



**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation

The Inspector General

Office of Inspector General  
Washington, DC 20590

January 15, 2009

The Honorable Patty Murray  
Chairman, Subcommittee on Transportation,  
Housing and Urban Development, and Related Agencies  
Committee on Appropriations  
United States Senate  
Washington, DC 20510

The Honorable James L. Oberstar  
Chairman, Committee on Transportation and  
Infrastructure  
United States House of Representatives  
Washington, DC 20515

Dear Chairmen Murray and Oberstar,

This report is in response to your October 15, 2008, request that we examine the Department of Transportation's (DOT) and the Federal Aviation Administration's (FAA) actions regarding final rulemaking activities related to the auction of take-off and landing slots at LaGuardia, John F. Kennedy (JFK), and Newark airports. We briefed your offices on the preliminary results of our work in late November.

Reducing flight delays and congestion at the three New York airports is an important issue facing the Nation. Because delays in the New York region affect flights across the United States, FAA worked with the airlines to establish temporary flight caps at JFK and Newark airports, effective March 30, 2008, and June 20, 2008, respectively.

The Secretary also established an Aviation Rulemaking Committee (ARC) to explore ways to alleviate congestion in the New York area. The ARC identified 77 action items, such as new take-off and landing procedures, to reduce delays.<sup>1</sup> In addition to implementing these action items, FAA planned to auction up to 66 slots at the three New York airports in January 2009.<sup>2</sup> According to FAA, the slot auctions would

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<sup>1</sup> New York Aviation Rulemaking Report, issued on December 13, 2007.

<sup>2</sup> Carriers that acquired a slot would have the authority to conduct a single, scheduled operation, 7 days a week, during a specific 30-minute period. A scheduled operation is either the arrival or departure segment of any flight regularly conducted by an air carrier between the airport associated with the slot and another point regularly served by an air carrier.

allow for more efficient allocation of slots at the three airports, encourage new entrants into the New York City area, and alleviate congestion by encouraging air carriers to increase the size of aircraft flying into these airports.

However, some stakeholders have expressed concerns that the auctions will not increase capacity but will instead result in higher airfares for consumers and reduced service to small communities. In August 2008, the Air Transport Association and the New York/New Jersey Port Authority filed suit in the U.S. Court of Appeals, claiming that FAA lacked the statutory authority to conduct the auctions.

On September 30, 2008, the Government Accountability Office (GAO) issued a legal opinion stating that FAA does not have the statutory authority to auction the slots. Moreover, GAO warned that if FAA auctioned the slots and retained and used the auction proceeds, it would violate the Antideficiency Act (the Act)<sup>3</sup> and the Purpose Statute.<sup>4</sup>

The Department disagreed with GAO and received an oral legal opinion from the Department of Justice (DOJ) Office of Legal Counsel on October 3, 2008, which stated that finalizing and implementing the slot auction rules would not violate the Act. FAA then issued the final rules outlining its plan for auctioning slots at the three airports on October 10, 2008.

Consistent with your request, we focused our review on two issues related to the rulemaking activities. First, in light of the GAO opinion, did FAA and DOT actions constitute a willful violation of the Antideficiency Act and Purpose Statute? Second, were career FAA and DOT staff coerced, compelled, or otherwise required by their supervisors to knowingly engage in illegal conduct?

To address these questions, our investigators, auditors, and legal staff interviewed 16 high-level FAA and DOT officials to determine how the policy debate and rulemaking evolved. The officials we interviewed are listed at exhibit A. We also reviewed e-mails and other communications within the Department, examined internal documents, and gathered information related to contracts and expenditures in support of various rulemaking initiatives and the slot auctions.<sup>5</sup> Exhibit B further details our objectives, scope, and methodology.

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<sup>3</sup> 31 U.S.C. § 1341(a)(1)(A).

<sup>4</sup> 31 U.S.C. § 1301(a).

<sup>5</sup> We requested communications between the Department and outside entities, such as the Office of Management and Budget, the Departments of Treasury and Justice, and the White House. The Department advised us that it could not release those communications to us without clearance from these outside entities. Based on our interviews and review of the internal documents, we concluded that a review of external communications would not affect our findings. As a result, we decided not to delay publishing our report while waiting for these communications.

