Issued in Washington, DC, January 13, 2005.

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[FR Doc. 05–1157 Filed 1–19–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 212

[Docket No. OST–2002–11741]

RIN 2105–AD38

Charter Rules for Foreign Direct Air Carriers

AGENCY: Office of the Secretary.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department seeks comment on a proposal to revise its rules on charter operations. This proposal arises from a petition filed by the National Air Carrier Association (NACA). NACA seeks to make changes to the definitions and standards the Department uses to determine whether to grant or deny foreign air carrier requests to conduct certain types of international charter flights.

The Department grants NACA's petition, and proposes to make some, but not all of the changes sought by NACA. The Department proposes to make revisions to definitions relating to charter types, and to modify the Department's current charter application form so as to require updated reciprocity information as well as numbers of U.S.-homeland services vs. U.S.-non-homeland services. The Department does not anticipate adopting NACA's requests to impose a reciprocity standard that ensures substantially equivalent opportunities for U.S. carriers in the homeland of the applicant, or to accord U.S. carriers a right of ''first refusal'' over foreign carrier requests to conduct certain U.S.-originating charter operations.

Specifically, the Department proposes to clarify the definition of ''fifth freedom charter'' by adding definitions of ''sixth- and seventh-freedom charters.'' The Department also proposes modifications to OST Form 4540 (Foreign Air Carrier Application for Statement of Authorization). Specifically, the Department proposes to require an updated reciprocity statement by foreign carriers for a statement of authorization to allow us to ensure that our reciprocity standards have been satisfied and are properly supported. The Department also proposes to require that foreign carrier applicants for a statement of authorization include historical data relative to the applicant's U.S.-home country operations to allow the Department to readily evaluate levels of third- and fourth-freedom versus fifth-, sixth-, and seventh-freedom operations. This data will allow the Department to satisfy any concerns we might have as to the applicant's reliance on fifth-, sixth- and seventh-freedom operations. These proposed modifications will ensure that the Department has the most current information on the state of reciprocity for each foreign carrier applicant for fifth-, sixth-, or seventh-freedom charter authority.

DATES: Comments should be received by March 22, 2005. Late-filed comments will be considered to the extent practicable.

ADDRESSES: To make sure your comments and related material are not entered more than once in the docket, please submit them (marked with docket number OST–2002–11741) by only one of the following means:

(1) By mail to the Dockets and Media Management, U.S. Department of Transportation, M–30, Room PL–401, 400 7th Street SW., Washington, DC 20590.

(2) By hand delivery to room PL–401 on the Plaza level of the Nassif Building, 400 7th Street SW., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

(3) Electronically through the Web Site for the Docket Management System at *http://dms.dot.gov*. [Comments must be filed in Docket OST–2002–11741, U.S. Department of Transportation, 400 7th Street SW., Washington, DC 20590.]

Due to security procedures in effect since October 2001 on mail deliveries, mail received through the Postal Service may be subject to delays. Commenters should consider using an express mail firm to ensure the timely filing of any comments not submitted electronically or by hand.

FOR FURTHER INFORMATION CONTACT: Gordon H. Bingham, Office of International Aviation (X–40), U.S. Department of Transportation, 400 7th Street, SW., Washington, DC 20590; (202) 366–2404.

SUPPLEMENTARY INFORMATION: Under current Department charter regulations in 14 CFR Part 212, foreign air carriers must obtain prior Department approval for all ''fifth-freedom'' charters. The standard for grant of such authority is a public interest test, with reciprocity on the part of the applicant's home country being the primary criterion. Under the Department's regulations, ''fifth-freedom'' charters include all charters operated between the U.S. and a third-country point, either via the foreign carrier's home country or absent any nexus to the foreign carrier's home country. Because almost all charter flights processed by the Department under Part 212 are conducted as point-to-point services, in practice the ''no nexus'' case represents the norm.

On March 4, 2002, NACA, on behalf of its member carriers (Air Transport International, American Trans Air, Express.Net Airlines, Falcon Air Express, Gemini Air Cargo, Champion Air, Miami Air International, North American Airlines, Omni Air International, Ryan International Airlines, USA 3000 Airlines, and World Airways, Inc.) filed a petition for rulemaking in which it requested that the Department change certain provisions of 14 CFR Parts 200 and 212. NACA asserted that the current definition of fifth-freedom passenger charters in Part 212 is inaccurate, and most of what the Department authorizes as fifth-freedom charters are in fact seventh-freedom operations because they involve no nexus with the foreign carrier's home country. NACA asserted that a true ''fifth-freedom'' charter would involve an airline carrying traffic that originates and terminates in a country other than its home country, provided the flight originates, terminates or changes gauge in the home country of the airline. Similarly, true ''sixth-freedom'' charters, according to NACA, involve the right of an airline to carry traffic that originates and terminates in a country other than its home country, provided the flight operates via the home country of the airline. NACA asserts that most foreign countries do not provide U.S. carriers reciprocal ''seventh-freedom'' passenger charter rights, and thus, the Department should scrutinize more closely the ''seventh-freedom'' charters it approves. Finally, NACA states that U.S. charter carriers have been adversely affected financially by competition from foreign carriers, particularly since the events of September 11, 2001, and that foreign carriers have been dumping their excess capacity into U.S. charter markets.

To remedy its concerns, NACA proposes changes to the definitions and standards the Department uses in determining whether to grant or deny foreign air carrier requests to conduct certain types of international charter flights. Specifically, NACA requests that we (1) add to and amend the Part 212 definitions concerning charter types so as to ensure, *inter alia*, that what it

regards as seventh-freedom passenger operations are identified as such; (2) amend the existing Part 212 reciprocity standard so that prior approval requires a finding of ''substantially equivalent'' reciprocity in the charter market of the applicant's home country; (3) alter the Department's methodology for measuring fifth-freedom traffic so that it more accurately reflects the realities in the marketplace and provides the Department with a better basis for resolving ''undue reliance'' issues; and (4) accord U.S. carriers a right of ''first refusal'' with respect to U.S.-originating fifth-freedom (seventh-freedom) passenger charter flights.

On March 21, 2002, the Department published a Notice in the **Federal Register** (67 FR 55, March 21, 2002) inviting interested parties to comment on NACA's petition. Comments to the petition were due May 6, 2002, and reply comments were due by June 4, 2002.

Comments of Interested Parties

The Department received a large number of comments in response to NACA's petition. A complete summary of those comments follow.

