

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

[Docket No. FAA-2008-0517; Notice No. 08-05]

RIN 2120-AJ28

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

AGENCY: Federal Aviation Administration (FAA).

ACTION: Notice of proposed rulemaking (NPRM).

**SUMMARY:** The FAA proposes to establish procedures to address congestion in the New York City area by assigning slots at John F. Kennedy (JFK) and Newark Liberty (Newark) International Airports in a way that allows carriers to respond to market forces to drive efficient airline behavior. This proposal is a companion to a separate rulemaking initiative addressing congestion mitigation at New York's LaGuardia airport. Today's proposal is similar to what we have proposed for LaGuardia airport, but it takes into consideration the characteristics of both JFK and Newark, including the large number of international flights at these airports and our international obligations. The FAA proposes to extend the caps on the operations at the two airports, assign to existing operators the majority of slots at the airports, and create a market by annually auctioning off a limited number of slots in each of the first five years of this rule. The FAA is proposing two alternatives.

Under the first alternative, the assignment of slots at JFK and Newark would be conducted through a uniform mechanism. The FAA would auction off a portion of the slots and would use the proceeds to mitigate congestion and delay in the New York City area. Under the second alternative, the same auction procedure would apply at Newark as under the first alternative but at JFK the auction proceeds would go to the carrier holding the slot rather than to the FAA. For both alternatives, this proposal also contains provisions for minimum usage, capping unscheduled operations, and withdrawal for operational need. The FAA proposes to sunset the rule in ten years.

**DATES:** Send your comments on or before July 21, 2008.

**ADDRESSES:** You may send comments identified by Docket Number FAA-

2008-0517 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.

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

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

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

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

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

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

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

**SUPPLEMENTARY INFORMATION:** Later in this preamble, under the Additional Information section, we discuss how

you can comment on this proposal and how we will handle your comments. Included in this discussion is related information about the docket and the handling of proprietary or confidential business information. We also discuss how you can get a copy of this proposal and related rulemaking documents.

**Authority for This Rulemaking**

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

**I. Background***A. History of Congestion Management Initiatives at JFK*

JFK has historically been a constrained airport. From 1969 through 2006, the FAA managed congestion there during the five hours of peak transatlantic demand—3 p.m. through 7:59 p.m., Eastern Time under the High Density Rule (HDR). 14 CFR part 93 subparts K and S.

In 1994, Congress began to relax the HDR by authorizing the Secretary of Transportation, upon making a public interest finding, to grant exemptions from the HDR to enable new entrant carriers<sup>1</sup> to provide air transportation at certain slot-controlled airports, including JFK. 49 U.S.C. 41714. In 1999, pursuant to this authority, the Department issued an order that authorized new flight operations at JFK by granting 75 slot exemptions to JetBlue Airways (JetBlue), a new entrant carrier, to be phased in over a five-year period.<sup>2</sup> The order stated that JetBlue would operate the majority of its flights outside the five HDR slot-controlled hours.

In 2000, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Public Law No. 106-181, ended the application of the HDR at JFK, effective January 1, 2007. 49 U.S.C. 41715(a)(2).<sup>3</sup> AIR-21 also

<sup>1</sup> The term "new entrant carrier" was defined as "an air carrier that does not hold a slot at the airport concerned and has never sold or given up a slot at that airport after December 16, 1985, and a limited incumbent carrier." 49 U.S.C. 41714(h)(3).

<sup>2</sup> *Application of New Air Corporation for Exemption from 14 CFR part 93, Subparts K and S of 49 U.S.C. 41714(c)*, Order 99-9-11 (September 16, 1999).

<sup>3</sup> The phase-out also included LaGuardia, as of January 1, 2007. 49 U.S.C. 41715(a)(2). The HDR at

directed the Secretary to grant exemptions from the HDR's flight restrictions for operations by new entrant carriers or for flights serving Small-Hub and Non-Hub airports as long as the aircraft used had less than 71 seats. Additionally, it preserved the FAA's authority to impose flight restrictions by stating that "[n]othing in this section \* \* \* shall be construed \* \* \* as affecting the Federal Aviation Administration's authority for safety and the movement of air traffic." 49 U.S.C. 41715(b).

Until recently, most operations at JFK took place during relatively pronounced arrival and departure banks corresponding to the operating windows of transatlantic flights. Maximum efficiency at JFK has been achieved with the use of either two arrival runways and one departure runway, or two departure runways and one arrival runway. Air traffic controllers have employed that configuration to facilitate the historic transatlantic traffic flows.

Since the spring of 2006, U.S. air carriers serving JFK have significantly increased their domestic scheduled operations throughout the day. Most of the increase has come from the two largest operators at the airport, Delta Airlines (Delta) and JetBlue. The new traffic patterns affect the efficient use of JFK's four runways, impeding the use of the three-runway configurations (two arrival/one departure, or one arrival/two departure) for maximum utility of active runways.

As a result of the increase in scheduled operations at JFK, the summer 2007 demand exceeded the airport's capacity during many periods of the day. During morning hours, volume-related delays were routine from 7 a.m. through 9 a.m. The afternoon and evening demand exceeded the airport's optimal capacity until about 10 p.m. This prevented the airport from having an evening period to recover from congestion-induced delays.

During fiscal year 2007, the average daily operations at JFK increased 21 percent over fiscal year 2006. Corresponding to the increased operations, on-time performance and other delay metrics have declined year over year. The on-time performance at JFK, which is defined as the arrival at the gate within 15 minutes of the scheduled time, declined from 68.5 percent in fiscal year 2006 to 62.19 percent in fiscal year 2007. On-time arrivals during the peak travel months of June, July and August declined from

63.37 percent in 2006 to 58.89 percent in 2007, while on-time departures declined from 67.49 percent to 59.89 percent. For the entire fiscal year, the average daily arrival delays exceeding one hour increased by 87 percent over fiscal year 2006 levels. Taxi out delays, which measure the time that aircraft wait prior to departing the runway, increased by 15 percent. Taxi out delays in the evening departure periods frequently exceeded an hour in duration.

The increased congestion and associated delays at JFK impact other airports in the region and the National Airspace System (NAS). The airspace redesign for the New York/New Jersey/Philadelphia metropolitan area, approved in 2007, documents the costs and far-reaching impacts of delays that originate from this area. The delays that cascade from this area throughout the NAS are costly and far-reaching, as detailed in the recently approved airspace redesign plan for the New York/New Jersey/Philadelphia metropolitan area.<sup>4</sup> The FAA has taken steps to implement airspace redesign, which will provide efficiency and congestion relief by, among other things, opening additional arrival and departure routes in the New York area. Further, the FAA, working with stakeholders, is implementing short-term initiatives to improve the efficiency of airport operations and air traffic control, particularly during severe weather. Additionally, the FAA has increased the use of a second departure runway at JFK when conditions permit. However, none of these initiatives will offer an immediate or complete solution.

On September 24, 2007, the FAA redesignated JFK as a Level 2 Schedules Facilitated Airport<sup>5</sup> for the summer 2008 scheduling season in accordance with the International Air Transport Association Worldwide Scheduling Guidelines (IATA WSG). 72 FR 54317. Under the WSG, carriers must inform the coordinator of projected operations at a Level 2 airport for the next scheduling season. When submitting the required information, the airlines expressed their intent to add new flights

<sup>4</sup> See: [http://www.faa.gov/airports\\_airtraffic/air\\_traffic/nas\\_redesign/regional\\_guidance/eastern\\_reg/nynjphl\\_redesign/](http://www.faa.gov/airports_airtraffic/air_traffic/nas_redesign/regional_guidance/eastern_reg/nynjphl_redesign/).

<sup>5</sup> An airport, where demand is approaching capacity and a more formal level of cooperation is required to avoid the circumstances of over-capacity, is designated an IATA Level 2 Schedules Facilitated Airport. At a Level 2-designated airport, a schedules facilitator seeks the cooperation and voluntary agreement of airlines serving the airport to avoid congestion.

at JFK during peak and off-peak hours for summer 2008.

Also in September 2007, the Administrator determined that JFK was a severely congested airport and that a scheduling reduction meeting, under 49 U.S.C. 41722, was necessary to discuss flight reductions with U.S. air carriers to reduce over-scheduling and flight delays at JFK during peak operating hours. On October 12, 2007, the Secretary of Transportation determined that a scheduling reduction meeting was necessary to meet a serious transportation need or to achieve an important public benefit. On October 22, the FAA opened a docket for information on the establishment of flight reduction targets at JFK during peak hours. 72 FR 59579. In order to address increases in demand by foreign air carriers, the FAA determined that a Level 3 Coordinated Airport declaration was warranted on October 25, 2007.<sup>6</sup> 72 FR 60710.

In order to address increases in demand by domestic carriers, the FAA convened the scheduling reduction meeting with U.S. carrier participants on October 23–24, 2007. Subsequent in-person and telephonic meetings took place as well. At the sessions, American Airlines, Delta and JetBlue, which together account for three-quarters of the total operations at JFK, withdrew the schedule increases each had proposed for summer 2008 during the airport's 3 p.m. to 7:59 p.m. peak hours. They also adjusted the timing of operations during those hours and others to smooth out peaks. Other airlines also agreed to retime peak operations. The FAA offered capacity during other hours to carriers who re-timed operations or added additional flights.

As a result of the agreements reached at that meeting and other discussions held with carriers regarding their projected summer 2008 schedules, the FAA issued a temporary Order limiting scheduled operations at JFK, effective 6 a.m., Eastern Time, March 30, 2008, through 11:59 p.m., Eastern Time, October 24, 2009, to U.S. and foreign air carriers serving the airport and generally capping scheduled operations at 81 per hour. 73 FR 3519 (Jan. 18, 2008), as amended 73 FR 8737 (Feb. 14, 2008). This Order temporarily responds to the carriers' desire to regularly schedule flights above the airport's capacity during peak operating hours, relieves the substantial inconvenience to the traveling public caused by excessive

<sup>6</sup> Where demand for an airport exceeds capacity, voluntary cooperation is unlikely to resolve the problem, and short term capacity enhancements are not available, the airport is designated an IATA Level 3 Coordinated Airport.

Chicago O'Hare International Airport was directed to be phased out by July 1, 2002. 49 U.S.C. 41715(a)(1).

congestion-related flight delays at the airport (which rippled through the NAS), reduces the average length of delays, and provides for a more efficient use of airspace.

#### *B. History of Congestion Management at Newark*

Newark was once subject to the HDR although the FAA suspended the application of the rule at Newark due to sufficient airport capacity to meet demand. 35 FR 16591 (Oct. 24, 1970). Over the past several years, however, Newark has grown to be one of the most delay-prone airports in the country. Current and anticipated demand during peak hours approaches or exceeds the average runway capacity, resulting in volume-related delays. These delays are aggravated by weather or other adverse operating conditions.

Comparing FY 2007 to FY 2000, average daily operations at the airport decreased about 3 percent (from 1,253 to 1,219) but performance nevertheless suffered. The percent of on-time gate arrivals decreased from 70.66 percent to 61.71 percent; arrival delays greater than one hour increased from 54 to 93 per day on average.

In 2007, for example, Newark's on-time arrival performance was 61.8 percent, the second worst among the top 35 airports. Based on "the airport's performance metrics and imbalance between air traffic control (ATC) capacity and demand that is expected to continue in the near term," the FAA designated Newark a Level 2 IATA Schedules Facilitated Airport for the summer 2008 scheduling season.<sup>7</sup> The FAA explained that "increased levels of air traffic operations, congestion and delay at [both JFK and Newark] airports and a tangible decrease in operational performance" warranted this designation.<sup>8</sup> The FAA found the morning hours of 7 a.m. to 10 a.m. and the afternoon and evening hours of 2 p.m. to 10 p.m. were particularly constrained, but that capacity otherwise was available for retiming of flights or new operations.