## Summary of Results

Since we began our review, the U.S. Court of Appeals issued a stay on December 8, 2008, forcing FAA to indefinitely postpone plans for auctioning slots at the New York airports pending further judicial review. The court will likely decide a number of controversial and important questions, including whether FAA has the statutory authority to auction slots. The following summarizes our findings:

- Before GAO issued its legal opinion in September, there were no serious disagreements between FAA and DOT about how to move forward with the slot auction rules. However, after GAO issued the opinion, FAA officials were concerned that finalizing the rules could result in an Antideficiency Act violation. FAA decided that it would not finalize the rules unless it received a legal opinion from outside the Department stating that signing the rules would not violate the Antideficiency Act. This position raised concerns within DOT that the auctions would be delayed and created considerable tension between FAA and DOT.
- In light of the DOJ opinion, FAA's actions regarding the slot auctions do not constitute a willful violation of the Antideficiency Act. Because of this opinion, Agency officials can demonstrate a good faith belief that what they were doing was lawful, which is a valid defense against a charge that they willfully violated the Act.
- While FAA's actions do not represent a willful violation of the Antideficiency Act, even non-willful violations are serious matters. If it is determined that finalizing and implementing the rules violated the Antideficiency Act, FAA must report the violation to Congress as well as the personnel actions taken against those principally responsible for the violation.
- Three legal issues will determine if the Agency's actions represent a violation of the Act: (1) Are slots real or personal property that FAA can sell pursuant to its property acquisition and disposition authority? (2) Does auctioning slots amount to the imposition of a "user fee?" (3) Is the Antideficiency Act violated if slots are neither property nor user fees?
- On October 2, 2008, two teleconferences took place between high-level FAA and DOT officials, including its General Counsel, regarding FAA's request for an outside legal opinion. Debate was vigorous, at times contentious, regarding the penalties for violating the Antideficiency Act and FAA's request for an outside opinion. At one point, the Secretary questioned whether the FAA attorneys' unwillingness to defer to the DOT General Counsel's legal judgment amounted to insubordination. The Secretary confirmed that she raised this question because she believed the FAA attorneys should have deferred to the DOT General

Counsel's legal opinion, which stated that proceeding with the auctions would not result in an Antideficiency Act violation.

- On October 3, 2008, DOT officials contacted both the Office of Management and Budget (OMB) and DOJ about providing a legal opinion. A DOJ attorney provided an oral legal opinion and promised to provide it in writing the following week. Based on this information, the FAA attorneys told the Acting FAA Administrator he could sign the final rules, which he did that day.
- While FAA staff felt considerable pressure from the Department, they told us that they were not coerced or otherwise compelled to agree with the decision to sign the final rules for the slot auctions.

### **FAA's and DOT's Actions Do Not Constitute a Willful Violation of the Antideficiency Act and Purpose Statute, but Legal Issues Remain To Be Resolved**

GAO's September 2008 legal opinion raised significant concerns as to whether slot auctions for the New York airports would violate provisions of the Antideficiency Act and the Purpose Statute. It is our view that FAA's actions regarding the slot auctions do not constitute a willful violation of the Antideficiency Act, but whether there is a violation of the Act depends on three interrelated legal issues.

We note that even if Antideficiency Act violations are non-willful, they are still serious matters and can lead to administrative sanctions.<sup>6</sup> If it is determined that finalizing and implementing the rules violated the Antideficiency Act, then the Department must report the violation to the President and Congress with a description of any personnel actions taken against those principally responsible for the violation.

- *The Antideficiency Act* prohibits Federal employees from making or authorizing expenditures exceeding the amounts appropriated by Congress. This can occur in two different ways—when an agency overspends an appropriations account or when an agency expends funds in contravention of a specific congressional prohibition.
- *The Purpose Statute* requires that public funds be used only for the purpose for which they were appropriated by Congress. It is violated if charges are made to the wrong appropriation or if unauthorized charges are made to any appropriation.

With respect to the FAA rulemaking, a violation of the Antideficiency Act would also violate the Purpose Statute. However, an Antideficiency Act violation causes much

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<sup>6</sup> Antideficiency Act and Purpose Statute violations are serious because they provide an important control established by Congress to implement a constitutional provision supporting the separation of powers between the Executive and Legislative Branches: "No money shall be drawn from the Treasury but in consequence of appropriations made by Law." Article I, Section 9.

greater concern because, unlike the Purpose Statute, it provides penalties for those employees held responsible. Willful violations of the Antideficiency Act are particularly significant because they can subject the responsible Government officer or employee to criminal prosecution.<sup>7</sup> Proof of willfulness, which is required for any criminal prosecution of the Act, requires that a Government official take an action with the knowledge that it is unlawful. A good faith belief, even if mistaken or unwise, is a defense against a willful violation.

