proposing to implement a weighted lottery for reassigning authorizations that are returned to the FAA, withdrawn as a result of failing to meet the usage requirements under the Use-or-Lose provision of the rule, or not assigned by the FAA as part of the initial allocation. Under this system, each carrier's weight in the lottery would be inversely proportional to the carrier's share of total operations at LaGuardia. If a potential new entrant wishes to participate in the lottery, its weight would equal that of a carrier with a single roundtrip flight at the airport.

An inversely weighted lottery would provide preferences to carriers that do not have a presence at LaGuardia and to those carriers with a limited number of Operating Authorizations at the airport.⁴¹ This approach meets the

⁴¹ This lottery differs from that which was proposed in the congestion management rule at Chicago's O'Hare. The lottery to reallocate withdrawn operations at O'Hare would consist of two rounds. In the first round, only new entrants and limited incumbents would be permitted to participate. In the second round any remaining Arrival Authorizations would be assigned by lottery to incumbent carriers at O'Hare.

The lottery proposed herein for LaGuardia also provides a preference for limited incumbents and new entrants, but does not preclude incumbent carriers from participating in the first round of the lottery. Since this proposed rule is expected to have a longer duration than that which was proposed at O'Hare, the FAA determined that it is important to

Secretary of Transportation's public interest objectives by keeping available a variety of adequate, economic, efficient, and low-priced air services; placing maximum reliance on competitive market forces and on actual and potential competition; encouraging entry into air transportation markets by new and existing air carriers; and continuing to strengthen small air carriers to ensure a more effective and competitive airline industry. See 49 U.S.C. 40101(a)(4), (6), (10)–(13) and (16), and 40105(b). To further these goals and to assure efficient and effective use of the authorizations, Operating Authorizations obtained through a weighted lottery may not be bought, sold, leased, or otherwise transferred until one year has elapsed from their assignment.

An inverse lottery disadvantages those carriers with the largest presence at LaGuardia because they will always be less likely to win an Operating Authorization than other carriers with a smaller presence. However, an inverse lottery is appropriate in this limited circumstance because under our proposal the incumbent carriers at the airport would have already received numerous Operating Authorizations in the initial allocation process.

This lottery approach is limited to Operating Authorizations that are lost via the Use-or-Lose provision or are otherwise returned to the FAA for non-use and to any Operating Authorizations that are not assigned by the FAA as part of the initial allocation. Those Operating Authorizations that revert back to the FAA as a function of the Operating Authorizations' finite life are not impacted by this lottery. The method for reallocating expired Operating Authorizations has not been decided; however, the FAA preliminarily finds that an inverse lottery would not be appropriate for reallocation. The FAA believes it may be unfair to impose an inverse lottery on those withdrawals because the incumbent carriers would repeatedly be penalized as the lowest weighted lottery participant.

The following provides an illustration of how weights would be assigned to each carrier in the lottery if there were three carriers participating in the lottery. Assume Carrier A has 50 Operating Authorizations, Carrier B has 20 Operating Authorizations, and Carrier C has 10 Operating Authorizations, for a total of 80 Operating Authorizations.

Carrier A's share is $50/80 = 0.600$
Carrier B's share is $20/80 = 0.250$

implement a lottery that provides all carriers access to reallocated/withdrawn Operating Authorizations.

Carrier C's share is $10/80 = 0.125$

The inverse of each carrier's market share determines each carrier's weight in the lottery. Thus:

Carrier A's weight in the lottery is: $1 / 0.6 = 1.67$
Carrier B's weight in the lottery is: $1 / 0.25 = 4.0$
Carrier C's weight in the lottery is: $1 / 0.125 = 8.0$

Each carrier's odds of winning the lottery are a function of their weight in the lottery. In this example, Carrier A holds the greatest number of Operating Authorizations at LaGuardia, and therefore has the lowest odds of winning the lottery. The odds that each carrier would win are as follows:

Carrier A's chances of winning are $1.67 / 13.67 = 12.22\%$
Carrier B's chances of winning are $4 / 13.67 = 29.26\%$
Carrier C's chances of winning are $8 / 13.67 = 58.52\%$

If a new entrant carrier, Carrier D, also enters the lottery it would be assigned a weight as if it had one round trip flight (2 Operating Authorizations) at the airport. The odds that each carrier would win are adjusted as follows:

Total weight in the lottery would be increased to $13.67 + 40 = 53.67$ ⁴², so:

A's chances of winning are $1.67 / 53.67 = 3.1\%$
B's chances of winning are $4 / 53.67 = 7.5\%$
C's chances of winning are $8 / 53.67 = 14.9\%$
D's chances of winning are $40 / 53.67 = 74.5\%$

Alternatively, the FAA is considering permitting the sale of Operating Authorizations that would otherwise be withdrawn or returned in a blind secondary market. This approach has the benefit of not penalizing, even marginally, carriers with sizeable Operating Authorizations because their acquisition opportunity would not be hampered by their existing holdings. However, this mechanism would not provide any advantage for new carriers or for those carriers with only a few Operating Authorizations.

Under the blind secondary market scenario, if a carrier did not meet the target aircraft size requirement, the FAA would provide 45 days advance notice to the carrier that it has failed to meet the usage requirement and an Operating Authorization(s) was to be withdrawn. The Operating Authorization would then be posted for sale in the blind

⁴² Carrier D's weight in the lottery is calculated as follows:

Carrier D's share = $2 \text{ Operating Authorizations} / 80 \text{ Operating Authorizations} = .025$
Carrier D's weight in the lottery is $1 / .025 = 40$.

auction (see details of Alternative 1 in the Secondary Market discussion below). Proceeds of a sale would go to the airline that lost the Operating Authorization and any unsold Operating Authorizations would revert to the FAA and be reallocated in a lottery.

The FAA requests comments on the relative merits of these two reassignment methodologies for withdrawn Operating Authorizations.

