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Slot Regulation at High Density Airports: How Did We Get Here and Where Are We Going

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SLOT REGULATION AT HIGH DENSITY AIRPORTS: HOW DID WE GET HERE AND WHERE ARE WE GOING?

EILEEN M. GLEIMER*

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I. INTRODUCTION

AS WITH ANYTHING in the area of airline regulation, reconciling the government's actions with its stated intent and the practicalities of the industry is frequently quite difficult. The

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regulations often do not address the issues of concern, or the history or language of the regulations themselves seems to belie the facts as they appear to the observer. The history of slots at high density airports is an example of aviation regulation that has developed a life of its own, and as a result, appears to have ensured its longevity—if not its immortality.

This Article will address the history and development of slots and the high density rule in an attempt to shed greater light on the evolution of the buy-sell rule, and the value and use of slots which developed as a consequence of their marketability. It will also address practical concerns relating to the protection and preservation of the value of slots, including the inability to predict with any certainty what the government may do and what will happen to the operations of airlines using the slots. Finally, it will address recent efforts to increase capacity at high density airports and the future of slot restrictions at high density airports.

II. THE HISTORY OF THE HIGH DENSITY RULE AND THE EVOLUTION OF THE BUY-SELL RULE

A. THE HISTORY OF THE HIGH DENSITY RULE

In 1968 the Federal Aviation Administration (FAA), in an effort to alleviate congestion, proposed special air traffic rules that would apply to certain airports which it designated as high density airports.1 The FAA’s initial focus was on the Chicago, New York, and Washington areas—specifically John F. Kennedy International Airport (JFK), LaGuardia Airport (LGA), Newark International Airport (EWR), Chicago O’Hare International Airport (ORD), and Washington National Airport (DCA).2 The

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1 33 Fed. Reg. 12,580 (1968) (codified as amended at 14 C.F.R. pt. 93, subpt. K) (proposed Sept. 5, 1968). The notice of proposed rulemaking (NPRM) was issued following a period of substantial flight delays and airport congestion and an increasing concern that the airport and airway system were on the verge of saturation, especially in Chicago, New York, and Washington. See Air Transp. Ass’n of Am., The Airline Scheduling Committee 1 (1992) [hereinafter The Airline Scheduling Committee].

2 33 Fed. Reg. 12,580, 12,581. At the time the high density rule was proposed, operating restrictions already existed at DCA. These restrictions began in 1966 when the DCA carriers, at the request of the FAA, entered into a voluntary agreement to limit their operations to 40 per hour. This agreement was made in lieu of the government imposing restrictions to ameliorate the congestion that resulted shortly after the jet aircraft ban was lifted at DCA. See Notice of Study and Request for Comments, 59 Fed. Reg. 15,392 (1994) [hereinafter 1994 FAA Request for Comments]; Comments of the Metropolitan Washington Airports Au-
FAA indicated, however, that if congestion and delay increased in other areas, it would consider extending these air traffic rules. These rules proposed to limit the number of Instrument Flight Rule (IFR) operations (takeoff and landings) permitted per hour and to require that each operation be supported by a "slot." The FAA proposed to allocate the hourly IFR reservations or "slots" among three classes of users—scheduled air carriers (except air taxis), scheduled air taxis, and all other aircraft operators. These classifications were originally described primarily by reference to the carriers' economic authority, an area which at the time was within the primary jurisdiction of the CAB, rather than the FAA.

3 33 Fed. Reg. 12,580, 12,581.
4 The Federal Aviation Regulations (FARs) require IFR operations when weather conditions are below the minimum for flight under visual flight rules (VFR). 14 C.F.R. § 1.1 (1995).
5 33 Fed. Reg. 12,580, 12,581. In fixing the number of IFR operations, the FAA advised that it would consider airport ground facilities, weather conditions, noise abatement procedures, aircraft mix, uniformity of flow, runway combinations, and the availability of alternative airports.
6 Id.
7 These classes have evolved over time to the present classes of slots, namely, air carrier slots, commuter slots, and others. The air carrier and commuter slot categories focus on the size of the aircraft being operated. The remaining category serves as a catch-all covering general aviation with aircraft of any size and certain charter flights.
In December 1968 the FAA adopted the high density rule.\textsuperscript{9} In the preamble to the rule, the FAA advised that the rule should not be viewed as the permanent solution to the air congestion problem and that it would be kept under continuing review and modified as circumstances required or permitted.\textsuperscript{10} In February 1969 the FAA amended the rule, specifically stating that it would be temporary in nature and establishing December 31, 1969, as the expiration date.\textsuperscript{11} By that date the FAA hoped that the problem of congestion would be alleviated; if not, further rulemaking action would be considered.\textsuperscript{12}

Despite the FAA's statement that the limitations contained in the high density rule "are not the permanent solution to the air congestion problem,"\textsuperscript{13} the FAA continued to extend the high density rule based on its perception that the conditions which led to its promulgation continued to exist.\textsuperscript{14} The rule was never extended to other airports, and in 1970 the rule was suspended at EWR.\textsuperscript{15} In 1973, the FAA finally admitted that it was retaining the high density rule at ORD, JFK, LGA, and DCA indefinitely.\textsuperscript{16} In short, the FAA appeared to believe that extensive federal regulation of operations at these airports was the only way to alleviate congestion.

\section*{B. The Allocation of Slots}

Although the high density rule allocated the number of slots among the different types of operators, it did not contain a pro-

\begin{itemize}
  \item[9] 33 Fed. Reg. 17,896 (1968) (FAA final rule designating JFK, LGA, EWR, ORD, and DCA as high density airports). The rule was to become effective on April 27, 1969, in order to coincide with the seasonal schedule changes. \textit{Id.} at 17,898.
  \item[10] \textit{Id.} Although many comments submitted in response to the proposed rule called for the rule to be temporary with a fixed expiration date, the FAA chose not to set a specific expiration date, choosing instead to have a more fluid ongoing review of the continued need for the rule. \textit{Id.}
  \item[11] 34 Fed. Reg. 2603, 2603 (1969). At the same time, the FAA postponed the effective date of high density rule from April 27, 1969, until June 1, 1969, to provide additional time for the adjustment of operations by all users of the airports and excluded from the high density rule extra sections of flights conducted at EWR, LGA, and ORD. \textit{Id.} Extra sections were already permitted at DCA. \textit{See The Airline Scheduling Committee, supra note 1, at 13; see also 14 C.F.R. § 93.123(b)(4) (1995).}
  \item[12] \textit{See 34 Fed. Reg. 2603, 2603.}
  \item[13] \textit{Id.}
  \item[15] 35 Fed. Reg. 16,591, 16,592 (the high density rule is suspended at EWR based on a determination that demand at the airport remains below capacity).
  \item[16] 38 Fed. Reg. 29,463 (1973).}
\end{itemize}
vision allocating the slots among the operators within each class. In fact, the FAA expressly contemplated that the airlines would voluntarily arrive at decisions to reduce their schedules to the level required by the high density rule and noted that the airlines were already discussing schedule changes pursuant to authority granted by the CAB.\(^\text{17}\)

The Scheduling Committee Agreements, which were developed by the airlines to govern the allocation practice, were submitted to the CAB for approval under section 412 of the Federal Aviation Act.\(^\text{18}\) The CAB approved the agreements, thereby\(^\text{19}\)

\(^{17}\) See 33 Fed. Reg. 17,896, 17,897. In an effort to forestall government action, in 1968 Trans World Airlines, Inc. (TWA) petitioned the CAB pursuant to § 412 of the Federal Aviation Act to permit the airlines to discuss the implementation of voluntary schedule changes at Chicago, Los Angeles, New York, and Washington. \textit{The Airline Scheduling Committee}, \textit{supra} note 1, at 1-2. The CAB granted the airlines the authority to hold such discussions for a period of sixty days subject to certain conditions, including the requirement that all airlines serving the four cities be allowed to participate. \textit{Id.} at 2 (citing C.A.B. Order Nos. 68-7-138 and 68-8-30). In the course of these discussions, it became apparent that the resolution of the problem of congestion would be extremely difficult and that reducing the number of operations and shifting the times of others would be required. \textit{Id.} at 5. Although the airlines had not been able to agree on the reductions, they made every effort to agree on procedures that they hoped would prevent government-imposed capacity limits. The airlines also limited the focus to the airports serving Chicago, Washington, and New York. \textit{Id.} at 7-9. The airlines further agreed to draft separate agreements for each of the cities and to hold separate meetings for each airport. The Chicago and New York agreements would become effective when signed by the airlines representing 90% of the operations in each city, and the DCA agreement would be effective when signed by all carriers operating at the airport. \textit{Id.} at 10 n.11.


\(^{19}\) Agreements filed pursuant to § 412(a) of the Federal Aviation Act of 1958, as amended, for the establishment of airline scheduling committees, \textit{Order Approving Agreement}, C.A.B. Order No. 68-12-11 (Dec. 3, 1968) (approving the Airline Scheduling Committee Agreements); Agreements filed pursuant to § 412(a) of the Federal Aviation Act of 1958, as amended, for discussions among certain air taxis and the establishment of scheduling committees, \textit{Order Approving Agreement}, C.A.B. Order No. 69-2-52 (Feb. 12, 1969) (approving the agreements to form scheduling committees for scheduled air taxi operators). The CAB first sought public comment on the agreement submitted on behalf of numerous airlines proposing to establish scheduling committees "to arrange for the administration of a program for the adjustment of scheduled domestic and foreign air transportation" at JFK, LGA, EWR, DCA, and ORD. Agreements filed
granting the carriers immunity from the antitrust laws. This approval and antitrust immunity enabled the airlines to allocate the slots among the carriers operating, or wishing to operate, at the particular high density airport and imposed certain conditions. Perhaps most significant were the requirements that adjustments in schedules be voluntary and that the limitations on operations not be greater than those imposed by the FAA’s regulations.

Because of the requirement that schedule changes be voluntary, the schedule changes could not be made unless there was unanimity among the affected carriers. Not surprisingly, unanimity was difficult to achieve and at times impossible, particularly after deregulation. In fact, in 1980 the FAA intervened when the DCA Air Carrier Scheduling Committee was deadlocked because of New York Air’s request for a significant

pursuant to § 412(a) of the Federal Aviation Act of 1958, as amended for the establishment of airline scheduling committees, Order Approving Agreement, C.A.B. Order No. 68-10-45 (Oct. 10, 1968). In approving the agreements, the CAB acknowledged the need for these agreements in order to implement the high density rule and granted the carriers antitrust immunity. As the CAB noted, although the FAA established the maximum number of movements at each of the high density airports and apportioned the number of movements among the classes of carriers, the FAA did not make allocations to each member of each class, anticipating that such an allocation would be accomplished by voluntary agreements among the class members. C.A.B. Order No. 68-12-11, at 4. Notwithstanding the grant of antitrust immunity, the CAB recognized the need to limit the discussions to those necessary to meet the limitations imposed by the high density rule in an attempt to ensure that no anticompetitive behavior would result. As such, the CAB conditioned its approval of the agreements (1) to require that any adjustments or reductions in operations be made for the sole purpose of complying with the FAA’s requirements; (2) to prohibit the discussion of city pair markets or other competitive factors; (3) to require notice of meetings and attendance of CAB and other designated representatives; and (4) to require the filing of proposed schedules submitted by the carriers and complete reports of the meetings. Id. at 5-6.

At the time, the approval under § 412 of the Federal Aviation Act carried with it automatic immunity from the antitrust laws under § 414. See 49 U.S.C. § 1384 (1988).

See C.A.B. Order No. 68-12-11 at 7; see also THE AIRLINE SCHEDULING COMMITTEE, supra note 1, at 11.

See id. at app. H.

The other practical shortcoming of the airline scheduling committees was the absence of a use-or-lose rule which would have freed up so called “pocket slots” which carriers held but did not need to support their operations. The retention of “pocket slots” stemmed from the fact that each slot held by an airline reduced the number of slots held by its competitors. As the prospects of a buy-sell rule increased, the pocket slot problem became more prevalent. See id. at 42-43.
The number of slots to mount a competitive Washington-New York shuttle service. The FAA's intervention gave New York Air the ability to launch its operation, although the allocation by the FAA fell short of New York Air's request—an uncompromising request which triggered the impasse.

The FAA's experience in the allocation of air traffic control resources following the 1980 DCA impasse was put to the test in 1981 following the air traffic controllers' strike. Because of the significant constraints on the control system created by the strike, the FAA implemented restrictions at twenty-two of the country's busiest airports based on a modified lottery and percentage reduction of the scheduled flights published by carriers. These restrictions superseded and in many cases were

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24 See 45 Fed. Reg. 69,403 (1980) (request for comments on the mechanism to be used for allocation of slots at DCA in face of deadlock of the scheduling committee); Special Federal Aviation Regulation (SFAR) No. 43, 45 Fed. Reg. 72,637 (1980).

25 The FAA allocated to New York Air 18 of the 20 slots it requested by taking slots which the incumbent carriers proposed to relinquish in the course of an incomplete nonbinding exercise and by taking an additional slot from each of the twelve largest carriers in the committee. See 45 Fed. Reg. 72,637, 72,640. This action by the FAA was perceived as having a chilling effect on the willingness of the scheduling committee participants to engage in nonbinding exercises, and, as such, an adverse impact on the continued viability of the scheduling committee process. See The Airline Scheduling Committee, supra note 1, at 31-33, 49; see also Dep't of Transp. Report to the Congress: A Study Of the High Den- sity Rule 25 (1995) [hereinafter 1995 DOT Report to Congress]. Although the FAA's action was challenged, it was upheld by the U.S. Court of Appeals for the Eighth Circuit which determined that the action of the Secretary of Transpor- tation was within the agency's statutory authority, procedurally adequate, and rationally based. Northwest Airlines, Inc. v. Goldschmidt, 645 F.2d 1309, 1318 (8th Cir. 1981). The court further determined that the action was consistent with the procompetitive policies of the Airline Deregulation Act of 1978. Id.

26 See The Airline Scheduling Committee, supra note 1, at 35, 40-41. Because the high density rule permitted carriers to operate VFR flights at high density airports without regard to the quotas, many airlines had far more flights listed in the Official Airline Guide (OAG) than slots to support them. Although this meant that the carriers had to cancel or reroute flights when IFR conditions prevailed, they were in a far better position under the Interim Operations Plan (IOP) since their permitted operations were based on the number of flights published in the OAG, not the number of slots they held. Id. at 35. Not long after the air traffic controllers' strike began, the FAA amended the high density rule to require IFR reservations, and therefore slots, for operations at DCA. See 46 Fed. Reg. 58,036, 58,041 (1981). To prevent the situation which became apparent during the IOP wherein the scheduled flights of some carriers far exceeded the number of slots held by the carrier at the airport, the FAA changed the rule to preclude any operation that is regularly scheduled to or from a high density airport from being operated under VFR to the extent such operation exceeds the high density lim- itations. 14 C.F.R. § 93.129(c) (1995).
more stringent than those imposed by the high density rule.\textsuperscript{27} Due to the substantial constraints on operations under the IOP, and perhaps because the FAA had gained experience from the carriers' tendency to hold "pocket slots," the FAA imposed a use-or-lose requirement in an attempt to maximize the utilization of airspace.\textsuperscript{28}

In an effort to ameliorate some of the scheduling difficulties created by the reductions imposed by the IOP, the CAB approved a Slot Exchange Agreement.\textsuperscript{29} Notwithstanding the attempt to maximize utilization through the use-or-lose rule and to increase flexibility with the Slot Exchange Agreement, the carriers continued to experience significant scheduling difficulties. As a result, the FAA in 1982 implemented an experimental buy-sell program which lasted approximately six weeks.\textsuperscript{30} During the six-week period, over 300 slots were transferred, of which


\textsuperscript{28} SFAR No. 44-3, 47 Fed. Reg. 7816, 7819 (1982) (slots must be used a minimum of 70% of their scheduled use or are subject to forfeiture).