Comments Filed in Support for NACA's Petition

Comments in support of NACA's petition were filed by eight NACA-member carriers and approximately 1,600 employees from two NACA-member carriers. Other comments in support of NACA's petition were filed by the International Brotherhood of Teamsters (IBT), the Air Line Pilots Association (ALPA) and the Aviation Suppliers Association, MLT Vacations Inc. (a U.S. indirect air carrier), Eagle Aircraft Supply and AAR Aircraft Services(aircraft sales and service companies), and P&C Engineering Consultants. Sen. Ernest F. Hollings (D–SC), Rep. John L. Mica (R–FL), Rep. William O. Lipinski (D–IL), Rep. Jerry Moran (R–KS), Rep. Jim Ryun (R–KS), Rep. Todd Tiahart (R–KS), Rep. Brad Carson (D–OK), and Rep. John Sullivan (R–OK), have written the Department urging us to review NACA's recommendations and, if warranted, make changes to our charter rules that give foreign airlines an unfair competitive advantage over U.S. carriers. Senator Hollings requests that we support the changes proposed by NACA.

NACA's supporters argue, generally, that the Department's current charter regulations undermine the ability of U.S. carriers to compete commercially; that limited fifth-freedom opportunities exist for U.S. carriers abroad; and that adopting a ''first refusal'' policy would promote U.S. charter viability. They believe that (1) NACA's proposals, if adopted, will remove the anomaly under which seventh-freedom passenger charter flights by foreign carriers are defined and regulated by the Department as fifth-freedom charter flights; (2) the Department's approval of large seventh-freedom charter programs (which the supporters believe are often indistinguishable from scheduled service) is contrary to the Department's longstanding policy of not granting scheduled seventh-freedom scheduled rights to foreign carriers; (3) the Department's definition of fifth-freedom charter flights is inconsistent with definitions used by our foreign trading partners for similar charter services and should be corrected; (4) U.S. carriers are placed at a competitive disadvantage when the Department provides economic opportunities to foreign carriers that exceed rights the U.S. has negotiated for U.S. carriers; and (5) the Department should revise filing procedures for its T–100 reporting data to more accurately measure levels of foreign carrier third- and fourth-freedom operations versus levels of fifth-freedom operations.

Commenters supporting NACA's petition also share NACA's view that the Department should give U.S. charter carriers ''first refusal'' rights to assist the ability of U.S. carriers to compete commercially and to remain viable supporters of the Civil Reserve Air Fleet (CRAF) program. They also believe that current DOT practice favors U.S. scheduled carriers by subjecting U.S. charter carriers to competition by foreign carrier charter operators while protecting U.S. scheduled carriers against competition by not allowing seventh-freedom scheduled operations by foreign carriers. They believe that because comparable rights for U.S. carriers may not be available in the home country of an applicant foreign carrier, ''first refusal'' would place U.S. charter carriers on an equal footing with U.S. scheduled carriers. They also state that ''first refusal'' would not interfere with foreign carrier third and fourth-freedom charter services, and will allow foreign carriers to conduct U.S.-originating seventh-freedom charters where no U.S. carrier lift is available. The IBT believes that ''first refusal'' should be extended to cover U.S.-originating seventh-freedom all-cargo charter flights as well.

Many of the commenters agree with NACA that the Department's reciprocity test does not go far enough because it does not take into account whether a commercially viable charter market actually exists in a foreign carrier's home country. They point out that the Department's existing reciprocity test requires nothing more than the apparent willingness of a foreign government to grant fifth-freedom charter rights to U.S. carriers, regardless of the size of the market or the existence of meaningful charter opportunities in the market. They believe that NACA's proposal will bring clarity to the standards for demonstrating reciprocity which they believe should be based on measurable traffic volumes or ''substantial equivalency''.

Other commenters suggest that foreign carriers enjoy a cost advantage over U.S. carriers because foreign carriers enjoy lower safety and security requirements and that cost and time burdens associated with the disparate safety and security requirements place U.S. carriers at a competitive disadvantage.

Comments Filed in Opposition to NACA's Petition

NACA's petition is opposed by the Air Transport Association (ATA); three trade associations (Airports Council International-North America, United States Airports for Better International Air Service, and the Washington Airports Task Force); seven U.S. indirect air carriers (Cuba Travel Services, Marazul Charters, Inc., TNT Vacations, Suntrips, Inc., Vacation Express, GWV Travel, and the Apple Companies); Atlas Air, Inc. (a U.S. all-cargo carrier); Port of Portland (a U.S. airport operator); eleven foreign direct air carriers (Condor Flugdienst, Grupo TACA representing six foreign carriers from Latin America; Skyservice Airlines, Inc., Lineas Aereas Allegro, S.A. de C.V., Antonov Design Bureau, and JMC Airlines Limited); and one individual.

Those opposing NACA's petition maintain that U.S. charter carriers provide the majority of flights in the U.S.-origin charter market in spite of the number of U.S-originating charter flights by foreign carriers authorized by the Department. They state that based on charter approval numbers offered by NACA, Department approvals of U.S.-originating charter flights by foreign carriers (with no home country nexus) since 1999, amount to less than seven flights per day throughout the U.S. TNT Vacations states that over the past several years it has been increasingly difficult to locate lift at rates enabling it to offer charter packages at prices competitive with vacation packages available through scheduled service. TNT states that the ''saving grace'' has been the competition provided by non-U.S. carriers in both home country- and

non-home country markets. TNT further states that NACA-member carriers have received over $90 million in taxpayer support under compensation legislation related to the events of September 11, 2001, and now, through NACA's petition, seek to impose additional financial burdens on the traveling public in the form of higher international charter prices.

ATA, the principal trade association of the U.S. scheduled airline industry (representing 21 U.S. carrier members and 4 foreign carrier associate members), believes that adoption of NACA's recommendations would effectively re-regulate international charter services, a result its membership opposes. ATA supports the current U.S. policy of placing maximum reliance on competitive forces to determine price, level and quality of air transportation services. ATA (as well as other commenters), opposes NACA's efforts to add new operating restrictions to charter services, whether by redefining definitions or by any other means, believing that any restrictions adopted by the United States will be applied reciprocally to U.S. carriers around the world. ATA contends that NACA's request for commercial equivalency is inconsistent with U.S. reliance on competition and should be rejected, arguing that U.S. aviation policy is intended to open foreign markets to competition, not to guarantee reciprocal access to similarly-sized markets for U.S. carriers. It argues that the Department's resources should not be used to protect U.S. carriers from foreign competition merely because a particular home country market is small, but should be used to open restricted markets to both U.S. charter and scheduled carriers. It states that NACA's request for ''first refusal'' is inconsistent with longstanding Department policy and U.S. efforts to liberalize the global aviation market, and, like Atlas Air, believes that vigorous enforcement of the public interest factors currently used by the Department are sufficient to ensure fair treatment of U.S. carriers without having to resort to ''first refusal''.