C. Commercial Options for Carriers

1. Secondary Market

Under the HDR, the Department received complaints about the buy/sell process as it was implemented. The rule permitted the buyer and seller to deal directly with each other. Incumbent carriers would refuse to sell to a new entrant or a competitive airline according to the reports received by the Department, raising concerns with the "transparency"⁴³ of the existing secondary market. There was no requirement for the seller to advise parties that slots were available, limiting opportunity for other carriers to make an offer for the slot. Finally, the terms of a transaction were not disclosed making it more difficult to develop future bidding strategies, which may have included cash and non-cash assets.

The Department of Justice submitted comments in the O'Hare rulemaking, which supported the use of a blind market or a non-transparent market, because the secondary markets at LaGuardia and O'Hare under the HDR have not been "sufficiently liquid."⁴⁴ A blind secondary market effectively eliminates non-cash assets to be bid. We acknowledge that a proposal to prohibit the use of non-monetary considerations in transactions involving Operating Authorizations may be unpopular.⁴⁵ Cash equivalent consideration allows the buyer of an Operating Authorization to offer items that may be mutually beneficial and less "cost" than cash. Perhaps, given the industry's liquidity problems and the operational needs of carriers at various airports, an airline selling or buying an Operating Authorization ought to be able to accept or offer non-monetary consideration (i.e. services, ground handling) as part of the

bid. By opening the auction to pledges of assets other than money, we would widen the auction market to cash-strapped airlines.

Nevertheless, we are concerned that the uniqueness of non-monetary assets, such as baggage handling and marketing arrangements, would effectively undermine any form of a "blind" secondary market. The inclusion of non-monetary assets would make it virtually impossible to hide identities during the bid evaluation process. In order for the buyer to put together an attractive package and assign a value to non-cash assets, the seller must be known. Similarly, a seller cannot assess the value of an asset if it does not know who is specifically offering the asset and how the asset would be transferred. Furthermore, if non-cash assets are pledged, the parties would want to negotiate terms, including but not limited to, the terms of any warranties, approval and agreement enforceability, and damages for any breach of the agreement. It is unreasonable to assume that the FAA, or any other entity, could independently appraise the value of a package for the buyer or seller. In fact, the FAA would not be in a position to judge the value of an offer to the selling carrier since that involves access to the carrier's strategic plan and internal documents that would not be readily available.

We are seeking comment on three alternative secondary market provisions for this proposed rule. Differences under each proposed alternative include whether the sale or lease is blind and whether non-cash assets could be included in the buyers' bids.

- Alternative 1 would be a blind, cash-only secondary market. The identity of the seller and the bidders would be maintained until the seller accepts the highest bid at the close of the auction. Sellers would be expected to close the sale in good faith regardless of whom the buyer may be.

- Alternative 2 would permit non-cash assets to be bid, and the parties identities would be known throughout the process. When the FAA posted notice of the sale of an Operating Authorization, the seller would be identified. As each bid was posted, the identity of the bidders would be disclosed. Consideration for the transaction could be any combination of money, real property and non-monetary assets. An estimated value of these assets would have to be provided under each bid. Because the FAA would not be in a position to deem what bid is of highest value to the seller, all bids would be posted at the close of each day. Within five business days of the

close of the auction, the seller, in good faith, would have to identify to the FAA which bid is most competitive. The seller and buyer then would have 10 business days to negotiate the provisions of the sale.

- Alternative 3 is a hybrid of the first two alternatives described above. This option provides for up-front anonymity and cash-only bids, but it would eventually allow the parties to negotiate non-cash terms. During the posting of the sale or lease and the subsequent bidding of an Operating Authorization, the party's identities would not be known. Once the auction closed, the FAA would forward the highest bid to the seller without any bidder identification. The seller would have three business days to accept the bid. The parties' identities would then be revealed, and they would have 10 business days to negotiate the possibility of non-cash assets in lieu of money as consideration for the sale or lease. If, however, the parties did not come to agreement on the non-cash assets, sale or lease of the Operating Authorization would have to proceed on a cash-only basis.

The advantage of Alternative 3 is that it responds to concerns that the buy/sell arrangements that currently occur under the HDR are too transparent; thereby allowing incumbent carriers to fence out new entrants or other airlines that could pose a competitive threat. At the same time, it releases restrictions on the use of non-monetary considerations. Again, because of the uniqueness of non-monetary assets, the identity of the buyer and seller eventually have to be disclosed so that they can come to terms on the possible non-cash aspects of the package. If, however, the parties cannot come to agreement on non-monetary consideration, both parties are fully expected to follow through on the transaction on a cash-only basis. While this may mean that cash-strapped carriers without the credit-worthiness to obtain liquidity on a secured or unsecured basis would not be able to participate in the process because they risk having to come up with 100% cash, it does allow for some flexibility.

Under either Alternatives 2 or 3, we would preclude the direct trading in gate leasehold interests. Under the terms of the FAA-airport grant assurances, airports have agreed to make their facilities available for public use under reasonable terms and conditions.⁴⁶ This assurance obligates an airport to make its facilities available to a requesting carrier, whether an incumbent carrier that is seeking to expand at the airport

⁴³ "Transparency means that the identity of buyers and sellers is known. Transparency in the secondary market permits strategic sales, leases, and purchases by incumbents to prevent new entry." Comments of the United States Department of Justice in Docket No. FAA-2005-20704. May 24, 2005, pp. 5-9.

⁴⁴ *Id.*

⁴⁵ We learned under the O'Hare rulemaking that most commenters believe that each carrier should be allowed to consider the value of specific gates, baggage handling, marketing arrangements, and other potential offers in lieu of cash.

⁴⁶ 49 U.S.C. 47107(a).

or a new entrant seeking access. By facilitating requested accommodations, an airport is able to provide opportunities for airline competition and thereby confer benefits on the traveling public and help to stimulate economic growth. Since gates are a necessary part of access, the FAA expects airports to assert and maintain control over each airline's use of and leasehold interests in the gates and to notify all interested carriers when a gate is underutilized or otherwise becomes available. Implementing fair and transparent procedures for gate access assures that dominant carriers do not control access to the airport to the exclusion of competitors. We believe that permitting a carrier to trade its gate leasehold rights for an operating authorization at LaGuardia would diminish the control of the airport operator over its facilities and could denigrate competitive opportunities at the airport served by the bidding airline.

