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# Part IV

# Department of Transportation

## Federal Aviation Administration

**14 CFR Part 93**

**Congestion and Delay Reduction at Chicago O'Hare International Airport; Final Rule**

**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**14 CFR Part 93**

**[Docket No.: FAA–2005–20704; Amendment No. 93–85]**

**RIN 2120–AI51**

## Congestion and Delay Reduction at Chicago O'Hare International Airport

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

**ACTION:** Final rule.

**SUMMARY:** The FAA is adopting regulations to address persistent flight delays from overscheduling at O'Hare International Airport (O'Hare). This final rule is intended to be an interim measure only, and the FAA anticipates that the rule will yield to longer term solutions to traffic congestion at the airport. Such solutions include plans by the City of Chicago to modernize the airport and reduce levels of delay, both in the medium term and long term. For this reason, the final rule includes provisions allowing for the limits it imposes to be gradually relaxed, and in any event the regulation will sunset in 2008.

**DATES:** This amendment becomes effective October 29, 2006. Affected parties, however, do not have to comply with the information collection requirements in §§ 93.23, 93.25, 93.27, 93.28, 93.29, 93.30, 93.31, and 93.32 until the FAA publishes in the **Federal Register** the control number assigned by the Office of Management and Budget (OMB) for this information collection requirement. Publication of the control number notifies the public that OMB has approved this information collection requirement under the Paperwork Reduction Act of 1995.

**FOR FURTHER INFORMATION CONTACT:** Dr. Jeffrey Wharff, Office of Policy and Plans, APO–200, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267–3274.

**SUPPLEMENTARY INFORMATION:**

### Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

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

Visiting the Office of Rulemaking's Web page at *http://www.faa.gov/avr/arm/index.cfm*; or

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 amendment number or docket number of this rulemaking.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

### Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. If you are a small entity and you have a question regarding this document, you may contact your local FAA official, or the person listed under **FOR FURTHER INFORMATION CONTACT**. You can find out more about SBREFA on the Internet at *http://www.faa.gov/avr/arm/sbrefa.cfm.*

### 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 policies for the use of navigable airspace and to assign the use we deem necessary to its safe and efficient utilization. It further directs the FAA to prescribe air traffic rules and regulations governing the efficient utilization of the navigable airspace. The FAA interprets this broad statutory authority to encompass management of the nationwide system of air commerce and air traffic control.

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

### Background

On March 25, 2005, the FAA published a notice of proposed rulemaking (NPRM) (70 FR 15521) which would limit the number of scheduled arrivals at O'Hare during peak operating hours and establish an allocation system, including transfer and usage requirements.

Since publishing the NPRM in March 2005, the FAA twice has extended the Order published in August 2004 that set operation limits on domestic and Canadian scheduled arrivals into O'Hare International Airport. The Order most recently was extended to October 29, 2006, which coincides with the effective date of this rule (71 FR 16405; March 31, 2006).

*History*

The High Density Traffic Airports Rule at O'Hare

Until July 2002, the FAA managed congestion and delay at O'Hare by means of the High Density Rule (HDR), which was codified in 14 CFR part 93, subpart K. The FAA adopted the HDR under its broad authority to ensure the efficient use of the nation's navigable airspace (49 U.S.C. 40103). The HDR took effect in 1969, and while it originally was a temporary rule, it became permanent in 1973.

The HDR established limits on the number of all take-offs and landings during certain hours at five airports, including O'Hare. In order to operate a flight during the restricted hours, an airline needed a reservation, commonly known as a slot. Slots were initially allocated through scheduling committees, operating under then-authorized antitrust immunity, where all the airlines would agree to the allocation. After the Airline Deregulation Act in 1978, new entrant

airlines formed and the pre-existing, or legacy carriers, sought to expand. This increased competition made it increasingly difficult for airlines to reach agreement, and the scheduling committees began to deadlock.

In 1984, the FAA amended the HDR to increase the hours in which limitations at O'Hare would apply and to increase the number of take-offs and landings permitted at that airport (49 FR 8237, March 6, 1984). The next year, a new Subpart S was added to Part 93 that established allocation procedures for slots including use-or-lose provisions and permission to buy and sell slots in a secondary market (50 FR 52195, December 20, 1985). These procedures replaced the scheduling committees.

Statutory Changes Ending the High Density Rule at O'Hare

In 2000 Congress relaxed the slot rules at the high density airports and phased out the specific regulations then in place at three of them, including O'Hare (49 U.S.C. 41715, 41717). With respect to O'Hare, Congress directed that:

(1) Beginning May 1, 2000, exemptions be granted to airlines to provide air service to small airports with 70-seat or smaller aircraft;

(2) 30 slot exemptions be granted to new entrant or limited incumbent air carriers;

(3) After May 1, 2000, slots no longer be required to provide international air service;

(4) Beginning July 1, 2001, the slot control restrictions be limited to the period between 2:45 p.m. and 8:14 p.m.; and

(5) Slot restrictions be lifted entirely after July 1, 2002.

In phasing out the HDR, however, Congress recognized the possibility that there could be an increase in congestion and delays at the affected airports. Therefore, in the section that phased out the rule, it made clear 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).)

Resurgence of Unacceptable Levels of Congestion

As a result of the 2000 legislation, the slot restrictions of the HDR lapsed at O'Hare as of July 1, 2002. The absence of these restrictions allowed airlines operating at the airport to add flights, which over time led to a dramatic increase in airline delays. These delays reverberated throughout the national air transportation system.

Initially, lifting the HDR had a minimal impact on delays due to the lingering effects of the 9/11 terrorist attacks on airline passenger traffic. But by 2003, the two air carriers operating hubs at O'Hare, American Airlines (''American'') and United Airlines (''United''), had added a large number of operations and retimed other flights, resulting in congestion during peak hours of the day. From April 2000 through November 2003, American increased its scheduled operations at O'Hare between the hours of 12 p.m. and 7:59 p.m. by nearly 10.5 percent. Over the same period, United increased its scheduled operations at O'Hare by over 41 percent.

The increases in operations by American and United did not result in a corresponding increase in seat capacity. During the peak period, these two carriers added 375 regional jet operations per day. Overall, American and United added over 600 regional jet operations per day. At the same time as they added regional jet operations, they reduced mainline jet operations. The result was actually a decrease in seat capacity by each carrier at O'Hare of more than 5.5 percent from April 2000 to November 2003 while flights increased by an average of 150 per day. In November 2003, more than 40 percent of American's and United's O'Hare flights were operated with regional jets, many to large and medium hubs. The significant increases in scheduled operations during this time period resulted in excessive delays and congestion at O'Hare.

By November 2003, O'Hare had the worst on-time performance of any major airport. O'Hare arrivals were on time only 57 percent of the time, well below the FAA goal of 82 percent. Departures were little better. They were on time only 67 percent of the time, well below the average of 85 percent at other major airports. These delays averaged about an hour in duration. Published schedules for February 2004 indicated that the problem would be exacerbated by the addition of even more flights.

Recognizing congestion was again becoming a significant issue, Congress enacted legislation that included a mechanism to help reduce delays and improve the movement of air traffic at congested airports (49 U.S.C. 41722). That statutory provision authorized the Secretary of Transportation (Secretary) to request that scheduled air carriers meet with the FAA to discuss flight reductions at severely congested airports to reduce over-scheduling and flight delays during hours of peak operation, if the Administrator determines that it is necessary to convene such a meeting and the Secretary determines that the meeting is necessary to meet a serious transportation need or achieve an important public benefit.

In early 2004, the Secretary and the FAA Administrator determined that a schedule reduction meeting was necessary to deal with congestion-related delays at O'Hare. Before such a meeting could be convened, however, United and American each agreed in separate discussions with agency officials to reduce their scheduled flights voluntarily. Accordingly, the schedule reduction meeting was deferred. Instead, the FAA issued an order implementing the voluntary agreement of the two air carriers, Docket FAA–2004–16944–55; 69 FR 5650 (2004). The FAA order required a 5 percent reduction in the two carriers' scheduled operations. This reduction was to be effective between 1 p.m. and 8 p.m. for six-months, beginning no later than March 4, 2004.

The FAA again reviewed O'Hare's on-time performance in March 2004 in light of the ordered schedule reductions. That review showed that the total delay minutes would have been as much as 30 percent higher without the reductions but that delays still remained more than double the level of a year earlier and represented more than a third of the total delays in the national airspace system.

In light of the continued problems at O'Hare, the agency officials again discussed the situation with American and United to consider additional flight reductions to improve on-time performance at the airport. As a result, on April 21, 2004, the FAA issued an amendment to the previous order in Docket FAA–2004–16944. This amendment required additional flight reductions. Specifically, beginning no later than June 10, 2004, it required (1) An additional schedule reduction of 2.5 percent of each carrier's total operations in the 1 p.m. through 7:59 p.m. hours including arrival reductions during specific times; (2) a reduction in the number of scheduled arrivals in the 12 p.m. hour; and (3) reductions to continue through October 30, 2004.

Prior to the implementation of the June flight reductions, delays at O'Hare continued. In May, there were a record 14,495 total delays. While the numbers in June and July improved, as the last round of cutbacks by American and United took effect, the FAA determined that the overall trend of delays remained unacceptably high.

Meanwhile, some airlines that were not party to the agreement involving American and United continued to add

flights, making it unlikely that those two carriers would extend their voluntary schedule reductions without similar commitments by other carriers. Published schedules for November indicated that during several times of the day scheduled arrivals would approach or exceed the airport's highest arrival capacity. Accordingly, in July, the Secretary and FAA Administrator determined that the scheduling reduction meeting that had previously been deferred now needed to be held (69 FR 46201, August 2, 2004).

The meeting between DOT and the carriers convened on August 4, 2004, and was followed by meetings between Federal officials and individual airlines. As a result, United and American agreed to reschedule and further reduce scheduled arrivals by about 5 percent during peak hours and other airlines agreed to some flight re-timings and not to increase the number of their scheduled arrivals. New entrants and limited incumbents were permitted to add a small number of scheduled flights. Based on the information provided through the meetings and submissions filed in the docket, the FAA issued a comprehensive order on scheduled arrivals at O'Hare on August 18, 2004, limiting scheduled arrivals by U.S. and Canadian air carriers to 88 during most hours of the day and implementing the above agreement (August 2004 Order). The Order took effect November 1, 2004, and was to expire on April 30, 2005. The FAA extended this Order on three separate occasions to permit full consideration of the issues and comment on the NPRM.[1] On each occasion the agency sought the views of interested persons on the advisability of extending the August 2004 Order in Docket FAA–2004–16944. As indicated in the October 2, 2005, extension of the Order, significant operational benefit has been achieved since the voluntary schedule reductions took effect on November 1, 2004. The subsequent extensions of the Order were necessary to maintain the scheduling limits set in August 2004 and achieve delay—reduction and operational benefits pending completion of this rulemaking.

Related Activity

On July 8, 2005, the FAA published in the **Federal Register** Special Federal Aviation Regulation (SFAR) 105, ''Reservation System for Unscheduled Operations at Chicago's O'Hare International Airport,'' (70 FR 39610). This SFAR limits unscheduled arrivals at the airport to four per hour and provides an allocation mechanism for operators to obtain reservations for those operations. SFAR 105 was extended through March 31, 2006 (70 FR 66253).

On September 30, 2005, the FAA issued the Record of Decision for O'Hare Modernization providing final agency determinations and unconditional approval of the revised Airport Layout Plan and other certain Federal actions by the FAA necessary for the proposed improvement of O'Hare, as provided in Alternative C presented to the agency (the O'Hare Modernization Plan and other components of the City's Airport Master Plan.). The O'Hare Modernization Plan (OMP) provides for certain capacity enhancement actions to result in new capacity by 2008.

Phased implementation of the OMP will provide incrementally increasing operational benefits. The FAA's analysis projects that the addition of the first new OMP runway will, by 2008, allow the airfield to accommodate over 50,000 additional forecast operations with an average annual delay per aircraft no higher than exists today. With the completion of Phase 1 of the OMP, the FAA's analysis projects that the airfield will accommodate, by the 2010 time frame, approximately 90,000 additional forecast operations (over today's activity level) with a decrease in average annual delay per aircraft of approximately 33% below today's delay per aircraft at O'Hare. Finally, with the completion of OMP Phase 2 in 2013, the FAA's analysis projects that the airfield will accommodate approximately 1.12 million annual forecast operations (an increase of more than 140,000 annual operation over today's activity level) with an average annual delay per aircraft nearly 70% below today's delay per aircraft.

*Summary of Comments*

The FAA published the NPRM, ''Congestion and Delay Reduction at Chicago O'Hare International Airport,'' on March 25, 2005. The comment period closed on May 24, 2005. During that period, we received 22 comments from interested parties including airlines, industry organizations, individuals, members of Congress and the City of Chicago (City). We also received five additional comments after the close of the comment period.

In the NPRM, we requested comment on several specific aspects of the proposed rule, as well as any general comments. Comments to the NPRM are addressed below by topic. Only one commenter supported the proposal entirely; he is a student and pilot.

Overall, most commenters agreed that before the recent schedule reductions at O'Hare, congestion and delays had become intolerable. Some clearly disliked the proposal and questioned whether less intrusive methods were available to address short-term congestion and delay. Nearly all commenters agreed that governmental limits on flights are not the preferred approach and increasing air traffic capacity at O'Hare is the best way to solve the problem of congestion and delays. Some commenters suggested that the Order only accomplished what market forces ultimately would have dictated carriers to do if given appropriate time.

Comments expressing concern that the NPRM amounted to a reimposition of the HDR were received from Senators Richard Durbin and Barack Obama, and Representatives Dennis Hastert, Jesse Jackson, Jr., Jerry Costello, John Shimkus, Jerry Weller, Melissa Bean, Danny K. Davis, Henry Hyde, Judy Biggert, Timothy Johnson, Daniel Lipinski, Luis V. Gutierrez, Lane Evans, Bobby L. Rush, Rahm Emanuel, Mark Kirk, and Donald A. Manzullo (Members of Congress). The Members did not oppose a short-term limit on flights, with certain modifications, provided that the rule sunset (as proposed) no later than April 2008.

Expiration of the August 2004 Order (No Further Governmental Action)

We questioned in the NPRM whether the limitations established in the August 2004 Order should be allowed to expire of their own accord with no governmental intervention to address the operational environment at the airport. Under this approach, carriers would be free to determine the number and timing of flights at O'Hare.

The Department of Justice (DOJ) and the Air Carrier Association of America (ACAA) objected to allowing the Order to expire with no mechanism in place to manage demand at O'Hare. DOJ argued that allowing the Order to expire with no plan in place to deal with the airport's limited capacity would lead to more congestion and significant delays for passengers throughout the country. ACAA contended that both American and United would add flights to block competition at any cost and that smaller carriers have fewer options to cancel flights or re-route passengers through other airports and consequently suffer disproportionate delays.

