BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.

In the matter of	:	
	:	
REVIEW OF EXISTING REGULATIONS	:	**FAA Docket 2004-17168**

COMMENTS OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Federal Aviation Administration has asked the public to identify regulations that the agency should amend, remove or simplify. 69 Fed. Reg. 8575 (Feb. 25, 2004). This request is part of the FAA's effort to make its regulations more effective and less burdensome. This is a timely request. The dire economic condition of the U.S. airline industry underscores the need to eliminate unjustified regulatory burdens. Widespread, meaningful regulatory reform will be an indispensable element in to returning U.S. airlines to financial health.[1]

Airlines today are experiencing enormous economic adversity. The U.S. airline industry suffered a net loss of $3.6-billion in 2003. Although traffic has been improving recently, the industry's financial prospects for 2004 are becoming bleaker because of surging energy costs. U.S. airlines annually consume nearly 18-billion gallons of fuel. Every dollar increase in the cost of crude oil results in a $425-million annual increase in U.S. airline industry fuel costs. Last May, the price of crude oil was roughly $28 per

[1] ATA is the principal trade and service organization of the U.S. scheduled airline industry. The members of the Association are: ABX Air, Inc, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, ASTAR Air Cargo, ATA Airlines, Atlas Air, Continental Airlines, Delta Air Lines, Evergreen International Airlines, Federal Express Corp., Hawaiian Airlines, JetBlue Airways, Menlo Worldwide Forwarding (formerly Emery Worldwide), Midwest Airlines, Northwest Airlines, Polar Air Cargo, Southwest Airlines, United Airlines, United Parcel Service, and US Airways. ATA's associate members are: Aerovías de México, Air Canada, Air Jamaica, and Mexicana de Aviación.

barrel; today it is near $41 per barrel. In this unrelentingly hostile economic environment, U.S. airlines cannot continue to bear unnecessary costs—whatever their source.

Regulatory burdens upon the airline industry have long been recognized, as has their impact. The FAA has estimated that "the annualized cumulative costs of all regulations imposed since 1983 is over $1.3 billion of which about $0.3 billion are the result of specific Congressional mandates...." FAA, Rethinking Regulation: Right Tools for the Task? White Paper APO-WP/2003-02 (Sept. 30, 2003) at 1. The National Commission to Ensure a Strong Competitive Airline Industry noted over a decade ago that "Federal regulations impose a massive cumulative burden on airlines." National Commission to Ensure a Strong Competitive Airline Industry, Change, Challenge and Competition: A Report to Congress at 10 (1993). That succinct but dispiriting assessment remains accurate today. Its clear implication is that we must not only remove unneeded *existing* rules from the Federal Aviation Regulations but we must also renew our efforts to assure that an exacting regulatory evaluation process exists to prevent such rules from being promulgated *in the first place*.

I

Attached is a compilation of those FAA regulations that our members have recommended be revised or eliminated because they impose unnecessary regulatory burdens, have outlived their usefulness or duplicate or conflict with other regulations. Unnecessary burden is often the result of a regulation not providing a clear, concise method for the operator to comply with it (and, conversely, for the FAA to determine compliance with the regulatory requirement).

The recommendations describe the regulation, its shortcomings, the suggested regulatory action to remedy those shortcomings, and the anticipated benefits of remedial action. Although the notice requested that commenters limit their recommendations to three regulations, we have identified more than three regulations because this submission is on behalf of all of our members.

II

The FAA's initiation of another review of its existing regulations is a concrete indication of the agency's ongoing commitment to regulatory reform. As the notice observes, this review is the latest in a series of FAA regulatory review initiatives that goes back to the early 1990s. Id.

Periodic reevaluations of existing regulations are important and useful undertakings. Static regulatory policies may provide an illusory sense of comfort but they do not advance civil aviation safety. Experience provides a reliable foundation upon which to evaluate the efficacy of existing regulations. Technological innovations, and the ensuing changes that they generate, are also necessary bases to evaluate existing regulations. Recognizing that circumstances change and acting upon that realization in no way jeopardizes the continued advance of safety in the U.S. airline industry. Thus, the fact that a regulation exists does not mean that it must continue to exist in its present form.