GWV states that while U.S. carriers have long been an integral part of its charter programs, it has been unable to obtain sufficient and competitively priced lift from U.S. carriers ''alone'' to meet its operational needs. GWV further stated that charter operators develop charter markets to serve a particular leisure market at the most economical cost, and adds that careful selection of aircraft, schedules and competitive rates are vital to a charter program's success. In that regard, foreign carriers play an ''indispensable'' role in supporting U.S. public charter programs and that adoption of NACA's petition would have a ''chilling'' effect on the willingness of foreign carriers to invest time or resources in bidding for U.S. tour operator charter contracts. GWV adds that if the Department adopts NACA's recommendations, and substitutes its judgment for the business judgment of GWV and other tour operators, it should also be prepared to assume the financial consequences and costs that could result from such a change.

Many of the commenters believe that the regulatory modifications NACA seeks are not necessary and can be better addressed by the Department through vigorous enforcement of existing regulations rather than by amending the current regulatory structure. They also suggest that NACA's concerns can be resolved through, among other things, Department efforts to ensure that foreign governments do not impede the ability of U.S. carriers to operate charter services, and by monitoring foreign carrier services to ensure that they do not place undue reliance on non-home country (fifth-freedom) charter operations. Atlas, as well as others, suggest that we should reject both NACA's call for an ''equivalency test''—which Atlas believes would preclude foreign carriers from small countries from operating any third-country charters—as well as its request to give U.S. carriers ''first refusal,'' which would invite foreign governments to apply a similar retaliatory policy against U.S. carrier charter operations. Airports Council International-North America (ACI–NA), United States Airports for Better International Air Service (USA–BIAS), and the Washington Airports Task Force (WATF) strongly oppose NACA's request. ACI–NA, on behalf of 53 U.S. participating airports, opposes NACA's petition, arguing that it would be detrimental to a wide range of U.S. interests. ACI–NA maintains that NACA's request for commercial equivalency focuses only on airline benefits and ignores the interests of airports and their local economies, and the traveling and shipping public. Similarly, ACI–NA, like many of the commenters opposing NACA's petition, rejects NACA's call for ''first refusal,'' stating that implementation of such a practice would take away a charterer's ability to negotiate the service which best meet its needs, and ultimately result in the loss of U.S.-originating charter programs because they would be priced out of the market. The loss of these programs would, in ACI–NA's view, be damaging to the traveling public, tour operators, U.S. airports and the local economies they serve. USA–BIAS, on behalf of 14 U.S. airports, states that NACA's petition looks only at the narrow mercantile needs of its members and ignores the greater good that international mobility brings to the U.S. economy, U.S. cities, U.S. businesses and the traveling public. USA–BIAS states that it sees no need for the ''hyper-regulatory'' approach sought by NACA, suggesting that the Department possesses ample tools under its existing regulatory framework to assess the public interest. ACI–NA, USA–BIAS and WATF all believe that fifth-freedom charter services provide U.S. airports with an opportunity to obtain new or competitive international air services and oppose any new regulations that would add restrictions to the ability of foreign air carriers to provide new services on international routes.

WATF states that history has demonstrated that the people and the economy of the United States benefit from a free and open air service market, rather than from arrangements which confer commercial benefits on a specific class of U.S. carrier. WATF further states that it would be ''a gross irony'' for the United States to accept the offending aspects of the NACA petition as it strives to negotiate ever more liberal air service agreements with foreign governments.

The Port of Portland expresses its interest in expanding international air services at its airport and is opposed to any initiative to make the addition of new international services more difficult, noting that Portland enjoyed the charter services of a foreign carrier passenger charter program to Cancun during the past winter season. Portland supports the strong opposition to NACA's request set forth in the comments of Atlas and Condor, a foreign carrier from Germany.

As noted above, eleven foreign carriers filed in opposition to NACA's petition. Condor Flugdienst (Germany), Grupo TACA (representing six foreign carriers from Latin America), Skyservice Airlines, Inc. (Canada), Lineas Aereas Allegro (Mexico), Antonov Design Bureau (Ukraine), and JMC Airlines Limited (United Kingdom). All believe that NACA's proposal is anticompetitive and, if adopted, would deprive the Department of its ability to consider the needs of all aviation and aviation-related entities.

Condor Flugdienst (Condor) states that if the Department adopts NACA's recommendations, the Department will

be retreating from its support of liberalization as the cornerstone of U.S. aviation policy by urging trading partners to embrace open skies and move away from ''balance'' as a guide for trading opportunities. Condor states that NACA should be careful of what it asks for, noting that if ''economic balance'' is scrutinized, there is large category of traffic where non-U.S. carriers are unable to compete because such arrangements are prohibited under FAA rules (specifically, the wet leasing of aircraft to U.S. carriers). Condor believes that the ability to wet lease aircraft is of greater value than the seventh-freedom charter flight issue NACA raises, and is particularly unfair given that U.S. carriers face no similar restrictions from foreign regulatory authorities when they wet lease aircraft to foreign carriers. Condor also believes that NACA would be concerned if foreign governments were to apply a strict ''reciprocity'' test with respect to such wet-lease services against U.S. carriers.

Grupo TACA argues that changing the name of what the Department defines as fifth-freedom charters to seventh-freedom charters would neither alter the nature of the subject charter operations nor would it impair the underlying justification for the Department's granting them. Grupo TACA states that NACA's efforts to create a commercial equivalency test would effectively prevent airlines from smaller countries from participating in the charter business while at the same time facing daily competition in their home countries from large U.S. scheduled and charter carriers.