The City argued the opposite. The City requested that the FAA accelerate the OMP approval process, allow the Order to expire, and let free market forces manage flight levels. The City

[1] *See* 71 FR 16405, March 31, 2006; 70 FR 59798, October 13, 2005; and 70 FR 15540, March 25, 2005.

also countered that the airlines have learned their lesson from past overscheduling and are not likely to repeat that practice. However, if delays were to reach unacceptable levels again, the City suggested that the FAA negotiate a new temporary scheduling agreement like the one that resulted in the August 2004 Order. The Airports Council International-North America (ACI–NA) supported the comments filed by the City.

The FAA has determined that a rule limiting arrivals at O'Hare is necessary. After the phase-out of the HDR at O'Hare, carriers had the opportunity to add flights and adjust schedules as they saw appropriate, which resulted in extensive delays for all operators at O'Hare and wide-ranging effects on the NAS. In contrast, since the limits on scheduled and unscheduled arrivals took effect on November 1, 2004, air traffic delays have decreased and on-time arrival performance has increased. Through October 2005, the average minutes of arrival delay at O'Hare decreased by approximately 24 percent when compared to the same 12-month period the year before. The longest arrival delays lasting more than one hour have decreased by 28 percent. Overall, the on-time arrival performance at O'Hare has increased by almost 7 percentage points. As a result, O'Hare is now performing near the average of the rest of the major airports in the NAS, a dramatic improvement from the airport's bottom-tier performance during much of 2004.

The FAA could permit the current scheduling limits to expire and allow carriers to individually determine the number and timing of their flights at O'Hare as advocated by some of the commenters. Safety would be maintained through air traffic control (ATC) procedures and congestion would be managed as needed through various traffic management initiatives. However, based on the history of scheduled demand, we forecast that flights would increase and that delays, cancellations, and disruptions at O'Hare and other airports are likely and would be unacceptable to the industry and the flying public. As indicated by the previous statistics, the limits imposed by the August 2004 Order have resulted in measurable reductions in delay. We are mindful that other factors have contributed to the decrease in delay, including additional flight reductions by some carriers beyond those specified in the Order, and increased operational capacity in some periods due to improved weather and other system efficiency gains.

We are not persuaded by the City's argument that the carriers at O'Hare will be able to resist the short-term marketplace incentives to add flights during peak hours, particularly if one or more of the hub carriers significantly changes its schedule or the other carriers introduce new service to O'Hare. Carriers typically respond to competition by matching frequency and/or fares. At O'Hare, the hubbing carriers have reduced flights significantly since November 2003, and if the Order expired, might resume previous flight frequencies or enter new markets to respond to other carriers' schedules.

In the event that flights were added and delays increased significantly, we could initiate schedule discussion meetings similar to the August 2004 discussions while continuing to manage delays on a daily basis. This process, however, would be counterproductive to our mandate to manage the use of the navigable airspace efficiently, particularly since it is very likely that carriers would launch new operations once the August 2004 Order expired. Furthermore, our ability to secure a new voluntary schedule reduction agreement is at best uncertain in view of the comments submitted in this rulemaking. Consequently, we dismissed this option as a feasible solution.

American noted that other airports experience more delay than O'Hare and that the FAA has not intervened there. American questions why O'Hare was singled out for such action. United commented that the operational limits at O'Hare, which is its primary hub, limit its ability to increase operations for new market opportunities or high passenger load factors.

The agency is addressing congestion at other delay prone airports. A single approach to manage congestion and delay at all airports cannot be realistically achieved at present. As articulated previously and elsewhere in the document, the deteriorating situation at O'Hare had impacts far beyond that airport. Delays at other airports on the other hand, generally do not lead to delays throughout the nation's air transportation system. Given the competitive stance of the major carriers, we believe that it was unlikely to be solved without government intervention. Our preference is to use whichever methods for addressing congestion are best suited for a particular airport. These methods may include increasing airport capacity and system efficiencies, or in the case at O'Hare, addressing through regulatory limits the impact of schedule adjustments by the largest operators at the airport.

Extend the August 2004 Order

No commenter specifically recommended that we simply extend the August 2004 Order until 2008. The City did suggest this action as an alternative if the current Order were allowed to expire and operations grew causing the airport to return to a critical state. DOJ stated that this option would be better than doing nothing; but it would lead to inefficient use of the airport's limited capacity and is not likely to result in any significant new entry or expansion by smaller carriers.

After considering this option, we concluded that it would be difficult to maintain the current agreement or negotiate yet another voluntary schedule reduction agreement that would limit operations until new airport capacity is in place. We agree with DOJ that while the continuation of the Order would achieve the objective of limiting overall operations at the airport, it would not necessarily result in any new entry by smaller carriers for the duration of the proposal. Also, this option would not necessarily promote the most efficient use of the operating authorities at O'Hare, given that the existing Order does not include provisions for usage, allocation, or market-based transfer mechanisms.

Any future scheduling discussions would start with current operational levels and the FAA's scheduling targets proposed for those discussions would apply.[2] As indicated in the comments, carriers of all sizes have expressed a desire to expand their operations at O'Hare, or at least preserve their option to grow. A scheduling meeting would confront us with complex and controversial determinations as to which carriers would have access to new capacity as it became available and how any new capacity would therefore be allocated. This is a complicated obstacle to overcome in the context of attempting to obtain a voluntary agreement from competing air carriers.

The FAA and the Office of the Secretary of Transportation are continuing the evaluation of market-based mechanisms, such as auctions or congestion pricing that may improve on prior methods of allocating available capacity at constrained airports. This evaluation includes an assessment of the research conducted by the

[2] The City comments that each carrier could be returned to November 2004 flight levels to ensure that there are not incentives for carriers to overschedule. However, if the August 2004 Order expires, we expect the target and the base schedules would be issues during the negotiations.

Department's contractor, National Center of Excellence for Aviation Operations Research (NEXTOR),[3] in conjunction with various air carriers and the Port Authority of New York and New Jersey, on options to manage demand at LaGuardia upon the expiration of the HDR at that airport. A market-based approach represents a much longer-term option that is not needed at this point in time at O'Hare, given the expectation of capacity improvement through the OMP.

As it would be unwise to let the limits simply expire, we find it necessary to invoke our authority to manage the efficient use of the navigable airspace and to impose peak hour scheduling limits at O'Hare so as to prevent overscheduling given the airport's current capacity. Even with the FAA approval of the OMP, there are no viable capacity enhancement efforts (procedural or technological) expected during the effective period of this rule that will result in sufficient capacity gains to completely meet the airport demand experienced during 2003 and 2004. Moreover, the uniqueness of O'Hare (as a major, dual hub airport) and its critical role in the National Airspace System (NAS) warrant special attention and careful measures to manage operations at that airport until new capacity comes on-line.

We stress that as a policy matter the Department promotes the efficient utilization of existing system capacity and the development of new capacity to meet aviation demand. We also prefer to address operational and airport congestion issues on a local level with airport operators and customers to the greatest extent practicable. This rule provides a temporary regulatory solution necessary to maintain an acceptable level of operations at O'Hare without congestion and delay impacting the entire NAS.

## Authority To Cap Arrivals at the Airport

America West and Continental opposed all government-imposed restrictions on airport access. These carriers, along with others, argued that the NPRM is contrary to Congressional intent in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21), which phased out the slot regulations at O'Hare. They also argue that as the HDR has been eliminated at O'Hare, the FAA may not implement a rule that is substantially similar to the HDR.

In carrying out our plenary authority to manage the safe and efficient use of the navigable airspace,[4] we properly may impose limits on flights at O'Hare to reduce delays and congestion. The HDR, which was also promulgated under this authority, addressed delays and congestion at five main airports.[5] While AIR–21 provided for the termination of the HDR at O'Hare and the New York airports, it also included a proviso that the FAA's ''authority for safety and the movement of air traffic'' was not to be affected by the phase out and termination of the HDR at O'Hare[6] or other HDR airports. There is no indication that Congress intended to narrow the FAA's authority to manage the use of the navigable airspace or to prohibit its use of this authority at O'Hare. AIR–21 by its terms only terminated the HDR then in place and did not restrict the FAA's authority to regulate the use of the airspace. The legislative history to the House version of AIR–21 (H.R. 1000), 106th Cong., Rpt. 106–167 indicates Congress' intent simply to place O'Hare on the same ''playing field'' as other airports.

Since AIR–21 the FAA has exercised its authority to manage the efficient use of the navigable airspace by capping the flood of AIR–21 slot exemptions filed for LaGuardia Airport (in November 2000), and by ordering schedule reductions in August 2004 at O'Hare.[7] In Vision 100—Century of Aviation Reauthorization Act (Pub. L. 108–176), Congress gave the Secretary and Administrator new authority to convene industry-wide scheduling meetings at O'Hare and elsewhere; these meetings, however, can only result in effective action if implemented through orders limiting flight operations. This basis for this new authority would not make sense if Congress had intended to take away the Administrator's authority to restrict operations at O'Hare. In all of these matters, as with the HDR in 1969, the agency was faced with delays at certain key airports that transcended those airports and disrupted the efficiency of the NAS. We conclude that the FAA retains its full authority to adopt this rule limiting flights at O'Hare.

## Operational Cap

The FAA proposed to limit the number of scheduled arrivals at O'Hare to 88 per hour, between the hours of 7 a.m. and 7:59 p.m. Monday through Friday and 12 p.m. and 7:59 p.m. Sunday.[8] The limit on scheduled arrivals would increase to 98 arrivals per hour in the 8 p.m. hour, Monday through Friday. These are the same hourly quotas imposed by the August 2004 Order. In setting the hourly arrival cap under the Order and proposing the same for the NPRM, the FAA relied on analyses of actual, weekday, hourly arrivals and departures at O'Hare in late 2003 and in 2004. (This is when scheduled demand at O'Hare was at its peak and pressure on the ATC system to accommodate that demand is reflected in actual airport hourly traffic counts.) We also relied on analyses preformed by MITRE Corporation's Center for Advanced Aviation System Development (CAASD), which ran computer modelling on behalf of the FAA to simulate the effect of hypothetical schedule reductions on the level of flight delays at O'Hare given the established air traffic control procedures and airport capacity.[9]

The models predicted that constraints used in the August 2004 Order and the NPRM would reduce delays at the airport by approximately 20 percent from the levels attributed to schedules in effect at the time the August 2004 Order was imposed. MITRE/CAASD also simulated the results of a completely unconstrained schedule, using the industry's proposed November 2004 schedules and calculated that delays under the Order would be approximately 43 percent less than would be experienced if no action were taken and schedules similar to the November 2003 schedules were allowed to take effect.

The City commented that the proposed hourly limits do not take advantage of present available capacity at the airport. The City contended that the airport could accommodate 92 scheduled arrivals per hour and accommodate international and unscheduled arrivals above that level. ACI–NA supports the City's comments.

We have reviewed the operational performance of O'Hare, including the percentage of flights arriving and

[3] NEXTOR is a consortium of universities contracted by the FAA to research various aviation issues.

[4] 49 U.S.C. 40103.

[5] 33 FR 17896; December 3, 1968.

[6] 49 U.S.C. 41715(b)(1).

[7] The schedule reduction meeting was convened under 49 U.S.C. 41722.

[8] During this period, scheduled arrivals are not to exceed 50 during each half-hour beginning at 7 a.m. and ending at 7:59 p.m. Scheduled arrivals are not to exceed 88 within any two consecutive 30-minute periods.

[9] There were 89 arrivals modeled during the 1 p.m., 3 p.m., and 6 p.m. hours and 98 arrivals in the 8 p.m. hour. Four arrivals per hour were added for unscheduled flights. The modeled results also included the impact of schedule agreements based on a 15-minute distribution. While that limitation was not incorporated as a condition in the August 2004 Order, it largely has been maintained by air carriers through on-going consultation with FAA on proposals to move arrivals between 15 minute periods.

departing the gate within 15 minutes of scheduled time, the percentage of flights delayed for more than one hour, recent actual arrival and departure rates, and have considered whether there have been any material capacity enhancements that would provide a basis for a higher hourly cap on scheduled arrivals. Our review indicated there have been variations in delay levels, airport acceptance rates, and weather patterns since the Order took effect in November 2004 but no significant capacity enhancement measures have been realized.

As stated, the City proposed a new cap of 92 scheduled domestic (and Canadian arrivals) per hour and no limits on international arrivals of either domestic or foreign air carriers.[10] The combined arrival demand under such a scenario could be accommodated only under optimal weather conditions and then, with some delays. Such a proposal would significantly increase delays over current levels in non-optimal conditions.

We noted in the NPRM that if during the pendency of this rulemaking, the actual performance of O'Hare—as indicated in the cumulative delay statistics and modeling results—demonstrated that an increase in the cap on operations would still allow for acceptable operational performance, then the arrival cap might be raised in the final rule. The final rule, however, adopts the proposed limits of 88 scheduled arrivals per hour and no more than 50 scheduled arrivals in each half-hour period beginning at 7 a.m. The final rule also adopts the higher limit of 98 arrivals during the 8 p.m. hour but amends the half-hour limit in that hour to be the same as in the other half-hours.[11] Accordingly, in the 8 p.m. hour, each half-hour cannot exceed 50 scheduled arrivals.

The limits proposed in the NPRM mirror those reached during the August 2004 schedule discussions and incorporated in the August 19, 2004 Order, as amended. We accepted the higher limit in the 8 p.m. hour in the negotiated agreement and in recognition that the following hour had sufficient capacity to quickly absorb any potential delays. The actual flight schedules during the half-hour limits for 8 p.m. proposed in the NPRM, however, were not balanced. In reviewing the operational impact of the compression of arrivals in the first part of the 8 p.m. hour, we conclude that it is not appropriate to adopt the proposed higher, half-hour limit for this hour. While we will assign Arrival Authorizations in accordance with the carrier limits established in the Order, should any Arrival Authorizations in the 8 p.m. hour, or any other hour, be returned or withdrawn, they will be reassigned but within the half-hourly limit not to exceed 50 Arrival Authorizations.

Some periods may have minor variations from the adopted hourly or half-hourly limits based on the Arrival Authorizations initially assigned. Some periods may be slightly over the adopted limits, while others are slightly under. We do not expect any new, major operational impacts, but we expect that some of these variations will be resolved over time as we consider schedule adjustments by carriers.

We are also adopting provisions to accommodate newly requested international arrivals above the hourly limits,[12] and we will also assign Arrival Authorizations for international arrivals, as described later. We have decided not to withdraw Arrival Authorizations from domestic operations in order to accommodate new international arrivals, as the Department expects the number of new international arrivals to be minimal during the life of this rule. The FAA intends to work with operators of international flights to minimize any potential impacts during peak hours but ultimately expects to accommodate these new flights even if there may be some operational or delay impacts. Additional discussion on the adopted rules that apply to international arrivals appears in a later section.

Although overall performance of the airport has exceeded the modeled results, several hours have scheduled arrivals below the levels permitted by the Order. Some carriers are not utilizing all their authorized scheduled arrival times, resulting in periods when the airport could accommodate additional flights. This rule adopts a usage provision in addition to a blind buy/sell/lease provision, which we expect to increase the actual utilization of the Authorizations (because carriers will either use them for their own flights or sell/lease them to other carriers). Some Arrival Authorizations are available and will be assigned at the time of initial assignment under this rule. Requests for Arrival Authorizations for new international service will be accommodated first and any remaining Arrival Authorizations will then be assigned using a preferred lottery. Both of these assignment mechanisms and our rationale supporting the use of these mechanisms are fully described further in this document.