Before finalizing the rules, FAA received a legal opinion from DOJ in October 2008. The opinion stated that FAA would not violate the Antideficiency Act by issuing and implementing the slot auction regulations. This opinion precludes a finding of willfulness because it provided FAA with support for a good faith belief that its actions were lawful.

### *FAA's Actions and Costs Incurred for the Slot Auction Effort*

If a violation of the Antideficiency Act occurs, it is important to understand the range of activities and expenditures that may be improper. Our review examined the key actions FAA took and how much money has been spent to move forward with slot auctions before and after GAO issued its legal opinion.

Our work shows that FAA's Office of Aviation Policy and Plans has relied on three contractors—GRA Inc., Beaujolais, and Power Auctions—to perform work associated with analyzing the rules and with the auctions. This includes economic analysis in support of the rules and development of an internet program to accept bids as well as a separate program to evaluate bids and determine the winning bidders. As shown in the figure below, as of December 2, 2008, FAA has obligated approximately \$1.25 million to the three contractors but has actually expended only a little more than \$200,000.

**Figure. FAA Obligations and Expenditures Related to Slot Auction Contractors**

Contractor	Description of Services	Amount Obligated	Amount Expended	Balance
<b>GRA (Task 1)</b>	Economic Analysis <i>Contract Awarded (Slots Mod) – 1/29/08</i>	\$199,924	(\$135,146)	\$64,778
<b>Beaujolais</b>	Technical Assistance in Selecting an Auction Firm <i>Contract Awarded – 6/10/08</i>	\$100,000	(\$50,025)	\$49,975
<b>GRA (Task 2)</b>	Economic Analysis <i>Contract Awarded (Slots Mod) – 7/29/08</i>	\$142,445	(\$32,453)	\$109,992
<b>Power Auctions</b>	Pre-Auction Services and Auction Execution <i>Contract Awarded – 9/24/08</i>	\$808,000	-	\$808,000
<b>Totals</b>		<b>\$1,250,369</b>	<b>(\$217,624)</b>	<b>\$1,032,745</b>

<sup>7</sup> 31 U.S.C § 1350.

The majority of FAA's investments for the slot auction initiatives occurred prior to the signing of the final rules on October 3, 2008. Since then, it has only obligated \$170,000 and expended \$6,000 towards the slot auctions. We understand that contractors have performed additional work in fiscal year (FY) 2009 but have not yet billed FAA. For example, Power Auctions has incurred about \$625,000 in unbilled charges related to conducting the auctions.

FAA has also incurred in-house costs related to the rulemaking activities. In May 2008, FAA established a specific project code to capture slot auction labor charges. As of November 22, 2008, labor charges applied to this project were \$55,190. However, according to FAA officials in the Office of Aviation Policy and Plans, not all FAA employees involved with auctions are charging their time to this project. We were unable to determine the labor charges before and after the GAO opinion.

In addition, there were in-house labor charges before FAA established the slot auction project code. These charges were captured under two project codes for general rulemaking and other topics. Because of the generality of these codes, we were unable to determine the specific slot auction labor charges associated with them.

### *The Decision on Whether Antideficiency Violations Occurred Depends on the Resolution of Three Legal Issues*

A final determination on whether Antideficiency Act violations occurred depends on resolution of three interrelated legal issues: whether (1) slots are real or personal property that FAA can sell pursuant to its property acquisition and disposition authority, (2) a rule auctioning slots amounts to the imposition of a "user fee," and (3) there is an antideficiency violation if slots are neither property nor user fees.

**FAA's Use of Its Property Authority To Auction Slots:** In its April 17, 2008, Supplemental Notice of Proposed Rulemaking (SNPRM), FAA asserted it had the authority to auction slots based on its property disposition authority.<sup>8</sup> In support of its arguments, FAA has argued the following points:

- FAA has exclusive sovereignty over the navigable airspace and has broad authority to regulate its use.
- FAA can lease intangible property and has the authority to dispose of property interests, including the power to dispose of its property via leases.

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<sup>8</sup> In addition to the April 2008 SNPRM, FAA cites in its final rules that the airlines have treated slots as a form of intangible property and that the courts have acknowledged that navigable airspace is public property.

