

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****Notice of FAA Final Order Directing the Disposition of Certain Overflight Fees Collected by the FAA**

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of FAA Final Order Directing the Disposition of Certain Overflight Fees Collected by the FAA.

SUMMARY: The FAA is publishing a Final Order issued on July 21, 2004 disposing of certain overflight fees collected by the FAA pursuant to 49 U.S.C. 45301.

SUPPLEMENTARY INFORMATION: The FAA issued a Final Order on July 21, 2004 disposing of certain overflight fees collected by the FAA pursuant to 49 U.S.C. 45301. The Order addresses the manner in which provisions of the recently enacted Vision 100—Century of Aviation Reauthorization Act, Public Law 108–176, affecting overflight fees will be implemented and how overflight fees previously collected shall be treated by the FAA. The final Order follows this notice.

Michael Chase,

Regulations Division, Office of the Chief Counsel.

Overflight Fees

Order Directing the Disposition of Certain Fees Collected by the Federal Aviation Administration Pursuant to 49 U.S.C. Section 45301.

I. Summary

The Federal Aviation Reauthorization Act of 1996 directed the Federal Aviation Administration (FAA) to establish a fee schedule and collection process for air traffic control and related services provided to aircraft, other than military and civilian aircraft of the U.S. Government or of a foreign government, that fly in U.S.-controlled airspace but neither take off from, nor land in, the United States, 49 U.S.C. 45301, as amended by Public Law 104–264. Such flights are commonly referred to as “Overflights” and the fees collected for services provided to them are known as “Overflight Fees”.

Although the courts have vacated the rules adopted by the FAA to implement this statutory directive, Congress has enacted recently Vision 100—Century of Aviation Reauthorization Act, Public Law 108–176 (Vision 100), that legislatively adopts the FAA rules, as well as the fees established by those rules, as of the date of their original issuance. This Order addresses the manner in which the new statute shall

be implemented by the FAA and how Overflight Fees previously collected shall be treated by the agency.

II. Background*A. The Judicial Challenge to the Initial Interim Final Rule*

The FAA began charging Overflight fees in May 1997 pursuant to an Interim Final Rule issued by the FAA. Those fees were challenged before the United States Court of Appeals for the District of Columbia Circuit by the Air Transport Association of Canada and seven foreign air carriers. On January 30, 1998, the D.C. Circuit vacated the FAA’s Interim Final Rule, holding that the FAA’s specific methodology for allocating certain costs did not comport with the requirements of the 1996 statute. *Asiana Airlines v. FAA*, 134 F.3d 393 (D.C. Cir. 1998). Following that decision, the FAA refunded approximately \$40 million in Overflight Fees that it had collected under its Interim Final Rule.

B. The May 2000 Interim Final Rule and August 2001 Final Rule

On May 30, 2000, the FAA issued a new Interim Final Rule imposing Overflight Fees beginning on August 1, 2000, derived from cost data produced by the FAA’s newly developed Cost Accounting System. The Air Transport Association of Canada and seven foreign air carriers challenged the new Rule before the D.C. Circuit. While the appeal was pending before the D.C. Circuit, on August 13, 2001, the FAA issued a Final Rule that was effective on August 20, 2001. Reflecting accounting adjustments, the Final Rule reduced Overflight Fees by more than 15%. The Air Transport Association of Canada and the seven foreign air carriers challenged the Final Rule as well, and the two challenges were consolidated before the D.C. Circuit.

On April 8, 2003, the D.C. Circuit set aside the Interim Final Rule and the Final Rule, holding that the FAA had failed to demonstrate that the Overflight fees established in the Rules met what the Court read to be the applicable statutory requirement, that is, that Overflight Fees must be “directly related” to the FAA’s costs. *Air Transport Association of Canada v. FAA*, 323 F.3d 1093 (D.C. Cir. 2003). The Court declined to use the congressionally modified “reasonably related” standard set forth in a recently enacted amendment to the FAA’s statutory authority, finding that the more flexible “reasonably related” standard was inapplicable to litigation

pending at the time the new standard was enacted.

C. Section 229 of Vision 100

In response to the D.C. Circuit’s decision, Congress enacted a specific provision in Vision 100 that directly addresses Overflight Fees. Vision 100 was signed into law by the President on December 12, 2003. Section 229 of that Act provides as follows:

(a) Adoption and Legalization of Certain Rules—

(1) Applicability and Effect of Certain Law—Notwithstanding section 141(d)(1) of the Aviation and Transportation Security Act (49 U.S.C. 44901 note), section 45301(b)(1)(B) of title 49, United States Code, is deemed to apply to and to have effect with respect to the authority of the Administrator of the Federal Aviation Administration with respect to the interim final rule and final rule, relating to overflight fees, issued by the Administrator on May 30, 2000, and August 13, 2001, respectively.