The commitment to reexamine periodically existing regulations, however, is only one element of a responsive regulatory program. There are two other indispensable components of such a program.

First, before a new regulatory review is undertaken, a thorough analysis of what was accomplished in the previous review should be performed. Regulatory reviews should not be regarded as isolated or episodic events; instead, they should be considered to be an integral part of an ongoing regulatory reform process. That process must be measured to determine its effectiveness. This means that the results of previous reviews need to be gathered, evaluated and disseminated to the public. That assessment of performance should be the basis of any subsequent regulatory review. The current review does not appear to have had the benefit of such an assessment.

Second, renewed attention must be given to the development of rules. There must be a rigorous evaluation of the need and impact of every proposed regulation. Rehabilitating or eliminating a flawed regulation after it has been issued is very inefficient for all concerned. The more effective approach is to prevent unjustified regulatory proposals from becoming rules.

Regulatory inefficiencies, including the distortions that unneeded regulations create, greatly burden the regulated community. This is not an abstract point. Airlines are under extraordinary financial and competitive pressures. The limited resources of regulated entities must be devoted to regulatory efforts that generate the most benefits, most efficiently.

In an industry as competitive as ours, unwarranted regulatory costs loom large and the limitation on our inability to recoup them is of decisive significance. The costs of unnecessary regulatory mandates cannot be automatically passed on to airline consumers. Market forces—not cost recoupment notions—determine the prices that airlines can charge. Passengers and shippers have repeatedly demonstrated their deeply rooted

aversion to increased fares and rates; they demand low prices. In this unforgiving pricing environment, consequently, airlines are left to bear the expense of unjustified regulatory costs. Whether a regulatory requirement is justified or unjustified, therefore, it is an unfunded demand on the regulated community.

III

The most effective way to avoid unnecessary regulatory costs is to prevent the introduction of inadequately justified regulations. This means that the various facets of a proposed regulatory initiative must be carefully evaluated before it can proceed to issuance as a final rule.

Rigorous evaluations of regulatory initiatives require disciplined but adaptable processes at the FAA that will allow the agency to formulate regulatory policies that respond to the most significant aviation safety and operational needs, and in doing so clearly meet demanding cost-benefit analysis standards. The abysmal economic state of the airline industry, the predicted growth of airline traffic in the coming decade, and the increasing technical complexity of air carrier equipment and operations will expose the regulated community to potentially enormous new costs unless regulatory discipline is a central, ongoing goal.

The airline industry has been involved in the previous FAA regulatory review efforts that the notice mentions. Although improvements have emerged from them, the overall success of those efforts has been mixed. The regulated community still needs the benefits of a leaner, more consistent and cost-benefit-oriented regulatory system.

This was the message of the Congressionally-established FAA Management Advisory Committee in its June 2001 Recommendations on Rulemaking. In that report,

the MAC concluded that

> "The FAA's ability to keep up with the increasing demand for air transportation and take advantage of the rapid development of new technologies is being compromised by the inefficiency and lack of credibility of the regulatory/rulemaking process. Unless remedied, these difficulties will erode the safety, security and efficiency of the aviation system. In addition, the United States' global leadership position in aviation will be further diminished."

Recommendations on Rulemaking at 3. The MAC also offered in its report six recommendations concerning cost-benefit analyses, rulemaking proceedings, airworthiness directives and advisory circulars, Aviation Rulemaking Advisory Committees, *ex parte* communications, and FAA/aviation community expertise. Id. at 5-7. The MAC's recommendations, which were developed after discussions with government agencies, the regulated community, and public interest groups, are important starting points in assessing how best to formulate regulatory policies at the agency in the future. As a performance-based organization, this is a matter of considerable importance to the FAA.