The general process under any of the alternatives would be as follows:

The FAA would serve as the clearinghouse through which sales and leases of Operating Authorizations are completed, which would address complaints by some airlines and other entities that under the HDR, they were not even aware of opportunities to purchase or lease slots.⁴⁷ A carrier wishing to sell, lease or buy an Operating Authorization would notify the FAA of the relevant details—the Operating Authorization number, time, frequency, expiration date and effective date the Operating Authorization would transfer to the winning bidder—and the FAA would post advance notice of the opening and closing dates for bids to all airlines and afford all airlines an equal opportunity to bid. A Small Community Operating Authorization must be sold, bought and leased as a Small Community Operating Authorization. Selling carriers may also provide the FAA with a minimum bid price, which the FAA would post.

Carriers would be permitted to continue bidding until the closing date of the auction. To insure against participants bidding at the last moment (known as “bid-sniping”), the “winning” bidder must participate in the bidding from the first day of the auction, rather than submitting a bid in the final minutes before the bidding is

closed.⁴⁸ In order to qualify, bids must meet the minimum price if one is specified. The FAA proposes that each auction would last for 3 business days. Upon acceptance of a bid and ratification of the sale or lease, both airlines would have to submit the necessary information to the FAA for transfer of the Operating Authorization in a timely manner. A record of each sale and lease would be kept on file by the FAA and be available to the public upon request. Only airlines would be allowed to participate in this market. The FAA welcomes comments from the public on these or other appropriate auction design features.⁴⁹

2. One-for-One Trades

In addition, the proposed rule would permit the one-for-one exchange of Operating Authorizations between airlines so long as no additional consideration was provided. Under the proposal, these exchanges must be publicly disclosed and could take place outside of the secondary market because many of these arrangements are for operational reasons and could be accomplished only through multi-carrier trades. Such exchanges would be an effective way to deal with variations in seasonal demand and airline business strategies. The authorizations could not be used until written confirmation of the transaction is received from the FAA. Both parties would have to attest that no other consideration or promise of consideration was provided by either party to the trade.

D. *Unscheduled Operations*

The FAA is proposing to implement a Reservation system for unscheduled operations to ensure that demand is spread reasonably throughout the day to support the FAA's established operational cap for scheduled and unscheduled flights.⁵⁰ Therefore, the

⁴⁸ Requiring the winning bidder to participate in all rounds of the auction encourages sincere bidding.

⁴⁹ The secondary market that is being proposed for use at LaGuardia differs somewhat from the blind secondary market that was proposed at Chicago O'Hare because the proposed rule at LaGuardia will be permanent and the O'Hare rule is scheduled to sunset in 2008. We believe that it is appropriate to implement a more sophisticated auction-style secondary market at LaGuardia considering the long-term nature of the rule.

⁵⁰ Unscheduled operations are operations other than those regularly conducted by a carrier between LaGuardia and another service point. The unscheduled operations include general aviation, public aircraft, military, charter, ferry, and positioning flights. (An air carrier also could use an Operating Authorization for a ferry, positioning, or other non-revenue flight. An air carrier may choose to do so if a Reservation is not available.) Helicopter operations are excluded from the reservation requirement. Reservations for unscheduled flights

FAA proposes a limit of 6 unscheduled operations per hour between the hours of 6:30 a.m. and 9:59 p.m. The FAA recognizes that there is often greater flexibility in the timing of these flights and there are many factors that impact the proposed time of these unscheduled flights. The FAA believes that a half-hour allocation period would be appropriate and proposes to limit Reservations in each half-hour period to no more than 3 operations (arrivals and departures).

The allocation mechanism for unscheduled operations proposed in this NPRM is similar to the procedures the FAA currently follows in allocating unscheduled reservations for airports subject to the provisions of the HDR (particularly LaGuardia Airport and John F. Kennedy International Airport). The proposed procedures are also similar to the measures that were implemented at Chicago O'Hare in Special Federal Aviation Regulation (SFAR) 105.

A Reservation would be allocated on a 30-minute basis during the peak hours for which the restrictions would be in place. The FAA's Airport Reservation Office (ARO) would receive and process all Reservations. The Reservations would be allocated on a first-come, first-served basis, determined by the time the request is received by the ARO. Operators can obtain a Reservation: (1) through the Internet; or (2) by calling the ARO's interactive computer system via touch-tone telephone. Operators would provide the date and time of the proposed operation and other identifying information concerning the aircraft and the intended flight. Reservations could be made no more than 72 hours in advance of the proposed flight time. The assigned Reservation number would be included in the “Remarks” section of the flight plan. Reservations must be cancelled if they will not be used as assigned so that another operator has an opportunity to operate to or from the airport. The FAA would not permit a secondary market in Reservations in order to prevent abuse of the system or the bundling of airport Reservations with other flight-related services.

The FAA is not proposing to include a limited exception to the 72-hour window for public charter operators to obtain a Reservation, as was adopted under SFAR 105 for Chicago's O'Hare International Airport. There is more connecting and international passenger

operating under visual flight rules (VFR) are granted when the aircraft receives clearance from air traffic control to land or depart LaGuardia. Reservations for unscheduled VFR flights are not included in the limits for unscheduled operators.

⁴⁷ The DOT has docketed three petitions on this subject in recent years. Dockets OST-2004-18586, OST-2002-13650, and FAA-2001-9156. The petitions are available for review on the DOT's Web site.

traffic at O'Hare than at LaGuardia, which has more point-to-point, short-haul traffic. Therefore, it is important that public charter operations flying into O'Hare be able to connect to commercially scheduled flights (domestic or international) and arrive at O'Hare at their intended arrival time so passengers can make their flight. Also, many of these public charter flights at O'Hare operate to international destinations, representing key access for service to those points from the Chicago area. However, charter operations that fly to the New York City area to connect to international or long-haul domestic flights, or to serve international destinations more on an origin/destination basis, are more likely to fly into Newark Liberty International or John F. Kennedy International (which house those operations in the New York area), rather than LaGuardia. Consequently, the nature of public charter operations at LaGuardia does not warrant treatment different than any other unscheduled operation.