(2) Adoption and Legalization—The interim final rule and final rule referred to in subsection (a), including the fees issued pursuant to those rules, are adopted, legalized, and confirmed as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically adopted, authorized, and directed as of the date those rules were originally issued.

(3) Fees to Which Applicable—This subsection applies to fees assessed after November 19, 2001, and before April 8, 2003, and fees collected after the requirements of subsection (b) have been met.

(b) Deferred Collection of Fees—The Administrator shall defer collecting fees under section 45301(a)(1) of title 49, United States Code, until the Administrator (1) reports to Congress responding to the issues raised by the court in *Air Transport Association of Canada v. Federal Aviation Administration and Administrator, FAA*, decided on April 8, 2003, and (2) consults with users and other interested parties regarding the consistency of the fees established under such section with the international obligations of the United States.

(c) Enforcement—The Administrator shall take an appropriate enforcement action under subtitle VII of title 49, United States Code, against any user that does not pay a fee under section 45301(a)(1) of such title.

Section 229 has a direct impact on the Overflight Fees that FAA has collected since August 1, 2000. First, in subsection (a)(1) it establishes that the “reasonably related” standard for evaluating Overflight Fees applies to

both the Interim Final Rule and Final Rule. Second, in subsection (a)(2), it adopts *legislatively* the Interim Final Rule and accompanying fees, in effect from August 1, 2000 to August 20, 2001; and the Final Rule and accompanying fees, in effect from August 20, 2001 to the present. Third, subsection (a)(3) provides that subsection (a) applies to fees assessed after November 19, 2001, the date on which the Aviation Transportation and Security Act was adopted, and before April 8, 2003, the date of the Court of Appeals decision setting aside the Interim Final Rule and Final Rule. Fourth, section 229 defers actual collection of Overflight Fees until the FAA Administrator has reported to Congress on the issues raised by the court in its April 8th decision and consults with users and interested parties regarding consistency of the FAA's fees with the international obligations of the United States.

First and foremost, section 229 express Congress' determinations to put back into place, by means of legislation, the rules adopted administratively by the FAA for the assessment and collection of Overflight Fees. Section 229 does raise an interpretive question, however, because while subsection (a)(2) adopts the FAA's Interim Final Rule and Final Rule "as of the date those rules were originally issued," subsection (a)(3) states that subsection (a) "applies to fees assessed after November 19, 2001 and before April 9, 2003. * * *" If the intended meaning of subsection (a)(3) is that all of subsection (a) applies only to fees "assessed after November 19, 2001," the first half of subsection (a)(2) would become a nullity; *all* of the fees assessed under the Interim Final Rule were assessed *before* November 19, 2001, since the rule expired on August 20, 2001, when the Final Rule took effect. If subsection (a)(3) were to be interpreted as limiting the reach of the entire subsection to the period of time post November 19, 2001, the legislative adoption of an Interim Final Rule and fees under subsection (a)(2) would have no meaning. Clearly, one section of the statute, subsection (a)(3), should not be read to nullify the express provisions of another subsection, subsection (a)(2), that legislatively adopts the Interim Final Rule and fees without limitation from the date of its issuance.

The dichotomy found in the text of section 229 is mirrored in the Conference Report accompanying the provision. There, Congress explained that it "agreed to ratify the interim final rule and final rule issued by the FAA on May 30, 2000, and August 13, 2001" but then states that "[t]his ratification

applies to fees collected after the date of enactment of [ATSA]," *i.e.*, November 19, 2001. Importantly, however, Congress goes on to state that "to clarify that the FAA has complied with its statutory mandate regarding overflight fees in the Interim Final Rule and Final Rule," Congress "retroactively as well as prospectively" in section 229 has proceeded to "legalize and ratify both the Interim Final Rule and the Final Rule, *effective as of the dates those rules were originally issued by the FAA.*" (Emphasis supplied.)