The FAA modeled the proposed summer 2008 schedule requests against Newark's average runway capacity, and delay projections for the summer of 2008 indicated a potential increase of almost 50 percent. The FAA also discussed carriers' future schedule plans at Newark and asked carriers to consider scheduling flights at times where there was available capacity. It was clear that some carriers intended to proceed with their plans to begin

operations according to their proposed schedules during the busiest hours, regardless of the potential impact on delay. Based on the requested schedules for Newark and anticipated additional demand for Newark due to the operating limits underway at JFK, the FAA determined that the anticipated summer 2008 demand would overtax Newark's capacity, warranting a Level 3 Coordinated Airport designation. 72 FR 73418 (Dec. 27, 2007). After the designation, a series of discussions with the FAA led some carriers, including the hub carrier, Continental, to move some of their historic flights from the most oversubscribed hours. The movement of these flights tended to smooth the scheduling peaks and valleys at Newark.

The information provided by the carrier for the summer 2008 scheduling season reflected a projected increase in flight schedules during the summer of 2008, especially during the peak hours. U.S. and foreign carriers had planned about 100 new operations per day at Newark, many during the afternoon and early evening hours for the summer of 2008.<sup>9</sup> That number of new flights, along with proposed retiming of historic flights into busier time periods, would have caused massive delays, because they would have exceeded the airport's optimal rate of handling flights over multiple, consecutive hours. For several consecutive hours, the number of hourly arrivals and departures would have reached the upper 80s to the mid-90s. These operations would have significantly exceeded the airport's average capacity of 83 total operations over the 12-month period ending August 2007. These additional flights would have caused a spike in congestion and delays at Newark and would also have had an adverse effect on other airports in the New York region and on the NAS.

Consequently, on March 18, 2008, the FAA proposed to place temporary caps on peak hour operations at Newark to mitigate persistent congestion and delays at the airport.<sup>10</sup> 73 FR 14552. The cap would limit scheduled operations during constrained hours to an average of 81 per hour.<sup>11</sup> The FAA stated that it identified Newark's average capacity by considering the airport's capacity to

be "the higher value of either the aircraft throughput at the airport in a given hour or the number of arrivals and departures that ATC personnel identified as achievable in that hour." 73 FR 14552, 14554. The measurement reflected "the airport's demonstrated and potential performance over time under actual meteorological and operational conditions." *Id.* The FAA committed to closely monitoring the gains in efficiency and delay reductions from implementing the airspace redesign and other air traffic control or airport operational changes to ensure that the scheduling limits reflect the available capacity.

The FAA has adopted its March 18, 2008, proposal to impose a temporary cap on scheduled operations at Newark. The cap takes effect 30 days after publication and expires 11:59 p.m. Eastern Time, October 24, 2009. The cap limits peak hour scheduled operations to an average of 81 per hour, except as provided in the appendix to the Order, and total scheduled and unscheduled operations to an average of 83. As indicated in the proposed order, the FAA intends to use the hours with scheduled operations below the limit of 81 for delay mitigation and would lease new capacity over 81 pursuant to an auction.

#### *C. New York Aviation Rulemaking Committee*

In addition to the regulatory initiatives discussed above, on September 25, 2007, the Acting FAA Administrator established an Aviation Rulemaking Committee (ARC) to explore various options, including market-based mechanisms, for addressing airspace congestion in the New York area. The ARC was comprised of officials from the FAA and the Office of the Secretary of Transportation (OST), the Port Authority of New York and New Jersey (Port Authority), representatives of carriers and operators serving JFK, Newark, LaGuardia, and Teterboro airports, airport and aviation industry trade associations, and consumer groups.

By design, the ARC provided opportunity for extensive input by all stakeholders, having members from major air carriers in the United States and their trade organizations (the Air Transport Association, the Regional Airline Association, the Air Carrier Association of America, the National Air Carrier Association), foreign carriers and their worldwide trade organization (IATA), the Port Authority, and the Airports Council International-North America. Through the ARC process, these stakeholders played a key role in

<sup>9</sup> Requests for additional flights or retiming of flights into peak periods were received after the FAA's announced schedule submission deadline of October 11, 2007. These requests were accommodated only if there was available capacity remaining after consideration of historic operations and on-time requests.

<sup>10</sup> 73 FR 14552 (March 18, 2008).

<sup>11</sup> The appendix to the order included a few operations for summer 2008 above the 81 per hour limit.

<sup>7</sup> 72 FR 54317 (Sept. 24, 2007).

<sup>8</sup> *Id.*

exploring ideas to address congestion and ensuring that any actions contemplated by the Department and the FAA would be fully informed. The ARC worked throughout the fall and submitted a report to the Secretary, dated December 13, 2007, discussing its findings. A copy of the ARC Report may be found at: <http://www.dot.gov/affairs/FinalARCReport.pdf>.

**II. Discussion of Proposed Rule**

Today’s proposal would replace the Orders imposing operating limitations at JFK and Newark and establish a rule limiting unscheduled operations at those airports. The Orders are scheduled to expire on October 24, 2009. If adopted, the proposed rule would apply to all operations at JFK and Newark

between the hours of 6 a.m. and 10:59 p.m., every day. For reasons set out in the Newark and JFK Orders, discussed above, the FAA has determined that capacity is constrained at these airports for this entire period.

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

PROPOSED REGULATION FOR JFK AND NEWARK

Feature	Newark	JFK	
		Option 1	Option 2
Base Schedule	Seasonal schedule, as approved by the FAA, for summer 2008 and winter 2008/2009.	Seasonal schedule, as approved by the FAA, for summer 2008 and winter 2008/2009.	Same as Option 1.
Slot	Defined as right to land or depart (not both) in a 30-minute time window.	Defined as right to land or depart (not both) in a 30-minute time window.	Same as Option 1.
Number of Slots	81/hour + 1 to 2 unscheduled	81/hour + 1 to 2	Same as Option 1
Slots definition	Common Slots: The Baseline (up to 20 slots per carrier) plus 90% of slots above 20 have 10 year leases; Limited Slots: 10% would have shorter leases and be auctioned over five years (2% each) (after which they convert to Unrestricted Slots).	Common Slots: the Baseline (up to 20 slots per carrier) plus 90% of slots above 20 have 10 year leases; Limited Slots: 10% would have shorter leases and be auctioned over five years (2% each) (after which they convert to Unrestricted Slots).	Common Slots: The Baseline (up to 20 slots per carrier) plus 80% of slots above 20 would have 10 year leases; Limited Slots 20% would have shorter leases and then be reallocated via auction over five years (4%/yr).
Slot Time of Day	6:00 a.m. through 10:59 p.m., everyday; no more than 81 in any one hour or 44 in any half-hour.	6:00 a.m. through 11:59 p.m., everyday; no more than 81 in any one hour or 44 in any half-hour.	Same as Option 1.
Mechanics	“Fair” initial distribution with half of slots with less than 10 years life selected by carriers; the other half selected by FAA according to specified rules.	“Fair” initial distribution with half of slots with less than 10 years life selected by carriers; the other half selected by FAA according to specified rules.	Same as Option 1.
Auction	Limited Slots would be auctioned among carriers.	Limited Slots would be auctioned among carriers.	Same as Option 1.
Auction Proceeds	Auction funds to FAA to defray costs of auction, then to NY capacity/projects.	Auction funds to FAA to defray costs of auction, then to NY capacity/projects.	Auction funds (net of auction costs) to incumbent holder; incumbent cannot bid on own slots.
Use/Lose	Only on grandfathered slots as consideration for slots.	Only on grandfathered slots as consideration for slots.	As as Option 1.
Term	Program is through March 2019; slot lives are whatever proportion of 10 years remain upon reallocation.	Program is through March 2019; slot lives are whatever proportion of 10 years remain upon reallocation.	As as Option 1.
Bidders	Airlines	Airlines	As as Option 1.
Holders	Holders of record (not marketing carrier).	Holders of record (not marketing carrier).	As as Option 1.
New or returned capacity	IATA WSG	IATA WSG	As as Option 1.
Secondary market	Transparent not blind: carrier notifies FAA of intent to sublease; FAA makes slot availability known; bilateral negotiations; final terms disclosed to OST for monitoring.	Transparent not blind: carrier notifies FAA of intent to sublease; FAA makes slot availability known; bilateral negotiations; final terms disclosed to OST for monitoring.	Same.
Logistical swaps of slots	Permitted	Permitted	Same.

The rule would apply to carriers at JFK and Newark. A U.S. air carrier conducting operations solely under another carrier’s market control with unified inventory control would not be considered a separate carrier, an approach that is consistent with how carriers have been treated historically

under the various slot regimes. The same would not be true for foreign air carriers. This difference in treatment reflects the commercial realities of JFK and Newark where there are foreign air carriers that share a common owner but hold out service to the public as separate commercial entities. Treating

foreign air carriers with common ownership as separate carriers for purposes of slot allocation is an accepted practice in the international arena. The recent SNPRM on LaGuardia airport, as well as the LaGuardia Order, treats carriers with common ownership as a single carrier.

As we have explained, we do not anticipate that airport and airspace system improvements scheduled to come on line during the next year and a half will be sufficient to meet the demand for flights at either JFK or Newark for the foreseeable future. Therefore, if we let the Orders expire according to their terms, we believe carriers will once again schedule flights well in excess of the respective capacities of both JFK and Newark and unscheduled operations would grow during peak hours. Historic experience strongly suggests that congestion and delays during peak operating hours would result, requiring the FAA to step in and address unacceptable operational performance yet again.

Rather than taking repeated, piecemeal approaches to limit and manage operations at JFK and Newark on a short-term basis, we believe it is prudent to adopt a longer-term rule dealing with the congestion and delays we expect to persist at those airports. The FAA's preference in addressing congestion resulting from capacity shortfalls is to expand the airport and airway system capacity and to increase the efficient use of existing resources. This is by far the most effective way to serve the traveling public and to promote a strong airport and airway system. Although both the FAA and the Port Authority are working to implement these capacity improvements, this rule would complement those efforts and mitigate projected airport congestion.

We propose to treat the three major New York City-area airports similarly by capping operations and introducing market mechanisms to allocate some slots. While we have provided two different versions of the draft regulatory text to present two alternatives for market allocation, Newark would be treated the same under both versions. Accordingly, all discussion of alternative 2 will be limited to JFK.

The FAA believes it is necessary to address congestion and delays at LaGuardia, JFK, and Newark in a coordinated manner. Congestion and delays at each of the three airports affect the other two airports as well as the NAS as a whole. The airports are all located relatively close to each other and consistently have been among the nation's most delay-prone airports.

Excluding any one of the three major New York-area airports from the imposition of caps would simply shift the problem to the non-slot controlled airport, as it would become very attractive to carriers wanting to start or add service in the New York market. The likely result would be an

overburdening of that airport and the system. We propose to award capacity at JFK and Newark through mechanisms that rely, in part, on the market. These mechanisms resemble those in the proposal for LaGuardia Airport, but are modified to reflect the respective characteristics of JFK and Newark.

Today's proposal will ensure that the scarce airspace resources are used for operations by the carriers valuing the resources most highly. Additionally, over the course of the ten-year life of the proposed rule, we will monitor the need to maintain the caps and may increase the number of scheduled operations in response to technological, operational, or capacity plans or improvements or to other factors that may warrant such action.

We note that both JFK and Newark are already capped under the respective Orders at 81 scheduled operations per hour (except as provided in the Appendices to the Orders). Today's proposal, if adopted, will replace those Orders. The FAA believes the summer of 2007 served as a stark reminder that the demand for access to New York City is exceptional and cannot be managed without these caps at an acceptable level of delay.

The NPRM proposes to apply the limits of the recent JFK and Newark Orders, except where the Administrator determines under § 93.163 of subpart N and § 93.183 of subpart O that additional slots can be accommodated. In addition, there would be no more than 44 slots in any 30-minute period at JFK and Newark, or more than 81 in a 60-minute period. We have proposed to specify the 30- and 60-minute limitations in addition to the hourly maximum to avoid excessive bunching of slots, which can cause unnecessary delays. Section 93.163(d) of subpart N and § 93.183 of subpart O sets out the authority of the Administrator to increase the number of slots as airport conditions warrant. No additional rulemaking would be required for any increase.

