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MEMORANDUM FOR THE RECORD

Meeting of Aviation Assembly Representatives with Federal Aviation Administration and Department of State Officials on the Interim Final Rule Establishing "Overflight" Fees

This meeting was held at 10 am on Wednesday, February 16, 2000, in room 8B of the FAA Headquarters Building. Participants were as follows:

Federal Aviation Administration

Mr. David Traynham	Assistant Administrator for Policy, Planning & International Aviation
Ms. Donna McLean	Assistant Administrator for Financial Services & Chief Financial Officer
Mr. Randall Fiertz	Manager, Overflight Fee Project
Dr. Woody Davis	Attorney-Advisor

Department of State

Ms. Susan Bennett	Office of Transportation Policy
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Aviation Assembly

Transportation Attaches from Eleven Embassies and the European Commission:

Mrs. Marie-Ange Katzeff	Belgium
Mrs. Mary Stamp	Canada
Mr. Jean-Michel Bour	France
Dr. Karin Kammann-Klippstein	Germany
Mr. Pantelis Gassios	Greece
Mr. Kee-Poong Park	Korea
Mr. Benedict Eybergen	The Netherlands
Mrs. Susan Paki	New Zealand
Mrs. Monica Kjollerstrom	Portugal
Mr. Marc Wey	Switzerland
Mr. Simon Knight	United Kingdom
Mr. Anders Jessen	European Commission

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CHIEF COUNSEL
RULES DIVISION

SUMMARY

Ms. Donna McLean began the meeting by reviewing the history of FAA's efforts to implement Overflight Fees. She noted that the Court of Appeals for the District of Columbia determined in January 1998 that the approach taken by FAA to allocate fixed and common costs among users was value-based and therefore in violation of the governing statute. The IFR was set aside by the Court, all billing of fees was immediately suspended, and the nearly \$40 Million that had then been collected by the FAA was refunded.

Ms. McLean noted that the legal requirement to establish Overflight Fees by the Interim Final Rule (IFR) process remained in effect. She explained that, since the FAA was already developing a new Cost Accounting System (CAS) for management purposes, FAA Management decided in the Spring of 1998 that it would derive its future Overflight Fees from its CAS data.

Ms. Mclean also noted that the Inspector General (IG) of the Department of Transportation had recently conducted an in-depth review of the cost and flight data being used by the FAA to derive the Overflight Fees. She noted that the IG issued an audit report that recommended FY 1999 cost data be used to derive the new Overflight Fees, and that FAA is now awaiting validated CAS data for FY 1999 (expected in March 2000) before publishing the IFR.

Dr. Karin Kammann-Klippstein asked why the FAA was planning to establish the fees with no prior consultation with the foreign governments. She said it had been their understanding that the FAA would definitely consult with the governments before any new schedule of Overflight Fees would be published. This general point of view was echoed and reiterated by several other Assembly members.

Dr. Woody Davis stated that the U.S. was precluded from doing the type of advance consultation they sought on the Overflight Fees because of the specific statutory direction to publish an Interim Final Rule, the process for which does not allow prior consultation in the traditional fashion. The Assembly members questioned how the U.S. could enter into bilateral agreements with foreign countries that require advance consultation on fees if such consultation is in conflict with U.S. law. Dr. Davis noted that the bilateral agreements pre-date the 1996 statute and that the IFR process does provide an opportunity to comment

before publication of a Final Rule. He said the U.S. believes that the process does accomplish the requirement for consultation, just on different terms than the more customary approach sought by the Assembly members.

Mr. David Traynham noted that the treaty obligations that were being cited usually apply in a non-regulatory environment. The Overflight Fees, however, constitute a Rulemaking specifically driven by the 1996 statute, and the terms of that statute requiring the IFR process do not permit the advance consultation desired by the Assembly members. Both Traynham and Ms. Susan Bennett, Department of State, expressed their view that the IFR process being followed by FAA, while different, still provides an ample (120-day) period for public comment, plus a requirement that all comments received be thoroughly and substantively addressed before any Final Rule can be issued. This, in effect, accomplishes the purposes of consultation. Dr. Davis reiterated that it could be years before the Final Rule would be issued, and that all comments would be addressed in the Final Rule.

Mr. Jean-Michel Bour noted that the IG audit report on flight and cost data included two recommendations that were being addressed over a longer time period, and that the recommendations would not be fully addressed until about June 2000 or later. Ms. Mclean replied that fees can be based on "best available data" and that there is no legal requirement to wait until every IG recommendation has been fully complied with before establishing fees. If the data so indicate, then the fees can be revised in the Final Rule.

Dr. Kammann-Klippstein stated that it was hard to understand why their comments and concerns could not have been heard earlier. Mr. Traynham explained that the public comment period being offered under the IFR process would achieve the purposes of consultation. He said the real test of whether meaningful consultation had been conducted was whether there was a realistic possibility that the proposed fees could be changed as a result of the public comments received. He stated that the answer to that question was clearly "Yes."

In response to more comment on the failure of the U.S. to engage in consultations on the fees over the past few years, Dr. Davis explained that the FAA has been in a rulemaking process on these fees from the moment the 1996 statute mandating the fees was enacted. The only consultation that FAA could have engaged in would have to have been prior to the 1996 law. Since enactment of that law, FAA has been precluded from any of the traditional

type of international consultation as Congress had determined how the FAA was to proceed in establishing these fees. Dr. Davis indicated that the January 1998 Court of Appeals decision addressed that point.

Finally, Mr. Bour commented that 60 days was an insufficient period of advance notice before the effective date of the fees. Mr. Randy Fiertz pointed out that this was exactly the same timing given by the FAA under the previous IFR. Mr. Fiertz also noted that there would be a significant amount of explanatory information released by the FAA at the time the fees are announced, and that everything done to derive the fees will be very apparent. He noted further that a public meeting would be held, as was done in the first rulemaking, approximately five or six weeks after publication of the IFR.

The meeting was adjourned at 11:15 am.

David A. Lawhead