

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Florence E. Harmon,
Deputy Secretary.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT-OST-2007-0022]

Denial of Airlines' Temporary Exemption Requests from DOT's Tarmac Delay Rules for JFK, EWR, LGA and PHL Operations

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: On March 30, 2010, the Department published a notice in the **Federal Register** seeking comment on separate requests by five airlines for a temporary exemption from a requirement that U.S. carriers adopt contingency plans for lengthy tarmac delays. These plans must include an assurance that a carrier will not permit an aircraft to remain on the tarmac for more than three hours in the case of domestic flights and for more than a set number of hours as determined by a carrier in the case of international flights without providing passengers an opportunity to deplane, with certain exceptions for safety, security, or Air Traffic Control (ATC) related reasons. The requests cover operations at John F. Kennedy International Airport (JFK), Newark Liberty International Airport (EWR), LaGuardia Airport (LGA), and Philadelphia International Airport (PHL). The carriers contend that without the requested exemption covering seven months in 2010 during which runway construction is expected to be underway at JFK, large numbers of flights will have to be canceled at the New York area airports and affected passengers will face significant inconveniences and delays before being re-accommodated. The Department received approximately 135 comments on these exemption requests, primarily from individual consumers. After fully considering the comments submitted, the Department is issuing this notice to announce its decision denying each of these exemption requests as not being in the public interest since the concerns raised by the carriers can be resolved through more careful flight scheduling. The notice also points out that if totally unexpected situations occur appropriate prosecutorial discretion can be applied

with respect to potential enforcement action.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

On December 30, 2009, the Department published a final rule titled "Enhancing Airline Passenger Protections" that sets forth numerous measures geared toward strengthening protections afforded to air travelers. 74 FR 68983. One of these provisions, which takes effect April 29, 2010, requires U.S. certificated and commuter air carriers that operate scheduled passenger service or public charter service using any aircraft with a design capacity of 30 or more passenger seats to adopt, implement, and adhere to contingency plans for lengthy tarmac delays at each large and medium hub U.S. airport at which they operate scheduled or public charter air service. For domestic flights, the rule requires covered U.S. carriers to provide assurance that they will not permit an aircraft to remain on the tarmac for more than three hours, with two safety/security and an ATC-related exceptions: (1) Where the pilot-in-command determines that an aircraft cannot leave its position on the tarmac to deplane passengers due to a safety-related or security-related reason (e.g. weather, a directive from an appropriate government agency); and (2) where ATC advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations. For international flights departing from or arriving at a U.S. airport, the rule requires covered U.S. carriers to provide assurance that the carriers will not permit an aircraft to remain on the tarmac for more than a set number of hours, as determined by the carriers, before deplaning passengers, with the same safety, security, and ATC exceptions. 14 CFR §§ 259.4(b)(1) and (b)(2). For all flights, carriers must provide adequate food and water no later than two hours after the aircraft leaves the gate (in the case of a departure) or touches down (in the case of an arrival) if the aircraft remains on the tarmac, unless the pilot-in-command

determines that safety or security requirements preclude such service. Carriers must also ensure that lavatory facilities are operable and medical attention is provided if needed while the aircraft remains on the tarmac. Pursuant to 49 U.S.C. 46301, violations of 14 CFR Part 259 subject a carrier to civil penalties of up to \$27,500 per violation.

On March 4, 2010, JetBlue requested an exemption from the requirements not to permit an aircraft to remain on the tarmac for more than three hours in the case of domestic flights and for more than a set number of hours as determined by a carrier in the case of international flights without providing passengers an opportunity to deplane for its JFK operations for the time period that operations at JFK are disrupted by the closure of the main runway at that airport, i.e., March 1 through December 1, 2010. JetBlue's request for an exemption during this period was followed by a similar request by Delta Air Lines for its JFK operations and a request by American Airlines that the Department grant an exemption for all carrier operations at JFK. Continental next requested that the Department extend any relief it grants carriers operating at JFK to carriers operating at the Newark and LaGuardia Airports. On March 22, 2010, US Airways also filed a request for a similar exemption for its operations at the Philadelphia Airport.

The carriers argue collectively that without the requested exemptions large numbers of flights will have to be canceled at the New York area airports and affected passengers will have to face significant inconveniences and delays before being re-accommodated. The basic rationale presented by Continental and US Airways in support of exemptions for their operations at Newark, LaGuardia and Philadelphia airports is that the delays and delay mitigation strategies at JFK resulting from the runway construction will affect the former airports by causing delays to spill over.