JFK and Newark have similar demand profiles, with an early morning peak that typically clears by mid-morning. Demand approaches capacity in the early afternoon and typically continues until about 10 p.m. Scheduled requests submitted by carriers to the FAA for summer 2008 showed marked increases throughout the day. Modeling and experience demonstrate that delays grow exponentially and have a cascading effect on airport operations and individual flights at the airport. As part of the discussions with the carriers regarding summer 2008 schedules, carriers decided to schedule flights at

off-peak hours since the FAA was unwilling to authorize new peak hour flights. Based on demand and the modeling showing the potential for increased delays, the FAA determined that the appropriate hours to limit flights would cover much of the operating day.

The FAA proposes that the final rule, if adopted, would terminate at 11 p.m. on March 30, 2019. This approach will allow for future determinations by the FAA as to whether a cap is still needed and, if so, whether changes are needed to more efficiently manage the scarce resource. At present it is impossible to determine what changes in business models may occur over the next ten years. In addition, full implementation of the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign project and NextGen technologies are expected to successfully impact delays and air traffic efficiency within the next ten years, and we should not prejudge the market response. The FAA plans to evaluate the effects of the slot program proposed today on the distribution of slots and entry into JFK and Newark. The agency intends to take this experience into account in all congestion management activities.

### III. Proposal for Efficient Allocation of Capacity at JFK and Newark

#### A. Need for More Efficient Allocation

Congress has directed the Department to place "maximum reliance on competitive market forces and on actual and potential competition." 49 U.S.C. 40101(a)(6). The ability of carriers to initiate or expand service at the airport is hindered, in large part, by the imposition of a cap. Accordingly, the FAA believes it must strike a balance between (1) promoting competition and permitting access to new entrants and (2) recognizing historical investments in the airport by carriers and the need to provide continuity. It is not the role of the Government either to dictate particular business models or to constrain a market and provide no means for others to enter that limited market. Simply imposing a cap and then doing nothing to ensure that there are competitive market forces and actual and potential competition is unacceptable.

Not only is the FAA required to assure the efficient use of the NAS, but it must do so in a manner that does not penalize all potential operators at the airport by effectively shutting them out of the market. Accordingly, the FAA believes that it is well within the agency's authority in 49 U.S.C. 40103 to

provide some mechanism for slot reallocation. Today's proposal attempts to strike the appropriate balance by actively developing a market that values the limited asset that the FAA created.

#### *B. Authority To Assign Slots at JFK and Newark*

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

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

The United States Government holds exclusive sovereignty over United States airspace. 49 U.S.C. 40103. Citizens of the United States have a public right of transit through navigable airspace, but the FAA is authorized to assign the use of the airspace necessary to ensure the efficient use of airspace. To the extent these needs can be met without specifying which citizen may transit or reserve a particular segment of airspace at a particular time, there was no need for the FAA to place constraints such as slots on the use of the airspace—this remains the case for the vast majority of the NAS.

As described above, however, at New York-area airports, in order to ensure the efficient use of airspace, FAA has had to impose constraints by assigning to carriers operational authority to conduct a scheduled arrival or departure operation on a particular day of the week during a specified 30-minute period. These reservations of airspace were called slots under the HDR. After the FAA issued the "buy/sell rule", 14 CFR part 93, subpart S, these slots were treated not only as property of the United States Government, but also as if the carriers had a property interest, albeit an interest that was heavily encumbered by the restrictions imposed by the FAA. The nature of this property interest, however, has always been somewhat unclear. To encourage the most efficient use of constrained airspace, the FAA is clarifying the proprietary interest that the FAA is willing to transfer to airlines for a limited period of time. However, the FAA has determined that in order to assure the efficient use of airspace, it

cannot simply permit those whom it grants authority to use the airspace to treat that authority as their own; it is the United States Government that has sovereignty over, and control of, the airspace. Such an approach would not only ignore the inherently valuable nature of an airspace usage assignment, but allows a select few to profit from a governmental interest to the detriment of their competitors and the public as a whole.

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

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

Because we must balance the need to promote market forces with the value of continuity and certainty of services, the FAA believes this is the appropriate vehicle to use to transfer most of the slots as described in the following options, for a ten-year period, to the carriers that currently have operating authorizations at JFK and Newark. Doing so will recognize these carriers' historical investment in JFK and Newark, and the public interest that has been served by that investment. In addition, it would prevent disruption to the national air transportation system that might otherwise occur, allowing the public to benefit from continued certainty of readily available air transportation to and from these airports. There will, however, be substantial ongoing Federal involvement with these slots, as the FAA will retain ATC responsibilities for assuring that the use of these segments of airspace for their specified times is

done safely and with maximum possible efficiency.<sup>12</sup>

#### *C. Description of the Proposal*

##### 1. Categories of Slots

Today's proposal would create three categories of slots: Common Slots, Limited Slots, and Unrestricted Slots. All three categories would be held by carriers pursuant to a lease. While the overwhelming percentage of slots will be Common Slots, many carriers would hold slots in all three categories.

Common Slots would be assigned to carriers currently serving the airports, and would be leased for the duration of the rule, *i.e.*, ten years. Once the rule sunsets, all interests would revert to the FAA, assuming the rule is not replaced by a different regulatory regime. Unlike slots allocated under the HDR and Operating Authorizations allocated under the JFK and Newark Orders, carriers would be granted clear property rights to Common Slots, allowing the slots to be collateralized or subleased to another carrier for consideration. However, Common Slots would be subject to reversion to the FAA under the rule's minimum usage provision and could be withdrawn for operational reasons.

Leases for Limited Slots would also be assigned by cooperative agreements between the FAA and the carriers, but during each of the first five years of the rule, a percentage of Limited Slots would be made available by auction, at which point they would be converted to Unrestricted Slots. Limited Slots would consist only of those slots operated on a daily, year-round basis. Thus, slots used on a seasonal or on a less-than-daily basis would not be designated as Limited Slots. The FAA arrived at this tentative proposal because we seek to populate the auction pool with those slots that are most economically valuable to carriers seeking to serve New York City. Slots only available on certain days or during one scheduling season would likely have value only to small subsets of operators at any given time, thus limiting the effectiveness of the market. Although slots would be awarded to carriers through the auction for daily, year-round operation, the

<sup>12</sup> Under the cooperative agreements FAA will be transferring a leasehold interest in the slots, but FAA will not entirely dispose of its property. Receiving compensation from these transfers is antithetical to the definition of a cooperative agreement. Nonetheless, to the degree that adequate compensation might be considered required under 49 U.S.C. 40110(a)(2), the compensation will be the carriers' agreement to be bound by the terms in the cooperative agreement as well as FAA's recognition of the public value received by the carriers' historical investment at JFK and Newark.

acquiring carrier may sublet to other carriers any portion of that award.

Under alternative 1, as currently proposed, 10 percent of the slots above the baseline operations<sup>13</sup> at both JFK and Newark would be designated as Limited Slots, and thus could become Unrestricted Slots. Under alternative 2, 20 percent of the slots at JFK above the baseline operations would be designated as Limited Slots.

The FAA recognizes that the percentage of slots that the agency proposes to reallocate represents a relatively small percentage of the total number of slots at the two airports, particularly since each carrier's first 20 slots, at each airport, will not be subject to reversion. Accordingly, we specifically invite commenters to address the desirability of assigning different percentages for both JFK and Newark under both alternatives. For example, should we increase the percentages to be auctioned under alternative 1 to 20 percent?

Additionally, the FAA seeks comment on whether the proposed percentages are sufficient to ensure the opportunity for new entry and an efficient allocation of slots among all carriers at the airports, such that each slot is allocated to the user who values it the most highly. Increasing the percentage of slots for auction would further facilitate the use of market forces to allocate capacity, which is a major goal of this rulemaking. On the other hand, lowering the number of slots withdrawn for auction would be less disruptive to the carriers currently operating at JFK and Newark, and would allow the agency to gain experience with the auction process. The agency also seeks input on the appropriate percentages of slots available for auction (both in total and annually) sufficient to assure an efficient allocation of this scarce resource. The final rule may provide for the reversion of a higher or lower percentage of slots available for auction than we have proposed under either alternative in this document.

Following a review of the comments and further consideration, we may provide in a Final Rule for an auction of a greater percentage of a carrier's Limited Slots. As with Common Slots, Limited Slots could be withdrawn under the proposed minimum usage provision, or for operational reasons.

Unrestricted Slots are slots that a carrier would lease directly from the FAA under the auction processes under both alternatives. These slots would not be withdrawn by the FAA either under

the minimum usage provisions or for operational reasons because carriers are required to purchase them due to government action. As with Common Slots, Unrestricted Slots would expire when the rule sunsets.

## 2. Initial Assignment of Capacity

Upon the rule's effective date, each carrier at JFK and Newark would automatically be assigned up to 20 slots. Carriers whose approved schedules under the JFK and Newark orders call for fewer than 20 operations would be assigned the same number of slots as they are approved to operate under the respective orders. These slots would constitute carrier's baseline operations. Slots above a carrier's baseline operations would be designated as Common or Limited Slots as described above. The FAA believes this is a rational approach to assuring that no carrier is affected at a level that could seriously disrupt its existing operations at the airports.

The number of slots to be designated as Limited Slots would be calculated after subtracting the slots in each carrier's baseline operations of up to 20 slots per day. In other words, if a carrier has 30 slots at JFK or Newark, 20 would be protected at that airport. Under alternative 1, 10 percent of the remainder, or one slot, would become a Limited Slot. Under alternative 2, 20 percent of the remainder, or two slots, would become Limited Slots at JFK. Of course, most carriers hold a number of slots that would not be evenly divisible by applying a 10-or 20-percent rule. In such situations, the FAA would round the number of slots to be designated as Limited Slots up or down to the nearest whole number. As a practical matter, a carrier would have to have at least 25 slots under alternative 1 or 23 slots under alternative 2, before any would be designated as Limited Slots.

Given the seasonality of operations at these airports, both in terms of differences between summer and winter operations and within-season variability (which is much greater than at LaGuardia), the determination of which carrier is entitled to which slot will be based on the seasonal schedules approved by the FAA for summer 2008 and winter 2008/2009. The FAA has tentatively decided to assign the majority of slots at the airport to existing carriers in order to minimize disruption and to recognize the carriers' historical investments in both the airport and the community.

No later than the final rule's effective date, the FAA will inform all carriers that will have Limited Slots of the number of Limited Slots they will have.

The designations as Limited Slots would be made by both carriers and the FAA. Once the total number of Limited Slots is communicated to each carrier, the carrier would designate 50 percent of the total by notifying the FAA within 10 days which of the slots in its slot pool it designates as Limited Slots. During the subsequent 10 days, the FAA would determine the remainder of slots that will be designated as Limited Slots for each carrier. In making this determination, the FAA would initially exclude from consideration slots held during all hours where carriers have collectively determined two or more slots should be Limited Slots. This approach will assure that slots will be available for auction throughout the day. The time windows for the Limited Slots would be distributed evenly over the day to the extent possible.

Limited Slots would expire on designated dates and the duration of each Limited Slot would be arranged to ensure that each affected carrier's aggregate lease duration would be approximately equal to that of the other affected carriers. The FAA would publish a list showing the expiration date for each Limited Slot. In this way, all carriers would know within 20 days of the rule's effective date what slots will become available for purchase, and when.

A technical report more fully explaining how Limited Slots could be categorized and allocated was prepared for the LaGuardia rulemaking. A copy of that report has been placed in the docket for this rulemaking. Commenters are encouraged to review and comment on that document.

## 3. Market-Based Award of Capacity

For the first five years of the rule, the FAA would conduct an annual auction of Limited Slots. Section 93.165(c) of subpart N and § 93.185 of subpart O provides for the conversion of Limited Slots to Unrestricted Slots. In accordance with the schedule published under § 93.164, one-fifth of the identified Limited Slots would revert to the FAA for auction each year. Both the auction and secondary market would be open to any carrier in order to avoid artificially restricting any carrier's flexibility to acquire Unrestricted Slots for its services, and to offer carriers wishing to initiate or expand operations at JFK or Newark the full range of opportunities to acquire slots.