In the third extension of the Order,[13] the FAA specifically addressed the ten Arrival Authorizations previously operated by Independence Air and explained why those operations are not excess capacity. Independence Air ceased operations all operations on January 6, and because Arrival Authorizations cannot be sold, leased, or transferred except on a one-for-one basis under the August 2005 order, they have been unused since that date. We concluded that all the subject Arrival Authorizations may not be available for reallocation because when negotiating scheduled reductions in anticipation of the August 2004 order, the FAA had to allocate Arrival Authorization in some peak afternoon and evening hours at levels that exceed the peak-hour target of 88 scheduled arrivals per hour. Furthermore, foreign carriers whose operations were not affected by the Order, have adjusted their schedules from August 2004 resulting in increased scheduled arrivals during certain hours. The Arrival Authorizations assigned to Independence Air, particularly in the peak afternoon and evening hours will offset these periods of continued scheduling over the operational target. We expect that approximately four Arrival Authorizations that were operated by Independence Air will be available in the morning hours for assignment under this rule.

As proposed, the FAA will semi-annually review the operational performance metrics for O'Hare, as well as any new, procedural or other capacity enhancement measures, to determine if additional Arrival Authorizations may be assigned. The FAA intends to increase the cap on operations when doing so is supported by the operational analyses performed in these reviews and our delay reduction objectives. We believe that various provisions of this rule discussed above adequately address the City's concern about utilizing existing capacity at the airport.

This rule adopts a caveat in the provisions governing the initial assignment of Arrival Authorizations that was not proposed in the notice. The NPRM proposed that carriers conducting scheduled service to O'Hare under the August 2004 Order would receive corresponding Arrival Authorizations for that service. Recent

[10] We note that there would also be an average of four unscheduled arrivals per hour.

[11] The NPRM proposed no more than 67 Arrival Authorizations between 8 and 8:30 p.m.

[12] The hourly limit of 88 scheduled arrivals per hour includes international arrivals scheduled for the Summer 2004 scheduling season.

[13] Third extension of the Order dated March 27, 2006.

events have required that we contemplate a situation for which a carrier was operating at ORD under the Order but has since terminated all service at O'Hare prior to our concluding this rulemaking. In such a case, we conclude such carrier(s) should not be entitled to corresponding Arrival Authorizations under this rule. Arrival Authorizations are not property and in view of such, the agency has expressly limited opportunities to monetize and collateralize this authority under the rule adopted here. In the above situation, permitting a carrier to ''retain'' this authority under the rule would provide the carrier with the ability to unfairly monetize its operating authority at the expense of other carriers seeking to operate at O'Hare or increase service. We do not find it fair or in the public interest to provide a carrier that is not serving the airport with the opportunity to monetize and collateralize the authority under the rule adopted here. Consequently, we have included a provision to require that for a carrier to receive an initial assignment of Arrival Authorizations, the carrier must be conducting some level of service at the airport as of October 29, 2006.

New Entrant/Limited Incumbent Preference for New Capacity

The proposal contemplated initially assigning all of the Arrival Authorizations based on the airport's existing scheduling limits and according to the carriers' existing operations. This assignment would benefit all of the incumbent carriers, especially United and American, which would hold the vast majority of Arrival Authorizations.

The Notice proposed that any Arrival Authorizations withdrawn or returned to the FAA would be reallocated by lottery to new entrants and to carriers with few operations (''limited incumbents''). In addition, the Notice proposed that, with respect to additional capacity created by an increase in operational caps from 88 to 89 or 90 arrivals per hour, the resulting additional Arrival Authorizations also be assigned by lottery to new entrants and limited incumbents. Under both scenarios, those Arrival Authorizations remaining after lottery would be assigned to incumbent carriers and then on an interim basis until the next lottery. Under the proposal, with respect to additional capacity created by an increase in operational caps above 90 arrivals per hour, the additional Arrival Authorizations would be assigned by lottery with no preference based on carrier identity.

We invited comments on whether the preference for new entrants and limited incumbents would promote competition. Specifically, we asked whether the service benefits potentially obtainable from incumbent carriers' networks argue against use of a lottery that prefers new entrant and limited incumbent carriers.

We first address our authority to adopt such a preference and then address the policy considerations supporting the preference. Lastly, we address arguments relating to allegations of an unconstitutional taking of property or deprivation of due process.

1. *Authority to impose a preference for new entrants/limited incumbents.*

American and United challenged the FAA's authority to impose a preference and argued that the FAA cannot engage in economic regulation by favoring some carriers over others to ''promote competition.''

Any scheme to limit flights at O'Hare must allocate those operating authorities according to some criteria. We expect that any set of criteria adopted would benefit certain carriers to the detriment of others and no one formula would be universally acceptable to all affected carriers. The FAA's statutory authority to regulate the navigable airspace does not expressly direct the agency to consider any specific factor in allocating airspace rights. Absent such expression, we must look to the public interest in determining criteria for assignment of these Arrival Authorizations. In considering the public interest, we are guided by the policy goals prescribed for the Secretary [14] and the pro-competition policies followed by Congress in adopting legislation on matters such as slot exemptions and airport grant programs. *See*, *e.g.*, *Delta Air Lines* v. *CAB*, 674 F.2d 1 (D.C. Cir. 1982). The courts have approved the Secretary's reliance on the pro-competition polices in allocating slots under the HDR. *Northwest Airlines* v. *Goldschmidt*, 645 F.2d 1309, 1315 (8th Cir. 1980).

As we articulated in the August 2004 Order, Congress has set forth a policy of promoting deregulation and competition in the airline industry by means of the Airline Deregulation Act of 1978 and subsequent legislation. In AIR–21, Congress authorized the award of slot exemptions at the HDR airports to new entrants and limited incumbents—*i.e.*, those carriers that have little or no presence at the slot-controlled airports. (See 49 U.S.C. 41714(c), (h), 41716(b), 41717(c), 41718(b)(1).) Congress also included similar provisions in statutes governing airport grants and passenger facilities charges, designed to encourage airports to adopt policies that will promote competition. (See 49 U.S.C. 40117(k), 47106(f), and 47107(s).)

The Department's prior pronouncements and decisions on the efficient use of the airspace have frequently cited concerns about airport access and competition. For example, under the HDR, we established a regulatory framework that included a buy/sell provision to address the goals of access, competition and small community service. Also, under the HDR, the Department sought to alleviate the advantage that incumbent carriers gained under the initial allocation of the HDR—which ''grandfathered'' hundreds of slots for existing operations)—and to afford new entry at the slot-controlled airports. We did so by withdrawing up to 5 percent of the air carrier slots at LaGuardia, O'Hare and Washington National Airport to allocate by lottery to new entrants and limited incumbents.[15] More recently, in response to the escalating number of AIR–21 slot exemptions filed for LaGuardia Airport in December 2000, the FAA issued orders governing the allocation of those slot exemptions that took into account the need to promote competition.[16]

2. *Policy considerations concerning the new entrant/limited incumbent preference.*

This part of the proposal received the most comment. Support for the preference came from those air carriers or their representatives that could benefit from the proposal, such as Alaska Airlines, America West, Independence Air, and ACAA. Those opposed to the preference include American, Delta Air Lines (Delta), US Airways, United, LECG LLC (in coordination with United), Regional Airline Association (RAA), the City, and Members of Congress.

Alaska Airlines strongly supported our reliance on competition considerations and argued that the preference is fair, appropriate and supports a key public interest objective. America West urged the FAA to

[14] *See* 49 U.S.C. 40101(a)(4), (6), (10–13)).

[15] *See* FAA's ''Special Slot Withdrawal and Reallocation Procedures,'' 51 FR 8632 (1986).

[16] *See* High Density Airports; Notice of Extension for the Lottery Allocation and Notice of Lottery for Limited Slot Exemptions at LaGuardia Airport 66 FR 41294 (Aug. 7, 2001) (expanding the scope of new entrants eligible to participate in the lottery to those that did not participate in the Dec. 4, 2000 lottery and those that had not applied for the AIR–21 slot exemptions by Dec. 4, 2000); High Density Airports, 67 FR 65826 (Oct. 28, 2002) (adopting the new entrant preference procedure for reallocating by lottery withdrawn or returned exemption slots at LaGuardia).

establish a system by which Arrival Authorizations are withdrawn from incumbent carriers if any new entrant or limited incumbent requests one and none are available. America West further commented that new entrants and limited incumbents should have first access to all new Arrival Authorizations even if they exceed 90 per hour. ACAA supported preferential treatment for new entrants and limited incumbents and asked that Arrival Authorizations held by American and United be withdrawn and redistributed at the rate of 2 additional Arrival Authorizations per hour. Additionally, ACAA asked that 5% of those Arrival Authorizations held by American and United be withdrawn and redistributed to new entrants and limited incumbents each year the rule is in place.

The City argued, in contrast, that the FAA should not discriminate among types of carriers and noted that O'Hare is one of the most competitive markets in the nation. The City also was concerned that the proposed preference would discourage incumbent carriers from working on meaningful delay reduction (that is, capacity enhancing) technological, and/or procedural changes at O'Hare, given that any resulting new capacity would initially benefit its competitors. The City also noted that allocation by random lottery may not result in the highest and best use of a limited resource.

Members of Congress commented that the proposal treats foreign carriers, new entrants, and limited incumbents preferentially and severely disadvantages the hub carriers, who have invested heavily in O'Hare. They also commented that Chicago is a highly competitive marketplace and all but four of the major U.S. carriers are represented in this region.

American commented that it and United had both reduced operations throughout 2004 while other carriers were allowed to increase operations without any constraint. American refuted the assertion in the NPRM that it can shift flights in response to consumer demand stating that, as O'Hare is its hub airport, the timing of flights is critically important to creating the maximum number of potential connecting opportunities. American contended that it reduced its schedule to meet the agency's scheduling target under the August 2004 Order and that Arrival Authorizations in excess of 88 per hour do not realistically represent ''new'' capacity.

Delta commented that the preference for allocating capacity does not place ''maximum reliance upon competitive market forces and competition'' as stated in the NPRM. Delta argued that the proposal undermines competition by favoring some carriers over others, and that future capacity should be distributed using the same public auction procedure proposed for buy/sell transactions, with all carriers permitted to compete equally for those rights.

US Airways commented that it is uniquely disadvantaged by the preference for new entrants and limited incumbents. US Airways argues that new entrants and limited incumbents could get new capacity and large incumbent carriers could operate flexibly with their larger holdings, but it could not respond competitively because it is neither a limited incumbent nor a large carrier at O'Hare.[17] US Airways noted that the NPRM did not provide any analysis indicating new entrant and limited incumbent carriers would, in fact, offer the travelling public more benefits than the network carriers or any analysis assessing the impact of Midway Airport. US Airways would prefer that all additional Arrival Authorizations be allocated through a no-preference lottery available to all carriers. US Airways claimed the stated policy directive to rely on competitive market forces and the pro-competition policies in the Airline Deregulation Act are not served by the proposed preferred lottery because it favors certain types of competitors at the expense of others.

United also argued that adequate competition clearly exists at O'Hare and that findings presented in comments filed by LECG show Chicago to have the ''second highest penetration of low fare carriers out of 11 major hub cities and it also has the lowest weighted average fare of any of the 11 major hub cities examined.'' [18] United contended that the FAA offered contradictory arguments by acknowledging Chicago as a competitive market in the cost-benefit analysis while proposing preferential treatment for certain carriers in the name of competition. Additionally, United asked the FAA to take Midway Airport into account when considering competition.[19]

United also expressed concern that the inability to obtain new Arrival Authorizations could put it at a competitive disadvantage while demand for international service grows and that it would have to decrease its service to small and mid-size communities in order to compete internationally.

We have decided to retain the proposed lottery preference. The rule will give new entrants and limited incumbents a relatively small advantage in obtaining additional Arrival Authorizations from a pool that, at most, will be 30 Arrival Authorizations per day—out of the more than 1,200 scheduled peak hour arrivals at O'Hare. By way of contrast, American and United each operate more than 400 arrivals per day. Additionally, both carriers conduct international operations and might benefit by receiving Authorizations for those flights outside the operational cap. (See discussion on international allocation in this document.) Unlike airlines with only a few flights at O'Hare, these carriers also have the ability to maintain their market presence by substituting larger jets for regional jets on some of their flights.

New entrants and limited incumbents will receive a preference in the reassignment of available Arrival Authorizations created by any increase in the hourly limitation from 88 to 89 or 90 authorizations per hour. In addition, we are adopting a ''blind'' buy/sell mechanism for transactions involving Arrival Authorizations by shielding the identity of parties to proposed transactions. This process should give a greater opportunity for smaller carriers to purchase or lease necessary arrival privileges. In this regard, we are influenced by the views of DOJ and others criticizing the lack of a robust secondary market under the HDR and urging us to adopt procedures that will result in an efficient allocation of slots and competitive entry at constrained airports.[20] At the same time, however, by leaving the current assignment of arrival privileges essentially unchanged from our existing orders, the vast majority of operating privileges will be held by the two largest carriers at the airport.

Entry, particularly by low-fare airlines, is an essential ingredient for airline competition. Studies of airline industry competition under deregulation have concluded that low-fare entry has a substantial impact on price and service. For instance,

[17] US Airways does not indicate specifically why having 17 arrivals is unique relative to other non-hub carriers. Air Canada has 16 arrivals; Northwest has 20; Delta has 21; and Continental has 22.

[18] Hub cities included in the LECG analysis include: New York, Chicago, Denver, Philadelphia, Houston, Dallas, Charlotte, Detroit, Minneapolis, Atlanta, and Cincinnati.

[19] According to the LECG analysis, ''In 2004 Midway offered non-stop service to all but two of the 25 large hubs with non-stop service from O'Hare (Honolulu and Salt Lake City).''

[20] DOJ argued in its comments that transparency in the market, market power vested in the incumbents, and repeated use of temporary administrative allocation mechanisms (that do not create long-term property rights) all contributed to the insufficiency liquidity of the secondary market under the HDR.

Southwest initiated service into Philadelphia in May 2004, and since that time the fares in Philadelphia have shifted from being 19 percent higher to 2 percent lower than fares in comparable domestic markets (comparing the Fourth Quarter 2003 to the Fourth Quarter 2004). A policy that fails to provide any special treatment for new entry, the approach recommended by United and other larger incumbents, would curtail competition that leads to substantial fare reductions, increased service, and enables more people to travel.