On March 30, 2010, the Department published a notice in the **Federal Register** seeking comment on whether it should act on the requests by JetBlue, Delta, American, Continental, and US Airways by means of one of the following four measures: (1) Deny each exemption request; (2) grant one or more of the exemption requests in their entirety; (3) grant a limited temporary exemption for operations at one or more of the airports by allowing the three hour limit to be raised to four hours during the two specific heavy construction periods (April 29 thru June 30, 2010, and September 16 thru

September 29, 2010) planned for JFK's Bay Runway; or (4) deny each exemption request, but direct the Aviation Enforcement Office to consider the runway closure and unexpected bad weather in deciding whether to pursue an enforcement case against a carrier for a lengthy tarmac delay incident that occurs at one or more of the airports. The comment period closed on April 9, 2010.

Comments Received

The Department received approximately 135 comments in response to the notice, primarily from individual consumers. Nearly all of the comments from individual consumers and advocacy organizations support denying the request. The comments from airlines, airline associations and airports are mixed—a few support giving priority or preferential treatment to exemption requests for operations at JFK while most assert that all carriers operating at JFK, LGA, EWR and possibly PHL should receive equal relief from the tarmac delay rule. The commenters' specific positions are set forth below.

In supplementary comments, JetBlue contends that unlike the requests made by Continental and US Airways, JetBlue's request is limited to operations at JFK, and is carefully limited to the time period that JFK operations will be disrupted by the Bay Runway reconstruction. JetBlue argues that Continental and US Airways have "chosen to try to jump on the bandwagon and bootstrap what they claim are related situations at LGA, EWR and PHL in an attempt to obtain relief" from the three hour rule. Continental states that the Department should focus its attention on the closure of the Bay Runway, and requests that the Department select Option 2, granting the requests of JetBlue, American and Delta in their entirety, and extending the same relief to all New York area airports (*i.e.*, JFK, LGA and EWR). Continental takes no position on whether relief should be extended to carriers at PHL.

JetBlue maintains that Options 3 and 4 do not go far enough in relieving carriers at JFK from potential unforeseen and unintended adverse circumstances. JetBlue states that it would not dismiss Option 4; however, it argues that Option 4 leaves carriers with uncertainty as to when and how the rule will be applied, and leaves the application of the rule to judgment after the fact.

JetBlue argues further that any exemption issued by the Department should apply to both domestic and international flights. JetBlue argues that

the three hour rule already exempts foreign air carriers, and that it is impractical for a carrier such as JetBlue to use different tarmac delay limits for its domestic and international flights. JetBlue argues that the only realistic way to put U.S. carriers on an equal footing with foreign air carriers is to exempt both domestic and international flights while the Bay Runway is closed.

American argues that while it does not oppose relief at other airports, such as EWR, LGA, and PHL, the Department's first priority should be to address the operational disruption that is widely anticipated will result from the runway closure and construction at JFK during the peak summer travel period into November. American states that at a minimum, the Department should grant a temporary exemption for operations at JFK by raising the three-hour limit to four hours for the period April 29, 2010, through November 15, 2010. In addition, American maintains that the Department should recommend to the Aviation Enforcement Office that it take into account the special circumstances at JFK as well as unexpected bad weather in deciding whether to pursue a case against a carrier for a lengthy tarmac delay incident at JFK.

In its supplemental comments, Continental continues to assert that all three New York metropolitan airports share airspace and arrival and departure corridors, and delays or delay mitigating strategies at JFK will adversely affect air carriers and passengers at EWR and LGA. Continental argues that the Department has long treated the New York/New Jersey airports as a single point, and states that if relief is granted to any carrier at any New York area airport, all carriers at all New York area airports should receive the same relief.

Similarly, US Airways continues to argue that the Philadelphia-New York City airspace is an intertwined web, with components that cannot be considered in isolation, and maintains that action at one airport creates ripple effects throughout the NY/NJ/PHL airspace. US Airways supports the grant of waivers to carriers operating at airports in the NY/NJ/PHL airspace, but argues that waivers must either be granted or denied to all carriers as a whole. US Airways argues that granting an exemption to only certain airports or carriers would be contrary to accepted existing practice, and would provide an unfair advantage to certain operators at the expense of others. US Airways maintains that fundamental fairness dictates that the Department treat all carriers equally and provide a level playing field, regardless of the

Department's decision to grant or deny the requested exemptions.