Following adoption of Section 229, FAA renewed its efforts to resolve an ongoing and lengthy dispute with regard to the overflight fees that were subject of litigation in the D.C. Circuit, *Air Transport Association of Canada v. FAA*. FAA has entered into a settlement agreement with the Air Transport Association of Canada and all of the foreign air carriers in that suit that will resolve all of the claims in the litigation made by these parties, and disputed by the FAA, for refunds of overflight fees, as well as potential claims by these carriers challenging the FAA's ability to impose and collect overflight fees authorized by the provisions of Section 229. Under the terms of the settlement agreement, the FAA would make payments to the litigating carriers from previously collected fees (and in some instances receive payments from such carriers), in addition to whatever refunds and credits these carriers are to receive pursuant to this Order. Each of these carriers has signed a complete release in which they agree to forgo any further litigation on these claims and also they have agreed not to challenge the imposition and collection of the current overflight fees as described in this Order and authorized by Section 229.

III. Determination

The FAA must if possible accomplish the clear intent of Section 229, which is to impose new fees at the levels previously set in the FAA Overflight Fees rules set aside by the D.C. Circuit's April 8, 2003 decision. It could be argued under the terms of section 229 that, notwithstanding the D.C. Circuit's decision, all Overflight Fees previously paid to and collected by the United States should be retained by the FAA pursuant to the rules and fees enacted by Congress and signed into law last December. However, as noted above, section 229 contains specific, but arguably ambiguous directions as to when the fees authorized and approved by the statute may be collected.

In light of the ambiguous and potentially conflicting provisions of the

statute, and in order to fashion a fair and reasonable approach to applying section 229, it is my judgment that this issue should be resolved by interpreting the statute to permit the FAA to retain only those fees collected for services provided after November 19, 2001. I have therefore decided that the FAA shall credit or refund: (1) All Overflight Fees paid under the Interim Final Rule, and (2) those fees paid under the Final Rule for services rendered prior to November 20, 2001.

As to those fees previously collected under the Final Rule for services provided after November 19, 2001, section 229 is clear and unambiguous: Congress has mandated under its legislatively enacted rule that fees matching those imposed under the FAA's Final Rule are due and collectible. Given this, and at the direction of Congress, I hereby determine that, except as otherwise ordered by the Administrator, the FAA will not refund any fees collected for services received after November 19, 2001.

Additionally, I have determined that the FAA will begin collecting Overflight Fees for the time period beginning March 1, 2003, the first day for which Overflight Fees have not yet been billed, as soon as the agency has complied with the requirements of subsection (b) of section 229, that is, as soon as the FAA "(1) reports to Congress" concerning matters raised in the most recent D.C. Circuit decision, and "(2) consults with users and other interested parties regarding the consistency of the fees established * * * with the international obligations of the United States." In the meantime, the FAA will issue invoices to all affected air carriers that reflect the Overflight Fees assessed by FAA for services provided between March 1, 2003, and February 29, 2004. FAA will begin collection of such assessed fees upon completion of the Report to Congress and the consultation process.

Accordingly, once the requirements of subsection (b) have been completed, FAA will use the following procedure to implement this Order:

Each air carrier or system user (hereafter "air carrier") who paid fees under the Interim Final Rule and/or the Final Rule will receive a refund or credit in an amount equal to the fees paid for services provided through November 19, 2001, offset or reduced by: (1) The amount due for any Overflight Fees invoices that remain unpaid by that air carrier for flights operated after November 19, 2001 through February 28, 2003; and (2) the amount due for new Overflight Fees

assessments for flights operated between March 1, 2003 and February 29, 2004.

If the amount of the air carrier's credit exceeds the amounts of unpaid liability in (1) and (2), the air carrier may request a direct refund in lieu of a credit. If it does not have a net credit, then the FAA will invoice the air carrier for the remaining amount owed for the period ending February 29, 2004. Any air carrier that does not pay any remaining invoice amount owed for the period ending February 29, 2004, may be subject to enforcement action by the FAA as authorized by section 229(c) of Vision 100. Overflight Fees for services provided beginning on March 1, 2004 will be separately assessed and invoiced.

This determination is administratively final. Any person seeking judicial review of this order must file a petition for review within 60 days of the date of issuance of this order in the United States Court of Appeals for the District of Columbia Circuit, or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

Dated: July 21, 2004.

Marion C. Blakey,
Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of the Federal Aviation Administration Overflight Fee Aviation Rulemaking Committee Charter

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of the Federal Aviation Administration Overflight Fee Aviation Rulemaking Committee Charter.

SUMMARY: The FAA is publishing the Charter of the Overflight Fee Aviation Rulemaking Committee recently created after the FAA issued a final order on July 21, 2004, directing the disposition of certain fees.