\textsuperscript{29} The CAB's approval of the Slot Exchange Agreement imposed several conditions, including a requirement that the procedure for slot exchanges be designed to ensure anonymity. See ATA, Slot-Allocation discussions, 92 C.A.B. 1301 (1981) (Order No. 81-11-102). To fulfill this condition, the carriers wishing to acquire or trade slots would advise the chairman of the scheduling committee in writing. The requests would then be reviewed and matched to the extent possible. See THE AIRLINE SCHEDULING COMMITTEE, supra note 1, at 41.

\textsuperscript{30} SFAR No. 44-3, 47 Fed. Reg. 19,988, 19,989 (notice of FAA policy permitting the transfer of arrival slots in any number and for any type of consideration at the 22 impacted airports); SFAR No. 44-3, 47 Fed. Reg. 25,508, 25,508 (extension of policy permitting transfers); SFAR No. 44-3, 47 Fed. Reg. 29,814, 29,814 (suspension of transfer policy). What a carrier could sell was defined by its pre-strike operating base which included the flights at high density airports that were listed in the OAG even if there were no slots to support them. This resulted in a substantial benefit to many carriers. See THE AIRLINE SCHEDULING COMMITTEE, supra note 1, at 35. The eventual elimination of controls at the vast majority of the affected airports also meant that carriers may have purchased operating rights which they no longer needed.
over 190 were sold.\textsuperscript{31} This experimental program was the first official experience that the government and the carriers had with a buy-sell program and shed light on the value placed on slots and some of the attendant risks associated with the treatment of slots as property. However, because only carriers were permitted to own slots and because of the short term nature of this program, many of the issues which now arise in slot transactions were not relevant and perhaps not apparent at that time.

As the air traffic control situation returned to normal, the FAA in 1983 issued a proposal to rescind the high density rule at ORD, JFK, EWR, and LGA.\textsuperscript{32} Because DCA was subject to separate treatment and included a passenger cap,\textsuperscript{33} it was not included in the proposal to rescind the rule. The proposal, however, was never adopted. By August 1984 all IOP limitations were lifted and capacity restrictions were once again governed by the high density rule.\textsuperscript{34}

Shortly after all IOP restrictions were lifted, it once again became apparent that congestion and delays at major airports during peak hours were a significant problem. In response, Eastern Air Lines, Inc. (Eastern) petitioned the CAB for discussion authority and approval under sections 412 and 414 of the Federal Aviation Act to enable carriers to integrate their schedules. Although the CAB believed that the discussions could reduce


\textsuperscript{32} 48 Fed. Reg. 13,434, 13,434 (1983) (proposed Mar. 31, 1983). The FAA proposed to remove the limitations on operations at JFK, LGA, and ORD and to delete EWR from the rule since the limitations imposed by the rule had been suspended at EWR for many years.

\textsuperscript{33} In an effort to address the growing controversy regarding the magnitude of operations at DCA, regulations were issued in 1980 that would reduce the number of air carrier operations at DCA from 40 to 36 per hour and limit the number of passengers served at DCA to 17 million per year. 1994 FAA Request for Comments, supra note 2, at 9. Before the regulations became effective, however, litigation was instituted challenging, among other things, the reduction to 36 operations per hour. Id. at 10. In late 1981 new regulations were issued reducing the number of air carrier operations per hour to 37 instead of 36 and adopting a 16 million annual passenger limitation along with a regulatory procedure to reduce the number of slots in order to maintain the passenger cap. Id. at 11; see also 46 Fed. Reg. 58,036, 58,037.

competition, it granted the authority and antitrust immunity necessary for airlines to participate in such discussions based on its belief that there was a potential for securing important public benefits—namely, a reduction in travel delays—and because it could find no materially less anticompetitive method of tackling the problem.

In spite of all of these efforts, dissatisfaction with the slot allocation system was growing. In particular, it was becoming apparent that the scheduling committees and the other "voluntary" arrangements simply were not working in the era of deregulation. The requirement for unanimity and the absence of deadlock breaking mechanisms or use-or-lose rule made new entry and growth difficult. For example, New York Air was only able to commence a competitive shuttle service in the Northeast because the FAA allocated a sufficient number of slots upon being advised by the scheduling committee that it was deadlocked.

The practical impediments to the functioning of the scheduling committees, combined with the fundamental tenet of deregulation that market-based mechanisms were a better and more pro-competitive form of allocation, led to increased discussions in industry, Congress, and the FAA regarding the possibility of a buy-sell rule. Initially, the prospect of a buy-sell rule and the

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35 See Application for Discussion Authority and Prior Board Approval of Carrier Agreement to Integrate Schedules, Order Granting Discussion Authority, C.A.B. Order No. 84-8-129, at 9-10 (Aug. 31, 1984) (1984 Discussion Authority). The CAB noted that the discussions go to the "heart" of the competitive process—namely, scheduling. Id. at 9. Because this would affect output, such agreements among competitors are per se violations of the antitrust laws. Id. at 10. Because of the important public benefits, however, the CAB approved the agreement and granted antitrust immunity subject to numerous conditions, including a requirement that any changes made be made on a voluntary basis. Id. at 13.

36 Id. at 9-10, 13-14; see also Application for Discussion Authority and Prior Approval of Carrier Agreements to Integrate Schedules, Order (Schedule Integration Order), C.A.B. Order No. 84-10-120, (Oct. 25, 1984); THE AIRLINE SCHEDULING COMMITTEE, supra note 1, at 36-37.

37 See supra notes 24-25 and accompanying text.

38 See, e.g., 45 Fed. Reg. 72,637, 72,638 (1980) (FAA noted suggestions that slots be treated as marketable rights); 49 Fed. Reg. 23,788, 23,790 (1984) (proposed June 7, 1984) (NPRM soliciting comments on allowing air carriers to transfer slots for any consideration with minimal government regulation and citing to comments filed in 1983 by the Air Transport Association proposing that carriers be permitted to buy and sell slots); 1984 Discussion Authority, supra note 35, at 5-7 (the CAB noted that Federal Trade Commission (FTC) staff and the Council of Economic Advisors prefer a market-based method of distributing slots to administrative approaches); 1985 Aviation Subcommittee Hearings, supra note 31, at 71 (hearings called to address the methods of allocating and transferring operating rights in a deregulated environment).
absence of a deadlock breaking mechanism increased the number of pocket slots since they did not want to give away what could ultimately become a valuable asset.

In June 1984 the FAA requested public comment on alternative methods of slot allocation. Many of the alternatives discussed in the proposed rule reflected the experience gained by the FAA during the air traffic controllers' strike—namely, the use of lotteries to allocate slots and the transfer of slots through a buy-sell mechanism.

C. The Buy-Sell Rule

In December 1985 the FAA adopted the buy-sell rule, permitting air carrier and commuter slots to be transferred for any consideration. This rule, unlike the experimental program in 1982, permitted non-air carriers to hold slots—something which is significant for carriers wishing to use their slots as security as well as communities that may wish to ensure the preservation of service to a high density airport. The rule provided that beginning April 1, 1986, permanent slots (except those designated for international or essential air service (EAS)) could be purchased, sold, traded, or leased by any party, in any number, at any high density airport on a daily, weekly, monthly, or any other basis. To avoid disruption to air service, the initial allocation of slots was made to air carriers and commuters who held permanent slots on December 16, 1985, the effective date of

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40 Id. at 23,789-90.
42 Id. at 52,182. The holder of the slot is effectively its “owner” while the operator is the user.
43 EAS is a program that was developed by Congress in conjunction with airline deregulation in an effort to help ensure that smaller communities are provided with the air service necessary to link them to the national air transportation system. To the extent necessary, carriers may receive subsidies to operate to certain EAS points. 49 U.S.C.A. §§ 41731-41742 (West 1995) (original version at 49 U.S.C. § 1389 (1988)).
45 In describing “permanent” slots, the FAA explained that a “slot is not permanent if it has been allocated for a short period of time and is to be returned to the appropriate scheduling committee.” 50 Fed. Reg. 52,180, 52,183. The FAA went on to note that the issue of whether a slot is “permanent” would generally arise in the case of commuter slots since commuter scheduling committees would frequently reallocate returned slots for short intervals pending the next scheduled permanent slot allocation. Id.
the rule, as indicated by the records of the appropriate scheduling committee.\textsuperscript{46}

For purposes of determining which slots would be withdrawn in the event capacity was reduced in the future or additional slots were needed to fulfill international or EAS obligations, the FAA assigned by lottery withdrawal priority numbers to each slot.\textsuperscript{47} The FAA, however, exempted from the withdrawal provisions carriers with a limited number of slots.\textsuperscript{48}

\textsuperscript{46} Id. at 52,190; see also 14 C.F.R. § 93.215 (1995). The DOT acknowledged that grandfathering slots would result in a benefit to incumbent carriers. Although many parties opposed the financial windfall the incumbents would receive as a result of the grandfather provision, the DOT determined that the one time benefit was necessary to implement the buy-sell system and to minimize the disruption of existing service. See 50 Fed. Reg. 52,180, 52,184. The DOT also believed that such grandfather provisions recognized the "investments and commitments in personnel, equipment, terminal development, and planning by existing carriers." Id. In addition, according to the DOT, the incumbent carriers had already received the value of the slots at no cost and only a marginal increase in value would result from the ability to sell such slots. Id. On reconsideration, seasonal slots and slots for charter carriers were grandfathered to the same degree as scheduled operator slots so that permanent slots that were held and operated by carriers for international service or on a seasonal basis in 1985 at JFK and ORD as evidenced by scheduling committee and FAA records could continue to be used by the carrier. 51 Fed. Reg. 21,708, 21,709, 21,712, 21,715 (1986). The buy-sell rule requires operators that did not receive slots under the grandfather provision for particular operations to make reservations for vacant slots for additional operations generally within 48 hours of use. Id. at 21,712. The revisions to the buy-sell rule issued on reconsideration added a provision for administrative allocation of certain types of vacant slots that will allow charter operators to make reservations weeks or months in advance of use of the slot. Id.; see also 14 C.F.R. § 93.217(a)(5) (1995).

\textsuperscript{47} 14 C.F.R. § 93.223 (1995); see also 50 Fed. Reg. 52,180, 52,192. These withdrawal priority numbers are important in evaluating the value of slots. A low number means a slot is vulnerable to withdrawal and a high number gives it more protection.

\textsuperscript{48} On reconsideration of the buy-sell rule, the FAA advised that it would not withdraw slots from carriers with eight or fewer non-international slots. However, the FAA stated that carriers with less than eight slots could not enter into lease arrangements to protect another carrier’s slots from withdrawal. 51 Fed. Reg. 21,708, 21,714, 21,716. The FAA further clarified the limitations on the protection from withdrawal of slots held by carriers with less than eight slots by specifically requiring the holding carrier to operate the slots itself. 54 Fed. Reg. 34,904, 34,905 (1989) (use requirement prevents larger carriers from transferring slots vulnerable to withdrawal to carriers exempt from withdrawal and leasing them back). In 1992 the withdrawal exemption was amended to cover carriers with twelve or less slots at a particular high density airport. 57 Fed. Reg. 37,308 (1992); 14 C.F.R. § 93.223(c)(3). The FAA has, however, granted exemptions to carriers that would qualify for this protection but for the fact that they transferred their slots to financial institutions in order to obtain financing and lease the slots back for use. See In re America West Airlines, Inc. and BT Commercial
The buy-sell rule also implemented a use-or-lose provision in the hope that marginally used slots would be freed up for carriers seeking entry to airports or seeking to expand their presence at airports. To monitor slot usage, the FAA required reports to be filed fourteen days after the end of each two-month period, with the obligation to file the report imposed on the holder of the slot. If a review of these reports indicated that the minimum usage requirements were not met, the FAA could withdraw the slot. It was contemplated that slots made available through the application of the use-or-lose provision, slots voluntarily returned to the FAA, and newly created slots resulting from increases in air traffic control capacity would be allocated by lotteries expected to occur not more than every six months.

49 14 C.F.R. § 93.227 (1995). This provision required that slots be used 65% of the time over a two-month period to avoid recall by the FAA. The FAA, however, specifically included a provision that would allow it to waive the use-or-lose rule in unusual circumstances outside of the control of a carrier (such as, the grounding of an aircraft type or protracted severe weather) which exists for a substantial period (defined by the FAA as nine days). 14 C.F.R. § 93.227(j); see also 51 Fed. Reg. 21,708, 21,716. In certain circumstances that did not otherwise meet the regulatory definition of unusual circumstances, the FAA, as a matter of policy, has applied the use-or-lose rule with flexibility. See, e.g., 61 Fed. Reg. 7213 (1996) (slots unused during a 1996 blizzard treated as used). 58 Fed. Reg. 21,095 (1993) (slots unused during a 1993 blizzard treated as used); 14 C.F.R. § 93.227(l) (slots held on Thanksgiving Day, the Friday following Thanksgiving, and December 24 through January 1 treated as used).

50 See 50 Fed. Reg. 52,180, 52,188-89 (the use-or-lose provision prevents the holding of "pocket" slots for speculative purposes and maximizes utilization of airport capacity).

51 14 C.F.R. § 93.227(i).

52 Originally, the FAA set aside 15% of the slots for a preferred allocation to new entrants and limited incumbents. 50 Fed. Reg. 52,180, 52,185. This was increased to 25% in 1986. 51 Fed. Reg. 21,708, 21,716. For purposes of the slot restrictions, the term "new entrant" is focused solely on the carrier's operations at the particular high density airport. In other words, even if a carrier has been in existence for many years, operates at other high density airports, or both, if it does not operate at the specific high density airport in question and has never sold or given up a slot at that airport after December 16, 1985, it is a new entrant. 14 C.F.R. § 93.213(a) (1) (1995). Limited incumbents are those carriers which operate fewer than twelve air carrier or commuter slots (in any combination) not counting international or EAS slots but including the number of slots which the carrier has had at the airport since December 16, 1985 (but which it may have transferred or lost as a result of nonuse). 14 C.F.R. § 93.213(a) (5) (1995). The category of limited incumbents initially included only those carriers with eight or fewer slots at a particular high density airport. 51 Fed. Reg. 21,708, 21,714.
The last lottery was held in 1989, and there appear to be no prospects for a lottery anytime in the foreseeable future.