United Airlines (United) states that it takes no position on whether the Department should grant exemptions from the tarmac delay rule at any or all of the airports for which exemptions have been sought. However, United also urges the Department to extend the same relief, if any, to all carriers at a given airport, not just to carriers that have formal exemption requests pending. United argues that the problems caused by runway closures, particularly when combined with adverse weather conditions, will affect all carriers operating at an airport, including those operating a limited number of flights, and opposes any selective relief at any given airport. In addition, while United maintains that it also takes no position with regard to Option 4, it states that if the Department were to adopt this approach, such enforcement policy guidance should not be limited to the instant case, but made applicable to any future case where the temporary closures of any airport movement area, whether due to ongoing construction or other causes, could lead to or exacerbate airside congestion and delays in flight operations, especially during adverse weather conditions.

Spirit Airlines (Spirit) supports a blanket exemption from the tarmac delay rules for all carriers operating at JFK, LGA, and EWR. Spirit argues that requiring carriers to comply with the new rules during the closure and construction of the Bay Runway likely will exacerbate the already difficult situation at JFK by necessitating flight cancellation due to long taxi-out and taxi-in times caused by the construction, as well the possibility of flight crew exceeding legally permitted crew time and increased operational difficulties for airports. Spirit argues that it and other small carriers with few flights will face unique operational challenges because flight cancellations by such carriers will make it difficult for passengers to reach their destinations. Spirit maintains that, unlike legacy carriers that have many slots and can cut back schedules during peak construction periods, Spirit, with only a few flights, is not in a position to scale back service. Spirit argues that granting the requested relief will not encourage carriers to ignore the intent of the rules, but rather will provide flexibility to carriers in borderline delay situations in order to mitigate potential harm to consumers when facing extraordinary adverse conditions resulting from runway closure and construction. In addition, Spirit argues that Option 3 would not be an effective way to

alleviate the problems associated with the runway reconstruction, and argues that enforcement should not be left to the discretion of the Aviation Enforcement Office.

The Air Carrier Association of America (ACAA) asserts that all carriers operating at JFK, LGA, EWR, and PHL should receive equal relief from the tarmac delay rule. The ACAA argues that if the Department approves tarmac delay exemptions for carriers operating at these airports, it should waive the tarmac delay requirements for all carriers at JFK, LGA, EWR, and PHL and for all carriers at any other airport where an exemption from the tarmac delay rule is granted. In addition, ACAA suggests that the Department also look into the impact that significant delays at JFK, LGA, EWR, and PHL will have on other airports in the New York-Philadelphia area and on airports in other parts of the country.

The Port Authority supports Option 4, stating that the Department should deny the blanket requests and that the Aviation Enforcement Office should consider the runway closure together with the unexpected circumstances such as weather conditions that would preclude full use of the remaining JFK runways in deciding whether to pursue an enforcement case against a given carrier. The Port Authority states that because airline schedules have already been reduced and use-or-lose penalties for schedule reductions at JFK have been suspended by the FAA with the support of the Port Authority, important passenger protections should not be waived on a wholesale basis because of the Bay Runway reconstruction.

Comments were also submitted by the City of Philadelphia (Philadelphia), the owner and operator of PHL. Philadelphia agrees with Continental's comment that delays and delay mitigation strategies at one New York Area airport adversely affect and inconvenience air carriers and passengers at other New York Area airports. Philadelphia states that at certain times, the efficiency of aircraft operations at PHL is closely tied to that of those at EWR, JFK, and LGA. Philadelphia argues that exemption from the application of the tarmac delays rules for carriers at only one selected major airport within the New York Air Route Traffic Control Center (New York ARTCC) would be fundamentally unfair and provide a competitive and operational advantage for operations at those selected points. Philadelphia states that each of the airports are subjected to the same airspace, shared departure and arrival routes and common control by the New

York ARTCC, and their interdependence of operations dictates that they be treated in a similar and fair manner. Philadelphia states that it does not wish to opine on the four options proposed by the Department, but believes that equal treatment of airports and the carriers operating at these airports should be paramount in the Department's ultimate decision. Philadelphia argues that, should the Department grant the individual or collective requests of carriers for exemptions from the tarmac delays rules at JFK, EWR and LGA, fundamental fairness and the public interest dictate that carriers operating at PHL be similarly exempted.

