U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

October 7, 2008

Kerry B. Long
Chief Counsel
Federal Aviation Administration
800 Independence Avenue S.W.
Room 900E
Washington, D.C. 20591

Re: Whether the Federal Aviation Administration's Finalizing and Implementing of Slot Auction Regulations Would Violate the Anti-Deficiency Act.

Dear Mr. Long:

In an effort to reduce congestion and improve competition at several of the nation's busiest airports, the Federal Aviation Administration ("FAA") intends to issue regulations that would establish an auction scheme for allocating certain arrival and departure operating authorizations, or "slots," at New York LaGuardia, John F. Kennedy International, and Newark Liberty International airports. FAA has traditionally exercised regulatory authority over the issuance and allocation of such operating authorizations, and the new regulations will continue to allocate most slots to existing operators at these airports. The new regulations reflect the first time, however, that FAA will allocate some slots through a market-based auction.

You have asked whether FAA's finalizing and implementing the slot auction regulations would violate the Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341(a)(1)(A). This question arises because of a recent letter opinion from the Government Accountability Office ("GAO") that concludes that FAA lacks existing statutory authority to issue these rules, and that to do so would violate an existing appropriations restriction prohibiting FAA from spending appropriations on "new aviation user fees." *See* Letter for Hon. James L. Oberstar, Chairman, Committee on Transportation and Infrastructure, House of Representatives, from Gary L. Kepplinger, General Counsel, Government Accountability Office, *Re: Federal Aviation Administration—Authority to Auction Airport Arrival and Departure Slots and to Retain and Use Auction Proceeds*, B-316796 (Sept. 30, 2008) ("GAO Opinion").[1] On October 3, 2008, I informed you that this Office had informally concluded that FAA's finalizing and implementing the regulations would not violate the ADA, and this letter explains the basis for that conclusion.

[1] The GAO opinion also concludes that if FAA proceeds with the slot auctions, it would violate the "purpose statute," 31 U.S.C. § 1301(a), which provides that "[a]ppropriations shall be applied only to the objects for which appropriations were made except as otherwise provided by law." GAO Opinion at 16. The GAO opinion did not analyze the purpose statute separately from the ADA, however, and treated the violations as coextensive.

We understand that FAA has concluded that it has the statutory authority to auction available slots on the ground that the operating authorizations constitute a form of intangible property that may be leased pursuant to FAA's broad authority to regulate the use of navigable airspace under 49 U.S.C. § 40103(b), and pursuant to its leasing and other property management-related authority under 49 U.S.C. § 106(*l*)(6), (n) and 49 U.S.C. § 40110(a)(2). FAA's regulatory statements accompanying the final rules explain the basis for its conclusions in detail and address a number of comments that challenge this conclusion. The Department of Justice is defending FAA's legal conclusions in federal court litigation that has been brought in anticipation of FAA's finalizing the slot auction regulations. *See Air Transport Ass'n v. FAA*, No. 08-1262 (D.C. Cir.) (filed Aug. 11, 2008).

GAO appears to conclude that if FAA has the authority to issue the slot auction regulations under its regulatory and leasing authorities, then the slot auctions would not implicate the ADA. *See* GAO Opinion at 6-7. Indeed, GAO devotes the majority of its analysis to evaluating, and ultimately disagreeing with, FAA's interpretation of these authorities. According to GAO, because FAA may not rely on these authorities, the "only other arguable" source of authority FAA could rely upon is the Independent Offices Appropriations Act ("IOAA"), 31 U.S.C. § 9701, which permits federal agencies to impose user fees on regulated entities for the costs of government services. GAO Opinion at 12-13. GAO concludes, however, that FAA may not rely on IOAA because an appropriations rider prohibits expending FAA funds on the finalization or implementation of "new aviation user fees." Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. K, tit. I, 121 Stat. 1844, 2379 (2007). Therefore, if FAA were to proceed with an auction and retain and use the proceeds, GAO concludes that FAA's actions would violate the appropriations restriction and thus the ADA. *See* GAO Opinion at 14.

For the reasons explained below, we disagree with GAO's analysis of the ADA question. As a threshold matter, we note that GAO is a legislative entity, and while we have frequently looked to its opinions as persuasive authority, they are not binding on the Executive Branch. *See, e.g.*, *Miscellaneous Receipts Act Exception for Veterans' Health Care Recoveries*, 22 Op. O.L.C. 251, 254 n.7 (1998). We agree with GAO that FAA must have the statutory authority to issue the slot auction regulations, and that FAA may not engage in expenditures that would violate the appropriations restriction on "new aviation user fees." We disagree, however, with GAO's conclusion that if FAA cannot rely on its regulatory and leasing authorities to issue the slot auction regulations, then FAA would be obliged to violate its appropriations rider by relying on the IOAA. Rather, the question whether FAA may rely on these existing statutory authorities constitutes a logically separate question from whether FAA's actions would violate the specific terms of the appropriations rider, and it is only a violation of the appropriations rider that would implicate the ADA.