As noted previously, the initial allocation of slots represented a financial windfall for incumbent carriers, a fact which the FAA acknowledged but believed was necessary to minimize disruption to operations at these airports. In an effort to minimize the impact this grandfather provision would have on carriers seeking entry to these airports and to diminish the advantage held by the incumbents, the FAA also proposed (and shortly thereafter adopted) an SFAR providing for a one-time withdrawal of five percent of the carrier slots at ORD, LGA, and DCA. These slots would then be reallocated to new entrants and limited incumbents along with all other slots not permanently allocated to carriers on December 16, 1985. No slots would be withdrawn from limited incumbents and no more than ten percent of a carrier's slots at a particular airport would be withdrawn. JFK was exempted from this withdrawal because of the large number of international operations and because it had accommodated new entrants. Commuter slots were also excluded from the withdrawal because of the historical success of the commuter scheduling committees in accommodating new entrants. Finally, slots deemed necessary by the DOT for EAS would not be withdrawn.

The FAA established guidelines for the one-time five percent withdrawal lottery. Specifically, the FAA required that a minimum number of slots in each controlled hour be placed in the reallocation pool in order to ensure that slots would be available throughout the day for the new entrants and limited incum-

53 See supra note 46.
54 50 Fed. Reg. 52,180, 52,184; see also 50 Fed. Reg. 52,199, 52,199 (1985) (proposed Dec. 20, 1985) (NPRM proposing withdrawal of slots for reallocation). The FAA noted that although it was appropriate to permit carriers to retain a large percentage of slots held by them, this method of allocation could place new entrant carriers and incumbent carriers with a limited number of slots at a disadvantage since the only way they could obtain additional slots would be to purchase them. Id. at 52,200. It should be noted that although the FAA referred to the purchase of slots as the only method to obtain slots, a lucrative market in leasing slots developed as a result of the buy-sell rule. The NPRM proposing the withdrawal of slots was finalized on March 12, 1986. SFAR No. 48, 51 Fed. Reg. 8632 (1986).
56 Id. at 8633.
57 Id.
58 Id. at 8635.
59 Id. at 8635-37.
Carriers were given the opportunity to identify the slots to be withdrawn. If they failed to respond in a timely fashion, however, the FAA made the selection for them. Although the FAA granted the right to buy, sell, and otherwise trade slots, the FAA stated (and continues to state to this day) that there are no proprietary rights created in slots—a subject which has been a topic of discussion by the bankruptcy courts.

60 Id. at 8636.
61 Id. at 8638. Carrier representatives were given five minutes to designate the slots to be withdrawn before the FAA would make the selection.
62 In the NPRM proposing the buy-sell rule, the FAA described slots as a temporary creation of FAA regulations which do not confer a long term right. It noted that slots can be taken away from a carrier in accordance with FAA regulations and that there is no guarantee that slots will be required at any airport for any particular period of time. 49 Fed. Reg. 23,788, 23,792. The FAA further noted that in *In re Braniff Airways, Inc.*, 700 F.2d 935, 942 (5th Cir. 1983), the court held that slots are not property in themselves and that even if a limited proprietary interest arose from the allocation of slots, transfers or dispositions of such slots would nevertheless require FAA approval. 49 Fed. Reg. at 23,788, 23,792 (citing *Braniff*, 700 F.2d at 942). In the preamble to the final rule, the FAA stated “[t]his amendment does not create proprietary rights in slots.” 50 Fed. Reg. 52,180, 52,182. The regulations governing the withdrawal of slots also state that “[s]lots do not represent a proprietary right but represent an operating privilege subject to absolute FAA control.” 14 C.F.R. § 93.223(a).
63 In *In re McClain Airlines, Inc.*, 80 B.R. 175 (Bankr. D. Ariz. 1987), the court determined that slots are property of the estate of the debtor airline which has been granted slots, despite § 1371(i) of the Federal Aviation Act which prohibited the CAB from creating property rights in air transportation. Notwithstanding the FAA’s disclaimer of “property rights” in slots as set forth in 14 C.F.R. § 93.223(a), the court reasoned that such a position must be considered in light of current administrative developments (that is, the buy-sell rule which permits carriers to purchase or sell slots). *McClain*, 80 B.R. at 177. As the court noted, the enactment of rules to “minimize government intervention” and provide “maximum reliance on market forces to determine slot distribution” in § 93.221(a) is difficult to reconcile with the agency’s claim in § 93.223(a) that such free market items do not constitute property rights. *Id.* at 179. In evaluating the property rights in the context of a bankruptcy, the court determined that if the government had properly and permanently withdrawn slots from a debtor airline under appropriate federal administrative law, the debtor and debtor’s estate lost rights in such slots. *Id.* at 179. The First Circuit in *In re Gull Air, Inc.*, 890 F.2d 1255 (1st Cir. 1989), also discounted the FAA’s statement that the buy-sell rule created no proprietary rights in slots. The First Circuit referred to the *McClain* decision which provided that by granting carriers the right to buy and sell slots with the intent of maximizing reliance on market forces and minimizing government involvement in slot distribution, the FAA grants to carriers a limited proprietary right in slots. *Gull Air*, 890 F.2d at 1259-60. Although the FAA attempted to refute such proprietary rights through its pronouncement in 14 C.F.R. § 93.223(a), the court concluded that such a statement does not detract from the reality that a market for these slots exists and that carriers possess a
III. THE CURRENT HIGH DENSITY RESTRICTIONS

Since 1985, the high density rule has been amended numerous times with respect to, among other things, the controlled hours at the airports, the number of authorized operations, the size of aircraft operated in each class of slot, and the minimum percentage of slot use required to avoid forfeiture. As it now stands, the high density rule includes the following significant provisions:

1. It applies to operations at ORD between 6:45 a.m. and 9:15 p.m., at JFK between 3:00 p.m. and 7:59 p.m., and to all operations at LGA and DCA, with the number of slots varying from airport to airport. During these hours scheduled carriers must
have slots to support each takeoff and landing. With the excep-
tion of LGA and the summer scheduling season at JFK, there is
no distinction between arrival and departure slots.69

2. Slots are allocated among three classes of users—air carriers,
commuters, and other operators (general aviation and charters).70
Commuter slots can only be used to support the operation of
jets with less than fifty-six seats and turbojet aircraft
with less than seventy-five seats.71 At ORD, the FAA will permit
up to fifty percent of a carrier’s commuter slot holdings to be
used for the operation of aircraft having an actual seating con-
figuration for 110 or fewer passengers and having a maximum
takeoff weight of 126,000 pounds.72 Carriers wishing to use
commuter slots for this purpose must obtain prior approval
from air traffic control.73 An equivalent provision does not exist
for commuter slots at the other high density airports. Except
for the limited flexibility for commuter slots at ORD, air carrier
slots are required to operate jet aircraft with fifty-six seats or
more and turbojet aircraft with seventy-five seats or more.

3. All permanent slots may be sold, leased, or otherwise
traded except slots designated for EAS and international ser-
vice.74 If the EAS and international slots will not be used for a
two-week period, they must be returned to the FAA.75 Interna-
tional slots in different hours may be traded on a one-for-one

and during the winter season at JFK, slots are allocated for specific hourly inter-
vals. 14 C.F.R. § 93.123; see also 1995 DOT REPORT TO CONGRESS, supra note 25,
at 31.

69 See id.
70 14 C.F.R. § 93.123(a).
71 Id. § 93.123(c).
72 Id. § 93.221(e).
73 Id. § 93.221(e) (3). A carrier must notify air traffic control (ATC) at least 75
days in advance of the planned startup date of the operation of 110-seat aircraft
in a commuter slot. The notification must include the slot number, proposed
time of operation, aircraft type and series, actual seating configuration, and
planned commencement date. ATC will approve or disapprove the use of such
aircraft in a commuter slot within 45 days of receipt of the notice. If the planned
commencement date is delayed by 30 days, a revised notice must be filed with
ATC.
74 Id. § 93.221 (1995) which, as a general rule, permits slots to be bought, sold,
or leased for any consideration and any time period. The FAA, however, prohib-
its parties from buying, selling, leasing, or otherwise transferring EAS or interna-
tional slots, except for limited one-for-one trades at the same airport. 14 C.F.R.
75 Id. §§ 93.217(a) (3), 93.219(b).
basis at the same airport between two independent air carriers (i.e., not commonly owned).\textsuperscript{76}

4. Slots must be used eighty percent of the time over a two-month period or they will be withdrawn by the FAA.\textsuperscript{77} The use-or-lose rules are intended to ensure that slots, and therefore service, at high density airports are maximized.\textsuperscript{78}

5. The FAA has acknowledged that the rigid application of the minimum use requirements in bankruptcy cases would impose time pressures that the bankruptcy proceedings cannot realistically accommodate.\textsuperscript{79} In an effort to balance these concerns against the need to establish a precise date when unused slots would revert to the FAA, the FAA adopted special rules to address bankruptcies.\textsuperscript{80}

   a. To ensure that EAS will be maintained to smaller communities, the FAA may, within thirty days after an operator files for bankruptcy, recall all slots of that operator which have been used to provide EAS if the DOT determines that the slots are required to provide substitute EAS to or from the same points.\textsuperscript{81}

   b. Aside from the possible withdrawal of slots to maintain EAS, the remainder of the bankruptcy-oriented slot provisions relate to relief from the use-or-lose rule. In effect, the FAA has recognized that slots are valuable assets of the debtor's estate and, by the flexibility granted under the rules, gives the bankrupt carrier the opportunity to con-

\textsuperscript{76} The FAA will, however, permit an international slot held by a carrier to be traded to another carrier for a slot (domestic or international) on a one-for-one basis at the same airport. The trades must occur between two separate (that is, not commonly owned) airlines and must be for slots in a different hour or half-hour period. \textit{Id.} § 93.217(a)(2). Common ownership is deemed to exist if one party owns 50\% or more of the carriers or if one carrier owns 50\% or more of another. \textit{Id.} § 93.213(5)(c). The FAA will permit similar trades for EAS slots subject to the same common ownership restriction. \textit{Id.} § 93.219(a).

\textsuperscript{77} \textit{Id.} § 93.227(a).


\textsuperscript{79} The FAA first acknowledged the need for special use-or-lose rules to accommodate bankruptcy situations when it adopted the buy-sell rule. \textit{Id.} at 52,193; \textit{see also} 56 Fed. Reg. 46,674, 46,678-79 (1991) (proposed Sept. 13, 1991) (proposed to amend rules relating to bankruptcies to account for different types and aspects of bankruptcy proceedings and reaffirmed the need for a precise date when unused slots will revert to the FAA while providing adequate period for sale under bankruptcy procedures). The proposed bankruptcy provisions were adopted unchanged by the FAA. \textit{See} 57 Fed. Reg. 37,308, 37,310.

\textsuperscript{80} \textit{See} 14 C.F.R. § 93.227(d).

\textsuperscript{81} \textit{Id.} § 93.227(h).
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Continue its operations or to sell its slots. Specifically, the FAA in bankruptcy cases provides the following time frames for relief from the use-or-lose rule:

i. A one-time sixty-day exemption from the date the initial bankruptcy petition is filed during which the use-or-lose rule will not apply;\footnote{id:93.227(d)(1)(i)}

ii. A thirty-day exemption from the date of submission of information required by Hart-Scott-Rodino or other federal law regarding a proposed transfer of assets (provided the information is submitted more than thirty days after the initial filing for bankruptcy and provided that the slot has not become subject to withdrawal under any other provision of the slot rules);\footnote{id:93.227(d)(1)(ii)}

iii. A thirty-day exemption following total cessation of operations at a slot controlled airport provided that the slot has not become subject to withdrawal under any other provision of the slot rules;\footnote{id:93.227(d)(2)(i)}

iv. Thirty days after the parties to the proposed transfer of any such slot comply with requests for additional information from the federal government in connection with the antitrust, economic impact, or similar investigation of the transfer provided that (1) the original notice of the transfer is filed with the federal agency within thirty days after the carrier ceases operation at the airport; (2) the request for information is made within ten days of the filing of the notice by the carrier; (3) the carrier submits the additional information to the federal agency within fifteen days of the request by such agency; and (4) any slot to be transferred has not become subject to withdrawal under another provision of the slot rules;\footnote{id:93.227(d)(2)(ii)(A)-(D)} and

v. Recognizing that (1) purchasers of slots from bankrupt carriers cannot always implement service immediately and the ramifications if the use-or-lose rule were rigidly applied; and (2) start-up waivers could be granted by the FAA to purchasers of slots in bank-

\footnote{id:93.227(d)(1)(i)} Id. § 93.227(d)(1)(i).
\footnote{id:93.227(d)(1)(ii)} Id. § 93.227(d)(1)(ii).
\footnote{id:93.227(d)(2)(i)} Id. § 93.227(d)(2)(i).
ruptcy although no set time frame or guarantee of a waiver is provided by the rules.\footnote{86}

In general terms, these provisions make clear that, notwithstanding the FAA's statements that slots are not proprietary rights, the FAA has accepted the fact that slots by their nature and by virtue of the buy-sell rule are proprietary rights that will be protected by bankruptcy courts.\footnote{87} Basically, as long as a carrier has complied with the FAA's slot regulations and the FAA has not withdrawn the slots in accordance with its rules, the slots are considered property of the estate to be treated as any other property, subject to the FAA's transfer requirements.

IV. THE SLOT MARKET CREATED BY THE BUY-SELL RULE

A. THE SALE AND LEASE OF SLOTS

The buy-sell rule contemplated that carriers would transfer slots they did not need, thereby providing access to the high density airports to carriers lacking slots.\footnote{88} Although the buy-sell

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\footnote{86} In the course of amending the provisions of the high density rule relating to the applicability of the use-or-lose rule in cases of bankruptcy, the FAA stated that it has granted waivers from the use-or-lose provisions to purchasers of slots in bankruptcy, but indicated that it was unwilling to create a regulatory provision automatically granting such relief. \textit{See} 57 Fed. Reg. 37,308, 37,310.

\footnote{87} \textit{See} \textit{discussion supra} notes 62, 63. Although the FAA has acknowledged that property interests in slots have been recognized by bankruptcy courts in spite of the FAA's regulatory pronouncement that slots do not constitute property, the FAA nevertheless continues its attempt to prevent claims that slots constitute property. Specifically, in the course of denying an exemption to United Air Lines, Inc. (United) that would have prevented the withdrawal of its slots at ORD for international service, the FAA stated that although bankruptcy courts may have recognized property interests in slots, property interests have not been found in any other context. \textit{See In re United Air Lines, Inc., FAA Docket No. 27151, at 5 (Mar. 30, 1993) (denial of exemption).} To emphasize the point, the FAA stated "[n]o degree of reliance, however large or unfounded, can create a property interest in slots when the rule and historical administration by DOT so clearly establish the concept that slots are not property." \textit{Id.}

\footnote{88} 50 Fed. Reg. 52,180, 52,185-86. The DOT did not believe that larger carriers would use their resources and the flexibility provided by the rule to dominate the markets and thereby create concentration at high density airports. The DOT's belief was based on what it perceived to be a lack of business incentive and the impracticality of obtaining monopoly control. Specifically, the DOT believed that a carrier would not have the incentive to acquire and use a slot merely to preempt another carrier since the slot holding carrier could maximize its profits by selling the slot to another carrier which is offering a highly valued service and therefore would be willing to pay for the slot. \textit{Id.} Reality has shown that the DOT's beliefs were quite naïve.
rule specifically contemplates that slots may be bought, sold, leased, or traded, the FAA allows any type of transfer as long as the transfer requirements are met. While the FAA's regulations are relatively straightforward and easily applied to the purchase and sale of slots, the regulations are not as clear in the area of leasing slots or using slots as security—transactions that likely represent a larger number of slot transactions than sales. In effect, the unwritten guidelines of the FAA must be fleshed out, and as the slot market continues to develop, the FAA faces many cases of first impression.