Comments were also submitted to the Department by U.S. Senators Barbara Boxer and Olympia J. Snowe. In a joint submission, they argue that granting the requested exemptions is unnecessary and would undermine important consumer protections for the flying public. They further contend that the exemption requested by these airlines would render the rule ineffective and maintain an unacceptable status quo. They state that, while the requested exemption may appear to be targeted toward the closure of JFK's main runway, allowing an exemption would create a dangerous precedent. They reason that construction and other disruptions at airports frequently cause minor delays throughout America's airports, and that nothing exceptional or unexpected exists about this particular case that warrants a blanket exemption. They maintain that, in the ordinary course, airlines modify flight schedules to account for construction and other disruptions, and this time should be no different. They argue that it has been clear for a decade that airlines refuse to hold themselves accountable to the voluntary standards they agreed to and that Federal action to compel airlines to recognize passengers' rights is not only long overdue, but the only means available to ensure these rights are protected.

In additional comments, FlyersRights.org argues that the petitioning airlines are trying to nullify the three hour rule so they can continue to over-schedule flights at congested airports without risk of penalty. FlyersRights.org argues that the petitioning carriers are seeking regulatory relief from the consequences of their chronic over-scheduling of daily flights in excess of runway capacity. The organization states that when airport capacity is temporarily reduced due to runway construction, carrier schedules must be reduced and carriers must use larger aircraft to make up the

difference for the reduction in the frequency of flights. FlyersRights.org maintains that over-scheduling exists because the FAA has not required the airlines serving JFK to reduce their scheduled operations at that airport to avoid multi-hour departure delays before takeoff during the Bay Runway reconstruction period, and that a grant of the exemption requests would set a bad precedent. FlyersRights.org argues that the Department has existing regulatory authority to consider mitigating factors in deciding whether to pursue an enforcement case where a violation of the three hour rule exists, and to negotiate the amount of any civil penalty. Therefore, FlyersRights.org argues no exemptions should be granted.

Approximately 125 individuals submitted comments on the carriers' requests for exemption. All but two of these consumers oppose the carriers' requests for an exemption from the three hour tarmac delay rule. Many consumers who oppose the carriers' requests support the position taken by FlyersRights.org, and many argue that the government must step in to protect the public because airlines too often mistreat and take advantage of their customers. One commenter, who supports the carriers' request for an exemption, argues that management science supports not having the tarmac delay rule at all, and that the rule regarding fines for three hour tarmac delays may negatively impact the flying public. The commenter suggests that the Department revoke the option of imposing a fine from its final ruling.

Decision

After carefully taking into account all of the information available to us at this time and fully considering the comments we received, the Department finds that inadequate justification exists for granting JetBlue, Delta, American, Continental, and US Airways the requested exemption from the tarmac delay requirements in 14 CFR 259.4(b)(1) and (b)(2) for their operations at JFK, LGA, EWR, and PHL airports, during the period of time that work affecting JFK's Bay Runway is scheduled to take place, or until work on that runway is complete. In these exemption requests, it was incumbent on the petitioners to demonstrate that the requested actions are necessary and in the public interest. They have failed to meet this burden and we are not convinced that it is in the public interest to grant the carriers the requested exemptions from the requirements of 14 CFR 259.4(b)(1) and (b)(2).

JetBlue maintains in its petition and the other petitioning carriers appear to agree that granting relief from 14 CFR 259.4(b)(1) and (b)(2) is critical so that the purpose of the tarmac delay rule—enhancing passenger protections—is not undermined by unforeseen circumstances. JetBlue argues that a rigid and inflexible application of the rule will cause carriers to cancel flights rather than risk substantial penalties to the detriment of passengers who want to reach their destinations.

We find this argument flawed and unpersuasive. JetBlue's argument suggests that it would better serve the public interest to hobble the very protections that the tarmac delay rule affords consumers by permitting carriers to force passengers to remain on an aircraft for more than three hours (as opposed to giving consumers the option to deplane after three hours, or permitting them to choose some other form of transportation, or not to travel at all). We strongly disagree. We cannot lose sight of the fact that passengers on flights delayed on the tarmac have a right to know that they will not be "held hostage" for an unreasonable length of time on the tarmac.