The final rule also differs from our proposal in two other respects: First, we are not adopting the provision that would have required a new entrant or limited incumbent carrier to forfeit Arrival Authorizations obtained in a preferred lottery upon an agreement providing for the sale, merger, or acquisition by another person of more than 50 percent ownership or control of that carrier. The final rule provides for a 12-month limitation on the sale and lease of Arrival Authorizations obtained in a preferred lottery and we do not believe it is necessary to adopt further limitations, as doing so might interfere with normal business decisions by a carrier. Second, we are clarifying that an incumbent carrier who obtains Arrival Authorizations on an interim basis may use them for at least a year before the Authorizations would again be made available to new entrant and limited incumbent carriers in another lottery. This should provide some schedule stability without creating a material obstacle to potential new entry.

*3. Takings Clause and Due Process Claims*

United has claimed that the FAA would be violating the carrier's substantive due process rights by limiting its operations and giving competitors preferential access to Arrival Authorizations. United also argues that its flight schedules and operating rights at O'Hare are intangible property that the FAA confiscated without due process of law.[21] U.S. Airways also argued that the proposal could violate the takings clause of the Constitution, because ''an economically unsupported government policy is undermining the value of years of investment and business planning that was premised on the ability to compete at ORD on a national and international basis.''

We responded to a similar argument from United in the August 2004 Order. Our analysis set forth in that Order is essentially the same here. The Supreme Court instructs us to consider three factors in determining whether government action constitutes a taking requiring compensation: the action's character, its economic impact, and the extent to which the action interferes with investment-backed expectations.[22] These standards do not suggest a plausible Takings Clause claim here.

This rule, not unlike other rules or the August 2004 Order, adjusts the benefits and burdens of economic life in order to promote the common good. This rule limits flights at O'Hare in order to relieve the congestion that choked a key airport and caused delays throughout the NAS. This rule will benefit the industry and the travelling public. This rule codifies the current level of operations mandated by the August 2004 Order and does not require additional flight reductions. Since the Order has been in effect, O'Hare has experienced more than a 20 percent delay reduction from the delays experienced prior to the issuance of the Order. Furthermore, this rule will be in effect for a relatively short period so as not to unduly interfere with the marketplace more so than necessary. This type of regulation is not normally deemed a taking of property.[23] And, unlike the governmental action in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), we are not unfairly singling out an air carrier based on its conduct far in the past and unrelated to any future commitments or injury it caused. Rather, the two largest O'Hare air carriers significantly increased their flights starting in late-2003, causing over scheduling and delay conditions.

The second element of the Court's standard involves the rule's economic impact. There is no evidence that restricting O'Hare flights for a limited period of time will have an unduly harmful impact on any air carrier. To the extent there is an economic impact by virtue of this rule, it may be mitigated and moderated by the reduced operating costs resulting from prior congestion and the potential opportunities for limited growth during the life of this rule.

The third element of the Court's standard concerns whether the rule will interfere with a firm's investment expectations.[24] That is not the case here. We have repeatedly used our authority to manage the efficient use of the airspace to administer the HDR at O'Hare and three other major airports and done so over many years. More recently, we imposed additional restrictions at LaGuardia because of increased delays at that airport, and from time to time have taken other steps to cause airlines to reduce flights in order to prevent unacceptable levels of delays. Further, even though the Airline Deregulation Act of 1978 terminated the Government's regulation of air carriers' rates, routes, and services, the Department and the FAA nonetheless have extensive regulatory authority over domestic airline operations. The Department and the FAA, for example, regulate in the areas of certificates, compliance, handicapped discrimination, records on the movement of traffic, carrier management, unfair and deceptive practices, unfair methods of competition, and airline safety. The Department and the FAA's regulation of airport development and noise also affect an airline's investment expectations.

As we stated in the August 2004 Order, no airline owns the airspace at O'Hare and no airline has a license to operate a specific number of flights at the airport. The circumstances at O'Hare do not indicate that any carrier holds a cognizable ''property interest'' in maintaining its schedules at the airport. O'Hare has long been subject to slot rules, it has never had unlimited capacity, and carriers should have known that large increases in service could lead to new controls on the use of the airport's capacity. Therefore, United and U.S. Airways could not have reasonably believed they would be able to add or operate all the flights they wanted in perpetuity.

In any event, United's argument that the regulation is tantamount to a taking without just compensation is contrary to Takings Clause precedent. *Continental Air Lines* v. *Dole*, 784 F.2d 1245 (5th Cir. 1986). The *Continental* decision quoted Justice Holmes' statement, ''Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'' 784 F. 2d at 1252 (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922))

United also claimed that the regulation discriminates against incumbents in violation of United's

[21] 21 United states that the FAA Chief Counsel has characterized airline operations as 'valuable assets' [n. 62 to United's Comments]. The Chief Counsel, however, stated instead that the High Density buy-sell rule had the collateral effect of creating a valuable asset. Andrew B. Steinberg & James W. Tegtimeier, *Dealing With Airport Congestion: The Regulatory Challenger of Demand Management*, 19 Air & Space Law. 1, 16 (Winter 2005).

[22] *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224–225 (1986); *Concrete Pipe & Products* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993).

[23] *Connolly*, 475 U.S. at 225.

[24] *Cf. Connolly*, 475 U.S. at 226–227.

Equal Protection rights. The test for determining whether an economic classification is vulnerable to an Equal Protection clause challenge is if it ''proceeds along suspect lines [or] infringes fundamental constitutional rights'' and ''if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'' [25] An incumbent air carrier is not a ''suspect'' class within the meaning of the Constitution's Equal Protection clause. Further, an air carrier has no fundamental constitutional right to an operation at a particular airport. There is a rational basis for the preference in this regulation. The limited preference will benefit consumers because it will promote entry and new competition at O'Hare and new entry has the potential to lower airfares at O'Hare. It is consistent with the public policies established by Congress. Finally, it does not impose significant harm on the incumbent carriers since the allocation to them of their November 2004 operations enables them to continue to operate their networks. Further, United has not shown that the regulation is ''so arbitrary or irrational that it runs afoul of the Due Process Clause'' and ''fails to serve any legitimate governmental objective.'' [26] This regulation serves to meet the recognized need of addressing persistent flight delays related to over scheduling at O'Hare, and is intended as an interim measure because the FAA anticipates that the rule will yield to longer-term solutions to traffic congestion at the airport.

Limited Incumbent Carriers

The NPRM proposed to define a limited incumbent carrier as a carrier that operates eight or fewer Arrival Authorizations at O'Hare and has never sold or given up an Arrival Authorization. In the proposed rule we stated our belief that this approach represented a fair approach to carriers that are not new entrants but should be afforded some additional consideration due to their limited presence at the airport. We also noted that the proposed term is consistent with the August 2004 Order.

America West commented that a cap of eight Arrival Authorizations for limited incumbents would be inadequate to generate sustained price competition at O'Hare. Furthermore, the carrier argued that the proposal does not satisfy Congress' objective to promote competition, because Congress (in AIR–21) capped limited incumbents at 20 slot exemptions at LaGuardia, which is a smaller airport than O'Hare. America West then argued that Arrival Authorizations should be withdrawn from incumbents to fulfill requests from new entrants and limited incumbents.

Conversely, American argued that the definition of limited incumbent should be consistent with the International Air Transport Association (IATA) Worldwide Scheduling Guidelines and the European Union's slot regulation (EU 793/2004), which define a new entrant carrier as a carrier that holds fewer than five slots at an airport on the day for which they are requested.

Independence Air and Alaska Airlines requested that the definition be expanded to include a carrier that operates 10 or fewer flights. Independence Air pointed out that the modest increase of two arrivals would bring that carrier into the scope of the definition of this category. The carrier also argued that this small change supports the public interest of fostering competition by affording the carrier a preference in a lottery to counter the vast number of Arrival Authorizations held by the two dominant carriers.

We proposed eight Arrival Authorizations as the threshold for determining limited incumbent status, as that was the number set forth in the August 2004 Order. There is no bright line test for limited incumbency and the initial selection of eight Arrival Authorizations was consistent with the pro-competition goals of AIR–21. We do not view it necessary to create a more generous exception for such carriers, nor are we persuaded by the arguments of the carriers to increase this number to 10. Had we proposed 10 Arrival Authorizations in the notice, it is likely that carriers (other than Independence Air) would have sought a higher number. We note that although AIR–21 changed the definition of a ''new entrant/limited incumbent'' carrier to a carrier that holds 20 slots and slot exemptions; it was very different in its provisions for slot exemptions for new entrants at O'Hare. At O'Hare, AIR–21 slot exemptions for new entrants were limited to 30 in total, in contrast to the statutory provisions for LaGuardia and JFK, which capped new entrants at 20 slot exemptions each. Consequently, we reiterate the rationale behind our test for limited incumbency as proposed in the NPRM and in the August 2004 Order and, with minor edits for clarity, we adopt the definition of limited incumbent as proposed.

Alaska Airlines supported the proposal, as stated in the NPRM, to allocate flights initially to the carrier actually operating the flight, except where the operating carrier does not market its service independently and in its own name. Alaska stated that it has full control over the flights it operates at O'Hare and it should not be penalized because some flights also carry the American code.

Alaska's comment is consistent with how we proposed to treat code share arrangements in the NPRM. We proposed that, with limited exception, Arrival Authorizations would be allocated solely to the carrier that actually operated the flight, regardless of any code sharing agreements. We further proposed that in making our initial Arrival Authorization determinations, we do not intend to assign Arrival Authorizations to a carrier that is essentially operating its service as a contractor for another carrier and does not market its service independently and in its own name. We have been presented with no information that would suggest this distinction is invalid. Therefore, this rule adopts our proposal that where the operating carrier conducts the flight solely under the control of another carrier, the carrier controlling the inventory of the flight will receive the Arrival Authorization.

We also find it necessary to adopt some minor edits to the definition for clarity. In defining this term, we resort to using the phrase ''U.S. or Canadian air carrier that *holds or operates*, on its own behalf, 8 or fewer Arrival Authorizations * * *'' As this rule also permits leasing, it is critical to characterize a carrier's rights respective to the operating authority accurately. In addition, the rule clarifies that for an Arrival Authorization held or operated by a U.S. or Canadian carrier to count towards limited incumbent status, the relevant carrier must hold or operate that authorization on its own behalf. This will not penalize a carrier that conducts service at O'Hare primarily as a contractor for another carrier and does not market its service independently and in its own name from the ability to obtain authorizations in its own name in a lottery.

Blind Buy/Sell Market

Under the proposed rule, we provided that the purchase and sale of Arrival Authorizations would be allowed to promote maximum reliance on market forces and efficient utilization of the Arrival Authorizations. To ensure that all carriers have a chance to obtain these valuable privileges, sales of Arrival Authorizations would be permitted only through a ''blind market'' overseen by

[25] *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

[26] *Lingle* v. *Chevron U.S.A. Inc.*, S. Ct. No. 04–163, slip op. at 12 (2005).

the FAA in which the only consideration for transactions would be monetary. Thus, under the proposal, the identity of the bidder would be confidential and the transaction could not involve real property, such as gates, non-monetary assets, or other services in lieu of cash. In the NPRM, we did not propose specific regulatory text to permit the leasing of Arrival Authorizations but put out the concept for comment.

The majority of commenters did not object to use of a blind secondary market as proposed for the buying and selling of Arrival Authorizations. A majority of commenters did, however, object to the prohibition on using non-monetary assets as payment and the proposed limits on the use of Arrival Authorizations as collateral for loans.

DOJ urged the Department to move aggressively to adopt either congestion pricing or an auction to allocate scarce airport/airspace capacity at O'Hare, cautioning that anything short would lead to an inefficient allocation. DOJ also stated that while the ''blind'' aspect of the secondary market may remedy problems associated with the bidding process, this proposal does nothing to encourage the two largest carriers to sell Arrival Authorizations. According to DOJ, other carriers that also have a presence at O'Hare, generally use that access to connect their hubs with Chicago and therefore, place high value on those Arrival Authorizations and thus are unlikely to sell. Consequently, DOJ does not see that this rule would result in many sales.

American supported the concept of a market for Arrival Authorizations but opposed the proposal to regulate and govern the operation of that market, arguing for an independent, free, and competitive market similar to the HDR. U.S. Airways, United and Delta argued that under the HDR, carriers selling slots in the secondary market of necessity evaluated the total compensation package being offered before choosing the successful bid. Moreover, U.S. Airways believed that given the industry's liquidity problems and the operational needs of carriers at various airports, an airline selling or buying an Arrival Authorization ought to be able to accept or offer non-monetary consideration (*i.e.* services, ground handling) as part of the bid.

United suggested a revised approach to conducting the secondary market and alternatively proposed that the FAA serve as the clearinghouse through which sales of Arrival Authorizations are completed. In this alternative, a carrier wishing to sell (or to buy) an Arrival Authorization would notify the FAA of the relevant details and the FAA would post such notice to potentially interested air carriers. United suggested a similar process for carriers seeking to obtain Arrival Authorizations. United also commented that restricting the sale to an all-cash-basis unnecessarily limits the flexibility of buyers and sellers and could effectively freeze some buyers out of the bidding entirely. Under United's proposal, sellers would be presented with all bids that are received by FAA, but the identity of the bidders would not be disclosed. Once the seller selected the offer it deems most attractive, the identity of the bidder would be disclosed to the seller and the transaction could be completed. United similarly urged the FAA to permit leasing/subleasing because it would allow carriers to adjust their schedules based on seasonal and market fluctuations. Lastly, United submitted that the secondary market will not be robust as long as new entrants, limited incumbents, and foreign carriers get Arrival Authorizations free of charge from the government.

RAA commented that the current system of buying, selling, leasing, and sub-leasing slots at HDR airports has worked effectively and does not warrant any change for the limited duration of this proposed rule. At the very least, RAA suggested that if sales are to be blind, there is no reason to preclude non-cash considerations for Arrival Authorizations.

Independence Air contended that buyers will ''undoubtedly wish to negotiate terms, including but not limited to, the terms of any warranties, the definition of what constitutes a default under the purchase agreement, limitations of liability, customary representations as to corporate authorization, approval and agreement enforceability, and damages for any breach of the agreement and other commercially and legally important matters prudently included in any significant purchase and sale agreement.'' Independence Air suggested that the FAA is not in a position to broker the details of a commercial arrangement and should not adopt a rule that cannot be readily enforced and that can so easily be manipulated by carriers. Independence Air also did not support the proposed cash only basis for transactions.

The ACAA supported the blind market system and stated that this market mechanism is reasonable and available to all carriers. ACAA further argued that American and United should be blocked from acquiring additional Arrival Authorizations if any other carrier submits a bid in any sale so that these two carriers cannot bid higher to block entry of low-fare carriers.

The City supported the buying and selling of Arrival Authorizations, but requested that as airport operator it be given a consultative role with the airlines in the process of a significant sale or lease of Arrival Authorizations (or at least advance notice of such a sale or lease), with a portion of the funds reserved for the airport.

America West also supported the proposed secondary market but commented that the FAA, not the selling carrier, should keep the proceeds of sales on the blind secondary market. America West explained that proceeds from the sale of Arrival Authorizations could be directed to enhancing capacity at O'Hare. Alternatively, if proceeds from the sale went to the selling carrier(s), America West said there would be a perverse incentive for airlines to resist expansion of airports because such expansion would eliminate the ''paper value'' of their Arrival Authorizations.