Skyservice Airlines, Inc. (Skyservice), a foreign air carrier from Canada, states that the liberal and pro-competitive environment between the United States and Canada has benefited carriers of both sides, noting that during calendar years 1999–2001, the Canadian Transport Authority (CTA) approved requests by U.S. carriers to operate a total of 371 fifth-freedom charter flights (passenger and cargo) to and from Canada. Skyservice believes that these services have benefited both the traveling and shipping public in both the United States and Canada and should not be overlooked in the context of NACA's petition. Skyservice also questions NACA's ''equivalency'' test and asks if the Canada market would qualify as ''substantially equivalent,'' and if not, which nation would. Skyservice disagrees with NACA's contention that foreign carriers enjoy cost or regulatory advantages over U.S. carriers.

Lineas Aereas Allegro S.A. de C.V (Allegro) states that the Department's charter policy is well-founded and applied responsibly, and therefore, it is not necessary to redefine the various charter types as NACA requests. Allegro further states that NACA's ''equivalency test'' would be burdensome to implement and could effectively prevent foreign carriers from operating any fifth-freedom charter flights in U.S. markets. Allegro also believes that the relief sought by NACA only considers the effect of its request on U.S. charter carriers rather than the aviation industry as a whole. Allegro states that NACA's suggestion that foreign carrier services to and from the United States do not meet U.S. safety standards is unfounded and that NACA provides no empirical data to support its claim. Allegro also disagrees with NACA's suggestion that the Department should revise the requirements for traffic data submitted by foreign carriers, believing that instead of relying on T–100 data, the Department would be better served by comparing the actual number of third/fourth-freedom flights with the number of fifth-freedom charter flights during a specified time period.

Antonov Design Bureau (Antonov) believes that the Department's rules require that the Department's actions on foreign carrier charter flight requests to and from the U.S. to points other than the operator's home country are reviewed and based on reciprocity and defined public interest principles, and that NACA's distinction of ''fifth'' versus ''seventh'' is a distinction without a difference.

JMC Airlines Limited (JMC) states that NACA's petition is contrary to the interests of the traveling public and is designed to eliminate competition by disqualifying non-U.S. carriers from conducting fifth-freedom charter flights. JMC believes that by adopting NACA's petition, the Department would effectively lose the ability to consider the interests and needs of other beneficiaries of charter services when considering fifth-freedom charter requests by non-U.S. carriers.

The U.S. indirect air carriers mentioned above oppose NACA's petition, believing it would have severe repercussions for their industry and the traveling public, in the form of higher charter prices and reduced service options. They believe that NACA's petition is designed to carve out an exclusive market for NACA members and reduce competition by barring foreign carriers from U.S. charter markets through NACA's ''first refusal'' or ''equivalency test.'' If adopted, NACA's proposal would make scarce resources scarcer and cause charter prices to escalate, especially in Caribbean markets where some countries have no carrier able to provide third/fourth-freedom competition against large U.S. scheduled and charter carriers. They also argue that NACA's proposal would have a ''chilling'' effect on competition because non-U.S. carriers will not expend time or resources pursuing U.S.-third country traffic when such opportunities could be lost to a less competitive bidder under a ''first refusal'' policy, ultimately diminishing the ability of indirect air carriers (tour operators) to select the direct air carrier which best meets their needs.

Reply Comments

Reply comments were filed by NACA, the Transportation Trades Department of the AFL–CIO (TTD), Amerijet International, Inc. (a U.S. all-cargo carrier), three foreign air carriers (Antonov, Air 2000 Limited, and Allegro), the Apple Companies and 15 ARC-accredited travel agencies.

Reply Comments in Support of NACA's Petition

NACA believes that some of the commenters did not understand that the proposed changes are narrow in scope, while other commenters ''vastly exaggerate'' the impact its proposed changes would have if adopted. NACA states that its petition does not seek to re-regulate or restrict competition and is intended to create fair and equal regulatory treatment of U.S. charter and scheduled passenger carriers with regard to seventh-freedom operations by foreign carriers. NACA states that the Department has established a ''dichotomy'' of regulatory treatment by giving the larger and stronger U.S. scheduled carriers preferential regulatory treatment over the smaller and weaker U.S. charter carriers by approving virtually all foreign carrier seventh-freedom charter requests, while at the same time enforcing a strict policy against allowing foreign carriers to operate seventh-freedom scheduled flights.

NACA states that it does not believe that foreign governments will take retaliatory action against U.S. carriers if its proposals are adopted, nor does it believe that all of its concerns can be resolved through vigorous enforcement of existing rules, as many of the commenters state. NACA maintains that failure to correct existing policies could have serious financial consequences on U.S. charter carriers and result in possible national security concerns if

U.S. charter carrier contributions to CRAF are diminished.

The TTD, on behalf of the 34 transportation unions it represents, supports NACA's petition and states that the Department's practice of granting foreign carrier seventh-freedom charter requests weakens U.S. charter carriers through lost revenues, and, therefore is a threat to the viability of U.S. charter carrier industry. TTD supports NACA's request that the Department subject foreign carrier charter requests to a substantial reciprocity test as well as granting U.S. carriers ''first refusal'' rights on foreign carrier seventh-freedom charter requests. TTD believes that by adopting NACA's recommendations the Department will establish a meaningful standard for reforming current regulations which TTD believes unfairly penalize U.S. charter carriers and their employees.

Amerijet International, Inc. (Amerijet) also supports NACA's proposal and believes that a review of the Department's charter regulations should be undertaken to insure that their impact is consistent with the goals of the Department and the Congress. Amerijet contends that the Department has abandoned its longstanding policy of not allowing foreign carriers to place undue reliance on fifth-freedom services, and suggests that the NACA's petition serves to strengthen that policy. Amerijet further states that following the events of September 11, Congress made it clear that the U.S. carrier industry requires a level of protection, and argues that that is all NACA and its supporters are seeking in this proceeding.

Reply Comments in Opposition to NACA's Petition

The Apple Companies, ARC-accredited travel agencies, and three foreign air carriers are unanimous in their reply comments in opposition to NACA's petition.

The Apple Companies state that the parties supporting NACA's petition represent a narrow sector of the industry; that those opposing NACA's petition are unanimous in their view that current regulatory mechanisms are sufficient to protect the public interest and that the overall interests of U.S. aviation would be severely damaged by NACA's protectionist and anticompetitive proposal; and, that foreign carrier fifth-freedom charter operations represent a small portion of all Public Charter flights operated annually in the United States.