It is also important to note that the Department's Federal Aviation Administration (FAA) predicts that the delays resulting from the runway closure at JFK will be workable, *i.e.*, similar to those seen during peak summer months. The FAA expects that flights can be rerouted or rescheduled in a way that will allow the other three runways to absorb the extra traffic. Airlines have already taken steps to adjust their schedules and operations to help mitigate the expected delays and they should further adjust them, if necessary. We believe that the concerns raised by the petitioning carriers can be resolved through further adjustment of schedules as appropriate, and that the public interest would be better served by keeping the full protections of the tarmac delay rule in place. In addition, we note that since 14 CFR 259.4(b)(2) permits U.S. carriers to establish any tarmac delay limit for their international flights that they choose, we believe there is no substantial reason to grant an exemption from this provision of the rule. Moreover, while in the event of a violation, as always, the Department's Aviation Enforcement Office will consider a number of factors including, for example, the harm to consumers caused by the violation and the specific impact of the runway closure in determining whether to pursue an enforcement case and the civil penalty it would seek in such an enforcement proceeding, it is incumbent on carriers

to adjust their schedules to reflect the reality of the runway construction. Therefore, based on the foregoing, we find that granting the requested exemption from the tarmac delay rule is not in the public interest, and we deny the requests of JetBlue, Delta, American, Continental, and US Airways, for an exemption from the requirements of 14 CFR 259.4(b)(1) and (b)(2) for their operations at JFK, LGA, EWR, and PHL airports, during the period of time that work affecting JFK's Runway 13R/31L is scheduled to take place, or until work on that runway is complete.

Issued this April 22, 2010, at Washington, DC.

Ray LaHood,

Secretary of Transportation.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT-OST-2010-0076]

Interim Notice of Funding Availability for the Department of Transportation's National Infrastructure Investments Under the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act for 2010; and Request for Comments

AGENCY: Office of the Secretary of Transportation, DOT.

ACTION: Interim notice of funding availability, request for comments.

SUMMARY: This interim notice announces the availability of funding and requests proposals for the Department of Transportation's National Infrastructure Investments. In addition, this interim notice announces selection criteria and pre-application and application requirements for the National Infrastructure Investments.

On December 16, 2009, the President signed the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act for 2010 (Div. A of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117, Dec. 16, 2009)) ("FY 2010 Appropriations Act"). The FY 2010 Appropriations Act appropriated \$600 million to be awarded by the Department of Transportation ("DOT") for National Infrastructure Investments. This appropriation is similar, but not identical to the appropriation for the Transportation Investment Generating Economic Recovery, or "TIGER Discretionary Grant", program authorized and implemented pursuant to the American Recovery and

Reinvestment Act of 2009 (the "Recovery Act"). Because of the similarity in program structure, DOT is referring to the grants for National Infrastructure Investments under the FY 2010 Appropriations Act as "TIGER II Discretionary Grants". As with the TIGER program, funds for the TIGER II program are to be awarded on a competitive basis for projects that will have a significant impact on the Nation, a metropolitan area or a region. Through this notice, DOT is soliciting applications for TIGER II Discretionary Grants. Because the TIGER II Discretionary Grant program is a new program, this interim notice requests comments on the proposed selection criteria and guidance for awarding funds. DOT will take all comments into consideration and may publish a supplemental notice revising some elements of this notice. If substantive changes to this notice are necessary, DOT will publish a supplemental **Federal Register** notice by no later than May 28, 2010. In the event that this solicitation does not result in the award and obligation of all available funds, DOT may decide to publish an additional solicitation(s). DOT is particularly interested in receiving comments on its intention to conduct a multi-agency evaluation and award process with the Department of Housing and Urban Development ("HUD") for DOT's TIGER II Planning Grants (as defined below in Section VII (TIGER II Planning Grants)), and HUD's Community Challenge Planning Grants, which were also authorized under the FY 2010 Appropriations Act. HUD is authorized to use \$40 million for "Community Challenge Planning Grants" to foster reform and reduce barriers to achieve affordable, economically vital, and sustainable communities. This multi-agency approach for planning awards would be consistent with DOT and HUD's participation in the "Partnership for Sustainable Communities" with the U.S. Environmental Protection Agency ("EPA") to help American families in all communities—rural, suburban and urban—gain better access to affordable housing, more transportation options, lower transportation costs, and a cleaner environment.

DOT and HUD believe there is great value in issuing a joint solicitation for the two planning grant programs in order to better align transportation, housing, economic development, and land use planning and to improve linkages between the three Partnership agencies' programs. DOT and HUD also believe this proposal has the potential to