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United States Government Accountability Office
Washington, DC 20548

B-317309

October 27, 2008

The Honorable Daniel K. Inouye
Chairman
The Honorable Kay Bailey Hutchison
Ranking Minority Member
Committee on Commerce, Science, and Transportation
United States Senate

The Honorable James L. Oberstar
Chairman
The Honorable John L. Mica
Ranking Minority Member
Committee on Transportation and Infrastructure
House of Representatives

Subject: *Department of Transportation, Federal Aviation Administration: Congestion Management Rule for LaGuardia Airport*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Transportation, Federal Aviation Administration (FAA), entitled “Congestion Management Rule for LaGuardia Airport” (RIN: 2120-AI70). We received the rule on October 9, 2008. It was published in the *Federal Register* as a final rule on October 10, 2008. 73 Fed. Reg. 60,574.

The final rule addresses congestion at LaGuardia Airport by grandfathering the majority of operations and auctioning off a limited number of slots. FAA plans to use the proceeds from the auctions to mitigate congestion and delay in the New York City area. The final rule also reduces the hourly cap on scheduled operations and contains provisions for use-or-lose, unscheduled operations, and withdrawal for operational need. The final rule has an effective date of December 9, 2008, and will sunset in 10 years.

Enclosed is our assessment of FAA’s compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Although our review indicates that FAA complied with the applicable procedural requirements, it is our position that FAA does not have the requisite statutory authority to promulgate this final rule. Specifically, on September 30, 2008, we issued an opinion in response to a request from Chairman Oberstar and others in

which we held that FAA currently lacks authority to auction arrival and departure slots, and thus also lacks authority to retain and use auction proceeds. B-316796, Sept. 30, 2008. We therein concluded that an FAA auction as outlined in the final rule would be without legal basis, and that if FAA conducted an auction and retained and used the proceeds, we would raise significant exceptions, under our account settlement authority, 31 U.S.C. § 3526, for violations of the “purpose statute,” 31 U.S.C. § 1301(a), and the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(A).¹

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer
Associate General Counsel

Enclosure

cc: Nancy Molitor
Program Analyst
Department of Transportation

¹ In addition, in August 2008, prior to the issuance of this final rule, FAA announced that it was planning to auction two specific slots at Newark on September 3, 2008. 73 Fed. Reg. 46,136 (Aug. 7, 2008). Multiple parties filed administrative and judicial litigation against FAA challenging the Newark auction as unlawful. *See, e.g., Air Transport Association v. FAA*, No. 08-1262 (D.C. Cir.) (filed Aug. 11, 2008), and *Consolidated Protests of Air Transport Association et al. of the Bid Solicitation and Conduct of Auction Process*, Docket No. 08-ODRA-00452 (filed Aug. 14, 2008).

ENCLOSURE

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION
ENTITLED
"CONGESTION MANAGEMENT RULE FOR
LAGUARDIA AIRPORT"
(RIN: 2120-AI70)

(i) Cost-benefit analysis

FAA concluded that the final rule “has benefits that justify its costs.” FAA states that the net present value benefits of the auction are \$65.4 million. While the total present value auction costs are \$24 million, the slot allocation benefits that offset these costs are \$89.3 million.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

FAA certified that the final rule will not have a significant impact on a substantial number of small entities under the Act.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

FAA concluded that the final rule will not impose any federal mandates under the Act on state, local, or tribal governments, or on the private sector of \$136.1 million in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The final rule was issued using the notice and comment procedures contained in 5 U.S.C. § 553. On April 16, 2008, FAA published a Notice of Proposed Amendment to Order and request for comments on reducing the number of unscheduled operations per hour at LaGuardia Airport. 73 Fed. Reg. 20,732. Subsequent to this Order, the FAA published a Supplemental Notice of Proposed Rulemaking in the *Federal Register* that withdrew certain proposals and instead proposed two options to allocate the limited capacity at LaGuardia. 73 Fed. Reg. 20,846 (Apr. 17, 2008). Under the second option, the FAA would not retire any slots, but would conduct an auction of 20 percent of the slots. The proceeds would go to the carrier holding the

slot after the FAA recouped the cost of the auction. FAA received 26 comments to the proposed rule. The majority of comments were consistent in rejecting the proposal. Many commenters said that the FAA had failed to demonstrate how the proposal would achieve any relief from congestion. Rather, according to the commenters, the proposed rule “would impose an untested and unproven auction process on airlines that would not address the fundamental airspace congestion issues in the New York metro area.” 73 Fed. Reg. 60,576. FAA responds to the comments in the final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The final rule contains new information collection requirements. As required by the Act, the FAA has submitted these information requirements to the Office of Management and Budget (OMB) for its review.

Statutory authorization for the rule

FAA cites 49 U.S.C. § 40103 as its authority to establish this rule. GAO disagrees with FAA’s assertion of its statutory authority, however, and so held in B-316796, Sept. 30, 2008.

Executive Order No. 12,866

FAA determined that the final rule is an “economically significant” regulatory action under the Order, and, therefore, OMB has reviewed this rule.

Executive Order No. 13,132 (Federalism)

FAA determined that the final rule will not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, and, therefore, would not have federalism implications.