The environments in which air carriers operate and the FAA regulates can change quickly and are subject to resource limitations. For those reasons, prognostications about the exact nature and extent of regulatory needs that in the long term will emerge in our industry are risky. Furthermore, the current economic distress of the industry means that airlines are concentrating on using existing resources as efficiently as possible rather than embarking on significant new capital commitments. A regulatory approach that disproportionately relied on projected long-term developments, therefore, could result in

a misalignment of resources that frustrated, rather than enabled, needed immediate system and capacity improvements.

A

In light of these considerations, we believe that the FAA should undertake regulatory, certification, and enforcement actions based upon the following considerations:

- Developing a clear, concise definition of the problem, which where appropriate includes a thorough risk assessment.
- Ranking the problem among competing safety, operational or capacity needs. That ranking should determine the order in which an issue is considered and resources are devoted to it.
- Determining the optimum administrative process to be used to solve the particular problem.
- When practicable, use of informal problem solving efforts rather than highly structured programs. This suggestion may require the FAA to reexamine, as the MAC suggested, its *ex parte* communication policies and its application of the Federal Advisory Committee Act.
- Willingness to delegate responsibility based upon the capability of the delegatee.
- Rigorous cost-benefit analysis of any proposed regulatory initiative. A thorough cost-benefit analysis must be an integral element of a decision to undertake any regulatory action.
- Thorough examination of voluntary alternatives to a proposed regulatory initiative.

The foregoing approach will require more responsive and collaborative

relationships among the agency, air carriers, manufacturers, and public interest groups. This collaborative framework is not intended to usurp the FAA's role as the regulator of air carrier safety. The airline industry does not want that statutory mandate to be compromised. The methods by which that mandate is discharged, however, need to be considered carefully for their efficacy and economy.

To be effective, the approach described above, at a minimum should be undertaken according to the following schema:

1. Restricting the number of regulatory proceedings. The number of regulatory proceedings should be restricted to a level that enables the FAA, the commercial aviation industry and the public to concentrate their limited resources on initiatives that are demonstrably necessary to improve aviation safety, operational efficiency or capacity, and which can meet stringent cost-benefit tests. Such a scaling back of regulatory activity should also result in quicker completion of those proceedings that are commenced.

2. Reliance upon smaller, more flexible FAA-industry working groups to respond to regulatory issues. Smaller working groups of agency, and operator and manufacturer representatives should be used to develop regulatory recommendations (i.e., pre-rulemaking stage proposals). Reliance upon groups which are small enough to be flexible and prompt in completing their assignments should improve responsiveness to regulatory issues. The effect of such an approach upon advisory committees would have to be evaluated.

3. Enforcement. Enforcement activities should have the twin objectives of identifying those areas in which a regulated entity may need to improve its compliance

with regulatory requirements and the agency may need to modify its regulatory programs. Thus, an enforcement program must be informative; it cannot merely be a scorecard. It should enable both the regulator and the regulated party to assess regulatory programs in terms of performance and continuing relevance.

B

The notice specifically requests suggestions about the development of rules as performance-based rather than prescriptive measures. As a general matter, the ATA and its member airlines prefer and strongly support the performance-based rulemaking approach. However, regardless of the approach used, in cases where a new product must be delivered to carriers before they can comply with a rule, one or more compliant products should be available for delivery, or sufficiently mature in design, certification, and production approval, before publishing a proposal that would require incorporation of the product into a regulatory requirement. Otherwise, carriers often will not have accurate or reliable information on which to base meaningful comments about the effectiveness, benefits, impact, or feasibility of the proposal, or offering practical alternatives. If a rule is proposed before a compliant product is certificated for production and use, there is a risk that the rulemaking will proceed based on the preliminary, and often optimistic, estimates of prospective developers and manufacturers. This situation sets the stage for cost, schedule, and effectiveness risks to be absorbed by the carriers, and for the rule to, in effect, become prescriptive (i.e., a prescription to install the first available product).

IV

The FAA deserves to be complimented for initiating this regulatory review. In

addition, however, we urge all interested parties—including the agency—to continue to work to improve the regulatory process. Success in regulatory reform will diminish the future need for these periodic reviews.

Respectfully submitted,

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May 25, 2004