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Air Transport Association of America

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Submitted via Internet

Docket Management System
U.S. Department of Transportation
Room PL 401
400 Seventh Street, SW
Washington, DC 20590-0001

Re: Docket No. FAA-1999-6622 (Notice No. 99-20) - 26

Dear Sir or Madam:

The Air Transport Association of America (ATA) submits these comments in response to the proposed revision to the FAA's general rulemaking procedures. 64 Fed. Reg. 69856, December 14, 1999 (the "NPRM" or "Proposed Rule").

ATA is the principal trade association for major and national U.S. airlines,¹ both passenger and cargo. On behalf of its members, ATA frequently participates in FAA rulemaking proceedings. For this reason, ATA has a keen interest in ensuring that the NPRM results in rulemaking procedures that are fair, reasonable and readily understood.

ATA supports the FAA's effort to simplify and streamline its regulations by adopting a "plain language" format. As a general matter, we believe that moving away from the traditional, prescriptive regulatory format will benefit all parties active in the administrative process at the FAA, as well as the general public, by making the regulations easier to understand. The question and answer format adopted for this particular NPRM seems to work well for this subject matter. However, this format may not work as well for more technically-oriented subjects, and we

¹ Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and USAirways. Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

recommend that the agency explore other plain language approaches in the future.

We disagree very strongly with one substantive change the Proposed Rule would make. The NPRM proposes to eliminate existing § 11.65(f), which expressly provides for informal discussions with FAA officials concerning a proposed rulemaking action. The preamble states that such contacts are “contrary to DOT ex-parte policy, which prohibits non-public contacts . . . once an NPRM has been issued.” (NPRM at 69857). The NPRM does not provide a citation to this policy. In place of § 11.65, the NPRM states it will hold open public meetings where discussion is appropriate.

FAA misreads the DOT policy, found in DOT Order 2100.2. DOT policy does not prohibit ex-parte contacts after a rulemaking has been issued, and the NPRM is incorrect when it makes this assertion. In fact, DOT policy contemplates informal public contacts after proposed rules have been issued, but before the comment period has closed, recognizing that such contacts may be “helpful in the resolution of questions of substance and justification . . .” See DOT Order 2100.2 (May 5, 1970). Indeed, Order 2100.2 recommends that officials responsible for rulemaking action “should be receptive” to appropriate contacts from interested parties.²

Order 2100.2 articulates sound legal and policy guidance. Neither the Administrative Procedure Act nor any other applicable statute mandates the FAA’s proposed prohibition. This is so because an arbitrary rule completely cutting off the agency from informal contacts could very well hinder the rulemaking process and prevent the agency from receiving important information. Likewise, it could prevent the public from having an opportunity to better understand the FAA’s information base and/or rationale for proposed action. Indeed, a strict prohibition such as the one proposed raises serious First Amendment free speech concerns.

Furthermore, the public meeting alternative is not realistic. The FAA has extremely limited resources and could not possibly convene public meetings in even a small portion of its rulemakings in order to accommodate the desire of interested parties to communicate information to the agency. To be sure, it is not desirable for the agency to have ex parte contacts on a regular basis regarding a rule proposal. However, the ability of interested parties to meet informally with agency officials from time to time is an important aspect of the rulemaking process and, when employed judiciously, can be very beneficial to the agency and all interested parties. DOT’s policy of placing a record of such meetings in the public docket ensures that all interested parties are aware of the contacts and are provided an opportunity to offer differing viewpoints. Notably, the NPRM contains no suggestion that this long-standing process has been abused or has caused problems in specific rulemakings.

For these reasons, we urge the FAA to reinstate existing § 11.65(f) in the final rule.

² Order 2100.2 correctly discourages non-public contacts once the comment period has closed. As DOT notes, such conduct may subject the rulemaking action to attack in court.

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In addition to the above, indeed related to the above issue of full notice to the public of the agency's rulemaking activities, ATA urges the FAA to widen its use of the electronic Docket Management System (DMS). Specifically, we recommend that FAA begin placing all exemption applications, orders and related documents into the DMS so that these documents can be obtained electronically over the internet, including the bases for granting or denying applications, and any conditions imposed by the FAA on exemption grants. If this cannot be effected through the DMS, then the FAA should make its internal electronic exemption record system available to the public via the internet. This could be done directly by the FAA or in conjunction with a third party.

Likewise, FAA should make every effort to use the internet to make all rulemaking documents and submissions available to the public.

Thank you for consideration of these views. I would be happy to answer any questions regarding these comments.

Very truly yours,

Air Transport Association of America, Inc.

/s/

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