- FAA has the authority to enter into and perform such contracts, leases, cooperative agreements, and other transactions as may be necessary to carry out the functions of the Administrator and the Administration.<sup>9</sup>

In its final report, GAO rejects FAA's argument that slot auctions fall within the Agency's property disposition authority. GAO states that the slots are not property created as a result of FAA regulations but *are* FAA regulations in that slots provide legal permission to conduct an act that otherwise would not be permitted. In this case, the act is permitting an aircraft to take off or land at one of the three New York airports. GAO also cites a number of arguments as to why it disagrees with FAA's analysis, including the following:

- The term "property" in the FAA statute refers to traditional property. Otherwise, FAA has improperly been giving away potentially millions of dollars since creating slots in 1968.
- Congress granted FAA authority to manage navigable airspace through its regulatory authority, not its property authority.
- Granting FAA authority under its property disposition authority would interfere with congressional prerogatives to set programmatic spending levels and oversee agency activities.
- It is unlikely in light of congressional restrictions on user fees that Congress intended to give FAA non-appropriation funding when it amended FAA's property acquisition statute to include personal as well as real property.<sup>10</sup>
- The slots are analogous to the Louisiana video poker licenses that the Supreme Court ruled were not Government property. The Court held that issuance of the licenses involved the Government acting as a regulator, not as a property holder.<sup>11</sup>

DOJ does not address whether slots fall within FAA's property disposition authority, asserting that it is not relevant to whether there is an antideficiency violation. Unless the pending litigation is settled, the question of whether auctioning slots falls within the FAA's property disposition authority will likely be decided in Federal court.<sup>12</sup>

**Slot Auctions and the Imposition of User Fees:** A key question is whether FAA's regulation for auctioning slots to the highest bidder is equivalent to establishing a new user fee. FAA cited its property authority as basis for proceeding with the slot auctions and does not believe these auctions would constitute a user fee.

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<sup>9</sup> 49 U.S.C. 106(l)(6) and 106(n).

<sup>10</sup> This authority was granted in the 1996 FAA Reauthorization Act.

<sup>11</sup> *Cleveland v. United States*, 531 U.S. 12 (2000).

<sup>12</sup> Congress could also clarify the extent of the FAA's property disposition authority.

Since 1997, Congress has included language in FAA's annual appropriations that prohibits it from finalizing or implementing any regulation that would impose any new aviation user fees without specific congressional authorization. The FY 2008 prohibition states, "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."<sup>13</sup>

Because GAO concluded that slot auctions do not fall within FAA's property disposition authority, it opines that the only other possible authority is under FAA's ability to impose user fees. However, the appropriations language prohibits FAA from implementing new aviation user fees.

Conversely, the DOJ opinion concludes that, regardless of whether FAA has the statutory authority to issue the slot auction regulations, implementing those regulations would not amount to a new user fee. DOJ notes that user fees are well-defined, meaning that a user fee has to be based at least in part on the basis of cost to the Government. Because the auctions are based on what the market will bear rather than the Government's cost, DOJ concludes that the auctions are not a user fee.

If the U.S. Court of Appeals concludes that the slot auctions are authorized under FAA's regulatory and property disposition authority, then there is no Antideficiency Act violation. Even if the court concludes that FAA has no authority, it may not decide the user fee issue since FAA does not rely upon that statutory authority as justification for slot auctions. However, if the court concludes that slot auctions are user fees, finalizing and implementing the regulations would then constitute a violation of the Antideficiency Act.<sup>14</sup>

**Implications if Slots Are Not Property or User Fees:** Another issue focuses on what happens if FAA lacks authority to auction slots because the slots are determined to be neither property nor user fees. GAO does not address this question because it concludes that slots are user fees.

DOJ opines that even if Federal courts determine that slots are not property and FAA lacks the authority to auction them, the slot auction regulations would not violate the Antideficiency Act as long as FAA does not make expenditures in violation of a condition set forth in an appropriations rider and its expenditures are consistent with available appropriations.<sup>15</sup> While GAO did not address this issue in its opinion, on

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<sup>13</sup> See Consolidated Appropriations Act of 2008, P.L. 110-161 (2007).

<sup>14</sup> The DOJ opinion acknowledges that if the rule creates a new user fee it would violate a specific appropriations provision and would therefore violate the Antideficiency Act.