The travel agencies believe that the changes proposed by NACA will eliminate competition and either increase prices or reduce the availability of charter vacation packages, to the detriment of the U.S. travel agent community. The agencies further support the Department's longstanding policy of letting the market set the price and quality of charter transportation services.

Antonov notes that while only NACA members and certain labor interests filed in support of NACA's request, groups such as tour operators, U.S. airports and cities with interests closely aligned with the needs of consumers and the traveling public oppose NACA's petition. Antonov concurs with the comments filed in opposition to NACA's request, and agrees with comments of USA–BIAS, Suntrips Inc., Vacation Express, and ATA, which Antonov believes are representative of the aviation community which stands to lose the most if NACA's petition is adopted.

Like Antonov, Allegro states that an analysis of the comments filed in response to NACA's petition suggests that NACA's petition enjoys little support outside its membership and the employees of some of its members, while a much broader cross-section of the aviation community opposes NACA's petition. Allegro believes that NACA's petition is anticompetitive and would ultimately reduce competition between U.S. and foreign carriers in the U.S. charter market to the detriment of the U.S. traveling public.

Air 2000 Limited (Air 2000) states that NACA's petition is contrary to international aviation policy and the interests of U.S. shippers, airports and the traveling public. Air 2000 further states that NACA's equivalency test would disadvantage U.S. airlines and U.S. workers, its ''first refusal'' proposal is anti-consumer and anticompetitive, and revision of the definitions of the freedoms of the air would lead to protecting only U.S. charter carriers from foreign carrier competition.

Overview

In its petition, NACA maintained that foreign air carrier charter flights generate more benefit to the foreign carrier industry than the U.S. carrier industry. It asserted that these flights now threaten the survival of some of its members and weaken their ability to serve the national defense.

NACA proposes a number of remedies to address this situation, including; revision of the definition of fifth-freedom charters; adoption of a new, more restrictive reciprocity standard; and, creation of an amendment to our regulations that would provide U.S. carriers with a right of ''first refusal'' for certain U.S.-originating passenger charter flights. In other words, ''first refusal'' in that context would mean the right to prevent a foreign carrier from operating any U.S.-originating fifth-freedom passenger charter (under our existing definition) that a U.S. carrier wants to operate.

After carefully examining the comments and information in the record, we have tentatively determined that it is in the public interest to make modifications to Part 212 that would improve our ability to assess the merits of applications filed under that Part.

Background

Our bilateral aviation agreements do not cover the passenger charter services that are at issue in this proceeding; [1] therefore, U.S. and foreign carriers operate these services only at the discretion of the U.S and foreign governments. The Department's regulations require foreign airlines to apply for permission to operate fifth-freedom charters (14 CFR 212.9), and establish a ''public interest'' standard for considering these foreign carrier requests (§ 212.11(a)).

Reciprocity on the part of the applicant's home country is the primary criterion for approval (§ 212.11(b)(2)). The Department also examines other factors that may be relevant in specific cases (for example, the extent of the applicant's reliance on fifth-freedom operations in relation to its third- and fourth-freedom services). In making its public interest determination, the Department's approach consistently has been to look not only to the interests of U.S. charter carriers, but also to consider the needs and concerns of other parties affected by its decision, notably the tour operator (frequently a U.S. company), and members of the traveling public (often U.S. citizens). The Department's longstanding policy has been to give charterers the maximum flexibility possible to choose the airline services that best meet their needs. The Department repeatedly has rejected according U.S. carriers a right of ''first refusal''.

NACA asserts that the Department has permitted foreign airlines to operate an excessive number of fifth-freedom passenger charter flights under Part 212, and that our actions have harmed its members and undermined their ability to serve the national defense. NACA

[1] A number of our agreements state the parties will give favorable consideration to such charters on the basis of comity and reciprocity. While this certainly reflects a spirit sympathetic to approval, it does not formally bind the parties to such a result.

also maintains that the effects of the events of September 11, 2001, have aggravated that harm and adverse impact on national defense, and that foreign governments do not provide NACA members with reciprocal charter opportunities. NACA has proposed several changes to Department rules to meet its concerns. Specifically, it asks the Department to:

- Add to and amend the Part 212 definitions concerning charter types so as to ensure, inter alia, that what it regards as seventh-freedom passenger operations are identified as such;
- Amend the existing Part 212 reciprocity standard so that prior approval requires a finding of ''substantially equivalent'' reciprocity in the charter market of the applicant's home country;
- Alter the Department's methodology for measuring fifth-freedom traffic so that, in NACA's view, it more accurately reflects the realities in the marketplace and provides the Department with a better basis for resolving ''undue reliance'' issues; and
- Accord U.S. carriers a right of ''first refusal'' with respect to certain U.S.-originating fifth-freedom (seventh-freedom) passenger charter flights.

Discussion

Proposed Modifications to OST Form 4540 and Amendments to Part 212

We are proposing two changes to Part 212 that are intended to improve our ability to assess the merits of applications filed under that Part. We believe that these changes will enhance the Department's decision-making process without imposing an undue burden on applicants or affecting the public benefits that our rules now provide.

First, we propose to amend the application form for charter applications (OST Form 4540) as regards the information to be provided on reciprocity. Specifically, we will add a note to the reciprocity section of OST Form 4540 to establish, as an express requirement for approval, that the applicant explicitly provide evidence that it has verified that its home country government would accord reciprocal treatment to comparable U.S. carrier requests. We will also require that the applicant provide the date of such verification and with whom the verification was made. This verification must come from an official of the government of the homeland of the applicant.

Because we recognize that some applicants may file multiple requests within a limited period, we will not require that each successive request entail a new effort to secure the needed verification. Under normal circumstances, we would consider 90 days a reasonable period to rely on a previously-filed verification of reciprocity, and our amendment to OST Form 4540 would so indicate. Of course, if intervening events give cause to doubt the continuing validity of such verification, we will expect applicants to seek a new verification, even if their subsequent request is submitted within 90 days of a previous verification. Alternatively, we may advise them of our inability to complete the processing of their application absent a new reciprocity verification.

Second, we propose to amend OST Form 4540 to require applicants to provide additional information regarding the extent to which they are relying on fifth-freedom charter services to and from the United States in relation to their overall services to and from the U.S. As noted earlier, although this relationship is an important public interest consideration in our determination of the merits of applications for fifth-freedom charter authority, a number of commenters have expressed concern that some applications for such authority do not contain facts that adequately address this issue. In response to those concerns, we propose to amend OST Form 4540 to expressly require that in Box 13 designated for ''Other information requested by DOT,'' (or, at the applicant's preference, in a cover letter or attachment) applicants shall specify the number of third- and fourth-freedom flights they have provided over the preceding calendar year.[2] This information should be presented with sufficient clarity for any commenting parties and the Department to readily evaluate the proposed services against the historical data. Failure to provide the necessary information would be expected to affect the processing of the application.