Regardless of the type of transfer, transfers must be processed through the FAA and reflected in the FAA's records. In order to process the request, the parties are required to submit certain factual information relating to the parties and the slots. The FAA requires the following: (1) the slot is from the transferor's then-approved FAA base; (2) written evidence of the transferor's consent; and (3) the recipient must refrain from using the slot until written confirmation has been received from the FAA. This written confirmation typically takes approximately four days, although in some cases it may take less, and in others far more.

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90 Leases are frequently a preferred method of slot transfer since it provides carriers with the flexibility necessary to satisfy short term needs that do not warrant the purchase or sale of slots. The ability to operate 110-seat aircraft in 50% of the commuter slots held by a carrier at ORD has also likely resulted in a lucrative leasing market due to the 50% limitation. Because of this limitation, a purchaser of commuter slots at ORD would need to buy two commuter slots to operate one of them with 110-seat aircraft. As a result, small carriers that do not operate larger aircraft can lease a commuter slot that can be operated with larger aircraft to another operator for money, slots, or any combination. Although the FAA does not permit a carrier to transfer the "conversion" right for the slot, a two way lease can arrive at the same result. The benefit to the smaller carriers at ORD and the value of their commuter slots is therefore increased by the provision allowing the operation of larger aircraft in these slots.
91 Id. § 93.221(a)(1).
92 Id. This provision requires that requests for transfers specify the names of the transferor and recipient; the business address and telephone number of the persons representing the parties; whether the slot is an arrival or departure slot; the date the slot was acquired by the transferor; the section of the subpart under which the slot was allocated to the transferor; whether the slot has been used by the transferor for international or EAS; whether the slot will be used by the transferee for international or EAS; and the withdrawal priority number assigned to the slot.
93 Id. § 93.221(a)(2)-(4).
In the case of leases, certain guidelines must be observed notwithstanding the fact that they do not appear in the regulations. First, the lease must specify a set term; it cannot be open ended. If there is no set term, the FAA assumes that the operator and holder status of the slot are being transferred by the transferor—thus, the transfer is treated as a sale. If the lease includes an option to renew, an additional filing would need to be made with the FAA to extend the lease. At the end of the specified term the FAA will automatically transfer the operator status back to the holder of the slot.

The FAA’s mechanical requirements likely stem, at least in part, from the fact that it does not want to be the arbitrator of a dispute between the parties. If a lease is being terminated early, both parties have to agree before the FAA will transfer the slot back to the lessor (or to a third party). Even if a default occurs, the FAA will not transfer the operator status of the slot back to the holder without the agreement of the lessee—which as a practical matter would be difficult to obtain. It is likely that nothing short of a court order would facilitate the early termination of the lease and the return of the slot to the lessor when the lessee/operator does not agree to the return. The FAA has not yet faced such a situation although it certainly has faced disputes between lessors and lessees.

Because new entrants and limited incumbents receive a preference in any FAA lottery of available slots, additional transfer restrictions are imposed on those slots. Specifically, for the first twenty-four months after the new entrant or limited incumbent obtains a slot in a lottery, the FAA will only permit that slot to be transferred by trade for one or more slots at the same airport or to other new entrants or limited incumbents and only if the carrier awarded the slot in the lottery used it for a minimum of sixty days. The same transfer restriction attaches to any slot acquired by the new entrant or limited incumbent as a result of a trade. The transfer restriction is removed after documentation supporting twenty-four months of continuous use has been submitted to the FAA. If the criteria are not met, the FAA will void any trade involving the lottery slot and withdraw the lottery

94 See id. § 93.225(h) (1995); see also supra note 52.
95 See id. § 93.221(a)(5).
96 Id. § 93.221(a)(5) (i), (iii).
97 Id. § 93.221(a)(5) (i).
98 Id.
slot\(^{99}\) (which may now be in the hands of the new entrant's transferee). These restrictions are intended to prevent carriers from participating in lotteries merely to obtain slots for the purpose of selling or leasing them.\(^{100}\)

B. **The Value of Slots**

The access to high density airports which slots provide has always resulted in a value to the carrier holding the slots. The buy-sell rule, however, has enabled parties to take greater advantage of this value. In evaluating the value of slots, four basic measures are used.\(^{101}\) First, to an incumbent airline, the economic value of its slots is equal to the discounted present value of the net profit stream from the fare premium it is able to charge as a consequence of its slot operations at three of the four high density airports.\(^{102}\) Second, the sales value of the slot is dependent upon a prospective buyer's assessment of the in-

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\(^{99}\) Id.

\(^{100}\) The transfer restrictions placed on slots received in lotteries stems from the concern that new entrants and limited incumbents would obtain these slots merely for a financial benefit. In 1988 the DOT and the FAA noted:

Since the rule was first issued, a total of 140 slots have been made available to new entrants or limited incumbents (holding less than 8 slots). Of the carriers which received the 140 slots, many if not most of the carriers sold those slots in the minimum time permitted or otherwise failed to use them. Of the 140 slots allocated to new entrants and carriers with less than 8 slots in the lotteries to date, only 15 are in use by the carriers that obtained the slots. Others were used by carriers which subsequently merged into larger carriers, but most of the 140 slots were sold or were returned to the FAA without operation.


\(^{102}\) The DOT noted in its report to Congress that a fare premium appears to exist at ORD, LGA, and DCA, but not at JFK. 1995 DOT REPORT TO CONGRESS, *supra* note 25, at 117. This was not the first time the DOT acknowledged the existence of a fare premium at the high density airports. See 1990 DOT Competition Study, *supra* note 100, at 2-10.
cremental earning power afforded by slot access and bargaining power. Specifically, value will vary with reference to the number of slots involved, the time periods which the slots reflect, and the particular high density airport to which they provide access. Third, the collateral value of slots depends on how they are appraised by the lender. The value will likely reflect a substantial discount because of the risk associated with such collateral both in terms of the possibility of withdrawal for non-use or elimination of slots due to an elimination of the high density rule. Finally, value may be reflected by the accounting treatment of slot value. This treatment, however, varies. For example, some airlines carry slots on their balance sheet at cost bundled with gates and other assets while others book the slots they purchased, but exclude those obtained under the grandfather provisions of the buy-sell rule.

Although types of value may be readily identified, discerning the specific commercial terms is more difficult since the FAA does not require the parties to specify the commercial terms of slot transactions. As a result, the monetary value placed on slots is largely determined by reference to anecdotal information or information reported to or by regulatory agencies such as the Securities Exchange Commission (SEC), the FAA or DOT, in trade publications, Congressional hearings.

1995 DOT Report to Congress, supra note 25, at 17. It has been acknowledged that a package of several slots at a high density airport likely have a greater value on a per slot basis than a single slot since it would enable the recipient to build a greater market presence. See 1990 DOT Competition Study, supra note 100, at app. B-3, B-4 & n.5.


Id. at 17-18.

106 The FAA requires only that a request to transfer slots provide the parties' names, addresses, and telephone numbers; whether the slot is an arrival or departure slot; the date the slot was acquired by the transferor; the regulatory provision pursuant to which the slot was acquired; whether the slot has been used for international or EAS operations, and whether the slot will be used for international or EAS operations. See 14 C.F.R. § 93.221(a)(1).

107 Reno Air recently advised the DOT that the asking price for air carrier slots at ORD was in excess of $1,000,000. See In re Reno Air, Inc., D.O.T. Order No. 94-9-30, at 4 (Sept. 20, 1994). As part of its 1990 study on competition in the domestic airline industry, the DOT examined slot values and prices at the high density airports. It noted that the general value of all slots at the four high density airports is approximately $3 billion or an average of $850,000 per slot. See 1990 DOT Competition Study, supra note 100, at 2-8. When accompanied by gates, the value of slots may double. Id. As examples, the DOT referred to the acquisition by Pan Am of three gates and 32 slots at LGA for $65 million (a sale that was required as a condition of the DOT's approval of Texas Air's acquisition of East-
bankruptcy cases, or other litigation. Not surprisingly, the value of slots has historically been tied to the type of slot; air carrier slots which can be used for the operation of any size aircraft and peak hour slots have the highest value. United itself has acknowledged that peak hour slots at ORD have recently traded for $2 million or more. When one considers that each slot United deploys in its system at ORD generates on average

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nearly $5 million in air transportation revenue annually,\textsuperscript{112} such a price tag is not surprising. An added value of slots is that a carrier can keep out its competitors.\textsuperscript{113}

C. \textbf{The Use of Slots as Collateral}

Slots have also been used by many carriers as collateral for financial obligations.\textsuperscript{114} The use of slots by carriers as collateral, however, raises additional questions. First, unlike the FAA Aircraft Registry which has a well developed system for recording security interests in aircraft and engines,\textsuperscript{115} the FAA Slot Administration Office does not record security interests. As a result, the only practical way that the secured party can protect itself is to require the carrier to transfer the slot to it. Such a transfer would involve both holder (owner) and operator status. The secured party then leases the slot back to the carrier. The net result is that the secured party is listed as the holder, and the carrier is listed as the operator.

\textsuperscript{112} See 1993 United Emergency Petition, supra note 111, at 9-10.

\textsuperscript{113} See infra notes 128-43 and accompanying text.

\textsuperscript{114} Currently TWA operates slots held by Shawmut Bank, as trustee, as security for TWA obligations. Slots are also held by State Street Bank & Trust Company to secure Business Express’ obligations; Citibank, N.A., as trustee, to secure USAir Shuttle’s obligations; and First Bank National Association, as trustee, and Mitsubishi Bank Limited to secure Northwest Airlines’ obligations. See General Services Administration, FAA Slot Management System Summary of Holdings by Carrier (slots held five or more days as of Dec. 29, 1995, Air Carrier Slots Only); see also 1994 FAA Request for Comments, supra note 2, Comments of the City of Chicago, at 17 (some slots at ORD have been treated as assets or collateral); \textit{In re America West Airlines, Inc., and BT Commercial Corporation, FAA Exemption No. 5518 (Sept. 9, 1992)} (FAA granted exemption from international and EAS withdrawal provisions for slots transferred by America West to BT Commercial Corp (BT Commercial) as part of America West’s debtor-in-possession financing and leased by BT Commercial to America West).

\textsuperscript{115} See 49 U.S.C.A. § 44107 (West 1995) which provides for a system for recording, among other things, documents executed for security purposes that affect an interest in an aircraft or engine. The FAA implements this statutory provision in 14 C.F.R. part 49 which specifies the requirements for recording aircraft titles and security documents at the FAA. Until filed, instruments eligible for recordation are not valid against persons having no knowledge of the interest. See 49 U.S.C.A. § 44108 (West 1995). As such, filing security interests in an aircraft or engines in accordance with FAA requirements gives notice to the world of the interest(s) claimed by the parties identified in such filings. See also Philko Aviation, Inc. v. Shacket, 462 U.S. 406 (1983) (Congress intended the FAA Registry to be a central clearing house for U.S. aircraft so that there will be ready access to claims against, liens, or other legal interests in aircraft).
The need to submit the documentation giving rise to the transfer depends entirely upon the manner in which the slot transfer request is worded. If a slot transfer request is submitted which references the existence of certain documentation, but does not state that the transfer is subject to the terms of the agreements, the submission of the transaction documents is not required. If, however, the transfer request states that the slots are transferred subject to a specified agreement, the FAA will require the submission of the agreement and will only permit subsequent transfers in accordance with the terms of the agreement. For example, if the agreement states that the operator may only transfer a slot to specified carriers or that prior approval is required, the FAA will require that such conditions be satisfied. The FAA, however, even if it has the agreements will not make determinations of compliance with payment provisions, existence of defaults, or foreclosure rights. It will leave those determinations to the parties or a court and will act as and when directed.

Because the FAA’s records are not required to reflect security interests in slots, and references to security agreements are at the option of the parties, determining the existence of a security interest requires a bit of detective work. For example, the identity of the holder and the existence of the lease to the carrier is a good indicator that the transaction is a security interest. Although investigation may uncover this information, the absence of FAA rules or a developed system by the FAA for protecting a party’s interest in a slot being leased to a carrier or being used as security makes slot transactions somewhat risky.

Perhaps one of the most significant issues in protecting slots is ensuring that the eighty percent minimum use requirement is met. What this means is that a daily slot must be used forty-eight or forty-nine days during each two-month reporting period. Daily slots operated by carriers that do not use them seven days a week are at greatest risk. Although some carriers return weekend slots to the FAA so that the eighty percent usage can be more easily met based on actual operations, most others, and particularly those with air carrier slots, seem to be less likely to do so. Instead, they often seek to meet the eighty percent usage requirement by leasing the slots to other carriers who need them on those days. In this fashion the combined usage of the slot exceeds the eighty percent minimum and therefore is not subject to withdrawal.
A suggested starting point when leasing or accepting slots as security would be to determine the schedule that will be supported by the slot. In other words, if it is a daily slot, does the carrier operate it daily? If the carrier does not operate it daily, how often does it operate the slot? These questions help determine how much flexibility remains for flights that are cancelled before the slot will be subject to withdrawal. Although the FAA regulations enable the FAA to waive the minimum use requirements for highly unusual and unpredictable conditions beyond the control of the slotholder that exist for a period of nine or more days, the relief contemplated by this provision would not be available for routine types of cancellations. As a result, the closer the carrier's schedule is to the minimum use requirements, even assuming one hundred percent of the scheduled flights are operated, the greater the risk that a slot may be withdrawn and the security or value reflected by the slot lost.

Because withdrawn slots obviously have no value, as security or otherwise, it is important that the operator have adequate flexibility to meet the minimum use requirements. There is a fine line between protecting the collateral and hamstringing the operator so that it cannot deal with the slot in a fashion that helps to avoid its withdrawal. Although it is not unusual to require a lender's approval before secured assets are transferred, such a requirement, when it pertains to slots, is not always practical. For example, given the significant amount of trading that sometimes occurs with weekend slots, the time required to obtain a lender's approval may prevent the slot from being used, thereby increasing the risk of withdrawal for failure to meet the eighty percent use rule. The operator is placed in an even more difficult position if the documents provided to the FAA state that slots may only be transferred with the lender's approval or may only be transferred once. Such conditions on the operator not only make it difficult to get FAA approval in time to permit the slot to be used, but also cause carriers to seek slots from other carriers that can more easily satisfy their operational needs. In determining the requirements that will apply to an operator, the important question is whether the requirements that are intended to protect the interest in the slot will, in the real world of airline operations, place the slot more at risk. Lenders may want to consider establishing general guidelines by which carriers may transfer slots on a short-term basis without prior approval, similar to identifying permissible sublessees in an aircraft lease.
Another issue to consider is whether a carrier should be given the flexibility to return slots to the FAA if they are routinely not going to be used on certain days and alternative operators are not available. Again, this question must be evaluated based on knowledge of the carriers' operations and the markets involved. Perhaps here it is easier to require prior approval or notice before the slot is to be returned to the FAA. The important thing is that the carrier and the lender must act quickly when it is apparent that returning slots to the FAA for certain days is the only way to protect the slots from withdrawal. Based on the obvious importance of slots to a carrier's operations and the inability to substitute something in its place, it is reasonable to assume that a carrier will make its best effort to avoid forfeiture, even if it is not the owner of the slot.