SUPPLEMENTARY INFORMATION: The FAA created an Overflight Fee Aviation Rulemaking Committee on July 21, 2004 pursuant to the Administrator's authority under 49 U.S.C. 106(p)(5). The Charter of this Committee is published to provide the public notice as to the objectives, scope of activities, duties, organization and administration of the

Committee. The Charter follows this notice.

Michael Chase,

Regulations Division, Office of the Chief Counsel.

Federal Aviation Administration Overflight Fee Aviation Rulemaking Committee Charter

1. *Purpose.* This order constitutes the charter for the Overflight Fee Aviation Rulemaking Committee (the "Committee") that is designated and established pursuant to the Administrator's authority under 49 U.S.C. 106(p)(5).

2. *Distribution.* This order is distributed at the director level in Washington headquarters and throughout the Office of the Associate Administrator for Financial Services and the Air Traffic Organization.

3. *Background.* a. Section 273 of the Federal Aviation Reauthorization Act of 1996, 49 U.S.C. 45301 (the "1996 Act"), authorized the FAA to impose fees on aircraft that traverse U.S.-controlled airspace but neither take off nor land in the United States. Under the 1996 Act, "[s]ervices for which costs may be recovered include the costs of air traffic control, navigation, weather services, training and emergency services which are available to facilitate safe transportation over the United States, and other services provided by the Administrator or by programs financed by the Administrator to flights that neither take off nor land in the United States." 49 U.S.C. 45301(b)(1)(B). At the time of its enactment, section 273 provided that the FAA Administrator "shall ensure that each of the [overflight] fees * * * is directly related to the Administration's costs * * * of providing the service rendered." 49 U.S.C. 45301(b)(1)(B)(1996). In November 2001, Section 273 was amended to state that the Administrator "shall ensure that each of the fees * * * is reasonably related to the Administration's costs, as determined by the Administrator, of providing the service rendered * * *." Section 119(d) of the Aviation and Transportation Security Act of 2001, Pub. L. 107-71.

b. In the years following enactment of the 1996 Act the FAA has issued two Interim Final Rules and a Final Rule attempting to establish those fees. In each instance, affected users successfully challenged the FAA's action in court. Additionally, the Congress has twice made changes to the basic statutory requirements related to overflight Fees. The most recent statutory change directly addressed the

issue of overflight Fees. Section 229 of Vision 100 provides as follows:

(a) Adoption and Legalization of Certain Rules—

(1) Applicability and Effect of Certain Law—Notwithstanding section 141(d)(1) of the Aviation and Transportation Security Act (49 U.S.C. 44901 note), section 45301(b)(1)(B) of title 49, United States Code, is deemed to apply to and to have effect with respect to the authority of the Administrator of the Federal Aviation Administration with respect to the interim final rule and final rule, relating to overflight fees, issued by the Administrator on May 30, 2000, and August 13, 2001, respectively.

(2) Adoption and Legalization—The interim final rule and final rule referred to in subsection (a), including the fees issued pursuant to those rules, are adopted, legalized, and confirmed as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically adopted, authorized, and directed as of the date those rules were originally issued.

(3) Fees to Which Applicable—This subsection applies to fees assessed after November 19, 2001, and before April 8, 2003, and fees collected after the requirements of subsection (b) have been met.

(b) Deferred Collection of Fees—The Administrator shall defer collecting fees under section 45301(a)(1) of title 49, United States Code, until the Administrator (1) reports to Congress responding to the issues raised by the court in *Air Transport Association of Canada v. Federal Aviation Administration and Administrator, FAA*, decided on April 8, 2003, and (2) consults with users and other interested parties regarding the consistency of the fees established under such section with the international obligations of the United States.

(c) Enforcement—The Administrator shall take an appropriate enforcement action under subtitle VII of title 49, United States Code, against any user that does not pay a fee under section 45301(a)(1) of such title.

c. Only July 21, 2004, the FAA issued a Final Order that (i) addresses the FAA's authority to impose overflight fees under Section 229 and other relevant law; (ii) provides, subject to conditions, refunds and/or credits for certain overflight fees previously paid; and (iii) assesses new overflight fees under the August 2001 Final Rule on both a retroactive and prospective basis.

d. The Administrator deems it appropriate to create the Overflight Fees Aviation Rulemaking Committee to provide users an in-depth opportunity to evaluate the data supporting the fee