We also propose revisions to our definitions. NACA asserts that many of the flights fitting our definition of fifth-freedom charters in § 212.2 in fact would be understood throughout the world as ''seventh-freedom'' charter flights because ''they do not carry paying passengers to, from, or via the homeland of the carrier.'' [3] NACA argues that it is misleading, confusing and bad policy for the Department to continue to call all passenger charter flights that serve countries other than the carrier's home country as ''fifth-freedom'' charters.[4]

While we could point to various commenters who contend that the charter community is so familiar with our longstanding regulatory nomenclature as to render confusion unlikely, we nevertheless conclude that even a limited degree of confusion is best avoided. Accordingly, we propose to expand the definitions in § 212.2 to expressly differentiate between fifth-, sixth-, and seventh-freedom charters.

Vision 100—Century of Aviation Reauthorization Act

Our proposed revisions to Part 212 are consistent with Section 820 of the recently signed Vision 100-Century of Aviation Reauthorization Act (the Act). Specifically, Section 820 of the Act provides the sense of Congress that the Department should ''formally define 'Fifth Freedom' and 'Seventh Freedom' consistently for both scheduled and charter passenger and cargo traffic.'' As noted above, we are proposing to expand the definitions in Part 212 to differentiate between fifth-, sixth-, and seventh-freedom charters. The revisions we propose will apply to both passenger and cargo services and will standardize the definitions used by the Department for both scheduled and charter services.

Other Issues

While we are proposing the changes outlined above in response to NACA's petition, we have concluded that the record does not provide justification for adopting other changes proposed by NACA, as they would in our view significantly reduce other important public benefits now provided by our fifth-freedom charter rules. Therefore, we do not anticipate adopting NACA's proposal to require a finding of ''substantially equivalent reciprocity'' in the charter market of the applicant's home country, or to accord U.S. carriers ''first refusal'' for U.S.-originating fifth-freedom (seventh-freedom) passenger charter flights. As more fully discussed below, we believe that the adoption of either of these changes would not be in the public interest.

Part 212 allows U.S. tour operators to hire foreign airlines that meet the requirements of that Part to provide foreign air transportation for the tour operators. While U.S. tour operators rely primarily on U.S. airlines for air service, they also use the option provided by our rules to use the services of foreign

[2] We are not, however, adopting NACA's proposal that we make methodological changes regarding our T–100 traffic data. We traditionally have based our undue reliance determinations on flights rather than traffic, and NACA has presented no persuasive reason to alter that approach.

[3] NACA Petition, at 4.

[4] *Id.*, at 5.

carriers in third-, fourth-, and fifth-freedom markets. The tour operators have demonstrated that this option enhances their ability to compete with airlines and cruise ship operators in the highly competitive discretionary travel markets. We also recognize that tour operators have made an important contribution to competition by offering attractive price and service alternatives to the marketplace.

By contrast, it is likely that the changes proposed by NACA would inhibit competition in markets served by U.S. tour operators. This is especially true to the extent that they would prevent tour operators from using foreign airlines by requiring, for example, the latter to obtain NACA's permission before they may provide transportation for U.S. tour operators in certain fifth-freedom and seventh-freedom markets.

In calendar year 2001, the Department authorized foreign airlines to provide 1490 roundtrip fifth-freedom charters on behalf of U.S. tour operators, or fewer than five roundtrip fifth-freedom charters per day.[5] Yet, this relatively small number of authorizations is important to a number of foreign airlines and their home countries. In these circumstances, our rules promote good aviation relations with other nations and support a liberal aviation environment that has benefited our citizens and airline industry overall. This point is illustrated by the fact that in 2001 we authorized airlines from Mexico and Central America to provide 512 fifth-freedom roundtrip charters, while U.S. airlines were providing nearly 140,000 flights—and carrying two-thirds of the cargo and passenger traffic—in the U.S.-Mexico/U.S.-Central America aviation markets.[6]

Furthermore, as the Air Transport Association (ATA), airlines, and other concerned parties have pointed out, NACA's proposal could invite retaliation against U.S. airlines by foreign governments because it could remove valuable fifth-freedom charter opportunities now enjoyed by their airlines. U.S. airlines providing scheduled service would be vulnerable to retaliation because of the huge stake they have in the bilateral aviation markets that would be affected. Also, such action would expose U.S. airlines providing wet-lease services to foreign airlines to a serious risk of harm because they are major providers of wet-lease services around the world and because those services are operated completely at the discretion of foreign governments.

The essence of NACA's position is that our rules permit foreign airlines to conduct business in markets that should be reserved only for U.S. airlines; however, the business which NACA is referring to involves the provision of service to tour operators, many of which are U.S. companies. Most of the tour operators participating in this proceeding commented that there is no need to make major changes to our fifth-freedom rules, and that those changes proposed by NACA would be harmful to both their interests and competition. We believe that the weight of the evidence supports that position.

NACA maintains that competition from the foreign charter operators hired by U.S. tour operators has harmed NACA members and has undermined their ability to serve the national defense. Our data shows, however, that the number of fifth-freedom charter flights authorized by the Department amount to a small percentage of the flights that NACA members operate. In calendar year 2001, for example, that number was less than 6% of the total number of civilian charters that NACA carriers operated and reported to the Department. It is likely that those authorizations had a smaller impact on NACA members than Department records indicate, considering that: (1) It is likely the foreign airlines did not use all of the authorizations for which they obtained Department authority; (2) NACA members operated a large number of military charters that are not reported to us; and, (3) NACA members have benefited from the extensive fifth-freedom opportunities provided by other governments.

NACA maintains that the rules have created a large aviation trade deficit with other nations because our fifth-freedom charter markets are significantly larger. We disagree. As noted above, our charter rules have supported a liberal aviation environment that has allowed U.S. airlines to capture traffic and revenues far in excess of the traffic and revenues that have been achieved by foreign airlines operating fifth-freedom flights, and has permitted our airlines to take advantage of the extensive fifth-freedom and wet-lease opportunities provided by other governments.