<sup>15</sup> If the expenditures are not consistent with available appropriations, FAA would be exceeding the amount appropriated by Congress for those activities, which is zero. As FAA would be spending money intended for another purpose, this would also violate the Purpose Statute, but DOJ was not asked to address the Purpose Statute.

October 30, 2008, the Senate Appropriations Committee requested that GAO provide a legal opinion on whether DOJ's interpretation of the Antideficiency Act is accurate.

### *FAA's Plan To Use Funds Generated by Slot Auctions Lacks Clarity*

In addition to legal issues we examined, there are unresolved questions about how FAA would use the funds generated by the slot auctions. FAA intends to use the funds generated by the slot auctions to mitigate congestion and delays in the New York City area. However, FAA has not stated if the funds will be used for capital projects, operational purposes, airspace redesign projects, research and development, or for demonstration projects with specific airspace users.

While money collected by Federal agencies is usually deposited in the Treasury's Miscellaneous Receipts Account, FAA is authorized under a specific statute to retain these funds in a specific Treasury account. This account is currently used, among other things, to collect overflight fees, which are specifically authorized by statute. Consistent with FAA's theory that the slots are property, the amounts collected at the slot auction would be placed in this account.

The funds in this account may be used for any "congressionally authorized and intended purposes"<sup>16</sup> and are available until they are spent without being subject to the annual appropriations process. The only control placed on the account is that FAA must annually report both actual and planned spending to congressional oversight committees on the same day the President's annual budget is submitted.<sup>17</sup>

Basically, the funds generated by the auctions would provide FAA with a source of revenue it did not previously have. We note that GAO cites this factor in arguing that FAA lacks authority to conduct slot auctions. GAO stated that it is unlikely that Congress intended for FAA to obtain this funding through a "back door" of general property authority.

If the Federal courts determine that the slot auction was not authorized, any use of the proceeds would likely constitute an augmentation of FAA funds, which is prohibited by law. FAA officials told us that the auction proceeds will not be used for any purpose until the litigation surrounding the slot auctions is resolved.

### **While There Was Vigorous and Sometimes Contentious Debate Between High-Level DOT and FAA Officials, Officials Were Not Coerced, Compelled, or Otherwise Required To Implement the Slot Auctions**

Based on interviews with FAA and DOT officials and the documentation we reviewed, we found no evidence that FAA personnel were coerced, compelled, or otherwise required to agree with the decision to implement the slot auctions. FAA

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<sup>16</sup> 49 U.S.C. 45303(c)(2).

<sup>17</sup> 49 U.S.C. 45303(d).

officials were under considerable pressure to move forward with auctioning slots because it was a high-priority initiative with the Department and Administration, and DOT officials wanted the first auction completed in January, before the current Administration leaves office.

When the GAO issued its legal opinion on September 30, FAA officials expressed concern that signing the final rules could expose FAA employees to criminal and administrative sanctions for violating the Antideficiency Act and requested an outside legal opinion prior to signing the rules. To address FAA's concerns, high-level FAA and DOT officials had several meetings on finalization of the rules. These discussions produced vigorous, and at times contentious, debate regarding the significance of the GAO opinion, the consequences for violating the Antideficiency Act, and the need for an outside legal opinion. Ultimately, DOT agreed that an outside legal opinion would be obtained before the Acting FAA Administrator signed the final rules. Once FAA received an oral legal opinion from the DOJ, the Acting FAA Administrator signed the final rules for the auctions.

**The Slot Auctions Were a High Priority for the Department, and the Schedule To Conduct the First Auction Was Very Aggressive:** According to both FAA and DOT officials, market-based solutions for alleviating congestion were a high priority within the Department. For example, included in FAA's 2007 reauthorization proposal were provisions allowing for slot auctions at LaGuardia airport and a pilot program at up to 15 additional airports for market-based solutions to alleviate congestion. An overview of FAA's and DOT's actions in support of the slot auction rulemaking is at exhibit C.

When it became clear that Congress would not pass FAA's reauthorization proposal, DOT and FAA began to look at other ways under its existing authority to implement market-based solutions. In the spring of 2008, FAA issued two proposed rulemakings that called for slot auctions at the three New York airports based on its property disposition authority. However, because of the nature of the rulemaking process, FAA and the Department were operating under a tight schedule to finalize the rules and get them published in the Federal Register by the week of October 8. If the rules were not published by that time, it would have been very difficult for FAA to conduct the first auction in January before the departure of the current Administration.