A constant criticism of the HDR buy/sell provision was that it did not ensure a ''fair'' distribution of slots across the industry because the largest slot-holders (typically, legacy carriers) could consider the identity of would-be buyers or lessees and choose not to provide them with slots—so as to deprive potential new entrants of airport access. Smaller carriers informed us that they were not even made aware when slots were available for sale or lease. The blind aspect of the buy/sell provision established by this rule should ameliorate this problem, at least to some degree, by making it more difficult for slot holders to consider the would-be buyer/lessee's likely use of Arrival Authorizations.

We acknowledge that our proposal to restrict the use of non-monetary considerations in transactions involving Arrival Authorizations (*i.e.*, the ''cash-only'' aspect of our rule) was unpopular among the commenters. Most of the comments suggested that each air carrier should be allowed to consider the value of specific gates, baggage handling, marketing arrangements, and other potential offers in lieu of cash. (Under our proposal carriers may, of course, continue to pursue business opportunities in the ordinary course so as to exchange services or facilities at O'Hare or other airports, but they cannot use Arrival Authorizations as part of any such discussions.) Although there is merit to this position, nevertheless we continue to be concerned that the uniqueness of non-monetary assets, proposed as consideration in potential

transactions, would effectively undermine the ''blind'' nature of the secondary market. The inclusion of such non-monetary assets would make it virtually impossible to hide identities during the bid evaluation process unless the FAA chose to ascribe a monetary value to non-monetary assets, a difficult and protracted exercise that would not be useful given the short duration of this rule. Therefore, the ''cash-only'' aspect of our proposal is unchanged in the final rule.

We reject United's suggested approach for similar reasons. Under United's approach, all bids would be forwarded to the selling carrier for review and selection. Once the selling carrier selected a bid, the identity of the selected bid would be released and the affected carriers would be free to consummate the transaction. United's approach only makes sense if non-monetary assets are permitted in the bidding package. If, however, the bids are strictly limited to money, nothing is gained by receiving all the bids because the only relevant bid is the highest one.

United also suggested that the FAA establish a corresponding process that would allow a carrier seeking to purchase or lease an Arrival Authorization to advise the FAA with that information to be made public in a similar (blind) manner. We accept this suggestion and provide for such notification in this rule. As in the case for sales or leases, we will not disclose the identity of the carrier but will include information such as time and frequency desired, effective date, reserve price, or other pertinent information. This information will be posted within two business days and for a period of at least 10 days. All offers of Arrival Authorizations for sale or lease will be processed in accordance with the adopted rules.

America West recommended that the FAA retain all proceeds from the sale of Arrival Authorizations for use in capacity expansion projects at the airport. While this proposal has appeal, the FAA is currently prohibited by statute from promulgating rules that result in the agency collecting user-fees [27] and accepting revenue for the sale of Arrival Authorizations.

With respect to the City's requests, the required public posting of the available Arrival Authorizations will provide all interested parties, including the City, with notice of transactions. The City may exercise its proprietary powers as airport operator with respect to managing the efficient utilization of gates and related facilities, including directing sharing of unused gate space, overseeing subleasing requests, and otherwise negotiating gate assignments or conversions to common-use, where practicable. Requiring advance airline-airport consultations otherwise would interfere with the efficient assignment mechanism we anticipate to occur in the blind market. Given our limited options, a lottery system provides the fairest and most unbiased process for allocating new capacity while the blind buy-sell market provides potential opportunities for carriers that value the Arrival Authorizations the most.

Leasing of Arrival Authorizations

The comments supported allowing leasing of Arrival Authorizations and cited positive experiences with leasing arrangements under the HDR. Delta argued that if leasing is prohibited, incumbent carriers facing temporary market conditions or seasonal fluctuations in demand for their service at the airport would be forced to operate sub-optimal service patterns to preserve their airport access rights until conditions improved. Furthermore, Delta commented that the opportunity to lease Arrival Authorizations gives carriers the flexibility to test marginal new markets without committing the potentially significant capital investment that a purchase-only rule would impose.

RAA commented that leasing and sub-leasing should be permitted as they play a crucial role in allowing carriers to adopt seasonal changes in demand.

Independence Air echoed other carriers and urged the agency to permit leasing as it is a logical and necessary means to make an efficient market and urged the FAA to allow leasing in the final rule. However, Independence Air did not believe the FAA can effectively match lessors and lessees simply on the basis of which lessee is willing to pay the most for the Arrival Authorization. As with buying/selling Arrival Authorizations, Independence Air contended that there are many commercial and legal considerations that impact a lessor's motivation to enter into an Arrival Authorization lease agreement.

As discussed in the NPRM, leasing of arrival privileges would allow the carriers to accommodate seasonality and market fluctuations inherent in airline operations. Leasing permits access to the airport that some carriers may not otherwise have. Leasing also can result in higher efficiencies and lower costs to the carriers holding the Arrival Authorizations. Allowing leases and sub-leases of Arrival Authorizations also makes sense given the minimum usage requirement.

As specified in the adopted regulations, leasing will be permitted subject to the same conditions as the buying or selling of Arrival Authorizations. A carrier seeking to lease Arrival Authorizations must notify the FAA, and the agency will post the solicitation (including relevant information) and accept all timely-filed bids. Only the highest bid will be forwarded to the potential seller or lessor, and the only permitted consideration is monetary. If the relevant carriers agree to negotiate or contract other details of the transaction that do not violate or infringe upon the applicable regulations, they may do so without FAA involvement.

In addition, we adopt several modifications in this section.

First, carriers that have Arrival Authorizations available for sale or lease may submit a base reserve price for Arrival Authorizations to the FAA for posting on the Web site along with other relevant information. Including a base reserve price provides a floor for the bids and facilitates the process.

Second, we have deleted the requirement that a carrier must notify the FAA 30 days before the planned sale date. Upon review, we concluded that the 30 day requirement could be unduly restrictive, particularly for carriers that may want to lease an Arrival Authorization and, for scheduling reasons, may not be in a position to provide 30 days notice.

Third, as a usage requirement is also adopted in this rule, carriers may need to shorten the duration of the bidding/selection process. Therefore, we have included two modifications: (1) The FAA will post notice of available Arrival Authorizations within two business days; and (2) the bidding period will be open for 10 business days. The NPRM did not specify the timeframe for bids to be submitted. We chose 10 business days, which should allow carriers sufficient time to assimilate data and make decisions. The 10 business-day period is not excessive and is intended to expedite the transaction process.

Fourth and as discussed earlier, carriers may advise the FAA of their interest in obtaining Arrival Authorizations in the market and request that the agency post the information that a carrier is seeking Arrival Authorizations.

The FAA will post listings of Arrival Authorizations for sale or lease through the blind market at *http://*

[27] Consolidated Appropriations Act, 2005, Pub. L. 108–447, Federal Aviation Administration, Operations, Title I, Division H, 118 Stat. 2809, 3201 (2204)

*www.Demand-Management-Airports.faa.gov.* Users may register with the Web site to receive immediate notification of information posted on this site.

Pledging of Arrival Authorizations

United, Delta, U.S. Airways, and JP Morgan Chase & Co. (JP Morgan) all commented unfavourably on the proposal's prohibition on the pledging of Authorizations as collateral. They argued that preventing the collateralization of these ''assets'' will not reduce barriers to entry but rather contribute to the barriers. They contended that carriers may need access to this financing option in order to purchase Authorizations under the rule and that this prohibition eliminates this option for affected carriers.

We have withdrawn the prohibition on pledging Arrival Authorizations as collateral in this rule. We do not seek to eliminate options available to carriers to secure needed financing. Arrival Authorizations are an operating privilege and we recognize that the buying, selling and leasing of these privileges may be advantageous to facilitate the carriers' efficient use of these privileges.

As proposed, the final rule permits Arrival Authorizations to be assigned only to eligible air carriers and not other entities. Since collateralization arrangements are strictly a matter of contract between the affected carriers and other parties, we will not record changes to the holder/operator status to reflect any pledging of these Arrival Authorizations. Carriers are free to structure the pledging of these Authorizations, subject to other requirements of this rule.

International Arrivals

In the NPRM, we proposed the following two options for assigning Arrival Authorizations to foreign air carriers:

*Administrative Option*—The FAA would accommodate requests by foreign air carriers for new or additional access administratively. If an Arrival Authorization was not available within the time period requested by a foreign carrier, an Arrival Authorization would be withdrawn from a domestic carrier to accommodate that request.

*Elective Option*—Foreign air carriers seeking additional Arrival Authorizations above the initial assignment of Arrival Authorizations could elect: (1) To obtain Arrival Authorizations as described above under the Administrative Option; or (2) or obtain Arrival Authorizations in the same manner prescribed to U.S. and Canadian air carriers, which is through the blind market and the lottery mechanisms.

Operations by Canadian air carriers were excluded from these proposed options because Annex II of the 1995 bilateral aviation agreement between the U.S. and Canadian governments provides that Canadian air carriers be treated in the same manner as U.S. air carriers under airport access rules for domestic operations at O'Hare. Therefore, arrivals at O'Hare from Canada by U.S. and Canadian air carriers are assigned under the same procedures that apply to domestic and transborder flights.

The proposal treated foreign air carriers differently than U.S. and Canadian air carriers for several reasons. First, air service agreements between U.S. and foreign governments obligate both parties to ensure fair and equal opportunity to compete in a market. Second, foreign air carrier operations have remained relatively constant over the last several years while at the same time, domestic operations have increased significantly. Third, U.S. air carriers have the ability to make international service decisions based on their allocated base of total Arrival Authorizations if additional Arrival Authorizations were not available for assignment by the FAA. This is not an option for foreign air carriers that have a limited presence at O'Hare. For most international operations, Chicago's Midway Airport is not a practical alternative airport for serving Chicago since Midway's runways could not accommodate the wide body aircraft serving many of the international points from O'Hare.

Other elements of the NPRM applicable to Arrival Authorizations assigned to foreign air carriers, irrespective of the option, were: (1) Initial Arrival Authorizations would be assigned to foreign air carriers based on historical seasonal schedules; (2) Arrival Authorizations could not be bought, sold, or leased; (3) Arrival Authorizations would not be subject to a minimum usage requirement. However, if they are not used for more than a 15-day period, under the proposal they must be returned to the FAA.

The Department faced this issue previously under the HDR. At O'Hare, foreign and domestic carriers were initially treated equally in that slots were withdrawn to accommodate international requests from both foreign and domestic carriers if not otherwise available. We subsequently amended the HDR to limit withdrawals for international operations for the benefit of carriers with 100 or more slots at O'Hare. Congress later capped the total number of domestic slots that could be withdrawn and reallocated for international service. Concurrently, Congress also authorized the Secretary of Transportation to grant exemptions from the HDR for foreign air carriers serving O'Hare. The Secretary exercised this authority as needed and until May 2000, when the slot requirements for international flights were eliminated at O'Hare.

Several commenters supported preferences or exemptions from the established cap for international arrivals without distinguishing between operations conducted by U.S. carriers and foreign air carriers.

KLM Royal Dutch Airlines, as one of two foreign carriers to comment, did not favor any particular allocation option for foreign carriers. KLM did, however, support the August 2004 Order and suggested that the FAA follow IATA Worldwide Scheduling Guidelines, which most countries follow in allocating slots at constrained airports throughout the world. IATA expressed concern that the proposals could discriminate between U.S. and foreign air carriers.

The other foreign air carrier to comment was Air France, who strongly supported an administrative assignment for new Arrival Authorizations and acknowledged that this could be accomplished under either Option 1 or 2. Air France currently operates one daily passenger flight between O'Hare and Paris, but has offered two such flights in the past. Air France stated that initiating international service requires significant investment and that foreign carriers may hesitate to make such an investment if they are unsure they can obtain an Arrival Authorization at O'Hare under the market or lottery systems. Air France argued that it is necessary to guarantee foreign carriers access to an Arrival Authorization at O'Hare should they decide to expand service there. Air France did not oppose the proposed prohibition on buying/selling, or leasing assigned Arrival Authorizations; nor did it oppose the return of Arrival Authorizations to the FAA if not used for more than 15 consecutive days.

American and United agreed that the allocation provisions should not discriminate against foreign carriers, but argued that the proposed administrative option unduly rewards foreign carriers at the expense of U.S. carriers. Furthermore, they complained that they would be restricted from adding new international services unless they reduced domestic flights. They

submitted that foreign air carriers providing similar international services would continue to receive preferred treatment, which places U.S. carriers at a competitive disadvantage.

United also pointed out that Congress had previously prohibited the Secretary of Transportation from withdrawing slots from domestic carriers to accommodate international operations while O'Hare was limited under the HDR. (*See* 49 U.S.C. 41714(b)(2)). United disputed our reliance on international air services agreements as a rationale for the proposed Administrative Option, observing that other countries do not interpret the bilateral agreements as requiring them to make slots available for U.S. air carriers. United commented that this proposal is not in the national interest because it weakens an already unfavorable trade balance by shifting carriage of international passengers (and their revenue) from U.S. carriers to foreign corporations. United prefers exempting all international arrivals, which would not arguably violate any international air service agreement. Lastly, United noted that U.S. carriers have been denied access to foreign airports when capacity is limited.

The City also argued for exempting all international flights because international operations are a small portion of the total flights at O'Hare and that the gate, immigration and terminal facilities at Terminal 5 would provide a natural limit to these flights.

We have reviewed the number of international arrivals conducted by foreign air carriers and domestic carriers during the peak hours. Together, these arrivals account for six percent of total arrivals at O'Hare. This six percent is almost equally divided between foreign air carrier arrivals and U.S. air carriers. We note that while some foreign air carriers have periodically dropped service, other foreign air carriers have added service, such that the overall level has remained constant for several scheduling seasons. International operations by U.S. air carriers have also been relatively constant over the past several years.

We do not agree with United's assertion that our reliance on international air service agreements was erroneous and misguided. We are bound by our agreements with foreign governments to ensure that the flag carriers of each party have a fair and equal opportunity to compete in the market.[28] In particular, as the Department seeks to expand Open Skies agreements, we do not want to adopt limits that might preclude either domestic or foreign air carriers from taking advantage of new opportunities. At the same time, we are mindful that U.S. carriers are also constrained by facilities or slot constraints at some foreign airports and do not always get to operate their preferred schedules. We prefer to address those issues on a case-by-case basis rather than set up a regulatory framework that makes U.S.-constrained airports more difficult to access.

In view of the comments, we are adopting a revised approach that treats all international arrivals the same, regardless of whether operated by a foreign or domestic air carrier, a position which is also consistent with international air service agreements. An Arrival Authorization will be required for any international arrival at O'Hare and will be assigned at the requested time or in the adjacent hour if one is not otherwise available. Under the rule we may also assign a time for new or rescheduled international arrivals within an hour of the requested time if needed to address operational efficiencies and facilitate schedule de-peaking.