The allocation of a Reservation does not constitute an Air Traffic Control clearance nor does it replace the need to file an IFR flight plan. The FAA would accommodate declared emergencies without regard to reservations. Non-emergency flights in direct support of national security, law enforcement, military operations, or public-use aircraft operations may be accommodated above the reservation limits with the prior approval of the FAA. The FAA may authorize additional Reservations for unscheduled operations if permitted by operating conditions or if there are temporarily available Operating Authorizations.

E. Administrative Reversion of Operating Authorizations

Operating Authorizations are temporary operating privileges. As such, they remain subject to FAA control. We propose allowing them to be bought and sold, subject to FAA secondary market restrictions, in order to promote their most efficient use. However, they may be withdrawn at any time to fulfill operational needs such as eliminating operations due to reduced capacity. If the FAA determines that capacity must be reduced for a specified period of time, for example if a runway were temporarily closed, Operating Authorizations would be withdrawn. Once the capacity is resumed, the withdrawn Operating Authorizations would be returned to the carriers from which they were withdrawn provided they continued to conduct scheduled service at the airport. The FAA would assign, by random lottery, priority

numbers for withdrawal of Operating Authorizations, if necessary to reduce capacity for operational reasons. If it was necessary to withdraw Operating Authorizations, they would be withdrawn in the specified 15-minute time periods in accordance with the priority list. Carriers with a limited presence at the airport would be protected from the withdrawal of Operating Authorizations. Carriers with fewer than 10 Operating Authorizations would not have authorizations withdrawn from them under these provisions of the rule.

The proposal also provides that all of the Operating Authorizations held by any carrier would revert to the FAA if that carrier ceases all operations at LaGuardia for any reason other than a strike or labor dispute.⁵¹

Paperwork Reduction Act

This proposal contains the following new information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA has submitted the information requirements associated with this proposal to the Office of Management and Budget for its review.

Title: Congestion Management Rule for LaGuardia Airport.

Summary: The FAA is proposing a new rule to address the potential for increased congestion and delay at New York's LaGuardia Airport (LaGuardia) when the High Density Rule (HDR) expires there on January 1, 2007. The rule, if adopted, would establish an operational limit on the number of aircraft landing and taking off at the airport. To offset the effect of this limit, the proposed rule would increase utilization of the airport by encouraging the use of larger aircraft through implementing an airport-wide, average aircraft size requirement designed to increase the number of passengers that may use the airport within the overall proposed operational limits.

Use of: The information is reported to the FAA by operators holding Operating Authorizations. 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 Operating Authorizations among the operators and facilitates the buying and selling of Operating

Authorizations in the secondary market. The FAA also uses this information in order to maintain an accurate base of operations to ensure compliance with the operations permitted under the rule and those actually conducted at the airport.

Respondents (including number of:) The likely respondents to this proposed information requirement are scheduled carriers with existing service at LaGuardia, carriers that plan to enter the LaGuardia market (and participate in the lottery or secondary market), and carriers that enter the LaGuardia market in the future. There are currently fourteen (14) carriers with existing scheduled service at LaGuardia.

Frequency: The information collection requirements of the rule involve scheduled carriers notifying the FAA of their use of Operating Authorizations. The carriers must notify the FAA of: (1) Requests to be included in a lottery for available Operating Authorizations; (2) requests for confirmation of one-for-one Operating Authorization trades; (3) usage of Operating Authorizations that are subject to the airport-wide upgauging target, and compliance with that target (on an annual basis); (4) usage of Operating Authorizations that are not subject to the airport-wide target (on a bi-monthly basis); and (4) participation in the secondary market.

Annual Burden Estimate: The annual reporting burden for each subsection of the rule is presented below.

The reporting burden was calculated by the following formula:

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

Section 93.67(c) Sale and Lease of Operating Authorizations

$$(16 \text{ carriers}) * (1.5 \text{ hours per submittal}) * (4 \text{ occurrences per year}) = 96 \text{ hours}$$

We assumed that the 16 marketing carriers operating at LaGuardia expend one and one half hours for each occurrence of a sale or lease of an Operating Authorization. For each operator, we assumed that a sale or lease of an Operating Authorization would occur quarterly.

Section 93.68(b) One-for-One Trades of Operating Authorizations

$$(16 \text{ carriers}) * (1.5 \text{ hours per submittal}) * (4 \text{ occurrences per year}) = 96 \text{ hours}$$

We assumed that the 16 marketing carriers operating at LaGuardia expend one and one half hours for each occurrence of a one-for-one trade of an Operating Authorization. For each

⁵¹ An air carrier could sell off its Operating Authorizations as part of a liquidation strategy, if it does so before failing to meet the Use-or-Lose requirements of the rule. However, if an air carrier ceases all operations and subsequently fails to meet the Use-or-Lose requirement, the Operating Authorizations would revert to the FAA and they could not be sold.

operator, we assumed that a one-for-one trade of an Operating Authorization would occur quarterly.

Section 93.72(a) Reporting Requirements

(16 carriers) * (1.5 hours per submittal)
* (1 occurrence per year) = 24 hours

We assumed that the 16 marketing carriers operating at LaGuardia expend one and one half hours for each annual occurrence of the data required in § 93.72(a)(1) and § 93.72(a)(2).

Section 93.72(b) Reporting Requirements

(16 carriers) * (1.5 hours per submittal)
* (6 occurrences per year) = 144 hours

We assumed that the 16 marketing carriers operating at LaGuardia expend one and one half hours every two months of the data required by § 93.72(b).