**The GAO Opinion Raised Significant Concerns at FAA About a Possible Antideficiency Act Violation:** FAA documents show that Agency officials were concerned in early August 2008 about a number of risks related to moving forward with slot auctions. One of their concerns was whether it would be an Antideficiency Act violation to use appropriated funds for an auction expert contract, auction services, regulatory analysis, and salaries for those who worked on finalizing the rules. Officials we interviewed stated that while there were policy debates regarding various aspects of the rulemaking, these debates were a normal part of the policy

development process. However, up until the point when GAO issued its opinion, there were no serious disagreements between FAA and DOT on moving forward with the slot auction rules.

Once GAO issued its opinion, senior FAA officials expressed concern that signing the final rules for the slot auctions could expose FAA employees to criminal and administrative sanctions for violating the Antideficiency Act. As a result, the Acting FAA Administrator advised DOT that FAA would not sign the final rules unless he received a legal opinion from outside DOT stating that proceeding with the rules would not violate the Act.

**There Was Vigorous and Contentious Debate on the Antideficiency Act and FAA's Desire To Obtain an Outside Legal Opinion:** To address FAA's concerns, the DOT General Counsel arranged a telephone conference where the Acting FAA Administrator and FAA Counsel could hear directly from DOJ and OMB attorneys regarding their view that finalizing the rules would not amount to an Antideficiency Act violation.

However, the teleconference, which occurred on October 2 at noon, did not proceed as planned. First, the OMB representative unexpectedly did not participate in the teleconference. Also, DOT attorneys expressed their view that the GAO opinion was not binding on the Executive Branch and that an outside opinion was not necessary. The Acting FAA Administrator, believing that DOT had already agreed to obtain an outside opinion before he would sign the rules and that the DOT attorneys were minimizing the significance of the GAO opinion, left the teleconference. Finally, while the DOJ representative was supportive of DOT's position, he did not make these comments until the Acting FAA Administrator left the teleconference. As a result, no progress was made towards finalizing the rules.

After the teleconference, the DOT General Counsel called OMB to seek a legal opinion to satisfy FAA, but OMB indicated that it would defer to the DOT General Counsel's legal judgment regarding the application of the Antideficiency Act. The General Counsel set up a second teleconference to avoid delay in signing the final rules. This teleconference, which occurred at 6:30 p.m., included the Secretary, Deputy Secretary, DOT General Counsel, DOT Chief of Staff, Acting FAA Administrator, FAA Chief Counsel, and senior DOT and FAA attorneys.

From the outset of the teleconference, there was a vigorous debate between the FAA and DOT attorneys, which at times became contentious.<sup>18</sup> The attorneys argued about whether issuing the final rules would violate the Antideficiency Act and, if there was a violation, the likelihood and severity of any sanctions directed at FAA employees. DOT attorneys also stated that there had never been a prosecution or conviction for a

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<sup>18</sup> The logistics of the teleconference were difficult because the Secretary and the DOT General Counsel were out of town, and two of the FAA attorneys, one of whom was the Chief Counsel, arrived late at the teleconference.

violation of the Antideficiency Act. Regardless of the penalties, FAA officials remained concerned about violating the Antideficiency Act.

At that point, DOT officials offered suggestions to FAA officials so the Acting FAA Administrator could sign the final rules without first obtaining an outside opinion. For example, it was suggested that the Acting FAA Administrator could sign the final rules and then withdraw them if an outside opinion was not obtained before the rules were published in the Federal Register. DOT officials also expressed their view that it is the DOT General Counsel that has the authority to decide whether finalizing the rules constituted an Antideficiency Act violation and concluded that signing the rules was not a violation of the Act.

FAA officials rejected these suggestions, and the FAA legal position remained that the Acting FAA Administrator should not sign the final rules without an outside opinion. An FAA attorney also pointed out that the Agency had independent authority and quoted from the statute that provides the Administrator with the final authority with regards to the Agency's acquisition and maintenance of property and rulemaking activities. Therefore, he stated that FAA did not have to follow DOT's direction.