As discussed above, FAA has concluded that it has existing statutory authority to issue the slot auction regulations, and the Department of Justice is currently defending that conclusion in litigation. We do not believe, however, that the ADA question addressed by GAO turns on whether FAA's legal position ultimately succeeds in the federal courts. By its terms, the ADA prohibits "[a]n officer or employee of the United States Government" from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). Because the ADA prohibits

only spending in excess of an "appropriation," this Office recently concluded that an expenditure that is consistent with existing appropriations, but violates a statutory restriction separate from an appropriations law, does not violate the ADA. *See* Memorandum for the General Counsel, Environmental Protection Agency, from C. Kevin Marshall, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences* at 15 (Apr. 5, 2007) ("Light Refreshments Op."), *available at* http://www.usdoj.gov/olc/2007/epa-light-refreshments13.pdf. If an agency expenditure that violates a separate spending restriction does not violate the ADA, then an agency expenditure exceeding an agency's non-spending statutory authorities would not do so either. So long as the agency's expenditure is consistent with its available appropriations, then the agency does not "make or authorize an expenditure . . . exceeding an amount available in an appropriation or fund," even if a court ultimately concludes that the agency's actions exceeded the scope of its existing statutory authorities. Indeed, were it otherwise, an agency would be found to violate the ADA each and every time a court found, after a challenge under the Administrative Procedure Act, that its actions were contrary to, or in excess of, its existing statutory authority. Neither the Executive Branch nor, to our knowledge, the Comptroller General has ever embraced such a conclusion.

Although we do not believe that the ADA question turns upon the correctness of FAA's understanding of its statutory authority, we do agree with GAO that it would violate the ADA for FAA to engage in expenditures in violation of a condition set forth in the appropriations rider. *See* Light Refreshments Op. at 10 (recognizing that "to violate a 'condition' or 'internal cap' in an appropriation would be to 'make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation'"); Memorandum for Stephen R. Colgate, Assistant Attorney General for Administration, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation* at 4-5 (Jan. 19, 2001) (same). Therefore, wholly apart from FAA's statutory authority to issue the slot auction regulations, we must consider whether such regulations would be consistent with the restrictions set forth in the governing appropriations law.

The appropriations rider at issue provides that "none of the funds in this Act shall be available for the Federal Aviation Administration to finalize or implement any regulation that would promulgate new aviation user fees not specifically authorized by law after the date of the enactment of this Act." Consolidated Appropriations Act, 2008, 121 Stat. at 2379. The GAO Opinion notes that Congress has included a version of this rider in FAA's appropriations for every year since FY 1998 and that according to the legislative history, Congress sought to prevent FAA from "establish[ing] new user fees under the generic authority provided in the User Fee Statute," because of "serious concerns about the impact of user fees" on regulated parties and on Congress's ability "to annually set programmatic spending levels and oversee the agency's spending habits." GAO Opinion at 13-14 (quoting appropriations committee and conference reports).

The question then is whether FAA's slot auction regulations, and its implementation of those regulations, would amount to "new aviation user fees" under the appropriations rider. The term "user fee" has a well-established meaning under the law, referring to a fee charged by the

government that is set at least in part on the basis of "costs to the government," 31 U.S.C. § 9701(b)(2)(A), and that generally is calibrated to recoup the cost of services provided to the user; user fees ensure that "those who specifically benefit from [the government's] services pay the cost" of those services. *Massachusetts v. United States*, 435 U.S. 444, 462-63 (1978); *see also United States v. Sperry Corp.*, 493 U.S. 52, 60-61 (1989); *Seafarers Int'l Union v. United States Coast Guard*, 81 F.3d 179, 182-83 (D.C. Cir. 1996). IOAA similarly expresses the "sense of Congress" that the purpose of a "user fee" is to permit a government agency, to the extent possible, to be "self-sustaining" in its provision of services. *See* 31 U.S.C. § 9701(a). Thus, "the measure of [user] fees is the cost to the government of providing the service, not the intrinsic value of the service to the recipient." *Seafarers Int'l Union*, 81 F.3d at 185.