Section 93.72(c) Reporting Requirements

(16 carriers) * (1.5 hours per submittal)
* (1 occurrence per year) = 24 hours

We assumed that the 16 marketing carriers operating at LaGuardia expend one and one half hours for each annual occurrence of the data required in § 93.72(c).

Section 93.73(d) Weighted Lottery

(16 carriers) * (1.5 hours per submittal)
* (4 occurrence per year) = 96 hours

We assumed that the 16 marketing carriers operating at LaGuardia expend one and one half hours every quarter for participation in a lottery for an Operating Authorization.

Section 93.74(d) Administrative Provisions

(16 carriers) * (1.5 hours per submittal)
* (4 occurrence per year) = 96 hours

We assumed that the 16 marketing carriers operating at LaGuardia expend one and one half hours every quarter for administrative provisions.

Summary—Total Annual Hourly Reporting Burden—576 Hours

The agency is soliciting comments to—

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

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

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

(4) Minimize the burden of the collection of information on those who

are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Individuals and organizations may submit comments on the information collection requirement by October 30, 2006, and should direct them to the address listed in the **ADDRESSES** section of this document. Comments also should be submitted to the Office of Information and Regulatory Affairs, OMB, New Executive Building, Room 10202, 725 17th Street, NW., Washington, DC 20053, Attention: Desk Officer for FAA.

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

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these proposed regulations.

Economic Assessment, Regulatory Flexibility Determination, Trade Impact Assessment, and Unfunded Mandates Assessment

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, this Trade Act requires agencies to consider international standards and, where appropriate, to be the basis of U.S. standards. Fourth, the Unfunded Mandate Reform Act of 1995 (Public Law 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 proposed rule (1) has benefits that justify its costs, is a “significant regulatory action” as defined in section 3(f) of Executive Order 12866, 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

FAA estimates that this proposed rule would result in about a 37% decrease in the average delay per operation at LaGuardia. Present value net benefits are estimated at \$4.3 billion from 2007–2019; net benefits over an infinite time horizon total about \$7.5 billion. The benefits are estimated by comparing the no-rule scenario (similar to the situation at LaGuardia in 2001) with the proposed upgauging scenario.

There are almost no costs associated with the proposed rule. The only exception is for the cost of designing and carrying out periodic lotteries that may be required to assign unused operating authorizations. These present value costs total about \$11.3 million through 2019, and \$19.4 million over an infinite time horizon.

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 New York’s LaGuardia Airport (LaGuardia).
- All communities, including small communities with air service to LaGuardia.
- Passengers of scheduled, domestic flights to LaGuardia.
- New York and New Jersey Port Authority.
- FAA Air Traffic Control.

Key Assumptions

- Base Case Flight Operations and Delay-Adjusted Official Airline Guide (OAG) Schedule, December 2000 (1,373 daily operations).

- Current Scenario Case Flight Operations and Delay—OAG Schedule, April 19, 2005 (1,194 daily operations).
- Delay improvements are about 9.2 minutes per flight, equivalent to a 37% improvement in delay. This delay improvement estimate was derived from GRA's⁵² Delay Model.
- For this evaluation, the proposed rule's effective date is January 1, 2007.

Other Important Assumptions

- Discount Rate—7%.
- Period of Analysis—2007 through 2019.
- Assumes 2005 Current Year Dollars.
- Passenger Value of Travel Time—\$30.86 per hour.⁵³
- For this evaluation, all flights to Non-Hub Airports with existing service at LaGuardia, as well as a baseline exemption of 10 flights for each carrier would be exempt from the aircraft upgauging target.

Alternatives We Have Considered

- Alternative #1—This alternative would have let the High Density Rule order expire on January 1, 2007. Based on history, under this alternative, we expected operators would most likely continue to expand operations, and therefore further worsen airport delays. We are presenting this alternative as the base case for calculation of costs and benefits associated with this rulemaking.
- Alternative #2—This alternative would exempt operations to Non-Hub Airports with existing service at LaGuardia from the target aircraft size calculation.
- Alternative #3—This alternative would exempt operations to Non-Hub Airports with existing service at LaGuardia and Small-Hub Airports within 300 miles of LaGuardia from the target aircraft size calculation.
- Alternative #4—This alternative would exempt operations to Non-Hub Airports with existing service at LaGuardia, Small-Hub Airports within 300 miles of LaGuardia, and Small-Hub Airports with existing LaGuardia service from the target aircraft size calculation.

We are seeking comment from industry on alternatives #2 through #4 to promote efficient use of the airspace through equipment type upgauging, but not at the expense of removing service to small and non-hub communities.

⁵² GRA Inc. of Jenkintown, Pennsylvania.
⁵³ "Draft Economic Value for FAA Investment and Regulatory Decisions, A Guide" December 31, 2004, weighted using LaGuardia shares of 51% leisure and 49% business travel.

Benefits of This Rulemaking

The primary benefits of this rule would be the airline and passenger delay cost savings. The benefits reflect a prorating of the 5.5 days per week the operational limits are in effect. The total estimated net benefits in present value dollars are about \$4.3 billion when compared to 2001 delays over the 13-year analysis interval.

Costs of This Rulemaking

The major costs of this proposed rule cover the costs of implementing a lottery system for unutilized operating authorizations. The estimated present value cost of this final rule is about \$11.3 million over the 13-year analysis interval.

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 proposed rule affects all scheduled operators at LaGuardia. A review of the number of employees for each operator shows that the following are "small entities" (defined as firms with 1,500 or fewer employees):

Carrier	Employees
Commutair	340

Carrier	Employees
Colgan Air	546

Under the proposed rule, all operators' Operating Authorizations would be "grandfathered" for at least three years. Further, service to Non-Hub Airports would be exempt from the upgauging incentive where smaller entities are operating. Thus most of the LaGuardia markets operated by existing small entities would be exempt from upgauging.

The FAA has also reviewed whether there would be interruptions to service to communities with a population of less than 50,000. Because of the exemption from the upgauging incentive Non-Hub Airports would receive, only one such community is exposed. Burlington, Vermont has a population less than 50,000, but because it is a small-hub community⁵⁴ it would not be eligible for the exemption. But, Burlington is a dynamic economy, has existing service from both Newark and JFK airports, and service from LaGuardia may well be viable at this airport even without the exemption.