As this approach does not involve any withdrawal of Arrival Authorizations from domestic carriers to accommodate new international arrivals, it may result in operations exceeding the adopted hourly limits. In adopting this approach, we weighed the public interest in maintaining our international obligations under various air service agreements with our congestion and delay reduction goals of this rule. Given the relative stability in the number of international arrivals since 2002 and the limited duration of this rule, we do not expect a dramatic increase in requests for Arrival Authorizations. As this rule is an interim measure, it is expected that new airport capacity will address this issue for the longer-term. We acknowledge that this approach may have some impact on the congestion and delay reduction goals of this rule. However, we believe that the public interest supports the offset of our delay reduction goals to accommodate our international obligations. We will consider the effect of any additional international arrivals as we conduct the semi-annual operational performance and capacity review.

As a result of this new approach in addressing international arrivals, we must modify how we proposed to initially assign Arrival Authorizations for domestic use and for international use initially under this rule. In calculating the proposed cap of 88 arrivals per hour, we included all international operations scheduled for August 2004 during the O'Hare schedule reduction meeting. Foreign air carriers, except Canadian air carriers, were not affected by the FAA's Order, and subsequently have added new flights and adjusted schedule times that will be reflected in the initial assignment under this rule. International operations by U.S. carriers were included in the August 2004 Order as part of the overall carrier limits, and each carrier could choose the international market, domestic market, or transborder Canadian market to serve within those limits.[29] Consequently, we will review each U.S. air carrier's operations under the August 2004 Order and assign Arrival Authorizations as either domestic or international, as appropriate. New international arrivals by U.S. carriers after the effective date of this rule will be eligible for assignment above the operational limits. The combined total of each U.S. air carriers' (initially assigned) Arrival Authorizations (domestic and international) will not exceed the total authorized for that carrier under the Order. We will make a similar determination to assign Arrival Authorizations for foreign air carrier operations using published schedules or other information available to the FAA for the base for the Summer 2006 and Winter 2006 scheduling seasons.

Beginning with the Summer 2007 scheduling season, and for every season thereafter, we will publish a notice in the **Federal Register** announcing the submission deadline for priority consideration for the assignment of historic and new international arrivals. This is similar to the IATA process followed by most slot-constrained airports outside the U.S. In assigning Arrival Authorizations for international arrivals, we expect to follow the procedures and processes of the IATA Guidelines to the extent those Guidelines do not conflict with this rule. All carriers must request Arrival Authorizations, in accordance with the scheduling season and information published by the FAA in the **Federal Register**.

As proposed, we adopt the provision that the Secretary of Transportation may withhold the assignment of an Arrival Authorization to any foreign air carrier of a country that does not provide

[28] Access to serve the Chicago area must generally be through O'Hare due to runway or facility constraints at other Chicago area airports.

[29] Canadian carriers' scheduled arrivals were limited by the Order but do not include arrivals from points outside Canada. Therefore, no adjustments are needed under this provision.

equivalent rights of access to its airports for U.S. air carriers.

As proposed, Arrival Authorizations assigned for international use may not be bought, sold, leased or otherwise transferred. Carriers may, however, trade these Arrival Authorizations assigned for international use on a one-for-one basis. We clarify that domestic Arrival Authorizations may be traded within the carrier's base subject to FAA approval. Arrival Authorizations assigned for international arrivals must be returned if not used for a 15-day period.

Lastly, we revise the definition of the scheduling seasons to recognize the change in U.S. daylight saving time start and end dates beginning in March 2007 (Energy Policy Act of 2005, Pub. L. 109–58).

Minimum Usage Requirements

In the NPRM, we sought comment on whether a minimum usage requirement would be necessary, and if so, whether an 80 percent or 90 percent usage requirement over a bimonthly reporting period would be appropriate. As an alternative to the above usage requirement, we proposed a periodic withdrawal of the least used Arrival Authorizations for redistribution.

The majority of commenters objected to having no usage requirement. The City argued that the landing rights represent scarce and valuable assets under this rule and that it is not prudent to omit a usage requirement. Delta commented that this option presented the risk that carriers that have more Arrival Authorizations than they can profitably use will simply hoard them and waste valuable capacity.

DOJ agreed that a usage requirement could prevent Arrival Authorizations from going totally unused, but argued that a usage requirement was unlikely to prevent the hoarding of Arrival Authorizations to deprive competitors of these assets. DOJ also maintained that a usage requirement does nothing to increase the liquidity in the market and allow entry by more efficient carriers.

Most commenters responded that a usage requirement in the 80–90 percent range is appropriate. U.S. Airways, American, Delta and Independence Air supported the 80 percent requirement. The City, RAA and America West supported a 90 percent standard. United supported a usage requirement of 85 percent.

American contended that the rule should conform to international minimum usage standards and seasonality. American supported an 80 percent usage standard, which is used by IATA and the European Union (EU) slot regulations on a seasonal basis. American also argued that since the FAA conceded in the NPRM that most slots (under the HDR) were operated 90 percent of the time, it is nonsensical to use a new standard over one that is already universally known and accepted. In addition, the usage period should be consistent with the IATA designated summer (seven months) and winter (five months) scheduling seasons. American stated that domestic service patterns now follow the seasonality patterns for international operations and that failure to recognize this is not efficient or equitable. Consequently, under American's suggestion, it would be logical to lose an Arrival Authorization for a season, if a carrier is not using it for that period, rather than force the carrier to inefficiently schedule a flight just to avoid losing the Arrival Authorization.

While American's suggestion to adopt a usage period similar to the IATA bi-annual scheduling season may be of some benefit, no other carrier has indicated that a two-month reporting period was unworkable. We also believe that the adoption of leasing provisions will assist carriers that experience some seasonal fluctuations in that they may choose to lease the Arrival Authorizations for the relevant period.

We conclude that a minimum usage requirement is necessary, as these Arrival Authorizations will represent a scarce resource and our desire is to ensure the efficient utilization of these privileges for the duration of this rule. Our experience at O'Hare under the August 2004 Order is that some carriers did not utilize their authorities and this resulted in unused capacity. Moreover, adoption of a minimum usage standard complements the ability to lease Arrival Authorizations, which is adopted in this rule and previously discussed.

There is not a marked difference in projected slot utilization at a 90 percent versus an 80 percent usage requirement over a two-month reporting period. We reviewed scenarios of an Arrival Authorization held Monday through Friday over a two-month reporting cycle and found that the difference in usage from 80 to 90 percent resulted in approximately 3–4 additional operations over the reporting period. Carriers, both domestic and foreign, have a lot of experience with an 80 percent usage requirement, as provided under the HDR and internationally. As American argued, most carriers exceed the 80 percent usage standard under the HDR, and we do not see that increasing the standard will result in a more efficient utilization record that warrants deviation from the present industry standard. Consequently, this rule adopts an 80 percent minimum usage requirement over a two-month reporting period.

There was no support in the comments for the alternative of periodically withdrawing the least utilized Arrival Authorizations. Comments viewed this option as disruptive to their businesses. Also, the City pointed out that even with the one percent withdrawal, there may still be ''inefficiently'' utilized Arrival Authorizations that are not withdrawn because they are not in the bottom one percent.

In the NPRM, we proposed that those Arrival Authorizations assigned to new entrants and limited incumbents via lottery would not be subject to the usage requirement for the first 90 days after assignment. For Arrival Authorizations assigned to incumbent carriers via lottery, the usage requirement would be waived only for the first 60 days. United argued all carriers experience the same issues in starting new service, including the publishing, promotion and selling of that service and that incumbents should not be afforded less time to deal with similar issues. Furthermore, United argued that this waiver period should apply to Arrival Authorizations obtained via purchase, not just via lottery.

We agree with United that different waiver periods are not warranted and that the 90-day waiver period should apply to Arrival Authorizations received by lottery and by purchase. We have determined not to extend this waiver to Arrival Authorizations involved in a lease because carriers involved in the lease transaction can determine the transaction effective date to include this issue.

Arrival Authorizations assigned for international use are not subject to the usage requirement. Arrival Authorizations assigned for international use are allocated seasonally and must be returned to the FAA if not used for more than a two-week period. We think that this approach adequately addresses usage for these operations.

In addition, we proposed two methods for reassigning Arrival Authorizations that do not meet a usage minimum, if adopted. Under the first method, the agency would conduct a lottery consisting of two rounds. In the first round, only new entrants and limited incumbents would be permitted to participate. In the second round, any remaining Arrival Authorizations would be assigned by lottery to incumbent carriers at the airport.

Under the second method, carriers losing Arrival Authorizations for failing to meet the usage requirement would be required to sell them using the blind market process. New entrants and limited incumbents would have preference in purchasing the subject Arrival Authorizations and the proceeds of a sale would go to the air carrier that lost the Arrival Authorizations. Any unsold Arrival Authorizations would be returned to the carrier that lost them.

Both Delta and United preferred the option that would permit carriers to be compensated for the loss of the Arrival Authorization, particularly if the Arrival Authorization was purchased on the market, rather than have the Arrival Authorizations withdrawn by the FAA. Furthermore, Delta contended that the mandatory sale will ensure that the Arrival Authorizations go to the highest bidder—a lottery makes no such assurance.

We have reviewed this proposal in light of the other amendments adopted in this rule and conclude that neither option is necessary. Since this rule adopts a provision that permits leasing, carriers have an option that will result in compensation, and that can address market fluctuations, seasonality, and simple usage issues. Carriers are far more likely to lease Arrival Authorizations, rather than entertain a forced sale and loss of the them. Therefore, this rule provides that Arrival Authorizations not meeting the usage requirement will be withdrawn by the FAA for reassignment.

America West also commented that carriers may circumvent a usage requirement by using Arrival Authorizations originally allocated for large aircraft operations with small aircraft. Consequently, America West requested that the rule provide that an Arrival Authorization will be withdrawn if its use is converted from large aircraft to small aircraft.

ACAA supported a 90 percent usage requirement for air carriers with more than 50 Arrival Authorizations because large carriers have too many options to protect Arrival Authorizations if the usage requirement is lower.

We do not support America West's suggestion that Arrival Authorizations for larger aircraft should receive different treatment under our usage requirements. This rule does not divide Arrival Authorizations into separate categories based on aircraft size. Furthermore, the initial assignment and subsequent reassignment of Arrival Authorizations does not contemplate aircraft size for the particular operation. Unlike the HDR, carriers have complete discretion under this rule to operate the aircraft they see fit for the service using the Arrival Authorizations. Regulating the aircraft size to use these Arrival Authorizations is unnecessary at this airport to meet the stated objectives of this rulemaking.

Likewise, we have not adopted ACAA's suggestion that the 90 percent usage requirement apply to air carriers with more than 50 Arrival Authorizations. The purpose of the usage requirement is to ensure that these resources are being used efficiently, consistently and universally. The rule offers some opportunity to new entrants and limited incumbents to gain new or additional access to O'Hare. ACAA's proposal could undermine the efficiency goal of the universal usage requirement, and would not necessarily result in additional Authorizations being available for new entrant and limited incumbents.

The City stated that given their fluidity, scheduled cargo operations, in comparison to schedule passenger operations, merit a lower usage minimum. We disagree. As discussed above, if cargo operators find that their scheduled operation cannot use the frequencies for which they hold the Arrival Authorization, the carriers are encouraged to make the frequencies available to other carriers via leasing. We do not see a need to establish a separate usage requirement for these flights.

In the NPRM, we proposed to waive the usage requirement for a specific carrier in the event of a strike or labor dispute. Although we did not receive any comments on this provision, upon reconsideration, we have decided to withdraw this part of the proposal as the term, ''labor dispute'' was so broad that it could apply to the filing of a grievance, a stop work action or other events that may or may not result in a strike. By including the provision that permits waiver in the event of a highly unusual and unpredictable condition that exceeds 5 consecutive days, the rule provides carriers with latitude and flexibility to deal with unpredictable conditions, while maintaining the integrity and purpose of the usage requirement.

Finally, we will waive the usage requirement for all carriers through December 31, 2006, which covers the first two months reporting period under the rule. The August 2004 Order does not contain any usage requirement and some carriers are not fully utilizing their permitted number of arrivals. Carriers typically complete their schedule planning process several months in advance of actual operations and most carriers have already finalized their November /December 2006 schedules. While it is possible that some flights might be added to meet the usage rules, other carriers may decide to use the sale/lease options under the rule. We conclude that a limited waiver of the usage requirement is warranted to provide for minimal disruption of carrier schedules during the transition from the August 2004 Order and the rule adopted here. Therefore, the first report detailing usage of the Arrival Authorizations will be for the January–February 2007 period.

Sunset Date

We proposed to terminate this rule on April 6, 2008. This date was selected for several reasons: (1) The City had proposed an O'Hare Modernization Program (OMP) that would increase the airport capacity and reduce the level of delays at the airport and the first phase would come on-line by the beginning of 2008 (the proposal was subsequently approved in the FAA's Record of Decision for the OMP dated September 30, 2005); (2) improvements in the Instrument Landing System for runways 27L and 27R are expected to improve the performance of the airport in adverse weather conditions; and (3) the proposed date in 2008 would allow regulation to address the present conditions at the airport until the benefits of these capacity enhancements are realized at the airport. Alternatively, if the OMP does not move forward in a timely manner, the proposed date would allow the FAA time to develop an alternative to this rulemaking.

Some carriers questioned whether the rule would really be temporary. The City opposed the sunset date and argued that the date is too long for ''an invasive rule to constrain operations at O'Hare.'' The City preferred termination of the rule after one year of the rule's effective date and argued that the sunset provision should include a contingency on changes in operating conditions at O'Hare, *i.e.*, if operations significantly decrease, the rule would sunset.

As stated in the Notice, the agency's preferred approach to reducing delay and congestion is to enhance airport infrastructure, so that capacity meets demand. See, 49 U.S.C. 47101(a)(9). If the desired capacity does not materialize within the timeframe of this rule, we may consider other congestion management techniques to replace this rule. We are also open to revisiting this date if changes to the airline industry obviate the need for a congestion management rule at O'Hare.

We cannot support a one-year rule at this point, as there will not be any measurable increase in capacity in such

a short period. We find it appropriate to extend the termination date of this rule through October 31, 2008, to reflect the current schedule for commissioning of the first runway (Runway 9L/27R). This date coordinates the rule with end of the summer scheduling season and U.S. daylight savings time, as amended by Public Law 109–58.[30] Therefore, we adopt October 31, 2008 at 9 p.m., as the sunset date for this rule.

**Paperwork Reduction Act**

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the FAA submitted a copy of the new information collection requirements(s) in this final rule to the Office of Management and Budget (OMB) for its review. OMB is still reviewing the submission and will provide an OMB Control Number when the review is complete.

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.

**International Compatibility**

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

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

Changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (5 U.S.C. 5601, *et seq.*) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 4 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, to be the basis of U.S. standards. Fourth, the Unfunded Mandate Reform Act of 1995 (Public Law 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation).

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

*Total Costs and Benefits of this Rulemaking*

FAA estimates that this final rule will result in a 32% reduction in delay at O'Hare, generating present value benefits of $475.6 million relative to November 2003 delays.

The estimated present value cost of this final rule is less than $1.0 million.