Under alternative 1, the FAA is proposing to have 10 percent of the carriers' slots above its baseline operations revert to the FAA over the first five years of the rule. The FAA would auction the reverting Limited

<sup>13</sup> "Baseline operations", as defined in § 93.162 and § 93.182, are up to 20 slots per day.

Slots, with FAA retaining proceeds of the sale. After recouping its auction costs, the FAA plans to spend the remainder of the proceeds on aviation congestion and delay management initiatives in the New York City area.

Alternative 1 would make approximately 19 slots available for auction at JFK and 18 slots available at Newark each year. Carriers typically require pairs of slots, so alternative 1 would provide the equivalent of approximately 9 round trips per day at both airports. Under alternative 1, any carrier could bid on a slot in an auction that is blind to the participants and it would be awarded in the form of an Unrestricted Slot to the highest responsive bidder. The winning carrier could commence operations using the newly acquired slot at the beginning of the next summer scheduling season.

Alternative 2 proposes a different auction procedure for JFK that would provide that the holder of a Limited Slot would retain the proceeds of its sale in the auction. The only deduction from the sale price would be for the FAA's costs associated with conducting the auction.

Under this alternative, 20 percent of the carriers' slots above the baseline operations at JFK would revert to the FAA over the first five years of the rule. Therefore, approximately 179 slots would be available at JFK, of which approximately 36 slots would be available for auction each year. Carriers typically require pairs of slots, so alternative 2 as proposed would provide the equivalent of 18 round trips per day at JFK.

Under alternative 2, Unrestricted Slots would be awarded to the highest responsive bidders in a blind auction. Only cash could be bid for a slot. Since the goal of this rulemaking is to impose marketplace discipline on the use of slots, the FAA has proposed certain restrictions in alternative 2 to reduce anticompetitive behavior. For example, carriers may not set minimum bids for the slots, so they cannot impose a price so prohibitively high as to effectively preclude any sales. For similar reasons, carriers would not be permitted to bid on their own slots; otherwise, knowing that no actual payment would be made, they could bid unrealistic amounts that no competitor could match. With unrealistic bids, the fair market value of the slot would not be identified.

Although the prohibition against a carrier bidding on its own slots would mean that the carrier would no longer have that slot, any carrier could negotiate for subleases or transfers from other carriers in the secondary market or

bid on other slots concurrently up for auction and held by other carriers.<sup>14</sup>

The FAA believes that the above procedures could not be applied at Newark, because the current market profile there would diminish the likelihood that the auction would bring the beneficial effects of market forces that this proposal seeks to stimulate. At JFK (and at LaGuardia), no one carrier provides the vast majority of slots that would be up for auction, and any carrier that values a slot at a particular time could have the opportunity to bid on an equivalent slot that is held by another carrier. At Newark, however, Continental would have approximately 174 of its slots up for auction if 20 percent of its slots reverted to the FAA, but would be unable to bid on those slots or on an equivalent number of slots because only 19 slots would be available from any other carrier. Under this circumstance, the prices paid for slots at Newark may not be reflective of their actual value, with no meaningful slot market developing.

Among the specific questions on which we request comment is whether under alternative 2, 20 percent of a carrier's slots above its baseline at Newark should revert to the FAA for auction, even though the reallocation mechanism would be the same as under the first alternative. The agency also requests comment on whether alternative 2, in its entirety, should be adopted at Newark.

The FAA considered using a transparent auction procedure for both alternatives 1 and 2. The FAA believes that such transparency with respect to identity of the bidders and their corresponding bids would encourage gaming of the auction and significantly reduce the economic value of the initial auction of slots. The FAA also believes that an auction where the identity of the bidders is not known assists new entrants seeking to enter the market. Therefore, under Alternative 1, the identity of bidders would not be known to other bidders. Since the FAA will accept the highest responsive bid, regardless of who that bidder is, there is no need to keep bidders' identities from the agency. Under Alternative 2, the identity of bidders would be known only to the auctioneer, and then only for administrative purposes.

The FAA does not propose to auction slots after the first five years because it believes that ideally slots should transfer from one carrier to another

<sup>14</sup> The FAA will attempt to auction an even number of slots during each hour to provide an opportunity for a carrier to replace a slot that it is auctioning. This may not always be possible.

through the secondary market. Not only will the auctions help create a market for slots, but all carriers will be able to assess the true market value of a slot. Armed with information on how much a given slot is likely to be worth on the open market, carriers (and their shareholders) will be in an even better position to determine how best to use their slots based on commercial considerations.

In the unlikely event no bids were received for a slot, we propose that the FAA retire the slot until the next auction to assist in delay mitigation. We request comment on whether, in the alternative, the carrier that previously held the slot should retain the slot for use until the next season.

#### 4. New and Returned Capacity

As mentioned above, the FAA may raise the caps at JFK or Newark based on an analysis of delay statistics, aircraft operations at the respective airports, airport and airspace improvements, and other pertinent factors. The agency believes there is unlikely to be much, if any, returned capacity because carriers can sublease slots that they do not utilize efficiently rather than surrender them to the FAA because of inadequate usage. It is impossible at this time to estimate with any certainty how much new capacity is likely to come online; but it is unlikely there will be much new capacity in the near-term. Over a longer period of time, the realization of new capacity is dependent upon NextGen technologies. The efficiencies realized from the New York/New Jersey/Philadelphia Metropolitan Area Airspace Redesign project will benefit delay reduction and will not be used to add new capacity at the airports.

The auction method proposed for LaGuardia, whereby all new and returned capacity would be auctioned, maximizes the total number of slots available for auction and would, in turn, increase the efficiencies that the proposal is intended to generate. However, the FAA believes the character of operations at JFK and Newark justifies a different approach. At both airports, a substantial percentage of air traffic is international. Historically, the FAA has used the IATA Worldwide Scheduling Guidelines (WSG) to allocate slots for international operations at slot constrained airports to the extent they did not conflict with the rules imposing caps at the affected airports.

The use of the WSG to assign new slots could affect carriers' scheduling incentives and reduce the efficiency of the market for existing slots. However, given the amount of new capacity that

is likely to be available during the rule's timeframe, this effect is likely to be small. Given the significant international presence at both airports, the FAA proposes to follow procedures for assigning newly available or returned slots that are largely derived from the WSG. A new entrant would be defined as a carrier holding or operating eight slots or fewer, assigned by the FAA, during the constrained hours. The FAA understands that in order to maintain viable operations at JFK or Newark, a carrier would need four to six slots for domestic operations, and at least two slots for an international operation. The five slots contemplated under the WSG provide little opportunity for a new entrant carrier to establish its operations before losing new entrant status and thereafter being able to expand in the New York market only through the purchase of a lease. Setting a limit of eight slots administratively assigned by the FAA as the cut-off for new entrant status allows a carrier to maintain its operations and provides some ability to grow without jeopardizing the carrier's access to slots through the WSG.

The agency is proposing that carriers lose their new entrant status if, at any point during the duration of the proposed rule, the FAA assigns a total of more than eight Common or Limited Slots on a particular day. Thus, if a carrier were awarded six Common Slots on a given day of the week, it could only be eligible for assignment of two more slots for that day through the WSG before losing its new entrant status, even if it subsequently subleased some of those Common Slots to another carrier, giving it less than eight total slots. However, the same carrier could be assigned six Common Slots, acquire any number of additional slots through the secondary market, and still be eligible to receive two additional slots under the WSG as a new entrant. This provision is intended to prevent carriers from continuing to gain an advantage as a new entrant by transferring holdings for which they have provided no monetary consideration. On the other hand, since only those slots administratively assigned by the FAA, and not those awarded by auction or through a lease with another carrier, would be considered in determining new entrant status, carriers with eight or fewer of these slots will not be discouraged from entering into lease agreements with other carriers, contributing to the development of a robust secondary market. A carrier's new entrant status would not be affected by one-for-one trades, which the agency

believes are necessary for operational efficiency, which do not result in either a gain or reduction in operations, and for which no consideration may be given. The FAA seeks comment on whether carriers should be allowed to retain their new entrant status if they have subleased or otherwise transferred slots originally allocated to them by the FAA.

After allowing for retimings and accommodating requests by new entrants, the FAA would evaluate the efficiency of the requested assignment in determining which carriers should receive the slot. We would consider the effective period of operation, the extent and regularity of the proposed usage, and the carrier's schedule constraints.

Using a WSG-based approach would facilitate the continued smooth integration of JFK and Newark into the international slot allocation system. Based on discussions during the ARC, we believe that the WSG approach is well-understood and is an internationally-recognized system of allocation at airports.

We recognize that this method of allocation differs from the method proposed for new and returned capacity in the companion proposal at LaGuardia. We also recognize that several commenters to the LaGuardia NPRM argued that any administrative allocation of capacity could dilute the viability of the secondary market. Accordingly, the FAA may adopt an allocation method that allocates new and returned capacity via an auction. This was the approach favored in the LaGuardia SNPRM. Under that approach, the slots would be auctioned as Unrestricted Slots. During the first five years of the rule, this new capacity would be auctioned at the same time as the slots that revert to the FAA under today's proposal. Should insufficient capacity be available to justify the expense of conducting an auction in the last five years of the rule, the FAA would retain the slots until sufficient capacity was available for a meaningful auction. The FAA invites comment as to whether the final rule should specify that new and returned capacity at JFK and Newark be allocated by auction instead of by the WSG-method method described above.

#### D. Auction Procedures

The FAA is currently engaged in procuring the services of a contractor to conduct auctions of the proposed Limited Slots.<sup>15</sup> The details regarding

<sup>15</sup> As indicated in the *Order Limiting Operations at John F. Kennedy International Airport*, 73 FR 3510 (1/18/08) and the *Notice of Proposed Order*

the specifics of any potential auction will be disclosed after the contractor has developed and validated an auction process and the FAA is ready to proceed with an auction.<sup>16</sup>

In order to ensure that auction participants understand how the auction process works, the FAA anticipates the contractor would have to conduct a training seminar and a mock auction prior to each auction. A single training seminar and mock auction would not suffice since presumably not every carrier will participate in every auction. The auction would also have to be structured to prevent gaming. This would likely be accomplished through the use of activity rules.

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

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

#### E. Secondary Trading

All slots will have value in the secondary market. To the extent that the secondary market is not mature and the value of slots is not well-known, the auction should inform potential buyers of the value of these slots and stimulate the secondary market. The FAA believes that ultimately the best way to maximize competition is with the

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

<sup>16</sup> Since the auction will address the lease of slots awarded by the FAA under its leasing authority rather than under any administrative allocation, notice to interested parties will be governed by applicable procurement law rather than the Administrative Procedure Act.

development of a robust secondary market. Through the years, the FAA has received complaints that carriers were unaware of possible opportunities to buy or lease slots at slot-controlled airports and that incumbent carriers were colluding to keep new entrant carriers out of the airport.

We believe some measures must be taken to assure access to the secondary market. All carriers interested in initiating operations at JFK and Newark, or increasing their operations there, should have an opportunity to participate in any transactions.

Accordingly, the FAA proposes to (1) permit carriers to include Common Slots for sale in the auction, organized by the FAA, and (2) establish a "secondary-market" bulletin-board system whereby carriers seeking to sublet slots, or to acquire such subleases, would notify the FAA, which would then post the relevant information on its Web site.

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

The FAA has tentatively decided that transactions via the bulletin-board-system would not have to be blind, and the transaction could include both cash and non-cash payments. While it may be argued that transparency among parties to the transaction encourages anti-competitive behavior, the FAA believes that a blind, cash-only requirement could be unduly restrictive. In particular, the FAA believes that non-cash bids promote competition by enlarging the pool of potential bidders. Thus, non-cash transactions should result in both more bidders and potentially higher bids. However, it is critical that the identities of parties be known if non-cash assets are permitted because that is the only way to value those assets. In addition, the non-cash aspect of the transaction would require direct negotiating.

