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United States Government Accountability Office
Washington, DC 20548

B-317308

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 John F. Kennedy International Airport and Newark Liberty International 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 John F. Kennedy International Airport and Newark Liberty International Airport” (RIN: 2120-AJ28). 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. 60,544.

The final rule establishes procedures to address congestion in the New York City area by assigning slots at John F. Kennedy and Newark Liberty International Airports. The rule also extends the caps on the operations at the two airports, assigns to existing operators the majority of slots at the airports, and develops a secondary market by annually auctioning off a limited number of slots in each of the first 5 years of the rule. The rule states that auction proceeds will be used to mitigate congestion and delay in the New York City area. 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).

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
JOHN F. KENNEDY INTERNATIONAL AIRPORT AND
NEWARK LIBERTY INTERNATIONAL AIRPORT"
(RIN: 2120-AJ28)

(i) Cost-benefit analysis

FAA concluded that the final rule “has benefits that justify its costs.” FAA concluded that the estimated present value of net benefits of improved slot allocation by auctions is \$272 million at John F. Kennedy International Airport (JFK) and \$225 million at Newark Liberty International Airport (Newark) from 2009 to 2019. FAA states that the costs of the rule, with a present value of \$34 million at JFK and \$20 million at Newark, are due to the design, implementation, and participation in an auction of slots. FAA also estimates that, through the long-term implementation of a cap on aircraft operations, the final rule will result in about a 25-percent reduction in the average delay per operation at JFK relative to a situation with no cap; the net value of the savings in average delay attributable to the cap generates a present value net benefit of about \$1,629 million from 2009 to 2019. FAA also estimated that at Newark, the final rule will result in about a 23-percent reduction in the average delay per operation at Newark, relative to a situation with no cap; the net value of the savings in average delay attributable to the cap generates a present value net benefit of about \$634 million from 2009 to 2019.

(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 May 21, 2008, FAA published a Notice of Proposed Rulemaking in the *Federal Register*. 73 Fed. Reg. 29,626. FAA received 38 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. 60,546. 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 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.

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.