Because the FAA only requires slot usage reports to be filed within fourteen days after the last day of each two-month period,\textsuperscript{116} it may be too late if the lessor or lender only monitors the carrier's usage through a review of the reports. As a result, lenders may want to monitor a carrier's operations and schedule changes on an ongoing basis to ensure that the eighty percent minimum usage requirement will be met. Also, there should be contingency plans if usage is low so that the slot will not be withdrawn. It must be remembered, however, that if the lease of slots to the carrier has not terminated, the carrier must agree to and sign any slot transfer to another carrier.\textsuperscript{117} In this regard, a lender or lessor may wish to require the lessee to sign a document authorizing the early termination of the lease or authorizing the transfer of the slot back to the lessor before any problem arises. It should also be remembered that the obligation to file usage reports is the obligation of the holder, not the operator.\textsuperscript{118} As such, the duty to file the report should be clearly specified in any agreement with the operator.

In assessing the value of slots, withdrawal priorities should also be considered, since the slot rule permits a slot to be withdrawn for international and EAS operations or air traffic control requirements.\textsuperscript{119} Even if a slot is not designated as an EAS slot, if a carrier wishes to terminate service to an EAS market or to transfer a slot used in such a market, the DOT may require that

\textsuperscript{117} See supra text accompanying notes 91-94.
\textsuperscript{118} 14 C.F.R. § 93.227(i).
\textsuperscript{119} Id. § 93.223(c)(2).
the carrier transfer the slot to the replacement carrier.\textsuperscript{120} It does not matter that the carrier may use it to support service in other markets. Any transfer of a slot used in an EAS market that will deprive that market of service will be subject to an examination by the DOT to determine whether it would be injurious to the EAS program. Although EAS slots are protected from withdrawal (as are international slots),\textsuperscript{121} their transferability is also more limited.\textsuperscript{122} As a practical matter, however, because most of the points covered by the EAS program are small communities, EAS issues are more likely to arise with commuter slots that support small aircraft rather than with air carrier slots.

Also, although the FAA will not withdraw slots from limited incumbents for EAS or international operations,\textsuperscript{123} certain criteria must be met for this exemption from withdrawal to apply. Specifically, slots held and operated by a limited incumbent are protected from withdrawal only as long as that carrier holds and operates them. Thus, if as part of a transaction the carrier will transfer the slots to the lender, an FAA exemption would be required to maintain the limited protection from withdrawal that is granted to the carrier. The FAA has granted such relief where a carrier transferred slots to a bank as part of the security for financing.\textsuperscript{124} This relief, however, would terminate if the operator or the holder were to transfer the slots.\textsuperscript{125}

Care must also be exercised if there is a trade involving a slot obtained by a new entrant or limited incumbent in an FAA lottery. As noted earlier,\textsuperscript{126} the carrier receiving the slot must use the slot (or the slot received in the trade) for two years before its transfer restrictions are removed.\textsuperscript{127} If it fails to use the slot obtained in the trade, the trade is void and the slot allocated in the

\textsuperscript{120} See In re Simmons Airlines, Inc., D.O.T. Order No. 94-5-12 (May 9, 1994). In that order, the DOT required as a condition to Simmons Airlines, Inc. discontinuing EAS in a particular market that Simmons transfer four ORD slots to the replacement carrier. The DOT determined that § 419(b)(7) of the Federal Aviation Act required Simmons to transfer slots to ensure that EAS continued in the market since the replacement carrier could not otherwise provide the replacement EAS. \textit{Id.} at 2-3.

\textsuperscript{121} 14 C.F.R. § 93.223(c)(2).

\textsuperscript{122} \textit{Id.} §§ 93.217(a)(2), 93.219(a).

\textsuperscript{123} \textit{Id.} § 93.223(c)(2).

\textsuperscript{124} See In re America West Airlines, Inc. and BT Commercial Corporation, FAA Exemption No. 5518 (Sept. 9, 1992) (exemption granted to America West to protect slots it transferred to BT Commercial).

\textsuperscript{125} \textit{Id.} at 2.

\textsuperscript{126} See supra text accompanying notes 94-100.

\textsuperscript{127} 14 C.F.R. § 93.221(a)(5).
lottery must be returned to the FAA even if it is no longer in the hands of the initial recipient.

Although great value has been attached to slots, trading in slots is a tricky proposition. The holder/owner of a slot runs the risk of losing the slot if the operator does not use it adequately. As such, non-carriers are often left relying on the carriers to protect the very collateral that secures loans or other obligations of the carrier. The important thing to remember is that slots are not like aircraft; some of the restrictions that may be placed on aircraft will not work with slots and will, as a practical matter, place the slot more at risk.

V. THE EFFECT OF THE BUY-SELL RULE ON COMPETITION

Although the larger carriers appear to have derived great benefit from the buy-sell rule, the new entrants and limited incumbents—the very carriers expected to benefit from this market-based mechanism—have not fared well. This stems primarily from the fact that sales of large numbers of slots and sales by carriers with substantial holdings are few and far between. The large slot-holding carriers have instead used their slots as security and gained great flexibility in meeting their needs both operationally and economically through the use of short-term leases.

After ten years of experience with the buy-sell rule, it is clear that although the sale of slots is permitted and, in fact, sales have occurred, the number of sales has declined. This reduction appears to be due to the fact that carriers do not want slots to wind up in the hands of their competitors, even if they do not.

128 The Senate Aviation Subcommittee has been advised that the number of slots that have been sold since the implementation of the buy-sell rule has decreased. See Barriers to Competition in the Airline Industry: Hearings Before the Senate Subcomm. on Aviation, 101st Cong., 1st Sess. 13-14 (1989) [hereinafter 1989 GAO Testimony] (statement of Kenneth M. Mead, Director of Transportation Issues, U.S. General Accounting Office). Specifically, it was noted that in 1986 an average of 128 air carrier slots were sold per quarter, while in 1988 the average number of slots sold per quarter was reduced to 20. Id. Furthermore, although a large number of slots were sold in 1986, these sales were required by the DOT as a condition of Texas Air (New York Air’s parent company) acquiring Eastern Airlines so that Pan Am could implement a competitive shuttle in the Northeast corridor. Id.

129 ValuJet Airlines has alleged existing carriers “can bar new competitive carriers from operating at [LGA] by refusing to sell or lease excess slots to such airlines.” See Plaintiff’s Complaint ¶ 23, 25, ValuJet Airlines, Inc. v. Trans World Airlines, Inc., No. 95-CV-2896 (N.D. Ga. filed Nov. 9, 1995); see also Memorandum of Points and Authorities in Support of Plaintiff’s Application for Tempo-
not need the slots for their own operations. In fact, the competitive considerations and reluctance to transfer slots may be greater when the potential buyer is a new entrant since it may be more difficult to determine the market in which the slots will be used due to the lack of a track record for the airline. The importance of slots to the ability of a carrier to mount competitive operations at high density airports has been acknowledged by the DOT.

The competitive issues arising from the inability of new entrants to obtain slots is a critical part of the litigation commenced in late 1995 by ValuJet Airlines, Inc. (ValuJet) against TWA and Delta Air Lines, Inc. (Delta). ValuJet alleged that carriers “can bar new competitive carriers from operating at [LGA] by refusing to sell or lease excess slots to such airlines.”

130 See 1990 DOT Competition Study, supra note 100, at app. B-4 (carriers have leased slots and not sold them even after they have reduced operations at the high density airport).

131 See id. at 2-9. As the DOT appropriately noted, the inclusion of a non-compete agreement as part of a slot sale would raise serious antitrust questions. Id. at n.9.

132 Texas Air-Eastern Acquisition Case, D.O.T. Order No. 86-7-21, at 2-3, 12-13, 15-16, 19-20 (July 9, 1986) (the sale of a sufficient number of slots to enable Pan Am to commence a shuttle service is a precondition of approval of the acquisition); Texas Air-Eastern Acquisition Case, D.O.T. Order No. 86-8-77, at 9-11 (Aug. 26, 1986) (disapproved the acquisition of Eastern by Texas Air in part on the basis of Pan Am’s lack of a sufficient number of slots to mount a competitive shuttle service); Texas Air Corp., D.O.T. Order No. 86-9-53 (Sept. 18, 1986) (tentatively approves Texas Air’s acquisition of Eastern based on the decision of Texas Air and Eastern to sell additional slots to Pan Am, thereby enabling Pan Am to commence a competitive shuttle); Texas Air Corp., D.O.T. Order No. 86-10-2 (Oct. 1, 1986) (approval of Texas Air’s acquisition of Eastern).


134 Plaintiff’s Complaint ¶ 23, 25, ValuJet Airlines (No. 95-CV-2896). ValuJet has recently leased ten slots at LGA from Continental Airlines. See ValuJet to
In fact, Valujet asserted that the real reason behind both TWA's desire to lease its slots to Delta instead of Valujet and Delta's interest in leasing the slots was to bar Valujet from entering the LGA-Atlanta market. In seeking a temporary restraining order (TRO) to stop TWA from leasing its LGA slots to Delta, Valujet asserted that TWA and Delta conspired to deny market access to Valujet by TWA leasing LGA slots to Delta instead of Valujet, thereby violating section 1 of the Sherman Act. Valujet further asserted that because Delta is the only carrier in the non-stop LGA-Atlanta market, Delta's acquisition of the LGA slots from TWA violates section 2 of the Sherman Act since it results in Delta wrongfully monopolizing the LGA-Atlanta market.

In denying Valujet's motion for a TRO, the United States District Court for the Northern District of Georgia determined that while Valujet's antitrust claims were troubling, they were not sufficiently developed to determine whether Valujet had a reasonable chance of succeeding on the merits, as is required to issue a TRO.

Although the antitrust issues in Valujet Airlines are not yet decided, the case highlights the fact that the FAA's belief that the use-or-lose rule in conjunction with the antitrust laws would cause operators to sell marginal slots to other carriers may have been somewhat naive, a fact which the DOT itself appears to have recognized, albeit a little too late.

Memorandum of Points and Authorities in Support of Plaintiff's Application for Temporary Restraining Order and Motion for Preliminary Injunction at 5-6, ValuJet Airlines (No. 95-CV-2896).

Id.


Although Valujet has leased ten slots at LGA from another carrier, it is continuing to pursue the antitrust claims against TWA and Delta. See Valujet to Launch Atlanta-New York Service With New Slots, supra note 134, at 452. When it adopted the buy-sell rule, the DOT agreed with the comments submitted by the FTC which stated that the application of the use-or-lose provisions in conjunction with existing antitrust laws would be sufficient to deter anticompetitive behavior. 50 Fed. Reg. 52,180, 52,186; see also Hardaway, supra note 101, at 68-70.

As the DOT noted in its study on competition in the domestic airline industry, the slot aftermarket has few sellers and the dominant carriers tend to buy slots, not sell them. See 1990 DOT Competition Study, supra note 100, at 2-16, 2-17; see also 1994 FAA Request for Comments, supra note 2, Comments of Midwest Express Airlines, at 3, 4 (competitors have a "buy, never sell" position). In fact, many interested parties are frequently not made aware of the availability of slots. Valujet asserted that the trading that does occur happens at quarterly meetings of the Airline Reservation and Reporting Committee, and slots are generally not
Reality has shown that the use-or-lose rule does not flesh out marginal slots. Instead, short term leases are frequently used to meet the minimum use requirement\textsuperscript{140} since the leasing mechanism also limits the competitor’s ability to gain a permanent foothold at the airport. Large carriers may also “park” excess air carrier slots with their affiliated commuter airlines or code-sharing partners to keep them out of the hands of their competitors—something that new entrants and limited incumbents vigorously protest.\textsuperscript{141} Given the enhanced value of slots under the buy-sell rule, the large carriers have become stronger, and the new entrants and limited incumbents weaker.

It is partly because of the concern for the competitive impact on new entrants and limited incumbents that the slot restrictions and high density rule are continually being examined.\textsuperscript{142}

\textsuperscript{140} See, e.g., Plaintiff’s Complaint ¶ 8, 11, ValuJet Airlines (No. 95-CV-2896) (carriers lease their excess slots to avoid forfeiture under the minimum use requirements); 1989 FAA High Density Rule Study, \textit{supra} note 107, Comments of America West, at 27 (short term leases are frequently used to avoid the loss of slots under the use-or-lose rule).

\textsuperscript{141} See, e.g., 1994 FAA Request for Comments, \textit{supra} note 2, Comments of Midwest Express, at 26 (large slot holders meet minimum use requirements by having their commuter affiliates operate air carrier slots with small aircraft rather than transferring the slots to third parties); \textit{Id.}, Comments of Port Authority of New York & New Jersey, at 4 (to maintain ownership of slots which may be withdrawn under the use-or-lose rule, airlines arrange for the use of commuter aircraft in air carrier slots); Surreply Comments of Air Wisconsin, Inc., \textit{In re American Airlines, Inc.} at 2-3 (Jan. 28, 1991) (according to January 1991 reservation center records, American has parked 21 air carrier slots with its subsidiary Simmons Airlines, to avoid forfeiture of the slots under the use-or-lose rules); 1989 GAO Testimony, \textit{supra} note 128, at 14 (slots are frequently transferred to affiliates or code-sharing partners to prevent use by competitors). In fact, sales between related carriers increased from 14% in 1986 to 39% in 1988. On the other hand, sales between unrelated carriers have decreased from 110 per quarter in 1986 to 28 per quarter in 1987 to 12 per quarter in 1988. \textit{See Airline Competition — Pending Legislation Helps to Address Serious Competitive Problems: Hearings Before the House Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 102d Cong., 1st Sess. 7 (1991) (statement of Kenneth M. Mead, Director of Transportation Issues, U.S. General Accounting Office).

In fact, it is the adverse effect of the apparent exercise of power by the large carriers that repeatedly raises the possibility that the government may take some action that reduces the value of slots. Although the elimination of the rule is frequently advocated, it does not appear likely to occur in the near future. Increases in the number of operations at high density airports, however, are not only more likely, but they have already occurred. In this fashion, some of the concerns raised by the smaller carriers regarding access to high density airports can be addressed without a massive disruption to the structure and relationships which have been built over the last ten years in reliance on the buy-sell rule.