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

International Trade Impact Assessment

The Trade Agreements Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this proposed rule and determined that it would impose the same costs on domestic and international entities and thus have a neutral trade impact.

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)

⁵⁴ <http://www.faa.gov/arp/planning/stats/index.cfm?nav=cargo#apttype>.

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 \$128.1 million in lieu of \$100 million. This final rule does not contain such a mandate. The requirements of Title II do not apply.

Executive Order 13132, Federalism

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

Environmental Analysis

FAA Order 1050.1E, Environmental Impacts: Policies and Procedures, identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion 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.)". It has been determined that no extraordinary circumstances exist that may cause a significant impact and therefore no further environmental review is required.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

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

List of Subjects in 14 CFR Part 93

Air traffic control, Airports, Alaska, Navigation (air), Reporting and recordkeeping requirements.

The Proposed Amendment

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

PART 93—SPECIAL AIR TRAFFIC RULES

1. The authority citation 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. Subpart C is added to read as follows:

Subpart C—Performance Based Upgauging Rule for New York LaGuardia Airport

Sec.

- 93.61 Applicability.
- 93.62 Definitions.
- 93.63 Operating Authorizations for Scheduled Arrivals and Departures.
- 93.64 Initial Allocation and Reallocation of Operating Authorizations.
- 93.65 Duration of Operating Authorizations.
- 93.66 Reversion and Withdrawal of Operating Authorizations.
- 93.67 Sale and Lease of Operating Authorizations.
- 93.68 One-for-One Trades of Operating Authorizations.
- 93.69 Average Aircraft Size Target.
- 93.70 Minimum Usage Requirements for Small and Community and Baseline Operating Authorizations.
- 93.71 Unscheduled Operations.
- 93.72 Reporting Requirements.
- 93.73 Weighted Lottery.
- 93.74 Administrative Provisions.

Subpart C—Performance Based Upgauging Rule for New York LaGuardia Airport

§ 93.61 Applicability.

(a) This subpart prescribes the air traffic rules for the arrival and departure of aircraft, other than helicopters, operating at New York's LaGuardia Airport (LaGuardia).

(b) This subpart also prescribes procedures for the assignment, transfer, sale, lease, reversion and withdrawal of Operating Authorizations issued by the FAA for Scheduled Operations by Carriers at LaGuardia.

(c) The provisions of this subpart apply to LaGuardia during the local hours of 6:30 a.m. through 9:59 p.m., Monday through Friday, and 12 p.m. through 9:59 p.m. on Sunday. No person shall conduct a Scheduled Operation to or from LaGuardia during such hours without obtaining an Operating

Authorization. No person shall conduct an Unscheduled Operation to or from LaGuardia during such hours without obtaining a Reservation.

(d) Carriers that have Common Ownership shall be considered a single U.S. air carrier or foreign air carrier for purposes of this subpart.

§ 93.62 Definitions.

For purposes of this subpart the following definitions apply:

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

Average Aircraft Size Target is the required average number of passenger seats per aircraft offered for sale for each Scheduled Operation at LaGuardia. The target is calculated as the annual passenger seats divided by the total number of Operating Authorizations held over the year excluding all Baseline Operations and Small Community Operating Authorizations.

Baseline Operations are Operating Authorizations excluded from the Average Aircraft Size Target. Annually, each Carrier may designate up to 10 Operating Authorizations per day as its Baseline Operations.

Carrier is a U.S. air carrier or foreign air carrier with authority to conduct scheduled service at LaGuardia under Parts 121, 129, 135 of this Chapter and has economic authority to operate scheduled service under 14 CFR chapter II and 49 U.S.C. chapter 411.

Carrier's Average Aircraft Size is the total number of passenger seats offered under all Operating Authorizations (excluding Baseline Operations and Small Community Operating Authorizations) over the calendar year, divided by the total number of Operating Authorizations held over the year.

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

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

Non-Hub Airport is a commercial service airport that has more than 10,000 annual passenger boardings but less than 0.05% of the total annual United States passenger boardings.

Operating Authorization is the operational authority assigned by the FAA to a Carrier to conduct one

scheduled instrument flight rules (IFR) arrival or departure operation at LaGuardia on a particular day of the week during a specific 15-minute period during the hours of 6:30 a.m. through 9:59 p.m., Monday through Friday, and 12 p.m. through 9:59 p.m. on Sunday.

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 to or from LaGuardia on a particular day of the week during a specific 30-minute period during the hours of 6:30 a.m. through 9:59 p.m., Monday through Friday, and 12 p.m. through 9:59 p.m. on Sunday.

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

Small Community Operating Authorizations are the designated Operating Authorizations excluded from the Average Aircraft Size Target but subject to the minimum usage requirement. These Operating Authorizations are designated by the FAA effective January 1, 2007 and may only be used to operate to a Non-Hub and Small-Hub Airports.

Small-Hub Airport is a commercial service airport with at least 0.05% but less than .25% of total annual United States passenger boardings.

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

Weighted Lottery is a lottery conducted by the FAA to reassign to Carriers' Operating Authorizations that are initially unassigned, returned to the FAA or withdrawn as a result of the Average Aircraft Size Target requirements or minimum use requirements. A weighted lottery assigns Operating Authorizations to a Carrier based on its inverse proportion of the Carrier's share of total Operating Authorizations at LaGuardia.

§ 93.63 Operating Authorizations for Scheduled Arrivals and Departures.

(a) During the hours of 6:30 a.m. through 9:59 p.m., Monday through Friday, and 12 p.m. through 9:59 p.m.

on Sunday, no person may operate an aircraft other than a helicopter, as a Scheduled Operation to or from LaGuardia unless he or she has received an Operating Authorization for that operation.