The Secretary told us that she was concerned that FAA was unwilling to consider any of DOT's suggestions for moving forward with the rules. At one point, the Secretary questioned whether the FAA attorneys' unwillingness to defer to the DOT General Counsel's legal judgment amounted to insubordination. According to FAA and DOT officials we interviewed, this question was not directed at a specific individual. The Secretary told us that she used the word "insubordinate" because she believed FAA attorneys should have deferred to the General Counsel's legal opinion that proceeding with the auctions would not result in an Antideficiency Act violation.

Following the insubordination question, FAA reiterated its legal position that the Acting FAA Administrator should not sign the final rules without an outside legal opinion. At this point, it became clear that the issue was not going to be resolved, and the Secretary ended the teleconference.

**FAA Received a Legal Opinion From DOJ and Finalized the Slot Auction Rules:** Within minutes of the end of the teleconference, the Secretary directed the DOT Chief of Staff to find a way to address FAA's concerns about signing the final rules. The DOT Chief of Staff then asked the FAA representatives to provide, by the next morning, a draft of a proposed opinion that would address FAA's concerns, which DOT could use to seek an outside opinion.<sup>19</sup>

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<sup>19</sup> Ultimately, this draft opinion was not used because DOJ provided an opinion based on its own legal analysis.

The next morning, DOT officials contacted both OMB and DOJ about providing a legal opinion. A DOJ attorney agreed to provide a legal opinion and held a teleconference with DOT and FAA Counsel. During the teleconference, the DOJ attorney described the content of the opinion and promised to provide it in writing the following week. Based on the teleconference, the FAA attorneys told the Acting FAA Administrator he could sign the final rules, which he did that day.

**FAA Officials Did Not Feel Coerced or Compelled To Sign the Rules:** During our review, we interviewed the FAA officials who participated in the two meetings regarding finalizing the rules. While these officials felt considerable pressure from the Department, they told us that they did not feel coerced or otherwise compelled to agree with the decision to sign the final rules for the slot auctions.

## Conclusion

The decision to move forward with auctioning slots at the New York airports has proven to be a complex and controversial issue for the Department and FAA, given congressional concerns, legal challenges, and stakeholder opposition. These issues were amplified by concerns about statutory authority, Antideficiency Act violations, and the fact that auctioning slots would not directly reduce delays. Many of the questions about FAA's authority to implement slot auctions will be decided by the Federal courts.

How—and at what pace—to introduce market-based solutions for reducing congestion in the National Airspace System is a policy question for the Congress and the new Administration. There are opportunities to clarify FAA's authority and the best way to address congestion, including market-based solutions, as Congress decides on how to finance aviation programs.

We provided Department officials with a draft of this report and made technical adjustments where appropriate in response to their comments. The Department concurred with both of our conclusions: that there was no willful violation of the Antideficiency Act and Purpose Statute and that no career staff was coerced. We appreciate the cooperation of the Department during this review. If I can answer any questions or be of further assistance in this matter, please contact me at (202) 366-1959 or my Deputy, Theodore P. Alves, at (202) 366-6767.

Sincerely,



Calvin L. Scovel III  
Inspector General

**EXHIBIT A. LIST OF FAA AND DOT OFFICIALS INTERVIEWED**

- 1. Nancy LoBue:** FAA Acting Assistant Administrator for Policy, Planning, and Environment (October 20, 2008)
- 2. Rebecca MacPherson:** FAA Assistant Chief Counsel for Regulations (October 21, 2008)
- 3. Patricia McNall:** FAA Assistant Chief Counsel for Acquisitions and Commercial Law (October 23 and November 10, 2008)
- 4. Jana Weir Murphy:** FAA Chief of Staff to the Acting Administrator (October 25, 2008)
- 5. James Whitlow:** FAA Deputy Chief Counsel for Policy and Adjudication (October 28, 2008)
- 6. Nan Shellabarger:** FAA Acting Deputy Assistant Administrator for Policy, Planning, and Environment (October 29, 2008)
- 7. Kerry Long:** FAA Chief Counsel (November 3, 2008)
- 8. Terence Carlson:** DOT Deputy Assistant General Counsel for General Law (November 5, 2008)
- 9. Melissa Burt:** DOT Counsel to the General Counsel (November 6, 2008)
- 10. Paul Geier:** DOT Assistant General Counsel for Litigation (November 7, 2008)
- 11. Jeffrey Wharff:** FAA Senior Economic Advisor (November 13, 2008)
- 12. Quintin Kendall:** DOT Chief of Staff (November 14, 2008)
- 13. Robert Sturgell:** Acting FAA Administrator (November 14, 2008)
- 14. D.J. Gribbin:** DOT General Counsel (December 8, 2008)
- 15. Thomas Barrett:** DOT Deputy Secretary (December 10, 2008)
- 16. Mary Peters:** DOT Secretary (December 10, 2008)