The FAA believes that these concerns could be met in a blind secondary market. For example, the agency could adopt a hybrid scheme whereby the initial offer and acceptance would be blind and limited to a cash offer, but the parties could negotiate non-cash assets after the offer had been accepted. Such an approach may be workable. During the posting of the lease and subsequent bidding for the slots, the parties' identities would not be known. Once the auction closed, the FAA would

forward the highest bid to the sublessor without any bidder identification. The sublessor would have a set number of business days to accept the bid. At that point, the parties' identities would be revealed, and they would have a set period of time to negotiate the possibility of non-cash assets in lieu of money as consideration for the lease. If the parties were unable to come to an agreement, the lease would have to proceed on a cash basis. The FAA seeks comment on this and other viable alternatives.

The FAA recognizes that non-blind transactions could facilitate, and even encourage, collusion. The Department has the authority under 49 U.S.C. 41712 to investigate, prohibit, and impose penalties on an air carrier for an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. The Department has consistently held that this authority empowers it to prohibit anticompetitive conduct (1) that violates the antitrust laws, (2) that is not yet serious enough to violate the antitrust laws but may do so in the future, or (3) that, although not a violation of the letter of the antitrust laws, is close to a violation or contrary to their spirit.<sup>17</sup>

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

Under proposed § 93.168 and § 93.188, trades among U.S. air carriers with unified marketing control (marketing carriers) would not have to

be advertised, because they are considered a single carrier for the purpose of this rule and these trades do not have the characteristics of a normal arm's-length transaction. Since foreign air carriers are considered separate carriers, they would not be able to take advantage of this provision. As it has done historically, the FAA would approve these transactions after it has received written evidence from each carrier that it consents to the transfer. The receiving carrier could not use the slot until the FAA has provided written approval of the transfer. Same day transactions among marketing carriers that address emergency situations, such as maintenance problems, adverse weather, or other unforeseen operational issues, could take place without prior approval by the FAA, but carriers would have to notify the FAA of the trade within five business days.

One-for-one trades between any two carriers would similarly not be subject to the restrictions of the secondary market. Such trades enhance the operational efficiency of the airport. However, the proposed rule would not allow consideration other than slots to be offered. When monetary or other compensation is involved in a slot transfer, the transaction would have to be handled as a sublease under § 93.168 of subpart N and § 93.188 of subpart O. As with subleases and trades between marketing carriers, the slot could not be used by the new carrier until the FAA provides written confirmation of the transfer.

#### IV. Unscheduled Operations

The FAA intends to limit unscheduled operations into and out of JFK and Newark during the constrained hours. Unscheduled operations at Newark would be limited to two per hour between 6 a.m. and 11:59 a.m. and between 10 p.m. and 10:59 p.m. and one per hour between 12 noon and 9:59 p.m. At JFK, there would be two unscheduled operations permitted per hour between 6 a.m. and 1:59 p.m. and between 10 p.m. and 10:59 p.m. and one per hour between 2 p.m. and 9:59 p.m. Under today's proposal, reservations would be required to use the airport (except for emergency operations) and could be obtained up to 72 hours in advance.

To the extent ATC can handle additional requests (for example, in good weather) it will do so without regard to the reason for the request. However, there is no guarantee that the FAA would accept more than the specified number of reservations per hour, and the determination to handle more traffic would likely be made on

<sup>17</sup> See *United Airlines, Inc. v. Civil Aeronautics Board*, 766 F. 2d 1107, 1112, 1114 (7th Cir. 1985) and cases cited therein; see also H.R. Rep. No. 98-793, 98th Cong., 2d Sess. (1984) at 4-5, Order 2002-9-2, *Complaint of the American Society of Travel Agents, Inc., and Joseph Galloway against United Air Lines, Inc., et al.* (Docket No. OST-99-6410) and *Complaint of The American Society of Travel Agents, Inc., and Hillside Travel, Inc. against Delta Air Lines, et al.* (Docket No. OST-02-12004) (September 4, 2002) at 22-23.

that day. Reservations for all non-emergency flights would still be required and would be assigned by the FAA's e-CVRS system. Additional information of procedures for obtaining reservations will be available on the Internet at <http://fly.faa.gov/ecvrs>.

The FAA proposes to allow Public Charter operators to reserve an allowable operation up to six months in advance. Since the reservation pool consists of operations planned well in advance and last-minute operations, the number of reservations made available to public charter flights up to six months in advance would be limited to no more than one in any hour and no more than 25 percent of the total reservations from 12 noon to 9:59 p.m. local time. A Public Charter operator without the advance reservation could attempt to secure a reservation within the three-day window that is available for all other unscheduled operations. A carrier could also elect to use one of its assigned slots or obtain a slot from another carrier in the secondary market.

## V. Other Issues

### A. 30-Minute Windows

Consistent with the existing JFK and Newark Orders, we propose to assign slots at JFK and Newark in 30-minute windows. The FAA cautions, however, that peaking within the 30-minute windows could lead to increased congestion. The FAA will continue to monitor operations and will address any significant operational issues through discussions with carriers.

### B. Use-or-Lose

Consistent with the approach taken in the JFK and Newark Orders, which is based on the WSG, the FAA is proposing a use-or-lose requirement for JFK and Newark that takes into consideration the seasonal nature of international, as well as some domestic, operations at those airports. Carriers would be expected to operate their Common Slots and Limited Slots in accordance with approved schedules at least 80 percent of the time. However, proposed § 93.170 of subpart N and § 93.190 of subpart O would consider the summer and winter schedules separately. Carriers would be allocated slots on the days and for the time periods set out in their summer 2008 and winter 2008/2009 schedules approved by the FAA. The carriers will be subject to the use-or-lose requirement only for those slot times that are allocated to them. Unrestricted Slots would not be subject to usage requirements.

The proposed rule would allow for limited waivers of the minimum usage requirements in the event that the carrier experiences an unusual and unpredictable condition that prevents it from using the slot for at least five consecutive days. If weather conditions prevented operations, for example, an operator might be granted a waiver of the use-or-lose provisions.

To enable carriers to make necessary operational adjustments, the usage requirements will not apply for the first 90 days after a carrier receives a slot under a sublease. However, a transfer between carriers under § 93.168(f) of subpart N and § 93.188(f) of subpart O of this part, in which one carrier holds marketing and inventory control of the flights operated by another carrier, is not a sublease for the purpose of this section. Therefore, there would be no 90-day waiver of the minimum use requirements following a transfer between them. Likewise, there would be no waiver for slots acquired via the WSG because carriers would have ample time after the slots were allocated to take the steps necessary to initiate the new operations.

### C. Usage Reporting Requirements

The minimum usage requirement for JFK and Newark would be calculated on a seasonal basis. Therefore, we are proposing to require carriers to file reports with the FAA for each scheduling season. In accordance with § 93.172 of subpart N and § 93.192 of subpart O, carriers would report the usage of Common and Limited Slots. An interim report would be due no later than September 1 for the summer scheduling season and no later than February 1 for the winter scheduling season. Carriers would also be required to file final usage reports within 30 days of the last day of the applicable scheduling season.

### D. Administrative Provisions

The FAA may withdraw or suspend slots at JFK or Newark for operational reasons pursuant to § 93.167 of subpart N and § 93.187 of subpart O. The FAA would assign a withdrawal priority number to each Common and Limited Slot by a random lottery. If a reduction in operations becomes necessary, slots would be withdrawn starting with the highest number. The Common or Limited Slot with the lowest assigned numbers would be the last to be withdrawn. The FAA would provide at least 45 days' notice of its intention to withdraw or temporarily suspend a slot, unless the operational circumstances necessitate a shorter notice period. Given that a number of operators will

have only a limited number of slots at JFK and Newark, we are requesting comment on whether the FAA should establish a level of slots that would not be subject to withdrawal or temporary suspension to fulfill operational needs to avoid the possibility of marginalizing or excluding such operators from the airport.

## VI. Regulatory Notices and Analyses

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

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

### Total Costs and Benefits of This Rulemaking

Through implementation of an auction, FAA estimates that this proposed rule would result in a long-term improvement in the allocation of scarce slot resources at JFK and Newark. The estimated present value of net benefits of improved slot allocation by

auctions is between \$256 million and \$267 million at JFK and between \$207 million and 218 million at Newark from 2009 to 2019. The costs of the rule, with a present value between \$11 and \$22 million each at JFK and Newark, are due to the design, implementation and participation in an auction of slots. These costs assume that the full cost of setting up the auction mechanism and participating in the auctions are individually borne at each airport; in fact, if auctions are conducted at more than one airport in the New York area, the costs of the setting up and participating in the auctions could be shared among the users of the airports and would be lower on a per airport basis.

This regulatory impact analysis assumes as a baseline that in the absence of this rulemaking, the FAA would not otherwise impose long-term caps on aircraft operations at JFK and Newark. Therefore, the FAA estimates that, through the long-term implementation of a cap on aircraft operations, this proposed rule would result in about a 25 percent reduction in the average delay per operation at JFK relative to a situation with no cap. After allowing for the lost consumer and producer surplus due to a reduction in air service caused by the caps, the net value of the savings in average delay attributable to the cap generates a present value net benefit of about \$686 million from 2009 to 2019. At Newark, this proposed rule would result in about a 23 percent reduction in the average delay per operation at Newark relative to a situation with no cap, generating a present value net benefit (after deducting lost producer and consumer surplus from reductions in air service) of about \$705 million from 2009–2019.<sup>18</sup> The benefits are estimated by comparing the no-rule scenario (similar to the situation at JFK and Newark in August 2007) with the proposed cap.

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

- Operators of scheduled and non-scheduled, domestic and international flights, and new entrants who do not yet operate at JFK and Newark.
- All communities with air service to JFK and Newark.
- Passengers of scheduled flights to JFK and Newark.

<sup>18</sup> Estimates based on a 7 percent discount rate. All results reported in this analysis are cost-beneficial at a 7 percent discount rate; using a 3 percent rate would make them even more so, with a present value net benefit of about \$836 million from 2009–2019 for JFK and \$859 million from 2009–2019 for Newark.

- The Port Authority of New York and New Jersey, which operates the airport.

#### *Key Assumptions*

- *Base Case:* No operating authorizations or caps.
- Cap on operations provides delay improvement.
- *Alternative 1:* 100 percent of slots held by a carrier with fewer than 21 slots at either JFK or Newark would be reassigned to the carrier with 10 years of life; for holders with 21 or more slots at either airport, 100 percent of the first 20 slots at each airport would be reassigned to the carrier with leases of 10 years and 90 percent of slots above the 20 slot base for the carrier would be reassigned to the carrier with leases of 10 years. Ten percent of slots above the 20 slot base would be designated as Limited Slots and would be auctioned: one-fifth immediately upon the implementation of the rule.<sup>19</sup> The remaining four-fifths of the Limited Slots would be assigned to the carrier which held them previously, but with leases of 1 to 4 years of life. The FAA would auction the Limited Slots to the highest bidder in annual auctions beginning in January 2009 and ending in January 2013. FAA would use the net revenues of the annual auctions to invest in capacity in the New York area.
- *Alternative 2:* For JFK, 100 percent of slots held by carriers with fewer than 21 slots at JFK would be reassigned to the carrier with leases of 10 years; for holders with 21 or more slots, 100 percent of the first 20 slots would be reassigned to the carrier with leases of 10 years and 80 percent of slots above the 20 slot base for the carrier would be reassigned to the carrier with leases of 10 years. Twenty percent of slots above the 20 slot base would be designated as Limited Slots and would be auctioned: one-fifth immediately upon the implementation of the rule. The remaining four-fifths of the Limited Slots would be assigned to the carrier which held them previously, but with leases of 1 to 4 years of life. The FAA would auction the Limited Slots to the highest bidder in annual auctions beginning in January 2009 and ending in January 2013. Carriers at JFK could not bid on slots they formerly held but would retain the net revenues generated by the sale of the former leases. As Newark would be treated the same under either approach, the key

<sup>19</sup> The slots auctioned in January 2009 under both alternatives would become available beginning in the summer season of 2009. Until that time, the air carrier that formerly held the Limited Slot could continue to use it.

assumptions for Newark are the same as under Alternative 1.

- For the purposes of this evaluation, the effective date is 12/01/08.