Who Is Potentially Affected by This Rulemaking

- Operators of scheduled, domestic and Canadian flights at O'Hare.
- Domestic and foreign air carriers.
- All communities, including small communities with air service to O'Hare.
- Passengers of scheduled, domestic and Canadian flights to O'Hare.
- Chicago Department of Aviation.
- FAA Air Traffic Control.

Key Assumptions

- Baseline Flight Operations—Official Airline Guide (OAG) Schedule November 20, 2003 of 1,464 daily arrival flights (OAG plus 96 unscheduled).
- Daily Flight Completion Factor: 97%/Daily Flight Cancellation Factor: 3%.
- No lost revenue due to cancelled flights—All Passengers are rebooked or rerouted to their destination.
- Delay improvements are 9.6 minutes per flight and equivalent to a 32% improvement in delay. We derive delay improvements from MITRE's Queuing Delay Model, which measures queuing delays against the OAG flight schedule.
- For this evaluation, the effective date is 10/29/06 and the sunset date is 10/31/08. We adjust annual estimates to reflect the 1.5 days per week when the limits are not in effect (all-day Saturday and until noon on Sunday).

Other Important Assumptions

- Discount Rate—7%.
- Assumes 2005 Current Year Dollars.
- Final rule will sunset October 31, 2008.
- Ground and Airborne average cost per hour—$1,935.
- Passenger Value of Time—$28.60 per hour.

Alternatives We Have Considered

- Alternative #1—This alternative would have let the August 18, 2004, order expire on April 30, 2005. Based on history, FAA expects that operators would most likely continue to expand operations, further increasing airport delays.
- Alternative #2—The FAA is continuing to explore the feasibility of a market-based solution such as an auction or congestion pricing.
- Alternative #3—The FAA implements this final rule providing an interim solution while capacity enhancement measures and market-based mechanisms are reviewed.

*Benefits of This Rulemaking*

The primary benefits of this rule will be the airline and passenger delay cost savings. The benefits reflect a prorating of the 5.5 days per week for which the operational limits are in effect, and the flight completion factor of 97%. The total estimated benefits, shown in table 1 are $475.6 million in present value dollars.

[30] Public Law 109–58 amends the start and end dates of U.S. daylight savings time beginning March 2007.

TABLE 1.—TOTAL PRESENT VALUE BENEFITS OF FINAL RULE

| | Airline delay cost savings | Passenger delay cost savings | Total benefits |
|---|---|---|---|
| 2006 | $19,094,170 | $21,212,339 | $40,306,510 |
| 2007 | 111,337,400 | 124,436,227 | 235,773,627 |
| 2008 | 82,300,269 | 117,219,790 | 199,520,059 |
| Total | 212,731,839 | 262,868,357 | 475,600,196 |

The total airline delay cost savings of $212.7 million is shown in Table 2. The total passenger delay costs savings of $262.9 million is shown in Table 3.

TABLE 2.—AIRLINE DELAY COST SAVING

| | Avg total delay (minutes) per day | Avg total delay (hours) per Day | Avg variable cost per hour | Prorated annual airline delay cost savings | Prorated present value of airline delay cost saving |
|---|---|---|---|---|---|
| 2006 | 13,772 | 230 | $1,935 | $20,430,762 | $19,094,170 |
| 2007 | 13,772 | 230 | 1,935 | 127,470,189 | 111,337,400 |
| 2008 | 13,772 | 230 | 1,935 | 100,821,369 | 82,300,269 |
| Total | | | | 248,722,320 | 212,731,839 |

TABLE 3.—PASSENGER DELAY COST SAVINGS

| | Total daily arrivals | Average AC seats | Average AC load factor | Passengers per flight | Passengers per day | Avg delay arrival | Total delay minutes | Total delay hours | Annual daily hours (prorated days rule is in effect) | Pax value of time | Daily pax delay costs | Prorated annual pax passenger delay reduction | Prorated PV of pax delay reduction |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 2006 | 1,420 | 104.3 | 0.728 | 75 | 107,827 | 9.6 | 1,035,142 | 17,252 | 3,864,528 | $28.60 | $493,417 | $22,697,203 | $21,212,339 |
| 2007 | 1,420 | 104.5 | 0.731 | 76 | 108,479 | 9.6 | 1,041,400 | 17,357 | 4,981,365 | 28.60 | 496,401 | 142,467,037 | 124,436,227 |
| 2008 | 1,420 | 104.9 | 0.734 | 76 | 109,341 | 9.6 | 1,049,677 | 17,495 | 1,399,569 | 28.60 | 500,346 | 143,599,283 | 117,219,790 |
| Total | | | | | | | | | | | | 308,763,523 | 262,868,357 |

*Costs of This Rulemaking*

The major costs of this final rule cover the blind market costs incurred by buyers and sellers of Arrivals Authorizations, the public costs of developing and managing the blind market, and other administrative and compliance costs. FAA believes that market pressures as well as provisions in this rule should mitigate the potential impact of this final rule on competition and airfares at O'Hare. The total present value costs of less than $1.0 million are shown in the last column of Table 4.

TABLE 4.—PRESENT VALUES OF TOTAL ANNUAL COSTS

| | FAA E-Bid develop. costs | E-Bid system operating costs | FAA E-Bid admin. costs | Other admin. costs | Reporting costs | Total costs |
|---|---|---|---|---|---|---|
| 2006 | $147,196 | $23,364 | $25,037 | $125,183 | $29,684 | $350,464 |
| 2007 | 0 | 43,672 | 46,797 | 233,987 | 15,734 | 340,189 |
| 2008 | 0 | 20,407 | 21,868 | 109,339 | 12,254 | 163,868 |
| Total | 147,196 | 87,444 | 93,702 | 468,509 | 57,672 | 854,522 |

*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 will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the Act.

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

determination, and the reasoning should be clear. The basis for such FAA determination follows.

The final rule affects all scheduled operators at O'Hare, more than just a few of which are small entities (where ''small entities'' are firms with 1,500 or fewer employees). The arrivals of all carriers currently providing service at O'Hare will be accommodated, thereby minimizing the impact on their schedules. For their given schedules, this final rule will lower their fuel burn costs substantially by reducing the number and magnitude of delays below those experienced prior to the August 2004 Order.

If Arrival Authorizations are returned or withdrawn for nonuse, new entrants and limited incumbents (many of which are likely to be small entities) receive a preference in the reassignment of those authorities. If additional (new) capacity becomes available during the duration of this final rule, new entrants, limited incumbents and incumbents have equal opportunity to receive additional Arrival Authorizations through a lottery. Carriers with a limited number of operations at O'Hare are also protected from withdrawal of Arrival Authorizations if the FAA determines it is operationally necessary to reduce the number of flights at the airport. Therefore, this rule affords limited preference to small entity operators for the assignment of available capacity and again favors these small entity operators if airport operations are reduced.

In ''grandfathering'' the air carriers' existing schedules, the final rule enables airlines to continue operating all existing air service to airports of communities with populations less than 50,000. Consequently, we do not expect this final rule to negatively impact airports in small communities.

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

*International Trade Impact Assessment*

The Trade Agreement Act of 1979 prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This rule excludes future growth in non-Canadian international arrivals from the hourly caps imposed. Thus, the FAA has assessed the potential effect of this final rule and determined that it will not create unnecessary obstacles to the foreign commerce of the United States.

*Unfunded Mandates Assessment*

The Unfunded Mandates 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 $128.1 million in lieu of $100 million.

This final rule does not contain such a mandate. Therefore, the requirements of Title II of the Unfunded Mandate Reform Act of 1995 do not apply.

**Executive Order 13132, Federalism**

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action will not have a substantial direct effect on the States, or 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 does not have federalism implications.

**Environmental Analysis**

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 312F, Regulations, standards, and exemptions (excluding those which if implemented may cause a significant impact on the human environment). It has been determined that no extraordinary circumstances exist that may cause a significant impact and therefore no further environmental review is required.

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

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

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

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

**The Amendment**

■ In consideration of the foregoing, the Federal Aviation Administration adds Subpart B to part 93 of Chapter II of Title 14, Code of Federal Regulations, as follows:

■ 1. The authority citation for this amendment continues to read as follows:

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

■ 2. Subpart B is added to read as follows:

## Subpart B—Congestion and Delay Reduction at Chicago O'Hare International Airport

Sec.

93.21 Applicability.
93.22 Definitions.
93.23 Arrival Authorizations.
93.24 [Reserved]
93.25 Initial assignment of Arrival Authorizations to U.S. and Canadian air carriers for domestic and U.S./Canada transborder service.
93.26 Reversion and withdrawal of Arrival Authorizations.
93.27 Sale and lease of Arrival Authorizations.
93.28 One-for-one trade of Arrival Authorizations.
93.29 International Arrival Authorizations.
93.30 Assignment provisions for domestic and U.S./Canada transborder service.
93.31 Minimum usage requirement.
93.32 Administrative provisions.
93.33 [Reserved]

## Subpart B—Congestion and Delay Reduction at Chicago O'Hare International Airport

### § 93.21 Applicability.

(a) This subpart prescribes the air traffic rules for the arrival of aircraft used for scheduled service, other than helicopters, at Chicago's O'Hare International Airport (O'Hare).

(b) This subpart also prescribes procedures for the assignment, transfer, sale, lease, and withdrawal of Arrival Authorizations issued by the FAA for

scheduled operations by U.S. and foreign air carriers at O'Hare.

(c) The provisions of this subpart apply to O'Hare during the hours of 7 a.m. through 8:59 p.m. Central Time, Monday through Friday, and 12 p.m. through 8:59 p.m. Central Time on Sunday. No person shall operate any scheduled arrival into O'Hare during such hours without first obtaining an Arrival Authorization in accordance with this subpart.

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

(e) The provisions of this subpart are applicable beginning October 29, 2006, and terminate at 9 p.m. on October 31, 2008.

**§ 93.22 Definitions.**

For the purposes of this subpart, the following definitions apply:

*Arrival Authorization* is the operational authority assigned by the FAA to a U.S. or foreign air carrier to conduct one scheduled arrival operation on a specific day of the week during a specific 30-minute period at O'Hare.

*Carrier* is a U.S. air carrier, Canadian air carrier or foreign air carrier with authority to conduct scheduled service at O'Hare under Parts 121, 129, 135 of the Chapter and the appropriate economic authority for scheduled service under Title 49 of the United States Code.

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

*Incumbent* is any U.S. or Canadian air carrier that is not a New Entrant or Limited Incumbent.

*International Arrival Authorization* is the operational authority assigned by the FAA to a Carrier to conduct one scheduled arrival operation at O'Hare from a foreign point or a continuation of a flight that began at a foreign point, except for arrivals at O'Hare from Canada by U.S. and Canadian air carriers.

*Limited Incumbent* is any U.S. or Canadian air carrier that holds or operates, on its own behalf, 8 or fewer Arrival Authorizations provided that it has not sold or otherwise transferred Arrival Authorizations, other than one-for-one transfers permitted in this subpart. Any Limited Incumbent that sells or otherwise transfers an Arrival Authorization shall thereafter be treated as an Incumbent for purposes of this rule.

*New Entrant* is any U.S. or Canadian air carrier that does not hold or operate, and has never held or operated any Arrival Authorization at O'Hare, on its own behalf.

*Preferred Lottery* is a lottery conducted by the FAA to assign Arrival Authorizations, with initial preference for New Entrants and Limited Incumbents.

*Scheduled Arrival* is the arrival segment of any operation regularly conducted by a carrier between O'Hare and another point regularly served by that carrier.

*Summer Scheduling Season* is the period of time from the first Sunday in April until the last Sunday in October. Beginning March 11, 2007, the summer scheduling season is the period of time from the second Sunday in March until the first Sunday in November.

*Winter Scheduling Season* is the period of time from the last Sunday in October until the first Sunday in April. Beginning March 11, 2007, the winter scheduling season is the first Sunday in November until the second Sunday in March.

**§ 93.23 Arrival Authorizations.**

(a) Except as otherwise established by the FAA under paragraph (d) of this section and § 93.29 of this subpart, the number of Arrival Authorizations shall be limited to:

(1) 88 per hour between the hours of 7 a.m. and 7:59 p.m. Monday through Friday and 12 p.m. and 7:59 p.m. Sunday,

(i) Not to exceed 50 during each half-hour beginning at 7 a.m. and ending at 7:59 p.m.

(ii) Not to exceed 88 within any two consecutive 30-minute periods.

(2) 98 between 8 p.m. and 8:59 p.m. Monday through Friday, and Sunday, not to exceed 50 between 8 p.m. and 8:29 p.m. and 50 between 8:30 p.m and 8:59 p.m.

(b) An Arrival Authorization is a temporary operating privilege subject to FAA control. Only Carriers may hold Arrival Authorizations. Arrival Authorizations may not be bought, sold, leased, or otherwise transferred to another Carrier, except as provided in §§ 93.27 and 93.28 of this subpart.

(c) Beginning six months from the effective date of this rule and on each six-month anniversary thereafter, the FAA shall conduct a review of existing capacity at O'Hare, to determine whether to increase the number of Arrival Authorizations. The FAA will consider the following factors:

(1) The number of delays;

(2) The length of delays;

(3) Weather conditions;

(4) On-time arrivals and departures;

(5) The number of actual arrival operations;

(6) Runway utilization and capacity plans; and

(7) Other factors relating to the efficient management of the national air space system.

(d) Notwithstanding paragraph (a), the Administrator may increase the number of Arrival Authorizations based on the review conducted in paragraph (c) of this section.

**§ 93.24 [Reserved]**

**§ 93.25 Initial assignment of Arrival Authorizations to U.S. and Canadian air carriers for domestic and U.S./Canada transborder service.**

(a) The FAA shall assign to each U.S. and Canadian air carrier, conducting scheduled service at O'Hare, as of the effective date of this rule, Arrival Authorizations for each scheduled arrival that it published for either domestic or U.S./Canada transborder service for any day during the 7-day period of November 1 through 7, 2004, as evidenced by the FAA's records, not to exceed the peak-day limits for each carrier established under the August 18, 2004, ''Order Limiting Scheduled Operations at O'Hare International Airport.'' A carrier's total assignment under this paragraph will be reduced accordingly by any international Arrival Authorizations assigned under § 93.29(a).

(b) If a U.S. or Canadian air carrier did not publish a scheduled domestic or U.S./Canada transborder arrival during the period of time referenced in paragraph (a) of this section, but was entitled to do so under the August 18, 2004, ''Order Limiting Scheduled Operations at O'Hare International Airport,'' and is conducting scheduled service at O'Hare as of the effective date of this rule, a corresponding Arrival Authorization shall be assigned for that arrival.

(c) Arrival Authorizations will be assigned to the U.S. or Canadian air carrier that actually operated the flight regardless of any codeshare or marketing arrangement unless such carrier did not market the flight under its own code and the inventory of the flight was under the control of another Carrier. If the inventory was under the control of another Carrier, the FAA shall assign the Arrival Authorization to that Carrier. Carriers may subsequently transfer Arrival Authorizations for use by other Carriers under their marketing control in accordance with § 93.2(m).