Nevertheless, because slot value is created by the limitations on access to high density airports, the elimination of the high density rule, substantial changes to the rule, or alternative methods of access to high density airports will have an effect on the value of slots. Although there have been objections to the artificial limitations imposed by the high density rule since inception, only in the last few years has the emphasis resulted in modifications that alleviate some of the constraints.
VI. EFFORTS TO EXPAND OPERATIONS AT HIGH DENSITY AIRPORTS

A. CALLS FOR REFORM

In August 1993 following the conclusion of extensive hearings, the Airline Commission recommended that the FAA "review the rule that limits operations at 'high density' airports with the aim of either removing these artificial limits or raising them to the highest practicable level consistent with safety requirements." The Airline Commission's findings, however, would not affect the legislated limits at DCA since those limits are legislated by statute. In response to the Airline Commission Re-

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144 The Airline Commission was created on April 7, 1993, by Public Law 103-13 and was directed to investigate, study, and make policy recommendations about the financial health and future competitiveness of the U.S. airline and aerospace industries. National Commission to Ensure a Strong Competitive Airline Industry, Pub. L. No. 103-13, 107 Stat. 43 (1993). The Airline Commission consisted of fifteen voting members and eleven non-voting members, who were appointed based on experience in aviation economics, finance, international trade, or related disciplines and represented airlines, passengers, shippers, airline employees, aircraft manufacturers, general aviation, and the financial community. Airline Commission Report, supra note 142, at 33-34; see also Pub. L. No. 103-13, § 204(e)(2), 107 Stat. 43, 43 (1993).


146 49 U.S.C. §§ 2454(c)(5)(C), 2458(e) (1988). As has been noted:
Washington National is the only [high density] airport for which the total number of slots today is the same as when the slot rule was imposed more than a quarter century ago. Since deregulation in 1978, growth in the airport's annual number of departures and enplanements has been negative. . . . Legislation enacted in 1986, which transferred management of the airport from FAA to the Washington Metropolitan Airports Authority (MWAA) prohibits any change in the 37 hourly slots presently allowed for air carrier operations [Metropolitan Washington Airport Act of 1986 (P.L. 99-591)]. Thus, unlike the other HDR airports, any change in the slot limitation on air carriers at DCA would require a change in federal law.

1995 DOT REPORT TO CONGRESS, supra note 25, at 97. In addition to limiting the number of slots, the Metropolitan Washington Airports Act of 1986 repealed the restriction set forth in 14 C.F.R. § 93.124 which limited the annual number of passengers permitted at DCA. 49 U.S.C. § 2458(e). The repeal of this provision enabled the airlines to use larger aircraft without facing a reduction in the number of slots. See supra note 33; 1994 FAA Request for Comments, supra note 2, Comments of MWAA, at 12-15. Notwithstanding the statutory limit on operations, the FAA permitted the published slot limits at DCA to be exceeded by four operations per day when it granted an exemption to enable Braniff Airlines, Inc. to resume the operations at DCA, even though all air carrier slots were already allocated. In re Braniff Airlines, Inc., FAA Exemption No. 2927 (Feb. 24, 1984). When the exemption was renewed following the enactment of the buy-sell rule,
port, the Administration recommended that the DOT review the high density rule, the process for allocating domestic and international slots, and alternative traffic management techniques, such as peak-hour pricing.\textsuperscript{147}

Congress, in the 1994 Act, also directed the Secretary of Transportation to conduct a study of the high density rule and report the results of the study to Congress.\textsuperscript{148} In conducting the study, the DOT was directed to consider, among other things, the following: (1) whether improvements in technology and in the air traffic control system and the use of quieter aircraft would make it possible to eliminate the limitations on hourly operations or to increase the number of such operations;\textsuperscript{149} (2) the effects of an elimination of the high density rule or an increase in the number of operations permitted thereunder on congestion, noise, competition, profitability, and safety;\textsuperscript{150} (3) the impact on EAS,\textsuperscript{151} on the ability of new entrants to obtain reasonable timed slots,\textsuperscript{152} and on the ability of foreign air carriers to obtain slots, including issues relating to reciprocity by a foreign carrier's home country;\textsuperscript{153} and (4) the impact of the withdrawal of slots to support foreign air transportation.\textsuperscript{154}

\textsuperscript{147} The Clinton Administration echoed the sentiments of the Airline Commissision and called for a review "to determine whether certain operating limitations imposed by the [HDR] can be eliminated or modified to better utilize airport capacity." See \textit{Clinton Initiative, supra} note 142, at 8.

\textsuperscript{148} See 49 U.S.C.A. § 41714(e) (West 1995). Although the results of the study were to be reported to Congress by January 31, 1995, the report was not issued until May 1995.

\textsuperscript{149} Id. § 41714(e)(1)(A).
\textsuperscript{150} Id. § 41714(e)(1)(B).
\textsuperscript{151} Id. § 41714(e)(1)(C).
\textsuperscript{152} Id. § 41714(e)(1)(D).
\textsuperscript{153} Id. § 41714(e)(1)(E), (F).
\textsuperscript{154} Id. § 41714(e)(1)(G). To minimize the withdrawal of slots from U.S. carriers for the international service of other U.S. carriers which have a large number
B. Increasing Access at High Density Airports

In an effort to increase access at high density airports, in the 1994 Act, Congress also authorized the Secretary of Transportation to grant exemptions from the slot rules. Authority to grant exemptions was limited to requests by carriers requiring such slots to provide EAS, U.S. or foreign airlines to provide foreign air transportation, and new entrant carriers. Specif-

of slots, the FAA restricted the withdrawal of slots for international service to preclude such a withdrawal for a carrier holding or operating 100 or more permanent slots. See 14 C.F.R. § 93.217(a)(10) (1995). Instead, these carriers are expected to use their existing slot base for new international service. See 55 Fed. Reg. 53,238, 53,239, 53,242 (1990).


See 49 U.S.C.A. § 41714(a) (West 1995). The Secretary of Transportation is required to ensure that a carrier providing or selected to provide basic EAS has the slots necessary to provide flights to the high density airport at reasonable times with consideration of connecting flights. Id. § 41714(a)(1). If necessary, the Secretary is authorized to grant exemptions to carriers providing such service using Stage 3 aircraft unless an exemption would significantly increase operational delays. Id. § 41714(a)(2). If an exemption would significantly increase operational delays, the 1994 Act requires the Secretary to take such action as may be necessary to ensure that the carrier providing or selected to provide basic EAS is able to obtain access to the high density airport. Id. § 41714(a)(3). Notwithstanding that direction, the 1994 Act does not require that slots be made available at ORD if there are at least 132 slots being used at ORD for basic EAS. Id.

See 49 U.S.C.A. § 41714(b) (West 1995). The 1994 Act authorizes the Secretary of Transportation to grant exemptions from subparts K and S of part 93 of title 14 of the Code of Federal Regulations to enable U.S. and foreign carriers using Stage 3 aircraft to provide foreign air transportation to and from high density airports, if such an exemption would be in the public interest. Id. § 41714(b)(1). The Secretary is prohibited from withdrawing a slot from a U.S. carrier to award to a foreign carrier if the Secretary determines that U.S. carriers are not provided equivalent rights of access to airports in the foreign carrier’s home country. Id. § 41714(b)(3). The Secretary is also prohibited from withdrawing a slot from an air carrier to allocate that slot to a carrier to provide foreign air transportation if the withdrawal would cause the number of slots withdrawn from that carrier at ORD to exceed the total number of slots withdrawn from that carrier as of October 31, 1993. Id. § 41714(b)(2). It is interesting to note that in March 1993 the FAA denied United’s request for an exemption that would have granted the relief provided by the 1994 Act. In denying the requested relief, the FAA reasoned
ically, the 1994 Act authorizes the Secretary of Transportation to grant exemptions from subparts K and S of part 93 of title 14 of the Code of Federal Regulations to enable carriers to provide EAS or foreign air transportation if the exemption is in the public interest. In the case of exemptions for new entrant carriers to provide service at high density airports (other than DCA), the Secretary is required not only to find that the exemption is in the public interest, but also that the circumstances are exceptional.

Following the enactment of the 1994 Act on August 23, 1994, the DOT received exemption applications from new entrant carriers, carriers wishing to provide EAS, and carriers wishing that many of the slots withdrawn or to be withdrawn from United were acquired by United with full knowledge of the vulnerable withdrawal priorities. The FAA believed that granting the requested relief would give United's vulnerable slots greater protection than the rule contemplated and would unfairly penalize other carriers whose slots may instead be withdrawn even though they paid more for slots with less vulnerability than United's. See In re United Airlines, Inc., Denial of Exemption, FAA Docket No. 27151 (Mar. 30, 1993) (denial of exemption).

A "new entrant air carrier" is defined by the 1994 Act as an air carrier that does not hold a slot at the airport concerned and has never sold or given up a slot at that airport after December 16, 1985, and a "limited incumbent" is defined by 14 C.F.R. § 93.213(a)(5) (1995) (defining a "limited incumbent").

Notwithstanding the stringent limitations applicable to DCA, the 1994 Act specifically contemplates the excess slots granted to America West at DCA and provides that the 1994 Act will not adversely affect the exemption. Id. § 41714(d)(2).

At DCA, the Secretary may grant an exemption only under exceptional circumstances to a carrier currently operating or holding a slot at the airport to enable that carrier to provide service with Stage 3 aircraft as long as the exemption does not increase the number of daily slots at the airport, does not increase the number of operations in any one hour period by more than two, does not result in the withdrawal or reduction in the number of slots held by a carrier, and does not result in a net noise increase to surrounding communities. Id.

See, e.g., Application of Midwest Express Airlines, Inc. (Aug. 23, 1994) (exemption requested to operate two of its slots at DCA at an earlier hour); Application of Reno Air, Inc. (Aug. 26, 1994) (exemption to operate three daily nonstop round trips between Reno, Nevada and ORD); Application of Western Pacific Airlines, Inc. (Mar. 23, 1995) (exemption requested to operate two daily nonstop roundtrip flights between Colorado Springs, Colorado and ORD); Application of Spirit Airlines, Inc. (May 23, 1995) (exemption requested to operate five daily nonstop roundtrip flights between Detroit City Airport and LGA); Application of Air South Airlines, Inc. (Apr. 5, 1996) (exemption requested for roundtrip flights between JFK and Charleston, Columbia, and Myrtle Beach, South Carolina.

See, e.g., Great Lakes Aviation, (Sept. 1, 1994) (requesting exemption for 24 operations to provide EAS between ORD and Danville, Galesburg, and Mattoon/
to engage in foreign air transportation. In September 1994 the DOT granted an exemption to Reno Air under the new entrant carrier provisions of the 1994 Act to operate three round trip flights between Reno, Nevada, and ORD using Stage 3 aircraft. In granting the exemption, the DOT determined that such a grant of temporary operating authority at ORD would be in the public interest based on the economic characteristics of the market, the history of nonstop service in the market, and the long-expressed desire of Reno Air to serve the market. The DOT also determined that Reno’s application was unique and met the exceptional circumstances requirement of the 1994 Act. The exemption specifically identified the arrival and departure windows for the temporary operating authority, limited the use of this authority by Reno Air to the nonstop Reno-Chicago market, and required that the service be provided only with Stage 3 aircraft. The DOT emphasized in the order that Reno Air was being granted temporary authority only and that such a grant did “not confer to the carrier any ability to own or hold such temporary operating authority for the purpose of selling, trading, transferring, or conveying this temporary operating authority (arrival or departure), or anything else of value.” Although Reno Air cannot transfer the temporary authority, it is subject to the use-or-lose rule applicable to holders of slots at high density airports.

Charleston, Illinois and Bloomington, Muncie/New Castle/Anderson, and Terre Haute, Indiana and requesting authority to move 17 EAS slots to improve the timing of flights between ORD and Pellston, Michigan; Quincy, Illinois; Rhinelander, Wisconsin; Mason City, Iowa; and Ottumwa, Iowa; Application of Direct Air, Inc. (Sept. 6, 1994) (requesting exemption to provide EAS between ORD and Bloomington and Terre Haute, Indiana).

164 See Petition of Simmons Airlines, Inc. d/b/a, American Eagle, DOT Docket OST-95-368 (Aug. 2, 1995) (requesting exemption for six international slots to operate three daily roundtrip flights between ORD and London, Ontario); Application of El Al Israel Airlines Ltd. (March 21, 1996) (exemption requested for two weekly roundtrip flights between Tel Aviv and Chicago); Petition of Kuwait Airways Corporation (Feb. 22, 1996) (exemption requested for four weekly slots between Chicago and Kuwait.

166 Id. at 5.
167 The arrival and departure windows were determined by the DOT after consultation with the FAA to “ensure the management and minimization of aircraft delays while still providing Reno Air with temporary operating authority at Chicago O’Hare.” Id.
168 Id. at 3-4.
169 Id. at 4.
170 Id. at 6; see also 14 C.F.R. § 93.227 (1995).
The DOT also granted an exemption to Midwest Express under the new entrant provisions to enable it to operate two of its slots at DCA at an earlier hour to improve the viability of its service to Omaha.\(^{171}\) In granting the exemption, the DOT determined that Midwest Express's circumstances met the exceptional circumstances's criterion of the 1994 Act and that granting the exemption would not violate any of the provisions of the 1994 Act.\(^{172}\) In an apparent effort to send a message that exemptions would not be routinely granted, the DOT noted that Congressional intent indicates that "the Secretary's authority to grant exemptions under this provision would apply only in limited circumstances to meet the specific needs of carriers holding a limited number of slots at Washington National."\(^{173}\)

In denying Spirit's application, the DOT stated that it intended to narrowly construe the meaning of "exceptional circumstances" for purposes of determining whether a new entrant should receive an exemption from the slot rules.\(^{174}\) The DOT's decision to interpret the intent of Congress narrowly stemmed from the inclusion of the "exceptional circumstances" criterion in the provision relating to the grant of exemptions to new entrants, whereas exemptions for EAS and foreign air transportation were to be based on the more inclusive public interest standard.\(^{175}\) Part of its determination that exceptional circumstances did not exist stemmed from the DOT's belief that the benefits of Spirit's proposal were too speculative and the operation too risky.\(^{176}\) Although Spirit proposed to use Stage 3 air-

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\(^{171}\) In re Midwest Express Airlines, Inc., D.O.T. Order No. 94-9-49 (Sept. 30, 1994).

\(^{172}\) Id. at 2.

\(^{173}\) Id.

\(^{174}\) In re Spirit Airlines, Inc., D.O.T. Order No. 95-8-38, at 5 (Aug. 24, 1995). United suggested that the availability of slots in the after market as was contemplated by the buy-sell rule should be a threshold issue for new entrants. Because the 1994 Act was silent on this issue, the DOT took no position on United's assertion and instead indicated a preference to rely upon individual circumstances as set forth in a carrier's application. Id. at 7-8.