#### *Other Important Assumptions*

- *Discount Rate*—3 and 7 percent in real (net of inflation) terms.
- *Period of Analysis:* 2009 to 2019.
- Assumes 2008 constant year (real) dollars.
- *Passenger Value of Travel Time*—\$28.60 per hour at JFK and Newark.<sup>20</sup>

#### *Alternatives We Have Considered*

- *No Action:* This alternative would let the current orders restricting operations at JFK and Newark expire on October 24, 2009 without replacing the limitations. The FAA expects that, without caps, air carriers would expand flight operations at these two airports to levels equal to or exceeding those experienced in the summer of 2007, causing increasingly severe delays at these airports and throughout the National Airspace System (NAS).
- *Caps:* This alternative would permanently impose caps at 81 scheduled operations per hour each at JFK and Newark, plus up to two unscheduled operations per hour at each airport, every day from 6 a.m. to 10:59 p.m.; it would grandfather current holders of operating authorizations to operate at the airports.
- *Alternative 1:* This alternative would institute caps at both JFK and Newark as described above and reallocate 10 percent of eligible capacity via five annual auctions beginning in January 2009. The FAA would retain the net proceeds of the auctions for use on congestion and delay management initiatives in the New York City area.
- *Alternative 2:* This alternative would institute caps at JFK as above and reallocate 20 percent of eligible slots at JFK, via five annual auctions beginning in January 2009. The carrier holding a slot to be reallocated would not be able to bid on its own slots, but would retain the net auction proceeds. Under alternative 2, the regime of Newark would be the same as in alternative 1.

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

#### *Benefits of This Rulemaking*

The primary benefits of this rulemaking would be due to the delay reduction from the caps on operations

<sup>20</sup> GRA, Incorporated “Economic Values for FAA Investment and Regulatory Decisions, A Guide,” prepared for FAA Office of Aviation Policy and Plans, (October 3, 2007). Passenger value of time is for “all purposes,” reflecting a mix of business and leisure travel.

and an improvement in the efficiency of allocation of scarce slot resources through the use of an auction mechanism and secondary slot subleasing markets characterized by clearly defined property rights.

#### *Costs of This Rulemaking*

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

#### *Paperwork Reduction Act*

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

Some of the information requirements in today's notice are similar to those originally proposed in the SNPRM "Congestion Management Rule for LaGuardia Airport" (Docket No. FAA-2006-25707; Notice No. 08-04). The FAA has applied these requirements and summarized them below.

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

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

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

This information is used to allocate, track usage, withdraw, and confirm transfers of slots among the operators and facilitates the transfer of slots in the secondary market. The FAA also uses this information in order to maintain an

accurate accounting of operations to ensure compliance with the operations permitted under the rule and those actually conducted at the airports.

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

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

*Annual Burden Estimate:* The annual reporting burden for each subsection of the rule is presented below. Annual burden estimates presented in today's notice are based on burden estimates from the SNPRM "Congestion Management Rule for LaGuardia Airport" (Docket No. FAA-2006-25709; Notice No. 08-04).

The burden is calculated by the following formula:

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

#### *Section 93.164(c)(2) Categories of Slots: A Carrier Shall Designate 50 Percent of Its Limited Slots*

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

Based on the current allocation of Operating Authorizations and the proposed level of baseline operations each carrier would be grandfathered under today's proposal, we assumed the four carriers with the most operations at JFK would expend up to 10 days of planning time each, potentially 80 hours, to develop and submit their designations of 50 percent of their Limited Slots, for a total of 320 hours. This designation would occur once, 10 days after the final rule effective date.

*Newark*

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

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

Total Annual Hourly Burden = 640 hours.

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

#### *Section 93.165(c) Initial Assignment of Slots*

We assumed that the 77 carriers operating at JFK and 39 carriers operating at Newark would expend time submitting and collecting information to participate in the proposed auctions for slot assignments. The FAA is currently in the process of procuring auction software and services. The FAA will make available burden estimates for information requirements relating to auction participation in a separate notice.

#### *Section 93.166(b)-(c) Assignment of New or Returned Slots*

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

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

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

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

Total Annual Hourly Burden = 285  
hours.

Based on burden estimates from "Congestion Management Rule for LaGuardia Airport," we assumed the 77 carriers operating at JFK would expend 1½ hours for each occurrence of a lease or transfer of a slot. For each operator with 6 or more slots (18 carriers total), we assumed that a lease or transfer of a slot would occur on average quarterly. For each operator with fewer than 6 slots (59 carriers total), we assumed that a lease or transfer of a slot would occur on average biannually. The total annual hourly burden for all carriers collectively would be 285 hours.

#### *Newark*

(1 carrier) \* (1.5 hours per submittal) \*  
(16 occurrences per year) = 24 hours.  
(12 carriers) \* (1.5 hours per submittal)  
\* (4 occurrences per year) = 72 hours.  
(26 carriers) \* (1.5 hours per submittal)  
\* (2 occurrences per year) = 78 hours.  
Total Annual Hourly Burden = 174  
hours.

As with JFK, we assumed the 39 carriers operating at Newark would expend 1½ hours for each occurrence of a lease or transfer of a slot. For the largest operator, we assumed that a lease or transfer of 4 slots would occur on average quarterly. For those operators at Newark with 6 or more slots (12 carriers total, excluding Continental Airlines), we assumed that a lease or transfer of a slot would occur on average quarterly. For each operator with fewer than 6 slots (26 carriers total), we assumed that a lease or transfer of a slot would occur on average biannually. The total annual hourly burden for all carriers collectively would be 174 hours.

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

##### *JFK*

(18 carriers) \* (1.5 hours per submittal)  
\* (4 occurrences per year) = 108  
hours.  
(59 carriers) \* (1.5 hours per submittal)  
\* (2 occurrences per year) = 177  
hours.  
Total Annual Hourly Burden = 285  
hours.

Based on burden estimates from "Congestion Management Rule for LaGuardia Airport," we assumed the 77 carriers operating at JFK would expend 1½ hours for each occurrence of a one-for-one trade of a slot. For each operator with 6 or more slots (18 carriers total), we assumed that a one-for-one slot trade would occur on average quarterly. For each operator with fewer than 6 slots (59 carriers total), we assumed that a

one-for-one slot trade would occur on average biannually. The total annual hourly burden would be 285 hours.

##### *Newark*

(1 carrier) \* (1.5 hours per submittal) \*  
(16 occurrences per year) = 24 hours.  
(12 carriers) \* (1.5 hours per submittal)  
\* (4 occurrences per year) = 72 hours.  
(26 carriers) \* (1.5 hours per submittal)  
\* (2 occurrences per year) = 78 hours.  
Total Annual Hourly Burden = 174  
hours.

As with JFK, we assumed the 39 carriers operating at Newark would expend 1½ hours for each occurrence of a one-for-one trade of a slot. For the largest operator, we assumed that a one-for-one trade of 4 slots would occur on average quarterly. For those operators at Newark with 6 or more slots (12 carriers total, excluding Continental Airlines), we assumed that a one-for-one slot trade would occur on average quarterly. For each operator with fewer than 6 slots (26 carriers total), we assumed that a one-for-one slot trade would occur on average biannually. The total annual hourly burden would be 174 hours.

#### *Section 93.171 Unscheduled Operations*

This section of the proposed rule requires unscheduled and public charter operations at JFK and Newark to be reserved using the Airport Reservation Office (ARO) or, for public charters seeking reservations up to six months in advance, through the Slot Administration Office. It is the FAA's intention, however, to require these reservation procedures at JFK and Newark regardless of and apart from the outcome of this rulemaking. Accordingly, the FAA will make available burden estimates relating to unscheduled and public charter operations in a separate rulemaking notice.

#### *Section 93.172(a)-(b) Reporting Requirements*

##### *JFK*

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

Based on burden estimates from the "Congestion Management Rule for LaGuardia Airport" (Docket No. FAA-2006-25709; Notice No. 08-04), we assumed the 77 carriers operating at JFK would expend, on average, 1½ hours two times per summer and winter season to submit the data required by § 93.172.

##### *Newark*

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

Based on burden estimates from the "Congestion Management Rule for

LaGuardia Airport" (Docket No. FAA-2006-25709; Notice No. 08-04), we assumed the 39 carriers operating at Newark would expend, on average, 1½ hours every two months to submit the data required by § 93.172.

#### *Summary*

##### *JFK*

Total First Year Hourly Burden—320  
Hours.

Total Recurring Annual Hourly  
Burden (per year for 10 years)—1,032  
Hours.

##### *Newark*

Total First Year Hourly Burden—640  
Hours.

Total Recurring Annual Hourly  
Burden (per year for 10 years)—582  
Hours.

The burden estimates for JFK and Newark do not include the time required to participate in the annual auctions. The FAA will make available burden estimates for information requirements relating to auction participation in a separate notice.

The agency is soliciting comments to—

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

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

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

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

Individuals and organizations may submit comments on the information collection requirement by July 21, 2008, and should direct them to the address listed in the **ADDRESSES** section of this document. Comments also should be submitted to the Office of Information and Regulatory Affairs, OMB, via facsimile at (202) 395-6974, Attention: Desk Officer for FAA.

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

### *Regulatory Flexibility Determination*

The Regulatory Flexibility Act of 1980 (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, § 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 most directly affects four scheduled operators at JFK (Delta Air Lines, JetBlue Airways, American Airlines, and United Airlines) and five scheduled operators at Newark (Continental Airlines, American Airlines, United Airlines, Delta Air Lines, and U.S. Airways). These carriers would receive one or more Limited Slots. None of these carriers are small businesses. However, the FAA considered that some small regional operators affiliated with these carriers and using slots provided by these carriers could be affected. Based on a review of the number of employees for each scheduled operator, the FAA found that only two scheduled operators (CommutAir and EOS Airlines) at JFK, and none at Newark, are considered small by Small Business Administration size standards (in this case, firms with 1,500 or fewer employees). Of the two scheduled operators at JFK, CommutAir operates under the name Continental Connection for Continental Airlines. Continental Airlines has fewer than 20 operations per day at JFK and therefore

neither it nor CommutAir is affected by this rule.

Using Enhanced Traffic Management System (ETMS) data, the FAA has determined that there are approximately 54 identifiable unscheduled operators at JFK and 61 identifiable unscheduled operators at Newark who could be affected by this rule. While some of these operators may be small businesses, the FAA does not believe they will be significantly impacted by this rulemaking. These operators typically have greater flexibility to adjust operations and carry out very few operations during peak hours compared to scheduled operators. During peak hours in the summer of 2007, there were fewer than two average unscheduled operations per hour at each airport, whereas the proposed rule would allow 1 to 2 operations per hour. Section 93.171(g) of subpart N and § 93.191(g) of subpart O enables the FAA to determine that additional reservations may be accommodated for a specific time period, and allows unused slots to be available temporarily for unscheduled operations. In summary, while the proposed rule reduces the number of unscheduled operations per hour, it does not significantly affect the overall number of current unscheduled operations that take place at each airport.

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

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 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards or engaging in related activities is not considered as creating unnecessary obstacles to the foreign commerce of the United States, so long as the standards and activities have a legitimate domestic objective, such the protection of safety, and do not

operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA notes the proposed rule to establish slots and limited auctions of slot leases at JFK and Newark is necessary for the efficient utilization of the national airspace system, and has assessed the effects of this rulemaking to ensure that the final rule, if adopted, would not impose costs or barriers to international entities within the national airspace system.

Foreign entities at both JFK and Newark would not have any slots classified as Limited Slots under either alternative 1 or 2 under the terms of § 93.164 of subpart N and § 93.184 of subpart O of the proposed rule. Foreign carriers might benefit from the rule if they choose to participate in the proposed auction to acquire additional slots or to sublease slots in the secondary market.

### *Unfunded Mandate Assessment*

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

### *Executive Order 13132, Federalism*

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

### *Environmental Analysis*

FAA Order 1050.1E, “Environmental Impacts: Policies and Procedures” identifies FAA actions that are normally categorically excluded from preparation of an environmental assessment or

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

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

The FAA has analyzed this NPRM under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order because 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.