(d) Any Arrival Authorization not assigned under paragraphs (a) or (b) of this section will be assigned to carriers conducting scheduled international service under § 93.29. Any remaining

Arrival Authorizations will be assigned by preferred lottery under § 93.30.

(e) The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this section.

**§ 93.26 Reversion and withdrawal of Arrival Authorizations.**

(a) A U.S. or Canadian air carrier's Arrival Authorizations assigned under §§ 93.25 or 93.27 revert automatically to the FAA 30 days after the Carrier has ceased all operations at O'Hare for any reason other than a strike.

(b) The FAA may withdraw or temporarily suspend Arrival Authorizations at any time as a result of reduced airport capacity or to fulfill operational needs. Whenever Arrival Authorizations must be withdrawn, they will be withdrawn in the required 30-minute Arrival Authorization time periods in accordance with the priority list established under § 93.32 of this subpart.

(c) Any Arrival Authorization that is withdrawn or temporarily suspended under paragraph (b) will, if reassigned, be reassigned to the Carrier from which it was taken, provided that the Carrier continues to conduct scheduled operations at O'Hare.

(d) The FAA shall not withdraw or temporarily suspend under paragraph (b) any Arrival Authorizations if the result would be to reduce a Carrier's total number of Arrival Authorizations below eight.

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

**§ 93.27 Sale and lease of Arrival Authorizations.**

(a) No U.S. or Canadian air carriers may sell or lease its Arrival Authorizations at O'Hare except in accordance with the procedures in this section and in the manner prescribed by the FAA. Carriers may not buy, sell, lease or otherwise transfer control of Arrival Authorizations assigned under § 93.29.

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

(c) New Entrants and Limited Incumbents may not sell, lease, or otherwise transfer control of any Arrival Authorizations assigned through a Preferred Lottery within 12 months of such assignment, except to another New Entrant or Limited Incumbent. One-for-one trades to other Carriers under § 93.28 are permitted.

(d) A U.S. or Canadian air carrier seeking to sell or lease an Arrival Authorization must provide the following information in writing to the FAA:

(1) Arrival Authorization number and time;

(2) Frequency;

(3) Planned effective date(s) of transfer;

(4) Minimum reserve price, if established by the offering carrier;

(5) Other pertinent information, if applicable; and

(6) Carrier's authorized representative.

(e) The FAA will post a notice of the available Arrival Authorization and specific information concerning the proposed sale or lease transaction on the FAA Web site at *http://www.fly.faa.gov.* The Web site will include information regarding registration to be advised of posted transactions, and other relevant information pertaining to this section. The FAA will post the notice within two business days after receipt of all required information from the U.S or Canadian air carrier offering the Arrival Authorization for sale or lease. The notice will provide ten business days for bids to be received and will specify a bid closing date and time. Only U.S. and Canadian air carriers may bid on Arrival Authorizations. Information identifying the Carrier providing the Arrival Authorization for sale or lease will not be posted or released by the FAA until after the FAA has approved the transfer.

(f) All bids must be sent to the FAA electronically, via the FAA Web site, by the closing date and time, and no extensions of time will be granted. Late bids will not be considered. All bids will be held confidential, with each bidder certifying in a form acceptable to the FAA that its bid has not been disclosed to any person not its agent.

(g) The FAA will forward the highest qualifying bid to the selling or leasing U.S. or Canadian air carrier without identifying the bidder. The selling or leasing Carrier will have up to three business days to accept or reject the bid. The selling or leasing Carrier must notify the FAA via the Web site or in writing of its acceptance no later than 5 p.m. Eastern Time on the third business day. If the selling or leasing Carrier does not notify the FAA of its acceptance within the allotted time, the transaction will terminate.

(h) Upon acceptance, the FAA will notify the U. S. or Canadian air carrier, who submitted the highest bid, and request that the buyer/lessee and the seller/lessor submit to the FAA the information (such as Arrival Authorization number, frequency and effective date(s) of transfer) required to transfer the Arrival Authorization.

(i) Each U.S. or Canadian air carrier must provide the FAA evidence of its consent and each Carrier must certify that only monetary consideration will be or has been exchanged.

(j) The FAA will approve requested transfers of Arrival Authorizations that comply with these regulations. The recipient U.S. or Canadian air carrier of the transfer may not use the Arrival Authorization until the conditions in paragraph (i) of this section have been met and the FAA has approved the transfer.

(k) The FAA will keep a record of all bids received and of each Arrival Authorization transfer, including the identity of both Carriers and the winning bid price, all of which will be made available to the public.

(l) U.S. or Canadian air carriers may request the FAA post notice that it is seeking to lease or purchase an Arrival Authorization at O'Hare. The Carrier may submit information in writing or via the FAA's Web site. This information may include the effective date, number or timing of Arrival Authorizations sought, whether a Carrier is seeking to purchase or lease, maximum price offered, or other pertinent information. The FAA may edit any submissions, or choose not to post certain information, in order to ensure the integrity of the solicitation process. Information identifying the Carrier seeking an Arrival Authorization for sale or lease will not be posted or released by the FAA. The FAA will post such requests within two business days of receipt for a period of at least 30 days. Any resulting offers to sell or lease Arrival Authorizations shall be conducted in accordance with this subsection.

(m) A U.S. or Canadian air carrier may transfer an Arrival Authorization to another U.S. or Canadian air carrier that conducts operations at O'Hare solely under the transferring Carrier's marketing control, including the entire inventory of the flight. Each Carrier must provide written evidence of its consent to the transfer. The FAA will approve requested transfers that comply with these regulations. The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this subsection. The recipient Carrier of the transfer may not use the Arrival Authorization until the FAA has provided written confirmation. A record of each Arrival Authorization will be kept on file by the

FAA and made available to the public on request.

**§ 93.28 One-for-one trade of Arrival Authorizations.**

(a) Except as otherwise provided in this subpart, any Carrier may exchange an Arrival Authorization it has been assigned with another Carrier on a one-for-one basis for the purpose of conducting that operation in a different half-hour time period.

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

(c) The FAA will approve requested transfers of Arrival Authorizations that comply with these regulations. The recipient Carrier of the transfer may not use the Arrival Authorization until written confirmation has been received from the FAA.

(d) A U.S. or Canadian air carrier assigned Arrival Authorizations under § 93.29 may trade on a one-for-one basis within its own base of Arrival Authorizations subject to FAA approval, provided that the purpose is to operate the arrival flight from a foreign point outside Canada in a different half-hour time period than assigned. The FAA must confirm the transfer prior to operation.

(e) A record of each Arrival Authorization exchange will be kept on file by the FAA and made available to the public upon request.

(f) Carriers participating in a one-for-one transfer must certify to the FAA that no other consideration will be or has been provided for the exchange.

**§ 93.29 International Arrival Authorizations.**

(a) Except as otherwise provided in paragraph (d) of this section, the FAA shall make an initial assignment of Arrival Authorizations to U.S. and Canadian carriers arriving from a foreign point, excluding Canada, or any other foreign carrier arriving from a foreign point or the continuation of a flight that begins at a foreign point for the winter and summer scheduling seasons as follows. This section does not apply to arrivals at O'Hare from Canada by U.S. or Canadian air carriers.

(1) *Winter Scheduling Season.* Upon request, the FAA shall assign to each Carrier that published a scheduled arrival during the Winter 2006 Scheduling Season, as evidenced by the FAA's records, a corresponding Arrival Authorization for the Winter 2007 Scheduling Season.

(2) *Summer Scheduling Season.* Upon request, the FAA shall assign to each Carrier that published a scheduled arrival for the Summer 2006 Scheduling Season, as evidenced by the FAA's records, a corresponding Arrival Authorization for the Summer 2007 Scheduling Season.

(3) Arrival Authorizations will be assigned to the Carrier that actually operated the flight regardless of any codeshare or marketing arrangement unless the flight was predominately marketed, by contract, under the control of another Carrier. If the flight was under the marketing control of another Carrier or the entire inventory was under the control of another Carrier, the FAA shall assign the Arrival Authorization to that Carrier.

(4) The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this subsection.

(b) Notwithstanding the limit on Arrival Authorization in § 93.23(a), any U.S. or Canadian air carrier arriving at O'Hare from a foreign point, excluding Canada, shall be assigned an Arrival Authorization under this section for that flight.

(c) Notwithstanding the limit on Arrival Authorizations in § 93.23(a), any non-Canadian, foreign air carrier conducting scheduled service and arriving at O'Hare shall be assigned an Arrival Authorization under this section for that flight.

(d) The Department of Transportation reserves the right to withhold the assignment of an Arrival Authorization to any foreign air carrier of a country that does not provide equivalent rights of access to its airports for U.S. air carriers, as determined by the Secretary of Transportation.

(e) For each scheduling season, Carriers must request Arrival Authorizations under this section in accordance with the procedures announced by the FAA in the **Federal Register**. A Carrier may request to operate more flights from foreign points than the number for which it received Arrival Authorizations under § 93.29(a) or to operate historic arrivals in a different half-hour than initially assigned for the previous corresponding scheduling season. The Arrival Authorizations will be assigned at the time requested unless:

(1) An Arrival Authorization is available within one hour of the requested time, in which case, the unassigned Arrival Authorization will be used to satisfy the request; or

(2) Operational efficiencies support assignment within one hour of the requested period. The FAA Vice President, System Operations Services, is the final decision-maker for determinations under this subsection.

(f) Each request for Arrival Authorizations under this section shall specify the complete flight information including the carrier identifier, flight number, complete flight itinerary, frequency, scheduled arrival time, aircraft and service type, effective dates and whether the Arrival Authorization is for a new or historic flight.

(g) Arrival Authorizations assigned under this section cannot be bought, sold, leased or transferred under § 93.27 but subject to FAA approval may be traded on a one-for-one basis under § 93.28 to meet the Carrier's operational needs.

(h) Arrival Authorizations assigned under this section are not subject to minimum usage requirements of § 93.31 of this subpart but will revert to the FAA if not used for 15 consecutive days. Arrival Authorizations assigned under this section may only be used for a flight arriving from a foreign point or for non-Canadian, foreign air carriers, the continuation of a flight that begins at a foreign point.

**§ 93.30 Assignment provisions for domestic and U.S./Canada transborder service.**

(a) Whenever the FAA has determined that sufficient Arrival Authorizations are available, they will be assigned by lottery in accordance with this section. Only U.S. and Canadian air carriers are eligible to participate in a lottery. U.S. and Canadian air carriers must hold appropriate economic authority for scheduled service under Title 49 of the U.S.C. and FAA operating authority under parts 121, 129, or 135 of this chapter to select Arrival Authorizations in a lottery.

(b) Arrival Authorizations not assigned under § 93.25, or returned to the FAA under §§ 93.26(a) or 93.31 for reassignment shall be assigned by a Preferred Lottery.

(c) Any Arrival Authorization available as the result of an increase in the hourly limits under § 93.23(a) of this part from 88 Arrival Authorizations to 89 or 90 shall be assigned by Preferred Lottery.

(d) Any Arrival Authorizations available as the result of an increase above 90 in the hourly limits specified in § 93.23(a) of this subpart shall be assigned by lottery that is open to all U.S. and Canadian air carriers eligible to participate.

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

(f) Any U.S. or Canadian air carrier seeking to participate in any lottery must notify the FAA in writing, and

such notification must be received by the FAA 15 days prior to the lottery date. The U.S. or Canadian air carrier must specify if it is requesting to participate in a lottery as a New Entrant or Limited Incumbent. The U.S. or Canadian air carrier must also disclose in its notification whether it has Common Ownership with any other Carrier and, if so, identify such Carrier.

(g) A random lottery shall be held to determine the order in which participating Carriers shall select an Arrival Authorization.

(h) In any Preferred Lottery, each New Entrant and Limited Incumbent will have the opportunity to select Arrival Authorizations, if available as provided in paragraph (i) of this section, until it holds a total of eight Arrival Authorizations. Arrival Authorizations remaining after all New Entrants and Limited Incumbents have been accommodated may be assigned to any other Carrier participating in the lottery. Arrival Authorizations remaining after all New Entrants and Limited Incumbents have been accommodated may be assigned to any U.S. or Canadian air carrier participating in the lottery for a minimum of 12 months, and then until the next lottery, when such Arrival Authorizations would again be available on a preferred basis to New Entrants and Limited Incumbents.

(i) At the lottery, each Carrier must make its selection within 5 minutes after being called or it shall lose its turn. If Arrival Authorizations still remain after each Carrier has had an opportunity to select Arrival Authorizations, the assignment sequence will be repeated in the same order. A Carrier may select one Arrival Authorization during each sequence, except that New Entrants may select two Arrival Authorizations, if available, in the first sequence of a Preferred Lottery.

(j) If there are available Arrival Authorizations for a temporary period, for example, Arrival Authorizations pending assignment in a lottery or international arrivals that are temporarily returned, the FAA may assign these Authorizations on a non-permanent, first-come, first-served basis.

### § 93.31 Minimum usage requirement.

(a) Except as provided in § 93.29 and paragraphs (b) and (c) of this section, any Arrival Authorizations not used at least 80 percent of the time over a two-month period shall be withdrawn by the FAA.

(b) Paragraph (a) of this section does not apply to Arrival Authorizations obtained under § 93.30 or bought under § 93.27 during the first 90 days after assignment.

(c) Paragraph (a) of this section does not apply to Arrival Authorizations of U.S. or Canadian air carrier forced by a strike to cease operations using those Arrival Authorizations.

(d) Every U.S. and Canadian air carrier holding Arrival Authorizations shall forward in writing to the FAA Slot Administration Office in a format specified by the FAA a list of all Arrival Authorizations held by the Carrier along with a listing of the Arrival Authorizations actually operated for each day of the 2-month reporting period within 14 days after the last day of the 2-month reporting period beginning January 1 and every 2 months thereafter. The report shall identify for each assigned Arrival Authorization the withdrawal priority number and half-hour period, the flight number, 3-letter identifier of the operating Carrier used for air traffic control communications, scheduled time of operation, origin airport, and whether a scheduled arrival was actually operated by the Carrier on a specified day. The report shall identify any Common Ownership or control of, by, or with any other carrier. A senior official of the Carrier shall sign the report.

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

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

### § 93.32 Administrative provisions.

(a) The FAA will assign, by random lottery, withdrawal priority numbers for the recall priority of Arrival Authorizations at O'Hare. The lowest numbered Arrival Authorization will be the last withdrawn. Newly created Arrival Authorizations will be assigned a priority withdrawal number and that number will be higher than any other Arrival Authorization withdrawal number previously assigned. Each Arrival Authorization will be assigned a designation consisting of the applicable withdrawal priority number, and the 30-minute time period for the Arrival Authorization. The designation will also indicate, as appropriate, if the Arrival Authorization is daily or for certain days of the week only; and is a summer or winter Arrival Authorization.

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

### § 93.33 [Reserved]

Issued in Washington, DC, on August 21, 2006.

**Marion C. Blakey,**

*Administrator.*

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