Although a carrier placing a winning bid for the right to use a particular slot will, in one sense, pay a "fee" for the right to "use" the slot, we do not believe that the FAA's slot auction scheme meets the established legal definition of a "user fee." Under its slot auction regulations, FAA does not propose to impose a specific fee or any other direct charge on all air carriers making use of the New York-area airports in question. Indeed, most of the slots will continue to be allocated to existing operators without charge. FAA proposes, however, to auction off, as leaseholds, a limited number of available slots at those airports to those carriers that will make the highest and best use of them. FAA will not be setting the price for these slots based on the costs to FAA or to any other government agency of providing any services (such as air traffic control) incident to the carriers' use of those slots. Rather, FAA will be auctioning each available slot to the highest bidder, setting a price based solely on what the market will bear. FAA's aim in implementing the slot auction scheme is not to make FAA's provision of any particular services "self-sustaining" but instead to allocate efficiently available slots so as to improve competition and reduce congestion at several of the nation's busiest airports.

The legislative history underlying Congress's enactment of the appropriations rider reinforces the conclusion that the slot auction regulations are not "new aviation user fees" as Congress understood that term. As GAO recognizes, the legislative history indicates that the appropriations rider was first enacted to prevent FAA from "establish[ing] new user fees *under the generic authority provided in the User Fee Statute*." GAO Opinion at 13 (emphasis added). Consistent with GAO's understanding of that purpose, FAA has expressly disclaimed any reliance in issuing the slot auction regulations on its "user fee" authority under the "User Fee Statute" (i.e., IOAA), and accordingly, could not appeal to that statute in defending the regulations in court, even if the slot auctions otherwise met IOAA's requirements. *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). FAA's finalizing and implementing the regulations thus is entirely consistent with the appropriations rider insofar as FAA has specifically declined to invoke the "user fee" authority that might otherwise have been available.[2]

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[2] As discussed above, GAO concluded that the slot auction regulations would constitute new user fees in part because it found that FAA, lacking alternative sources of authority, would be obliged to appeal to its authority under IOAA. *See* GAO Opinion at 12-13. As a general matter, we do not believe that the presence or absence of FAA's authority under other statutory provisions should have any bearing on whether the slot auction regulations constitute "new aviation user fees" under the statute. Because the appropriations rider would permit "new aviation user fees" if "specifically authorized by law," however, FAA's alternative statutory authority could be relevant if FAA were to interpret its regulatory and leasing authorities as specifically authorizing the slot auction rules as newly imposed aviation user fees. As discussed, FAA does not seek to justify the slot auction rules as imposing "user fees," however, and we agree with that conclusion.

The GAO Opinion also suggests that FAA would violate the ADA not simply by expending funds in finalizing and implementing the auction rules, but also "if FAA retained and used the proceeds" from the auction. GAO Opinion at 16. The ADA governs only the expenditure or obligation of appropriated funds. Whether FAA may retain funds received from the auction thus would be governed by other statutory provisions, namely the Miscellaneous Receipts Act, 31 U.S.C. § 3302, as well as FAA's authority to retain any "fees and [other] amounts collected" in the course of its regulatory activities. *See* 49 U.S.C. § 45303(c) ("Notwithstanding section 3302 of title 31, all fees and amounts collected by the Administration, except insurance premiums and other fees charged for the provision of insurance and deposited in the Aviation Insurance Revolving Fund . . . shall be credited to a separate account established in the Treasury and made available for Administration activities . . . .").[3] The ADA, of course, would govern the future expenditure of FAA funds, if retained pursuant to section 45303(c), but the propriety of such expenditures would depend on the circumstances surrounding them, rather than whether they were obtained as the proceeds of the slot auction program.

For the reasons explained, we conclude that FAA would not violate the ADA by issuing and implementing the slot auction regulations. Please let us know if we can by of further assistance.

Sincerely,

Steven A. Engel
Deputy Assistant Attorney General

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[3] The GAO opinion references "unresolved legal questions" raised by the Department of Justice with respect to FAA's 1980 proposal to assign slots through an auction mechanism. *See* GAO Opinion at 4-5. These questions, and FAA's own concerns, appear to have been based on the fact that FAA did not at the time have statutory authority to retain the auction proceeds. *See* High Density Traffic Airports; Slot Allocation and Transfer Methods, 50 Fed. Reg. 52,180, 52,183 (Dec. 20, 1985) ("The auction mechanism was not proposed . . . because legislation would be required for the collection and disposition of the proceeds."). Section 45303 of title 49, which the current FAA proposal relies upon as the basis for retention of auction proceeds, postdates FAA's earlier auction proposal. *See* Pub. L. No. 104-264, § 276(a)(2), 110 Stat. 3213, 3247 (1996). It appears, moreover, that DOJ otherwise supported FAA's efforts in 1980 to implement a market-based mechanism for allocating airport slots. *See* Special Air Traffic Rules and Airport Traffic Patterns, 45 Fed. Reg. 71,236, 71,241-42 (proposed Oct. 27, 1980) ("[T]he Department of Justice recommends development of a market based system for allocating slots.").