#### Additional Information

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

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel

concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

#### Proprietary or Confidential Business Information

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

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

#### Availability of Rulemaking Documents

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

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

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

You may access all documents the FAA considered in developing this proposed rule, including economic analyses and technical reports, from the internet through the Federal

eRulemaking Portal referenced in paragraph (1).

#### List of Subjects in 14 CFR Part 93

Air traffic control, Airports, Navigation (air).

#### Proposed Regulatory Text

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

#### PART 93—SPECIAL AIR TRAFFIC RULES

1. The authority 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.

#### Proposed Amendment—Alternative 1

2. Subpart N is added to read as follows:

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

Sec.	
93.161	Applicability.
93.162	Definitions.
93.163	Slots for scheduled arrivals and departures.
93.164	Categories of slots.
93.165	Initial assignment of slots.
93.166	Assignment of new or returned slots.
93.167	Reversion and withdrawal of slots.
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#### Subpart N—John F. Kennedy International Airport and Newark Liberty International Airport Traffic Rules

##### § 93.161 Applicability.

(a) This subpart prescribes the air traffic rules for the arrival and departure of aircraft used for scheduled and unscheduled service, other than helicopters, at John F. Kennedy International Airport (JFK) and Newark Liberty International Airport (Newark).

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

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

accordance with this subpart. No person shall conduct an Unrestricted Operation to or from JFK or Newark during such hours without first obtaining a Reservation.

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

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

#### § 93.162 Definitions.

For purposes of this subpart, the following definitions apply:

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

*Baseline Operations* are those common slots held by a carrier at JFK or Newark on [final rule effective date], that do not exceed 20 operations per day.

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

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

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

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

*New Entrant* is any carrier that is administratively allocated a total of 8 or fewer slots at JFK or Newark, respectively, during controlled hours at any point during the duration of the rule.

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

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

*Reservation* is an authorization received by a carrier or other operator of an aircraft, excluding helicopters, in

accordance with procedures established by the FAA to operate an unscheduled arrival or departure on a particular day of the week during a specific 30-minute period.

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

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

*Summer Scheduling Season* begins on the last Sunday of March.

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

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

*Winter Scheduling Season* begins on the last Sunday in October.

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

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person shall operate any scheduled arrival or departure into or out of JFK or Newark without first obtaining a Slot in accordance with this subpart.

(b) Except as otherwise established by the FAA under paragraph (c) of this section, the number of Slots shall be limited to no more than eighty-one (81) per hour at JFK and eighty-one (81) per hour at Newark. At JFK, the number of Slots may not exceed 44 in any 30-minute period, and 81 in any 60-minute period. At Newark, the number of Slots may not exceed 44 in any 30-minute period and 81 in any 60-minute period. The number of arrival and departure Slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

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

(1) The number of delays;

(2) The length of delays;

(3) On-time arrivals and departures;

(4) The number of actual operations;

(5) Runway utilization and capacity plans; and

(6) Other factors relating to the efficient management of the National Airspace System.

#### § 93.164 Categories of slots.

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

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

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

(c) *Limited Slots*. Those Slots assigned to a Carrier subject to return to the FAA under § 93.165(c) shall be designated as Limited Slots until the date of their reassignment by the FAA as Unrestricted Slots. A Carrier may continue to use a Limited Slot that has reverted to the FAA until the date of the auction.

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

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

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

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

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

#### § 93.165 Initial assignment of slots.

(a) Except as provided for under paragraphs (b) and (c) of this section,

any Carrier allocated operating rights under the Order limiting operations at JFK or the Order limiting operations at Newark as evidenced by the FAA's records, will be assigned corresponding Slots in 30-minute periods consistent with the limits under § 93.163(b) and its summer and winter season schedules as approved by the FAA. If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned Slots within the same hour to meet the 30-minute limits under § 93.163(b). The FAA Vice President, System Operations Services, is the final decisionmaker for determinations under this section.

(b) If a Carrier was allocated operating rights under the Order limiting operations at JFK or the Order limiting operations at Newark, but the operating rights were held by another Carrier, then the corresponding Slots will be assigned to the Carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) Starting [date 35 days after the effective date] and every year thereafter through 2013, one-fifth of the total number of Limited Slots shall revert to the FAA in accordance with the schedule published under § 93.164(c)(4) and be auctioned as Unrestricted Slots by the FAA. Any Slot receiving no responsive bids will be retired until the next auction. An affected Carrier will be allowed to use the Limited Slot until the effective date of an award to a Carrier as an Unrestricted Slot.

**§ 93.166 Assignment of new or returned slots.**

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

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

(c) Before assigning new or returned Slots under this section, the FAA will first accommodate Carrier requests to

retime Slots for operational reasons or to bring the flight time closer to the time originally requested by the applicant Carrier in previous corresponding seasons, as reflected in FAA records.

(d) After accommodating Carrier requests for retiming of Slots, the FAA will assign 50% of the new Slots and returned Slots to New Entrants, unless requests by New Entrants constitute fewer than 50% of available Slots.

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

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

- (1) The effective period of operation;
- (2) The extent and regularity of intended use of a Slot;
- (3) Schedule constraints of Carriers requesting Slots.

**§ 93.167 Reversion and withdrawal of slots.**

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

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

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

(d) Common Slots and Limited Slots will be withdrawn in accordance with the priority list established under § 93.173 and international obligations.

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

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

**§ 93.168 Sublease and transfer of slots.**

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

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

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

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

- (1) The names of all bidders and all parties to the transaction;
- (2) The offered and final length of the sublease;
- (3) The consideration offered by all bidders and provided by the sublessee.

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

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

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

**§ 93.169 One-for-one trade of slots.**

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

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

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

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

**§ 93.170 Minimum usage requirements.**

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

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

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

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

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

**§ 93.171 Unscheduled operations.**

(a) During the hours of 6 a.m. through 10:59 p.m. Eastern Time, no person may operate an aircraft other than a helicopter to or from JFK or Newark unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO) or in the case of Public Charters, in accordance with the procedures in paragraph (d) of this section. Requests for Reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to or departure from JFK or Newark. Additional information on procedures for obtaining a Reservation is available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Reservations, including those assigned to Public Charter operations under paragraph (d) of this section, will be available to be assigned by the ARO on a 30-minute basis as follows:

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

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

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

(d) One Reservation per hour will be available for assignment to Public Charter operations prior to the 72-hour Reservation window in paragraph (a) of this section. No more than 25 percent of the Reservation available from 12 noon through 9:59 p.m. will be made available to Public Charter operations under this paragraph.

(1) The Public Charter operator may request a reservation up to six months in advance of the date of the flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591. Submissions may be made via facsimile to (202) 267-7277 or by e-mail to: [7-awa-slotadmin@faa.gov](mailto:7-awa-slotadmin@faa.gov).

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

(3) The Public Charter operator must identify the call sign/flight number or aircraft registration number of the direct Air Carrier, the date and time of the proposed operation(s), the airport served immediately prior to or after JFK or Newark, aircraft type, and the nature of the operation (e.g., ferry or passenger). Any changes to an approved Reservation must be approved in advance by the Slot Administration Office.

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

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

(f) Air Traffic Control will accommodate declared emergencies without regard to Reservations. Non-emergency flights in direct support of

national security, law enforcement, military aircraft operations, or public-use aircraft operations may be accommodated above the Reservation limits with the prior approval of the Vice President, System Operations Services, Air Traffic Organization. Procedures for obtaining the appropriate waiver will be available on the Internet at <http://www.fly.faa.gov/ecvrs>.

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

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

**§ 93.172 Reporting requirements.**

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

(b) Such reports, in a format acceptable to the FAA, must contain the following information for each Common Slot or Limited Slot:

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

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

**§ 93.173 Administrative provisions.**

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

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

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

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

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

#### Proposed Amendment—Alternative 2

3. Subparts N and O are added to read as follows:

##### Subpart N—John F. Kennedy International Airport Traffic Rules

Sec.

- 93.161 Applicability.
- 93.162 Definitions.
- 93.163 Slots for scheduled arrivals and departures.
- 93.164 Categories of slots.
- 93.165 Initial assignment of slots.
- 93.166 Assignment of new or returned slots.
- 93.167 Reversion and Withdrawal of Slots.
- 93.168 Sublease and transfer of slots.
- 93.169 One-for-one trade of slots.
- 93.170 Minimum usage requirements.
- 93.171 Unscheduled operations.
- 93.172 Reporting requirements.
- 93.173 Administrative provisions.

##### Subpart O—Newark Liberty International Airport Traffic Rules

- 93.181 Applicability.
- 93.182 Definitions.
- 93.183 Slots for scheduled arrivals and departures.
- 93.184 Categories of slots.
- 93.185 Initial assignment of slots.
- 93.186 Assignment of new or returned slots.
- 93.187 Reversion and withdrawal of slots.
- 93.188 Sublease and transfer of slots.
- 93.189 One-for-one trade of slots.
- 93.190 Minimum usage requirements.
- 93.191 Unscheduled operations.
- 93.192 Reporting requirements.
- 93.193 Administrative provisions.

#### § 93.161 Applicability.

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

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

(c) The provisions of this subpart apply to JFK during the hours of 6 a.m. through 10:59 p.m., Eastern Time. No

person shall operate any scheduled arrival or departure into or out of JFK during such hours without first obtaining a Slot in accordance with this subpart. No person shall conduct an Unscheduled Operation to or from JFK during such hours without first obtaining a Reservation.

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

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

#### § 93.162 Definitions.

For purposes of this subpart, the following definitions apply:

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

*Baseline Operations* are those common slots held by a carrier on [final rule effective date], that do not exceed 20 operations per day.

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

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

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

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

*New Entrant* is any carrier that is administratively allocated a total of 8 or fewer slots at JFK during controlled hours at any point during the duration of the rule.

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

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

*Reservation* is an authorization received by a carrier or other operator of an aircraft, excluding helicopters, in

accordance with procedures established by the FAA to operate an unscheduled arrival or departure on a particular day of the week during a specific 30-minute period.

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

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

*Summer Scheduling Season* begins on the last Sunday of March.

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

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

*Winter Scheduling Season* begins on the last Sunday in October.

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

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person shall operate any scheduled arrival or departure into or out of JFK during such hours without first obtaining a Slot in accordance with this subpart.

(b) Except as otherwise established by the FAA under paragraph (c) of this section, the number of Slots shall be limited to no more than eighty-one (81) per hour at JFK. The number of Slots may not exceed 44 in any 30-minute period, and 81 in any 60-minute period. The number of arrival and departure Slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

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

- (1) The number of delays;
- (2) The length of delays;
- (3) On-time arrivals and departures;
- (4) The number of actual operations;

(5) Runway utilization and capacity plans; and

(6) Other factors relating to the efficient management of the National Airspace System.

**§ 93.164 Categories of slots.**

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

(b) *Common Slots.*

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

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

(c) *Limited Slots.* Those Slots assigned to a Carrier subject to return to the FAA under § 93.165(c) shall be designated as Limited Slots until they are transferred to another Carrier under those provisions. A Carrier may continue to use a Limited Slot that has reverted to the FAA until reassigned to another Carrier as an Unrestricted Slot.

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

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

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

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

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

**§ 93.165 Initial assignment of slots.**

(a) Except as provided for under paragraphs (b) and (c) of this section, any Carrier allocated operating rights

under the Order limiting operations at JFK, as evidenced by the FAA's records, will be assigned corresponding Slots in 30-minute periods consistent with the limits under § 93.163(b), and its summer and winter season schedules as approved by the FAA. If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned Slots within the same hour to meet the 30-minute limits under § 93.163(b). The FAA Vice President, System Operations Services, is the final decisionmaker for determinations under this section.

(b) If a Carrier was allocated operating rights under the Order limiting operations at JFK but the operating rights were held by another Carrier, then the corresponding Slots will be assigned to the Carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) Starting [date 35 days after the effective date] and every year thereafter through 2013, one-fifth of the total number of Limited Slots identified on [date 20 days after the effective date] shall revert to the FAA in accordance with the schedule published under § 93.164(c)(4) and be auctioned as Unrestricted Slots by the FAA and subsequently transferred to another Carrier, effective no later than the next Summer Scheduling Season.