(b) Seventy-five (75) Operating Authorizations are available per hour at LaGuardia. The number of Operating Authorizations may not exceed 19 in any 15-minute period; 38 in any 30-minute period; and 75 in any 60-minute period. The number of arrival and departure Operating Authorizations in any period may be adjusted by the FAA if 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.

§ 93.64 Initial Allocation and Reallocation of Operating Authorizations.

(a) Except as provided for under paragraphs (b) and (c) of this section, any Carrier allocated operating rights under 14 CFR part 93, subpart K, and 49 U.S.C. 41716 during the week of October 1–6, 2006, as evidenced by the FAA's records, will be assigned corresponding Operating Authorizations, by hour, effective January 1, 2007. The FAA will assign Operating Authorizations in 15-minute periods consistent with the limits under § 93.63(b) of this section. If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the grandfathered Operating Authorizations within the same hour to meet the 15-minute and 30-minute limits under § 93.63(b) of this section. 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 14 CFR part 93, subpart K, and 49 U.S.C. 41716 during the week of October 1–6, 2006, but the operating rights were held by another carrier, then the corresponding Operating Authorizations will be assigned to the carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) If a carrier was allocated operating rights under 14 CFR part 93 during the week of October 1–6, 2006, and those operating rights were held by an entity other than a certificated carrier, then corresponding Operating Authorizations will be assigned to the operating carrier, as evidenced by the FAA's records.

(d) Any Operating Authorizations that are returned to the FAA or withdrawn as a result of the Average Aircraft Size Target requirement under § 93.69 of this subpart or the minimum use

requirement for Operating Authorizations to or from Non-Hub and Small-Hub Airports under § 93.70 of this subpart will be reallocated by a Weighted Lottery.

§ 93.65 Duration of Operating Authorizations.

(a) Operating Authorizations initially assigned to Carriers on January 1, 2007, have a minimum term of three years unless withdrawn or returned in accordance with this subpart.

(b) By January 1, 2007, the FAA will establish the expiration schedule for all Operating Authorizations assigned to Carriers on January 1, 2007. Ten percent of these Operating Authorizations will expire annually beginning on December 31, 2009.

(c) Each expired Operating Authorization will be reallocated and thereafter shall carry a 10-year operating term.

§ 93.66 Reversion and Withdrawal of Operating Authorizations.

(a) A Carrier's Operating Authorizations revert automatically to the FAA 30 days after the Carrier has ceased all operations at LaGuardia for any reasons other than a strike.

(b) The FAA may retime, withdraw or temporarily suspend Operating Authorizations at any time to fulfill operational needs.

(1) Operating Authorizations will be withdrawn in accordance with the priority list established under § 93.74 of this subpart.

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

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

(c) The FAA shall not withdraw or temporarily suspend any Operating Authorizations under paragraph (b) of this section from any Carrier if the result would reduce the Carrier's total number of Operating Authorizations below ten per day.

§ 93.67 Sale and Lease of Operating Authorizations.

(a) Carriers may buy, sell or lease Operating Authorizations in accordance with this section.

(b) Only monetary consideration may be provided in any transaction conducted under this section.

(c) A Carrier must provide notice to the FAA to sell or lease an Operating Authorization. Such notice must contain: the Operating Authorization number and time, effective dates and, if appropriate, the duration of the lease and the minimum size aircraft that must be used for the operation. The Carrier also may provide the FAA with a minimum bid price.

(d) The FAA will post a notice of the sale or lease of the Operating Authorization 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. Information identifying the seller or lessor of the Operating Authorization will not be released until after the transfer of the Operating Authorization.

(e) The FAA must receive all bids electronically, via the FAA Web site, by the closing date and time. Eligibility requires a bidding Carrier to participate on the first day of the bidding process. Late bids will not be considered. All bids will be held confidential, with each bidder certifying to the FAA that its bid has not been disclosed to any person.

(f) The FAA will forward the highest bid to the seller or lessor without any information about the identity of the bidder. The seller or lessor has three business days to accept or reject the bid.

(g) Upon acceptance, the FAA will notify the buyer/lessee.

(h) Written evidence of each Carrier's consent to the transfer must be provided to the FAA, and each Carrier must certify that only monetary consideration will be exchanged.

(i) The Operating Authorization may not be used until the conditions of paragraph (h) of this section have been met, and the FAA provides notice of its approval of the transfer.

(j) A Carrier may transfer an Operating Authorization to another Carrier that conducts operations at LaGuardia solely under the transferring Carrier's marketing control, including the entire inventory of the flight. Each party to such transfer must provide written evidence of its consent to the transfer. The FAA Vice President, System Operations Services, is the final decision maker for any determinations under this subsection. The recipient Carrier of the transfer may not use the Operating Authorization until the FAA has provided written confirmation.

§ 93.68 One-for-One Trades of Operating Authorizations.

(a) A Carrier may trade an Operating Authorization with another Carrier on a one-for-one basis.

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

(c) The recipient of the transfer may not use the Operating Authorization until written confirmation has been received from the FAA.

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

§ 93.69 Average Aircraft Size Target.

(a) On an annual basis, beginning in 2008, each Carrier's Average Aircraft Size must meet or exceed the Average Aircraft Size Target established by the FAA for LaGuardia. The FAA will publish the target in the **Federal Register** at least 90 days before the beginning of the calendar year.

(b) Baseline Operations and Small Community Operating Authorizations are excluded from the Carrier's Average Aircraft Size calculation.

(c) Beginning January 1, 2009, if a Carrier's Average Aircraft Size does not meet the Average Aircraft Size Target over the preceding year, the FAA will withdraw Operating Authorization(s) from the Carrier until the target is met.

(1) The FAA will withdraw the Operating Authorization(s) that used the aircraft with the smallest seating capacity.

(2) Unless there is an operational need identified by the FAA, the Carrier may designate which Operating Authorization is withdrawn.

(d) Paragraph (a) of this section does not apply to Operating Authorizations that are not used by a Carrier because of a strike.