\(^{175}\) Id. Although the DOT noted that Congress did not specifically mandate that exceptional circumstances only be found where there is no nonstop service in the market, the DOT believed it was clear that the absence of nonstop service was considered by Congress when the provision was adopted. Id. at 5. The DOT also denied the application of Western Pacific Airlines for an exemption to provide service between Colorado Springs and ORD based in part on the fact that adequate service already existed in the market. In re Western Pacific Airlines, Inc., D.O.T. Order No. 95-4-33, at 3 (Apr. 20, 1995).

craft as required by section 206(c)(1) of the 1994 Act, the DOT nevertheless determined that public interest requires it to consider the noise concerns expressed by local communities.\textsuperscript{177}

While the DOT identified the areas where it believed Spirit had failed to meet the exceptional circumstances criterion, perhaps the most weight was placed on the position of the FAA Office of Air Traffic System Management (ATM) which did not support Spirit’s request. ATM’s position was based on several factors. First, LGA currently operates at capacity under almost all circumstances due to limitations resulting from the intersecting runways.\textsuperscript{178} Second, due to limited taxiways and staging and holding areas, ground congestion is also a problem.\textsuperscript{179} Third, because there are numerous air carrier and general aviation airports in the New York area, the airspace in the area is congested and complex.\textsuperscript{180} Fourth, the delays at LGA are consistently among the highest in the nation, and increased operations at LGA would have an adverse impact on airports with flights operating to and from LGA.\textsuperscript{181}

In addition to the limited relief which has been granted under the new entrant provision of the 1994 Act, the DOT has granted exemptions for the provision of EAS.\textsuperscript{182} The inclusion in the 1994 Act of exemption authority for EAS reflects ongoing concern with the decline in service to smaller communities, particularly those linked to ORD. These communities continually face the possibility that their service may be discontinued, not only because of the impact of budget constraints on the EAS program, but because of the desire of airlines to maximize the profit that they can earn with their ORD slots. In part, because of this concern, the FAA has retained the distinction between air carrier and commuter slots\textsuperscript{183}

\textsuperscript{177} Id. at 8.
\textsuperscript{178} Id. at 8-9.
\textsuperscript{179} Id. at 96
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{183} See 50 Fed. Reg. 52,180, 52,192 (commuter slots should continue to be used with smaller aircraft more suitable to small and medium sized communities and not with large aircraft serving busier more populous markets); 54 Fed. Reg. 34,904, 34,905 (1989) (slightly increasing size of aircraft operated in commuter slots has no significant effect on regional airline industry and service to small communities since the distinction between these aircraft and turbojet aircraft used for longer routes and higher volume markets remains); 56 Fed. Reg. 41,200, 41,202 (1991) (category of commuter slots is retained for aircraft of a size suita-
in spite of repeated requests that the distinction be eliminated.\footnote{See 1989 FAA High Density Rule Study, supra note 107, Comments of American, at 13 (the distinction between air carrier and commuter slots should be eliminated); 1994 FAA Request for Comments, supra note 2, Comments of Midwest Express, at 22 (the distinction between air carrier and commuter slots should be eliminated). \textit{Id.}, Comments of Regional Airline Ass’n, at 1. \textit{Contra} 1989 FAA High Density Rule Study, supra note 107, Joint Comments of USAir and Piedmont Aviation, at 4 (elimination of distinction between commuter and air carrier slots will threaten service to small communities); \textit{Id.}, Comments of United, at 10-11 (separate slot pools ensure that service to smaller communities would not be economically infeasible due to high slot prices); \textit{Id.} Comments of America West, at 35 (a single slot pool would be a “death knell” for small community service).}

In granting an exemption for twenty-four operations at ORD to Great Lakes, the DOT stated that the “primary focus of the slots provisions of the [1994 Act] is to restore essential air service to Chicago’s O’Hare Airport for communities that have recently lost it.”\footnote{Essential Air Service, D.O.T. Order No. 94-10-47, at 2. Although the DOT stated that it was required to grant such exemptions to air carriers using Stage 3 aircraft or to commuter air carriers, it acknowledged that if such exemptions would cause operational delays, it would be required to assure access to ORD by some other means. \textit{Id.} Although Great Lakes also requested authority to move the times associated with 17 of its slots, the DOT denied that request based on its belief that the “well-timed” requirement in the 1994 Act relates to the restoration of EAS and not all existing EAS flights. \textit{Id.} at 2-3.} The DOT advised that the 24 exemptions must be used within the five minute increments established by the order; must be used for the communities at issue; and must be EAS tagged.\footnote{\textit{Id.}} If Great Lakes seeks to discontinue such service, the exemption authority would be withdrawn and transferred to the replacement carrier.\footnote{\textit{Id.} at 2-3.} As required by the 1994 Act, the DOT stated that it did not appear that the grant of such authority would result in significant delays within the meaning of the statute, but that it would continue to monitor the operations.\footnote{\textit{Id.} at 4.}

When the DOT issued a second exemption for four operations to Great Lakes for the provision of EAS between ORD and Oshkosh, Wisconsin,\footnote{See Essential Air Service, D.O.T. Order No. 94-11-12 (Nov. 17, 1994).} the DOT noted that the combined number of exemptions granted to Great Lakes returned the number of EAS operations at ORD to 132—the level previously
operated at ORD prior to the EAS reductions. Because 132 operations were specifically identified in the 1994 Act, the DOT advised that it was now "unprepared to authorize any additional EAS operations at O'Hare since significantly increased operational delays could result." Consistent with its position in the Reno Air order, the DOT also noted that the "exemptions granted to Great Lakes . . . are for the specific purpose of providing EAS at the six named communities. As such, they may not be bought, sold, traded or leased without [DOT] approval, and they are subject to the use-or-lose provision, and all other provisions of the slot rules."

In the area of foreign air transportation, the DOT has granted an exemption to Kuwait Airways Corporation. The application for exemptions filed by American Eagle on August 2, 1995, and by El Al Israel Airlines Ltd. on March 21, 1996, have not yet been decided. Of the three applications for an exemption for slots to support foreign air transportation, only the petition filed by American Eagle generated objections. Specifically, United raised concerns that if American Eagle, as a subsidiary of American, receives an exemption for slots to support its proposed three roundtrips per day between ORD and London, Ontario, a precedent would be established permitting the large incumbent carriers at ORD (that is, United and American) to obtain such exemption authority for international operations rather than relying upon their own slot holdings. Perhaps because of the issues raised by United's objection, it has been easier to delay a decision on the application.

In addition to high density airport access made available to U.S. carriers under the 1994 Act, the United States, as part of the Air Transport Agreement entered into with Canada in February 1995, included provisions to enable Canadian carriers to

190 Id. at 2.
191 Id.
192 Essential Air Service, D.O.T. Order No. 94-10-47, at 4; see also Essential Air Service, D.O.T. Order No. 94-11-12, at 3.
193 See Kuwait Airways, D.O.T. Order No. 96-3-40 (Mar. 18, 1996) (exemption granted for slots to support two weekly flights between Chicago and Kuwait).
194 See supra note 164 and accompanying text.
195 Answer of United Airlines, Inc. dated Aug. 17, 1995, DOT Docket OST-95-368. United pointed out American has 890 slots at ORD of which 281 are commuter slots. Id. at 7. United acknowledged that it holds 898 slots at ORD. Id. at 8-9.
obtain access to high density airports.\textsuperscript{196} The slots allocated to the Canadian carriers would be subject to the general rules governing slot use,\textsuperscript{197} but would not be subject to withdrawal for international service or to provide slots to new entrants.\textsuperscript{198} Although the regulations do not contemplate the transfer of slots used for international service except for one-for-one trades,\textsuperscript{199} the 1995 U.S.-Canada Bilateral provides that Canadian carriers “may monetize slot holdings and . . . may freely buy, sell and trade slots.”\textsuperscript{200} Any such slot transaction, however, would permanently modify the base level and neither the airline nor the Canadian Government would have a claim to any other slot to restore the base level.\textsuperscript{201}

C. What Does the Future Hold?

In May 1995 the DOT in its report to Congress published the results of its review of the high density rule.\textsuperscript{202} In its report, the DOT made several observations regarding the potential impact

\textsuperscript{196} See Air Transport Agreement, Feb. 24, 1995, U.S.-Can., Hein’s No. KAV 4196, Temp. State Dep’t No. 95-73 [hereinafter 1995 U.S.-Canada Bilateral]. Annex II of the 1995 U.S.-Canada Bilateral provides for the U.S. Government to establish a base level of 42 free slots for Canada at LGA and a base level of 36 free slots in the winter and 32 free slots in the summer at ORD. Annex II further provides that the U.S. “will endeavor to provide such slots at times of the day suitable for transborder air service.” Id. Annex II, § 1, para. 2. Slots required by Canadian carriers in excess of the base would be obtained through normal channels. Based on the then-current slot holdings of Canadian carriers, a total of 10 new slots would be provided at ORD and 14 at LGA. Transportation Facts, U.S.-Canada Open Skies Bilateral Aviation Agreement, U.S. DEP’T OF TRANSP., Feb. 24, 1995, at 3, available in WESTLAW, 1995 WL 76841. Under these provisions, Canadian Airlines International received six slots at ORD and ten slots at LGA while Air Canada received four slots at each airport. See Canadian Gets Bulk of U.S. Slots; Air Canada Gets Hong Kong, AVIATION DAILY, Mar. 13, 1995, at 395.

\textsuperscript{197} Annex V of the 1995 U.S.-Canada Bilateral exempts the slots from the use-or-lose rule during a three year transition period. 1995 U.S.-Canada Bilateral, supra note 196, Annex V, § 5, para. 2.

\textsuperscript{198} Id. Annex II, § 1, para. 3.


\textsuperscript{200} 1995 U.S.-Canada Bilateral, supra note 196, Annex II, § 1, para. 5. Annex V, however, provides that during a three year transition period, Canadian airlines may lease or sell such slots only to other Canadian airlines. Id. Annex V, § 5, para. 1. The slots can be traded during that period with any U.S. or Canadian carrier for slots at other times at LGA or ORD to adjust flight times for transborder service. Id.

\textsuperscript{201} Id. Annex II, § 1, para. 5.

\textsuperscript{202} See 1995 DOT REPORT TO CONGRESS, supra note 25. This study was implemented pursuant to a Congressional mandate in the 1994 Act. See 49 U.S.C.A. § 41714(c) (West 1995). The results of the study are based, in part, on the comments filed in the 1994 FAA Request for Comments, supra note 2.
of eliminating the high density rule and evaluated certain alternatives.\textsuperscript{203} As a general matter, the DOT noted that changing the high density rule will not affect air safety since the rule plays a secondary role to the FAA’s traffic management system which limits demand to operationally safe levels.\textsuperscript{204}

After examining the capacity at each of the high density airports, the DOT concluded that certain airports could accommodate growth while others could not.\textsuperscript{205} Specifically, it determined that ORD could support more growth since ORD appears to have more airfield capacity, gate and landside capacity, and capacity for federal inspection services.\textsuperscript{206} With respect to DCA, it noted that the airfield capacity appeared significantly higher than reflected by the number of existing slots and that gate and landside capacity could accommodate new growth.\textsuperscript{207}

\textsuperscript{203} The DOT explained that the 1995 DOT Report to Congress presents a “snapshot estimate” of what is likely to occur if the high density rule were lifted or modified overnight. It was noted that numerous long term and short term actions could be taken by affected parties if travel delays increased due to changes in the high density rule, including the elimination of certain operations by the airlines, the re-scheduling or cancellation of flights in bad weather, an alteration of traffic management techniques by air traffic control in an effort to improve operating efficiency, and the investment in additional capacity by the airports.

\textsuperscript{204} Id. at 3, 7, 37.

\textsuperscript{205} Id. at 10-13.

\textsuperscript{206} Id. at 10. The DOT believes it is unlikely that carriers other than United and American are likely to expand at ORD, except to their own hubs, due to the substantial competition already provided by United and American. As a result, the DOT believes the total amount of the additional service would be relatively modest and would be similar to the levels introduced by non-hubbing carriers from points where slot controls do not exist. More significant levels of increased operations at ORD would result from changes made by United and American. These increases would result from these carriers’ attempts to fill in existing patterns of jet service and replenish commuter operations which are now operated through their code-sharing partners due to the change in the high density rule which permits the operation of smaller jet aircraft in commuter slots. Id. at 54.

\textsuperscript{207} Id. at 12. Unlike the other high density airports, a change in slots for air carriers at DCA would require a change in federal law since the Washington Metropolitan Airports Act of 1986 (49 U.S.C. §§ 2454, 2458) prohibits any changes to the 37 slots per hour presently allowed for air carrier operations at DCA. DCA currently has 60 hourly slots, of which 37 are allocated to air carriers, 11 to commuters, and 12 to other users. DCA also has two additional commuter slots for aircraft equipped to conduct a short takeoff or landing (STOL). Id. at 97. The latest master plan for DCA, formulated in 1989 after the airport was transferred to MWAA, assumes that the current level of slots allocated to air carriers and commuters will remain fixed for the indefinite future. According to the DOT,
At JFK, the DOT noted that airfield capacity appears to be well-matched with the number of slots while other capacities could accommodate additional growth in operations. The existing number of slots at LGA, however, appeared to slightly exceed the airfield capacity, although gate and landside capacity appeared sufficient to accommodate new growth.

The DOT also noted in its report to Congress that the elimination of, or a substantial change in, the high density rule is likely to result in an increase in the number of airport operations—an increase which will be accompanied by both benefits and costs. Such an increase would also have implications for air traffic management, international air service relations, new entrant airlines, loss of slot value by incumbent carriers, and local/regional economic development. For ex-

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208 Id. at 11.

209 Id. at 11. Presently there are 68 slots per hour even though airfield capacity accommodates only 66 per hour. Id. at 11.

210 Id. at 3, 15.

211 Although the high density rule and the DOT practice allow for consideration of reciprocity when evaluating foreign carrier requests for slots, the high density rule has not been used to deny access to foreign carriers. The DOT pointed out, however, that granting slots to foreign carriers has imposed limits on domestic service, and because these limitations may impair feeder traffic, the unavailability of slots at specifically desired times may have restrained international services. According to the DOT, an elimination of the high density rule could result in new international service by U.S. and foreign carriers. See id. at 16. The DOT noted that because the 1994 Act authorizes the Secretary of Transportation to grant exemptions for air carriers to provide foreign air transportation, the need to increase slot withdrawals from domestic carriers in the future would not exist even if the high density rule is retained. See id.

212 Although the DOT notes in its report to Congress that the high density rule, particularly at ORD, may have served as a barrier to EAS, the exemption authority contained in the 1994 Act provides an alternative avenue for carriers to provide EAS. See supra text accompanying notes 182-92.

213 The DOT recognized that the high density rule has served as a barrier to service by new entrants at high density airports because these carriers have been unable to assemble a sufficient number of slots during desirable time periods to begin service. This inability stems in part from the unwillingness of the incumbents to sell slots due to an apparent concern about the competitive consequences of new entrant activity. See 1995 DOT REPORT TO CONGRESS, supra note 25, at 16.

214 The report to Congress recognized that because slots provide access to a limited resource, the slots provide a value to the holders which have the opportunity to earn financial returns. Specifically, the DOT identified the following four measures of slot value: (1) the economic value of a slot; (2) the sales value of a slot; (3) the value of a slot as collateral for securing a loan; and (4) the account-
ample, consumers would benefit from new and expanded air services and the reductions in air fares that would result from increased competition.\textsuperscript{215} Airports would benefit from increases in revenue which result from the larger number of operations.\textsuperscript{216} The incumbent carriers, however, would face a reduction in profits when the fare premium presently charged at certain high density airports is lost due to increased competition.\textsuperscript{217}

The DOT believed, however, that due to the increased operations that would result from the elimination of the high density rule, consumers and airlines would not only experience an increase in airport operations, but they would also experience an increase in travel delay time and costs.\textsuperscript{218} The benefits of such an elimination varied from airport to airport. At ORD, there would be a positive net dollar benefit of $205,000,000 per year.\textsuperscript{219} At JFK, the value of the additional service resulting from an elimination of the high density rule would slightly outweigh the cost of delay and would result in a net benefit of $7 million per year.\textsuperscript{220} At LGA and DCA, however, the elimination of the high density rule would result in net losses.\textsuperscript{221}

\textsuperscript{215} 1995 DOT REPORT TO CONGRESS, supra note 25, at 3, 8.
\textsuperscript{216} Id. at 17; see also supra text accompanying notes 101-13.
\textsuperscript{217} Id. at 11-13. Although the DOT found no technical barriers to air traffic control’s ability to ensure safety while managing increased operations without a high density rule, it indicated that delays would be likely not only at the high density airports but also at other airports. For example, a significant increase in delays at JFK or LGA could affect delays at EWR and other nearby airports due to the “interaction of airspace” in the area. Id. at 15. Notwithstanding this concern, the DOT noted that after a period of adjustment, the delays should be no greater than at other major airports that operate without the high density rule, such as Atlanta Hartsfield International Airport, Dallas-Fort Worth International Airport, and Los Angeles International Airport. Id.