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

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

(3) The FAA shall pay to the holder of the Limited Slot all proceeds from the transaction following deduction of the FAA's expenses for conducting the auction.

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

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

(6) The Carrier holding a Limited Slot will be allowed to use the Slot until the first day of the next Summer Scheduling Season.

**§ 93.166 Assignment of new or returned slots.**

(a) This section describes the process by which the FAA assigns new Slots, as well as Slots returned to the FAA pursuant to the provisions of § 93.170. These Slots will be assigned by the FAA to requesting Carriers for the Summer and Winter Scheduling Seasons.

(b) Requests for the new Slots or returned Slots or both must be

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

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

(d) After accommodating Carrier requests for re-timing of Slots, the FAA will assign 50% of the new Slots and returned Slots to New Entrants, unless requests by New Entrants constitute fewer than 50% of available Slots.

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

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

(1) The effective period of operation;

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

(3) Schedule constraints of Carriers requesting Slots.

**§ 93.167 Reversion and withdrawal of slots.**

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

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

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

(d) Common Slots and Limited Slots will be withdrawn in accordance with the priority list established under § 93.173 and international obligations.

(e) Except as otherwise provided in paragraph (a) of this section, the FAA will notify an affected Carrier before withdrawing or temporarily suspending a Common Slot or Limited Slot and specify the date by which operations under the Common Slot or Limited Slot

must cease. The FAA will provide at least 45 days' notice unless otherwise required by operational needs.

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

**§ 93.168 Sublease and transfer of slots.**

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

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

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

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

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

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

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

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

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

(g) A Carrier wishing to sublease a Slot via an FAA auction, rather than

pursuant to this section, may do so. The Carrier shall retain the proceeds and the Slot shall retain the same designation that it had prior to the Carrier placing it up for auction.

**§ 93.169 One-for-one trade of slots.**

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

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

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

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

**§ 93.170 Minimum usage requirements.**

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

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

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

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

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

**§ 93.171 Unscheduled operations.**

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person may operate an aircraft other than a helicopter to or from JFK unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO) or in the case of public charters, in accordance with the procedures in paragraph (d) of this section. Requests for Reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to

or departure from JFK. Additional information on procedures for obtaining a Reservation is available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Reservations, including those assigned to Public Charter operations under paragraph (d) of this section, will be available to be assigned by the ARO on a 30-minute basis at JFK as follows:

(1) Two Reservations per hour

between 6 a.m. and 1:59 p.m. and

between 10 p.m. and 10:59 p.m.

(2) One Reservation per hour between

2 p.m. and 10:59 p.m.

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

(d) One Reservation per hour will be available for assignment to Public Charter operations prior to the 72-hour Reservation window in paragraph (a) of this section. No more than 25 percent of the reservations from 12 noon through 9:59 p.m. will be made available for Public Charter operations under this paragraph.

(1) The Public Charter Operator may request a reservation up to six months in advance of date of the flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591. Submissions may be made via facsimile to (202) 267-7277 or by e-mail to: [7-awa-slotadmin@faa.gov](mailto:7-awa-slotadmin@faa.gov).

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

(3) The Public Charter operator must identify the call sign/flight number or aircraft registration number of the direct Air Carrier, the date and time of the proposed operations(s), the airport served immediately prior to or after JFK, aircraft type, and the nature of the operations (e.g., ferry, passenger). Any changes to an approved Reservation must be approved in advance by the Slot Administration Office.

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

(e) The filing of a request for a Reservation does not constitute the filing of an IFR flight plan as required by regulation. The IFR flight plan may be filed only after the Reservation is obtained, must include the Reservation

number in the "Remarks" section, and must be filed in accordance with FAA regulations and procedures.

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

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

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

#### **§ 93.172 Reporting requirements.**

(a) No later than September 1 for the Summer Scheduling season and February 1 for the Winter Scheduling Season, each Carrier holding a Common Slot or Limited Slot must submit an interim report of Slot usage for each day of the applicable scheduling season. No later than 30 days after the last day of the applicable scheduling season, each Carrier holding a Common Slot or Limited Slot must submit a final report of the completed operations for each day of the entire scheduling season.

(b) Such reports, in a format acceptable to the FAA, must contain the following information for each Common Slot or Limited Slot:

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

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

#### **§ 93.173 Administrative provisions.**

- (a) Each Slot shall be assigned a number for administrative convenience.
- (b) The FAA will assign priority numbers by random lottery for Common

Slots and Limited Slots at JFK. Each Common Slot and Limited Slot will be assigned a withdrawal priority number, and the 30-minute time period for the Common Slot or Limited Slot, frequency, and the arrival or departure designation.

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

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

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

### **Subpart O—Newark Liberty International Airport Traffic Rules**

#### **§ 93.181 Applicability.**

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

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

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

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

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

#### **§ 93.182 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 Newark.

*Baseline Operations* are those Common Slots held by a carrier on [final rule effective date], that do not exceed 20 operations per day.

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

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

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

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

*New Entrant* is any carrier that is administratively allocated a total of 8 or fewer slots at either JFK or Newark during controlled hours at any point during the duration of the rule.

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

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

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

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

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

*Summer Scheduling Season* begins on the last Sunday of March.

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

*Unscheduled Operation* is an arrival or departure segment of any operation that is not regularly conducted by a carrier or other operator of an aircraft,

excluding helicopters, between Newark and another service point. The following types of carrier operations shall be considered unscheduled operations for the purposes of this rule: public, on-demand, and other charter flights; hired aircraft service; extra sections of scheduled flights; ferry flights; and other non-passenger flights.

*Winter Scheduling Season* begins on the last Sunday in October.

**§ 93.183 Slots for scheduled arrivals and departures.**

(a) During the hours of 6 a.m. through 10:59 p.m., Eastern Time, no person shall operate any scheduled arrival or departure into or out of Newark without first obtaining a Slot in accordance with this subpart.

(b) Except as otherwise established by the FAA under paragraph (c) of this section, the number of Slots shall be limited to no more than eighty-one (81) period at Newark. The number of Slots may not exceed 44 in any 30-minute period and 81 in any 60-minute period. The number of arrival and departure Slots in any period may be adjusted by the FAA as necessary based on the actual or potential delays created by such number or other considerations relating to congestion, airfield capacity and the air traffic control system.

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

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

**§ 93.184 Categories of slots.**

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

(b) *Common Slots.*

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

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

(c) *Limited Slots.* Those Slots assigned to a Carrier subject to return to the FAA under § 93.185(c) shall be designated as Limited Slots until the date of their reassignment by the FAA as Unrestricted Slots. A Carrier may continue to use a Limited Slot that has reverted to the FAA until reassigned to another Carrier as an Unrestricted Slot.

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

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

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

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

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

**§ 93.185 Initial assignment of slots.**

(a) Except as provided for under paragraphs (b) and (c) of this section, any Carrier allocated operating rights under the Order limiting operations at Newark as evidenced by the FAA's records, will be assigned corresponding Slots in 30-minute periods consistent with the limits under § 93.183(b) and its summer and winter season schedules as approved by the FAA. If necessary, the FAA may utilize administrative measures such as voluntary measures or a lottery to re-time the assigned Slots within the same hour to meet the 30-minute limits under § 93.183(b). The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this section.

(b) If a Carrier was allocated operating rights under the Order limiting operations at Newark, but the operating rights were held by another Carrier, then the corresponding Slots will be assigned to the Carrier that held the operating rights for that period, as evidenced by the FAA's records.

(c) Starting [date 35 days after the effective date] and every year thereafter through 2013, one-fifth of the total number of Limited Slots shall revert to the FAA in accordance with the

schedule published under § 93.164(c)(4) and be auctioned as Unrestricted Slots by the FAA. Any Slot receiving no responsive bids will be retired until the next auction. An affected Carrier will be allowed to use the Limited Slot until the effective date of an award to a Carrier as an Unrestricted Slot.

**§ 93.186 Assignment of new or returned slots.**

(a) This section describes the process by which the FAA assigns new Slots, as well as Slots returned to the FAA pursuant to the provisions of § 93.190. These Slots will be assigned by the FAA to requesting Carriers for the Summer and Winter Scheduling Seasons.

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

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

(d) After accommodating Carrier requests for retiming of Slots, the FAA will assign 50% of the new Slots and returned Slots to New Entrants, unless requests by New Entrants constitute fewer than 50% of available Slots.

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

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

- (1) The effective period of operation;
- (2) The extent and regularity of intended use of a Slot;
- (3) Schedule constraints of Carriers requesting Slots.

**§ 93.187 Reversion and withdrawal of slots.**

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

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

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

(d) Common Slots and Limited Slots will be withdrawn in accordance with the priority list established under § 93.193 and international obligations.

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

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

#### § 93.188 Sublease and transfer of slots.

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

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

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

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

- (1) The names of all bidders and all parties to the transaction;
- (2) The offered and final lengths of the sublease;
- (3) The consideration offered by all bidders and provided by the sublessee.

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

(f) Slots may be transferred among a U.S. Air Carrier and another Carrier that

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

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

#### § 93.189 One-for-one trade of slots.

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

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

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

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

#### § 93.190 Minimum usage requirements.

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

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

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

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

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

#### § 93.191 Unscheduled operations.

(a) During the hours of 6 a.m. through 10:59 p.m. Eastern Time, no person may operate an aircraft other than a helicopter to or from Newark unless he or she has received, for that Unscheduled Operation, a Reservation that is assigned by the Airport Reservation Office (ARO) or in the case of Public Charters, in accordance with the procedures in paragraph (d) of this section. Requests for Reservations will be accepted through the e-CVRS beginning 72 hours prior to the proposed time of arrival to or departure from Newark. Additional information on procedures for obtaining a Reservation is available on the Internet at <http://www.fly.faa.gov/ecvrs>.

(b) Reservations, including those assigned to Public Charter operations under paragraph (d) of this section, will be available to be assigned by the ARO on a 30-minute basis at Newark as follows:

(1) Two Reservations per hour between 6 a.m. and 11:59 a.m. and between 10 p.m. and 10:59 p.m.

(2) One Reservation per hour between 12 noon and 9:59 p.m.

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

(d) One Reservation per hour will be available for assignment to Public Charter operations prior to the 72-hour Reservation window in paragraph (a) of this section. No more than 25 percent of the reservations available from 12 noon through 9:59 p.m. will be made available for Public Charter operations under this paragraph.

(1) The Public Charter Operator may request a reservation up to six months in advance of the date of the flight operation. Reservation requests should be submitted to Federal Aviation Administration, Slot Administration Office, AGC-200, 800 Independence Avenue, SW., Washington, DC 20591. Submissions may be made via facsimile to (202) 267-7277 or by e-mail to: [7-awa-slotadmin@faa.gov](mailto:7-awa-slotadmin@faa.gov).

(2) The Public Charter operator must certify that its prospectus has been accepted by the Department of

Transportation in accordance with 14 CFR part 380.

(3) The Public Charter operator must identify the call sign/flight number or aircraft registration number of the direct Air Carrier, the date and time of the proposed operation(s), the airport served immediately prior to or after Newark, aircraft type, and the nature of the operation (e.g., ferry, passenger). Any changes to an approved Reservation must be approved in advance by the Slot Administration Office.

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

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

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

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

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

#### **§ 93.192 Reporting requirements.**

(a) No later than September 1 for the Summer Scheduling Season and February 1 for the Winter Scheduling Season, each Carrier holding a Common Slot or Limited Slot must submit an interim report of Slot usage for each day of the applicable scheduling season. No later than 30 days after the last day of the applicable scheduling season, each Carrier holding a Common Slot or Limited Slot must submit a final report of the completed operations for each day of the entire scheduling season.

(b) Such reports, in a format acceptable to the FAA, must contain the following information for each Common Slot or Limited Slot:

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

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

#### **§ 93.193 Administrative provisions.**

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

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

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

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

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

Issued in Washington, DC, on May 15, 2008.

**Nan Shellabarger,**

*Director of Aviation Policy and Plans.*

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