(e) The FAA may waive the requirements of paragraph (a) of this section in the event of a highly unusual and unpredictable condition that is beyond the control of the Carrier and that persists for a period of 5 consecutive days or more. Examples of conditions which could justify a waiver under this paragraph are weather conditions that result in the restricted operation of an airport for an extended period of time or the grounding of any aircraft type.

(f) Paragraph (a) of this section does not apply to Operating Authorizations that are held by a Carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Sunday in January.

(g) Paragraph (a) of this section does not apply to the first 90-day period after assignment of Operating Authorizations obtained in a Weighted Lottery or through a sale.

§ 93.70 Minimum Usage Requirements for Small Community and Baseline Operating Authorizations.

(a) Any Small Community or Baseline Operating Authorization that is not used at least 80 percent of the time over a consecutive two-month period will be withdrawn by the FAA.

(b) Paragraph (a) of this section does not apply to the first 90-day period after assignment of Operating Authorizations obtained in a Weighted Lottery or through a sale.

(c) Paragraph (a) of this section does not apply to Operating Authorizations that are not used by a Carrier because of a strike.

(d) The FAA may waive the requirements of paragraph (a) of this section in the event of a highly unusual and unpredictable condition that is beyond the control of the Carrier and that persists for a period of 5 consecutive days or more. Examples of conditions which could justify a waiver under this paragraph are weather conditions that result in the restricted operation of an airport for an extended period of time or the grounding of any aircraft type.

(e) The FAA will treat as used any Operating Authorization held by a Carrier on Thanksgiving Day, the Friday following Thanksgiving Day, and the period from December 24 through the first Sunday in January.

§ 93.71 Unscheduled Operations.

(a) During the hours of 6:30 a.m. through 9:59 p.m., Monday through Friday, and 12 p.m. through 9:59 p.m. on Sunday, no person may operate an aircraft other than a helicopter or from LaGuardia unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO). Additional information on procedures for obtaining a Reservation will be available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Six (6) Reservations are available per hour. The ARO will assign Reservations on a 15-minute basis.

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

(d) 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 must be filed only after the Reservation is obtained, include the Reservation number in the "Remarks" section, and be filed in accordance with FAA regulations and procedures.

(e) 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>.

(f) 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 not likely, the FAA may determine that additional Reservations may be accommodated for a specific time period. Unused Operating Authorities may also be temporarily made available for Unscheduled Operations. Reservations for additional Operations must be obtained through the ARO.

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

§ 93.72 Reporting Requirements.

(a) *Carrier's Aircraft Size Target.* (1) Annually, beginning March 1, 2008, each Carrier holding an Operating Authorization must report, in a format specified to the FAA, the following information for each Operating Authorization held during the previous calendar year:

(i) The Operating Authorization number, time, and arrival or departure designation;

(ii) The operating Carrier;

(iii) The aircraft-type;

(iv) The number of passenger seats offered on the aircraft for each operation; and

(v) The date and time of each of its operations using an Operating Authorization, including flight number, and origin/destination.

(2) Annually, beginning March 1, 2008, each Carrier holding an Operating Authorization must report, in a format

specified by the FAA, the average number of seats flown over all Operating Authorizations that are subject to the Average Aircraft Size Target.

(b) Minimum Usage Requirements for Small Community and Baseline Operating Authorizations. Each Carrier holding a Small Community or Baseline Operating Authorization must, within 14 days after the last day of the 2-month period beginning January 1, 2007, and every 2 months thereafter report, in a format acceptable to the FAA, the following for each Operating Authorization held:

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

(2) The operating Carrier;

(3) The aircraft-type;

(4) The number of passenger seats offered on the aircraft for each operation; and

(5) The date and time of each of its operations using an Operating Authorization, including flight number, and origin/destination.

(c) Annually, by March 1, 2008, each Carrier must designate ten Operating Authorizations as its Baseline Operations and report to the FAA the Operating Authorization number, time, and arrival or departure.

(d) The FAA may withdraw the Operating Authorizations of any Carrier that does not report its utilization of Operating Authorizations in accordance with this section.

§ 93.73 Weighted Lottery.

(a) The FAA will reassign by Weighted Lottery Operating Authorizations not assigned by the FAA as part of the initial allocation and those returned to the FAA or withdrawn, as described under § 93.66 of this subpart or withdrawn under § 93.69 and § 93.70 of this subpart.

(b) Each Carrier's weight in the lottery is inversely proportional to its share of total Operating Authorizations at LaGuardia. Any Carrier that does not hold or operate Operating Authorizations under its own name as of the announced date of a Weighted Lottery, and has not held or operated Operating Authorizations at LaGuardia since [EFFECTIVE DATE OF FINAL RULE], its weight is equal to that of a Carrier with two Operating

Authorizations (a single roundtrip flight).

(c) The FAA will publish a notice in the **Federal Register** announcing the lottery dates and any special procedures for the lotteries.

(d) Any Carrier seeking to participate in a lottery must notify the FAA in writing, and such notification must be received by the FAA 15 days prior to the lottery date. The Carrier must report—

(1) If it currently operates scheduled service at LaGuardia or has operated scheduled service at LaGuardia since [EFFECTIVE DATE OF FINAL RULE];

(2) The number of Operating Authorizations it holds (if any); and

(3) If there is common ownership with any other Carrier, and if so, the identify of such Carrier.

(e) Operating Authorizations obtained under this section may not be bought, sold, leased, or otherwise transferred until one year has elapsed from their assignment.

§ 93.74 Administrative Provisions.

(a) The FAA will assign priority numbers by random lottery for Operating Authorizations at LaGuardia. Each Operating Authorization will be assigned a withdrawal priority number, and the 15-minute time period for the Operating Authorization, frequency, and the arrival or departure designation.

(b) If FAA determines that operations need to be reduced for operational reasons, the lowest assigned priority number Operating Authorization will be the last withdrawn.

(c) Any Operating Authorizations 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 Operating Authorizations 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.

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

Issued in Washington, DC on August 23, 2006.

Nan Shellabarger,

Director of Aviation Policy and Plans.

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