\textsuperscript{219} The net benefit is based on consumer benefits of $1.3 billion in the form of fare reductions and new services, reduced by $645 million to reflect the costs resulting from delays, resulting in a net consumer benefit of $626 million. The airport would gain $25 million in revenue from the increased operations. The airlines, however, would experience a loss of $446 million resulting from the loss of the fare premium and the cost of delayed flights. Id. at 10.

\textsuperscript{220} Id. at 11.

\textsuperscript{221} The DOT determined that the overall net financial impact at LGA would be negative with an overall loss of $17 million per year. Id. At DCA, the DOT be-
Because the elimination of the high density rule would likely cause a change in the type of operations and aircraft used, the processing of traffic by the airports would also be affected due to the different separation standards for heavy and large jets and prop aircraft. The DOT also believed that because the enforced leveling of operations imposed by the high density rule would no longer govern, airlines could reschedule their flights to more desirable times of the day, causing operations to be more concentrated or peaked during certain time periods. An elimination of the rule would also cause a near-term increase in the size of the population affected by aircraft noise at each of the high density airports, although the noise would be reduced as carriers make the transition to a Stage 3 fleet.

In addition to the operational and consumer issues, the elimination of the high density rule would have a direct effect on the value that has been derived from slots. Although an incumbent airline would still have its operations at the high density airport, the fare premium would likely be diminished as a result of increased competition. This reduction in fares would cause a loss of the slot’s economic value. Sales value would be completely eliminated since slots would no longer be required. Since slots would have no value and, in fact, would not exist, the ability to use slots as collateral would also be eliminated depriving carriers of this financial resource and creating potential problems for parties that have accepted slots as collateral. If the high density rule is eliminated, carriers that reflect slots on their balance sheets would incur a sizeable negative net benefit in terms of dollars. Based on the DOT’s analysis, the costs would be significantly greater than benefits due to (1) large increases in operations and delays, and (2) a large increase in general aviation traffic which contributes to delays, but only benefits a limited portion of the airport users. Id. at 13.

Id. at 39.

Id.

Id. at 3. The DOT also noted that the concentration of more operations into shorter periods of time as occurs with increased peaking not only exacerbates delays, but it also increases perceived noise. Id. at 44.

Id. at 44. Part 91, subpart 1 of the FARs mandates the gradual elimination of Stage 2 aircraft and a transition to a Stage 3 fleet in the contiguous United States commencing January 1, 1995, and prohibits the operation of Stage 2 aircraft in the contiguous United States after December 31, 1999. See 14 C.F.R. §§ 91.853, 91.865, 91.867 (1995).

See 1995 DOT REPORT TO CONGRESS, supra note 25, at 17; see also supra text accompanying notes 101-13.

See 1994 FAA Request for Comments, supra note 2, Comments of the City of Chicago, at 17 (a phase-out of the high density rule would permit a more orderly write-off of slots including those used as collateral).
sheet would need to write them off to the extent they have not already been depreciated.\textsuperscript{228}

In addition to examining the impact of an immediate elimination of the high density rule, the DOT also evaluated various alternatives. First, the DOT considered a phase out of the high density rule over a specified period, such as five years, in order to stretch out the realization of the benefits and costs associated with immediate elimination of a rule.\textsuperscript{229} The considered phase out could be implemented by gradually reducing slot controlled hours at the airport or by gradually increasing the number of slots until demand (or available capacity) is met.\textsuperscript{230} Another alternative considered by the DOT was the retention of the high density rule with the addition of slots either to the point of allocating all available capacity or specifically for the provision of high value services which the DOT defined as long haul, large jet operations.\textsuperscript{231} The DOT also considered an alternative that would not involve lifting the rule entirely or adding more slots. Under this alternative, the high density rule could be eliminated during the periods at each airport when operations are slack, thereby allowing market forces to determine the types of services offered at these times.\textsuperscript{232}

If the high density rule is to be retained, the DOT suggested several changes that could be made to either improve the performance of the rule or simplify its implementation, or both.\textsuperscript{233} First, the DOT suggests that the definition of a slot be changed to take into account separation standards for different aircraft

\textsuperscript{228} See 1995 DOT REPORT TO CONGRESS, supra note 25, at 17. It should be noted that in its comments on the NPRM which proposed the buy-sell rule, the FTC noted that “[f]inancing [of slots] should be facilitated by the fact that slots are non-deprecating and readily transferable.” 50 Fed. Reg. 52,180, 52,185 (citing FTC comments).

\textsuperscript{229} The DOT believes it is unlikely that fare reductions will occur unless the high density rule is eliminated or a very large number of slots are added. See 1995 DOT REPORT TO CONGRESS, supra note 25, at 18.

\textsuperscript{230} Id.

\textsuperscript{231} Id. Under such an alternative, slots would be added to bring operations up to the airport’s balanced airfield capacity at ORD and DCA. At LGA and JFK, where capacity is already constrained, a “reasonable” number of slots would be added to accommodate high priority users including international operations. The DOT does not believe this alternative would provide any significant changes in the peaking pattern of operations or any reductions in fares. Id. at 40.

\textsuperscript{232} Id. at 20. The DOT noted that there is a considerable drop-off in operations from Saturday noon through Sunday noon at ORD, LGA, and DCA. Although there is no weekend drop-off in operations at JFK, there is a seasonal reduction in operations during the winter.

\textsuperscript{233} Id. at 110-11, 122.
and the amount of time needed to process an aircraft through the system.\textsuperscript{294} The DOT also suggests that the slots be enforced on a rolling hour basis which would eliminate situations where two back to back half hours exceed the hourly slot limit.\textsuperscript{295} This rolling hour concept would be coupled with a change in the slot definition as noted above.\textsuperscript{296} Another alternative suggested by the DOT would be the assignment of limited terms for slots in order to maximize benefits at the high density airports consistent with public interest concerns. Under this scenario, each domestic slot would be defined as having a finite life after which it would be withdrawn and redistributed among users to ensure that some slots become available on a regular basis.\textsuperscript{297} The DOT also suggested that slot pools could be reallocated among user groups to improve the net benefits generated at the airports. It is clear that the DOT believes net benefits rise with large aircraft and long distance flights as well as intercontinental flights to cities not presently served. It also believes that domestic flights using large jet aircraft produce greater benefits than commuter or general aviation flights with smaller prop aircraft.\textsuperscript{298}

Modifications to the use-or-lose rules were also suggested.\textsuperscript{299} Under the present rule, some carriers may operate marginal or unprofitable flights during the weekends merely to maintain their slot allocation. The DOT believes that incentive may be eliminated if there is no enforcement of the use-or-lose rule on weekends, thereby resulting in the availability of more weekend slots to be leased out to other potentially higher value users.\textsuperscript{300} Such an analysis reflects the DOT's apparent perspective regard-

\textsuperscript{294} Id. at 110. Currently, slots are defined as the right to land or take off during a specific time period; the allocations are made without reference to the fact that different aircraft require different amounts of time to be processed through the system.

\textsuperscript{295} At certain airports abroad, such as London Heathrow, the total number of slots permitted in any hourly period (regardless of when it starts and ends) cannot exceed a set limit. This rolling hour provision would eliminate the occurrences at the high density airports, especially ORD, where back to back half hours exceed the hourly slot limit. \textit{Id.}

\textsuperscript{296} Id. at 111. The DOT suggested that separate pools of slots could be maintained for different user groups. The reallocation could be accomplished through an auction process.

\textsuperscript{297} Id.

\textsuperscript{298} Id.

\textsuperscript{299} At present, a carrier must use slots 80\% of the time over a two-month period (average of 5.6 operations per week to maintain daily slot allocation). 14 C.F.R. § 93.227(a) (1995).

\textsuperscript{300} See 1995 DOT REPORT TO CONGRESS, \textit{supra} note 25, at 111.
ing the shortcomings of the high density rule. Rather than attempt to force carriers to release the slots for the weekends, the DOT accepts the status quo and attempts to resolve it by relieving the carriers of some of the burdens imposed by the use-or-lose rule—burdens intended to shake out slots that were not being used.

With respect to the distinction between air carrier and commuter slots, the DOT suggests that the distinction may cause certain high value opportunities to be missed. As such, the DOT believes the distinction should be eliminated. If a distinction remains, the DOT suggests that commuter use of air carrier slots be prohibited, thereby encouraging the holder of air carrier slots to sell or lease their slots to other operators when they do not have an appropriate use for them.

Certain minor administrative changes to the high density rule were also urged by the DOT. First, the DOT believes that the concept of “substantial compliance” should be formalized at JFK and LGA to raise quotas to actual levels. It also suggests that trades on international slots within a carrier’s base allocation be permitted so that a carrier can trade domestic and international slots within its own base to improve the timing of flights.

Based on the information compiled in the course of the 1994 FAA Request for Comments as reflected in the 1995 DOT Re-

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241 Id. To address public interest/distributional questions, a separate pool of EAS slots could be maintained. To date, the repeated requests to eliminate the distinction between air carrier and commuter slots have been unsuccessful. See supra note 183.

242 1995 DOT REPORT TO CONGRESS, supra note 25, at 111. As the DOT notes, many carriers currently operate commuter size aircraft in air carrier slots. Id. In certain circumstances, this enables the carrier to maintain the slot and keep out potential competitors operating higher value jets. See also discussion supra note 141.

243 The FAA’s “substantial compliance” policy provides a degree of flexibility at high density airports when exact literal compliance has not been accomplished. This policy was implemented prior to the enactment of the buy-sell rule enabling operators to meet the operational quotas over several hours, rather than the 30 or 60 minute time frames set forth in the rule, as long as a balance of operations was maintained. See 1994 FAA Request for Comments, supra note 2, Comments of the Port Authority of New York & New Jersey, at 5.

244 1995 DOT REPORT TO CONGRESS, supra note 25, at 122.

245 Id.
PORT TO CONGRESS, the DOT announced that it was not in the public interest to change the high density rule at present.246

VII. CONCLUSION

As noted earlier, when originally adopted, the high density rule was intended to be a temporary measure.247 Obviously, it has been far from temporary. Although the FAA has at times increased the level of operations permitted during controlled hours, it has also increased the number of controlled hours at certain airports. It would appear, at least from the perspective of the DOT and the FAA, that the high density rule is here to stay. Given the congestion and delays experienced at airports not subject to the high density rule, one has to wonder how the DOT and the FAA justify the retention of the high density rule at certain airports when it has not been imposed at others.248

The high density airports are certainly no more or less congested than other major airports such as Los Angeles, Atlanta, Miami, and Dallas.

The 1995 DOT REPORT TO CONGRESS reflects that air traffic capabilities can accommodate increased capacity and that the number of slots can effectively be increased at ORD, LGA, and JFK through the exemption process authorized by the 1994 Act. It appears, however, that at least for the time being, these lim-

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246 DOT Issues Report on High Density Rule, U.S. DEP’T OF TRANSP. NEWS, June 16, 1995, available in WESTLAW, 1995 WL 361737 (“Based on the report, the department concludes that the projected costs to consumers, airlines and communities of eliminating or modifying the rule currently outweigh the benefits, and that it would not be in the public interest to initiate a rulemaking on this issue.”).
247 See supra text accompanying notes 1-16.
248 Although the DOT has noted the possibility that due to congestion and delays at certain airports, the creation of an allocation program or market for slots may be required in the future, no action has been taken to increase the number of high density airports. See 1990 DOT Competition Study, supra note 100, at 2-20 to 2-25. Instead, when significant delays at Atlanta, Boston, ORD, Dallas, Denver, Newark, and Philadelphia raised concerns, the DOT granted the airlines discussion authority and antitrust immunity to facilitate the shifting of schedules necessary to alleviate the delays. See Discussion Authority, D.O.T. Order No. 87-3-39 (Mar. 11, 1987). The DOT chose to address the congestion problem through carrier discussions even though the FTC suggested that the problem be solved by expanding the high density rule to cover the additional airports facing delays. Id. at 2-3, 8; see also Discussion Authority, D.O.T. Order No. 87-1-54 (Jan. 28, 1987) (show cause order). Such restrictions are imposed by the DOT when particular airports will face unusually high operations for a limited period of time. See 61 Fed. Reg. 5492 (Feb. 12, 1996) (to be codified at 14 C.F.R. pt. 91, SFAR 74) (temporary slot requirements imposed at Atlanta airports during the 1996 Summer Olympic games).
ited increases in operations are the only way to accommodate new entrants and alleviate the anticompetitive impact of the high density rule. Recognizing, however, that there have been technological advances in air traffic control since the high density rule was adopted over twenty-five years ago and that the slot restrictions at high density airports are an impediment to new entry and growth and therefore competition, efforts will continue to be made to eliminate or significantly relax slot restrictions.

Although the scarcity value would be somewhat diminished by an increase in the number of slots, financial disruption would be minimized. It is clear that despite the belief that the buy-sell rule would enable market mechanisms to facilitate access to high density airports, no meaningful access has been provided to new entrants since the buy-sell rule was enacted. The only meaningful access ever granted to a new entrant at a high density airport was that provided to New York Air in 1980, which occurred only because there was no buy-sell rule and the FAA intervened.

Aside from the noise-related issues which have been so closely tied to slot restrictions, it appears that the buy-sell rule has virtually ensured that slots at high density airports will not be eliminated in their entirety. Although there may be concern about the anticompetitive nature of the rule and its discrimination against new entrants, it is recognized that the sudden elimination of slots would have a negative financial impact.

The sensitive issues for the future are not whether the basic rules will be eliminated, since repeal of a rule by the FAA is a rarity. Rather, the primary issue is whether the FAA will continue to find or be forced to find additional capacity in the system to increase the number of slots at the high density airports—something that has already been done through the 1994 Act. Based on the technological advances in the area of navigation, there will also likely be an increase in permitted operations at high density airports with the possible exception of DCA. Thereafter, the issue will reduce itself to the method by which the additional capacity will be allocated. It is a sure bet that new entrants will argue for priority; certain incumbents will want the slots previously withdrawn from them to support restoring other operations; international carriers will want their piece of the pie; smaller communities will want slots for EAS (to the extent the program survives); and some communities will fight the increase because of noise concerns. Regardless of the
method of allocation, it is unlikely that significant changes will be made at high density airports.
Comments