NACA also contends that the rules discriminate against its members because our rules prohibit ''all 7th freedom scheduled passenger flights by foreign carriers,'' while permitting what NACA refers to as seventh-freedom charter flights by foreign carriers. We disagree with this contention. The international aviation industry is still heavily regulated. Most governments believe that charter service and scheduled service are in separate product markets; therefore, they have created different opportunities and have imposed different restrictions on each class of service. Thus, while most nations permit U.S. airlines to operate charter flights between their home countries and third countries, they prohibit U.S. airlines from providing scheduled service between their home countries and third countries. Our rules reflect the realities of the still-regulated international aviation system. While we would prefer to have a situation that imposes no restrictions on international aviation services, we note the existing situation has provided U.S. charter airlines with advantages that are not afforded to U.S. scheduled airlines.

Regulatory Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be considered to the extent practicable. In addition to late comments, the Department will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This rule is a significant regulation under Executive Order 12866 and DOT's Regulatory Policies and procedures because of public interest. The NPRM was reviewed by the Office of Management and Budget under Executive Order 12866. The rule will not impose any new costs on applicant carriers. It simply would clarify the types of charters being conducted. The change to OST Form 4540 is minor and will require no additional burden on the applicant carriers.

Executive Order 13132 (Federalism Assessment)

The Department has analyzed this rulemaking action in accordance with the principles and criteria set forth in Executive Order 13132 and has determined that it does not have sufficient federalism implications to warrant consultation with State and local officials. The Department anticipates that any action taken will

[5] Foreign air carrier applications for statements of authorization under 14 CFR Part 212 are on file in the Department's Foreign Air Carrier Licensing Division, Room 6412, 400 7th Street, SW., Washington, DC 20590.

[6] Form T–100 data on file with the Department.

not preempt a State law or State regulation or affect the States' ability to discharge traditional State government functions.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant impact on a substantial number of small entities. The Department will analyze any action that might be proposed for the purpose of the Regulatory Flexibility Act.

The Department certifies that this rule will not have a significant economic impact on a substantial number of U.S. small businesses. Because the rule is applicable to foreign air carriers, the proposed changes in the NPRM will not have a significant impact on small entities within the meaning of 5 U.S.C. 601, *et seq.*

Regulation Identifier (RIN)

A regulation identifier (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Unfunded Mandates Reform Act

The changes proposed would not impose any unfunded mandates for the purpose of the Unfunded Mandates Reform Act of 1995.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. This rule contains information collection requirements. As required by the Paperwork Reduction Act, the Department will submit this requirement to the Office of Information and Regulatory Affairs of the OMB for review, and reinstatement, with change of a previously approved collection for which approval has expired.

OST Form 4540 is a required Application for Statement of Authorization for foreign air carriers to file with the Department prior to engaging in certain charter operations to and from the United States. The Department grants the authorization to the foreign air carrier. Foreign air carriers file this form as often as necessary whenever they have charter flights required by Part 212. This form is required for all foreign air carriers seeking Department authority to conduct certain types of charter flights, and does not require a significant amount of time and is not burdensome to complete.

OMB Number: 2106–0035.

Title: 14 CFR Part 212—Charter Rules for U.S. and Foreign Direct Air Carriers.

Burden hours: 1000.

Affected public: Business or other for-profit.

Cost: $400,000.00.

Description of Paperwork: The proposed changes to the rulemaking and the form are intended to improve the Department's ability to assess the merits of applications filed under Part 212, and will ensure that the Department has the most current information on the state of reciprocity for each foreign carrier applicant for charter authority filed under Part 212. These proposed changes will also enhance the Department's decision-making process without imposing an undue burden on applicants or affecting the public benefits that the Department's rules now provide. The collection of historical data relative to the applicant's U.S.-home country operations will allow the Department to satisfy any concerns it might have as to the applicant's reliance on fifth-, sixth- and seventh-freedom operations.

List of Subjects in 14 CFR Part 212

Air carriers, Air transportation, Charter flights, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department proposes to amend Part 212 as follows:

PART 212—CHARTER RULES FOR U.S. AND FOREIGN DIRECT AIR CARRIERS

1. The authority citation for 14 CFR Part 212 continues to read as follows:

Authority: 49 U.S.C. 40101, 40102, 40109, 40113, 41101, 41103, 41504, 41702, 41708, 41712, 46101.

2. Amend § 212.2 by adding, in alphabetical order among the existing definitions, a definition of ''Sixth freedom charter'' after ''Single entity charter,'' and a definition of ''Seventh freedom charter'' after ''Part charter.''

§ 212.2 Definitions.

* * * * *

Sixth-freedom charter means a charter flight carrying traffic that originates and terminates in a country other than the country of the foreign air carrier's home country, provided the flight operates via the home country of the foreign air carrier.

* * * * *

Seventh-freedom charter means a charter flight carrying traffic that originates and terminates in a country other than the foreign air carrier's home country, where the flight does not have a prior, intermediate, or subsequent stop in the foreign air carrier's home country.

* * * * *

3. In § 212.9, revise paragraph (b)(1) to read as follows:

§ 212 Prior authorization requirements.

* * * * *

(b) * * *

(1) Fifth-, sixth-and/or seventh-freedom charter flights to or from the United States;

* * * * *

Issued this 10th day of January, 2005, in Washington, DC.

Karan K. Bhatia,

Assistant Secretary for Aviation and International Affairs.

BILLING CODE 4910–62–P

APPENDIX

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 2106-0035.

U.S. Department of Transportation

FOREIGN AIR CARRIER APPLICATION FOR STATEMENT OF AUTHORIZATION

(See Instructions on Reverse Side)

DO NOT WRITE–FOR OFFICIAL USE ONLY

Disposition of Application:

__ Approved
__ Approved, subject to condition(s) on reverse
__ Disapproved/Dismissed for reason(s) cited on reverse.

Under assigned authority _____

Effective from _____ to _____

Director, Office of International Aviation

To: Department of Transportation
Foreign Air Carrier Licensing Division, X-45
Office of International Aviation
400 Seventh Street, S.W.
Washington, D.C. 20590

Operations pursuant to this authorization shall conform to Part 212 of the Department's regulations, to the terms, conditions and limitations of the applicant's foreign air carrier permit or exemption, and to Part 129 of the Federal Aviation Regulations.