## **EXHIBIT B. OBJECTIVES, SCOPE, AND METHODOLOGY**

The objectives of our review were to determine whether (1) in light of the GAO opinion, actions taken by FAA and DOT constituted a willful violation of the Antideficiency Act and Purpose Statute and (2) career FAA and DOT staff were coerced, compelled, or otherwise required by their supervisors to knowingly engage in illegal conduct. We conducted this review in accordance with generally accepted government auditing standards. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our objectives.

To answer our objectives, we analyzed FAA's rulemaking actions and gathered information related to contracts and expenditures in support of various rulemaking initiatives and the slot auctions. We also reviewed e-mails and other communications within the Department and examined internal documents. Our auditors, investigators, and legal staff interviewed 16 high-level FAA and DOT officials to determine how the policy debate and rulemaking evolved. Finally, we reviewed the legal issues associated with the rulemaking initiatives, Antideficiency Act, Purpose Statute, GAO and DOJ opinions, and lawsuits filed in Federal court.

## **EXHIBIT C. OVERVIEW OF EVENTS RELATED TO SLOT AUCTIONS AT THE NEW YORK AIRPORTS**

Market-based solutions have long been viewed as a solution for alleviating congestion, particularly at airports where building additional runways is not an option. In 2006, FAA began taking formal steps to outline its plans for implementing market-based solutions, such as peak hour pricing and slot auctions. Key FAA actions include the following:

- *August 29, 2006:* FAA issues a Notice of Proposed Rulemaking for congestion mitigation at LaGuardia airport. In the rule, FAA states that it lacks the statutory authority to conduct market-based approaches such as congestion pricing or auctions.
- *February 14, 2007:* FAA submits its reauthorization proposal to Congress. The proposal includes two provisions for market-based mechanisms to alleviate congestion: one to permit auctions or congestion pricing for LaGuardia airport and one for a pilot program at up to 15 airports.
- *April 17, 2008:* FAA issues a Supplemental Notice of Proposed Rulemaking for LaGuardia airport. FAA states that the August 2006 rule was incorrect concerning its authority to conduct slot auctions and proposed to assign the majority of slots to existing carriers and either retire or auction a small number of slots.
- *May 21, 2008:* FAA issues a Notice of Proposed Rulemaking for JFK and Newark airports. FAA proposed to extend operations caps at the airports, assign a majority of slots to existing carriers, and auction a limited number of slots over a 5-year period.
- *October 10, 2008:* FAA publishes final rules regarding slot auctions for LaGuardia, JFK, and Newark airports. The rules were scheduled to be effective on December 9, 2008.
- *December 8, 2008:* The U.S. Court of Appeals for the District of Columbia issues stay, which prevents the auctions from going forward.

The following page contains textual versions of the graphs and charts included in this document. This page was not in the original document but has been added here to accommodate assistive technology.

# **Review of the Department of Transportation's and the Federal Aviation Administration's Actions Related to Slot Auctions at New York Airports**

## **Section 508 Compliant Presentation**

### **Figure. FAA Obligations and Expenditures Related to Slot Auction Contractors**

FAA's Office of Aviation Policy and Plans has relied on three contractors—GRA Inc., Beaujolais, and Power Auctions—to perform work associated with analyzing the rules and with the auctions. As shown in the figure, as of December 2, 2008, FAA has obligated approximately \$1.25 million to the three contractors but has actually expended only a little more than \$200,000.

- GRA provided economic analysis services. FAA awarded the contract on January 29, 2008, and obligated \$199,924. However, only \$135,146 has been expended, leaving a balance of \$64,778.
- Beaujolais provided technical assistance in selecting an auction firm. FAA awarded the contract on June 10, 2008, and obligated \$100,000. However, only \$50,025 has been expended, leaving a balance of \$49,975.
- FAA again tasked GRA with economic analysis services, awarding this contract on July 29, 2008. FAA obligated \$142,445 for this contract, but has only expended \$32,453, leaving a balance of \$109,992.
- Power Auctions provided pre-auction services and auction execution. FAA awarded this contract on September 24, 2008, and obligated \$808,000. However, FAA has not expended any of this money.