Application is made for authorization to conduct charter flights under provisions of applicant's foreign air carrier permit and 14 CFR 212 or DOT order.

1. Name of Applicant:

Nationality:

2. Send authorization To:
a. Name and Address:

b. Telephone:
Fax:

3. Name of Charterer:

Address:

4. Total charter price:

5. Dates of flights under this authorization:

6. Aircraft make, model, and capacity:

7. Country in which aircraft is registered:

8. Planned routing of flights (indicate non-traffic stops by asterisks):

9. No. of flights _____ (specify whether one-way or round-trip) and type:

Passenger ___ Cargo ___ Mixed ___

For passenger flights: available passenger seats _____, number of passengers to be carried _____.

If cargo to be carried, weight and description of cargo:

OST Form 4540

(Continue on back)

10. If application is being filed late, state reason for lateness:

11. Description of chartering organization and purpose of flights:

12. Does the nation which is the domicile of the applicant grant to United States carriers a privilege similar to that requested herein? _____; if so, has evidence of such reciprocity, from an official of the carrier's homeland government, been submitted to the Department? _____; when?_____. Date that applicant last verified reciprocity_____(must be in preceding 90 days); with whom?_____. If the fact has not been established with the Department, provide documentation to establish such reciprocity.

13. Other information requested by DOT (other than third- and fourth-freedom applications): Include here the number of one-way third- and fourth-freedom flights operated by the applicant in the preceding 12 month period/calendar year (alternatively, this information may be provided in a cover letter).

CERTIFICATION

I hereby certify that the flights for which authority is sought herein conform to the requirements of DOT's Regulations and applicable orders of DOT governing charters.

_____ _____

(Date) (Signature and title of authorized officer)

INSTRUCTIONS

1. Prepare an original and one copy of this application according to Section 212.10 of the Department's Regulations. If extra space is required to complete an item, continue on a separate sheet of paper.

2. Send the application to: Department of Transportation, Foreign Air Carrier Licensing Division, X-45, Office of International Aviation, 400 Seventh Street, S.W., Washington, D.C. 20590 (and, if required by regulation or Order, to the Director of Flight Standards Service (AFS-1), Federal Aviation Administration, 800 Independence Avenue, S.W., Washington, D.C. 20591).

DO NOT WRITE -- FOR OFFICIAL USE ONLY

Exercise of the authorization is subject to the following condition(s), OR Application is disapproved/dismissed for the following reason(s):

[FR Doc. 05–1107 Filed 1–19–05; 8:45 am]
BILLING CODE 4910–62–C

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD13–04–047]

RIN 1625–AA09

Drawbridge Operation Regulations; Duwamish Waterway, Seattle, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to temporarily change the operating regulations for the First Avenue South dual drawbridges across the Duwamish Waterway, mile 2.5, at Seattle, Washington. The proposed change would enable the bridge owner to keep the bridges closed during night hours for a 4-month period. This would facilitate painting the structure while properly containing debris and paint.

DATES: Comments and related material must reach the Coast Guard on or before March 22, 2005.

ADDRESSES: You may mail comments and related material to Commander (oan), 13th Coast Guard District, 915 Second Avenue, Seattle, WA 98174–1067 where the public docket for this rulemaking is maintained. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Aids to Navigation and Waterways Management Branch between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Austin Pratt, Chief, Bridge Section, (206) 220–7282.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [CGD13–04–047], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Aids to Navigation and Waterways Management Branch at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The dual First Avenue South bascule bridges provide 32 feet of vertical clearance above mean high water for the central 100 feet of horizontal distance in the channel spans. When the drawspans are open there is unlimited vertical clearance for the central 120 feet of the spans. An adjacent, parallel bascule bridge was constructed and completed in 1999. Drawbridge openings are provided for recreational vessels, large barges, and floating construction equipment.

The operating regulations currently in effect for these drawbridges at 33 CFR 117.1041 provide that the spans need not open for the passage of vessels from 6 a.m. to 9 a.m. and from 3 p.m. to 6 p.m. Monday through Friday, except on all Federal holidays but Columbus Day. The draws must open at any time for a vessel of 5,000 gross tons and over, a vessel towing such a vessel or en route to take in tow a vessel of that size.

The proposed temporary rule would enable the bridge owner to paint the structure after preparing the surfaces of the steel truss beneath the roadway. All of this work must be accomplished within a containment system that permits no material to fall into the waterway. This containment system would have to be removed or partially dismantled for drawspan openings. Therefore, the bridge owner has requested periods in which the work may proceed without frequent interruption.

Discussion of Proposed Rule

This proposed rule would allow the bridge to remain closed to navigation from 9 p.m. to 5 a.m. Sunday through Friday from June 1 to October 1, 2005. One-hour notice would be required for openings during the currently established weekday closed periods discussed below.

Preliminary analysis indicates that most vessel operators will not be inconvenienced by the hours of temporary closure. Others would receive enough notice to plan trips at other hours. Vessel traffic includes tugboats, barges, derrick barges, sailboats and motorized recreational boats including large yachts. The majority of vessels pass through the dual bascule spans during hours other than the proposed closure times.

First Avenue South is a heavily traveled commuter arterial that serves Boeing Company plants and other industrial facilities in south Seattle. Currently, the dual bascule spans need not open for the passage of vessels from 6 a.m. to 9 a.m. and from 3 p.m. to 6 p.m. Monday through Friday. Vessels of 5000 gross tons or more and vessels enroute to tow such vessels may request an opening at any time.

However, under this proposal, between June 1 and October 1, 2005, from Sunday to Friday, the draws need not be opened for the passage of any vessels from 9 p.m. to 5 a.m. Furthermore, Vessels of 5000 gross tons or more and vessels enroute to tow such vessels must provide one-hour notice for openings during the current weekday closed periods. Vessels of this size infrequently ply this reach of the waterway. The dual spans open an average of four times a day. Draw logs show that up to 25% of openings have happened during the proposed hours of closure. Many of these vessels could schedule movements to avoid these periods.

Regulatory Evaluation

This proposed rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not ''significant'' under the regulatory policies and procedures of the Department of Homeland Security.

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under the regulatory policies and procedures of DHS is unnecessary.

We reached this conclusion based on the fact that most vessels will be able to plan transits to avoid the closed periods. Most commercial vessel owners have indicated that they can tolerate the proposed hours by working around them. Saturdays will enjoy normal operations, lessening inconvenience to sailboats.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed rule would have