**4910-9X**

**DEPARTMENT OF TRANSPORTATION**

**Office of Aviation Analysis**

**49 CFR Part 398**

**Docket No.: DOT-OST-2014-0061**

**Essential Air Service Proposed Enforcement Policy**

**AGENCY: Office of Aviation Analysis (X50), Department of Transportation (DOT).**

**ACTION: Notice of Proposed Enforcement Policy**

**SUMMARY:** This proposed notice of enforcement policy announces how the Department of Transportation (DOT) intends, going forward, to enforce compliance with the requirements of the Department of Transportation and Related Agencies Appropriations Act, 2000, which prohibits the Department from subsidizing Essential Air Service (EAS) to communities located within the 48 contiguous States receiving per passenger subsidy amounts exceeding $200, unless the communities are located more than 210 miles from the nearest large or medium hub airport. As proposed, all communities receiving subsidies under the EAS Program would have until September 30, 2015, based on data from October 1, 2014, through September 30, 2015, to ensure compliance with the $200 subsidy cap or face termination of subsidy eligibility. After September 30, 2015, the Department would continue enforcement of the $200 subsidy cap on an annual basis based on data compiled at the end of every fiscal year. Consistent with established procedures, DOT will issue each potentially impacted community a show cause order regarding termination of eligibility and provide each such community with a fair and reasonable opportunity to demonstrate compliance with the $200 subsidy cap prior to a final decision by DOT. In addition, any community that is deemed ineligible under the $200 subsidy cap

provision may petition the Secretary for a waiver. After receiving a community's petition for a waiver, the Secretary may waive the subsidy cap for a limited period of time, on a case-by-case basis, and subject to availability of funds. To provide the Department with sufficient time to evaluate the FY 2015 data for potentially affected communities, DOT does not intend to begin the Show Cause Order process until January 2016.

**DATES:** Send comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** Send comments identified by docket number DOT-OST-2014-0061 using any of the following methods:

- Federal eRulemaking Portal: Go to http://www.regulations.gov and follow the online instructions for sending your comments electronically.
- Mail: Send comments to Docket Operations, M-30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue, SE, Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.
- Hand Delivery or Courier: Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- Fax: Fax comments to Docket Operations at (202) 493-2251.

*Privacy*: In accordance with 5 USC 553(c), DOT solicits comments from the public to better inform its decision-making process. DOT posts these comments, without edit, to www.regulations.gov, as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at www.dot.gov/privacy. DOT will read and respond to all substantive

comments. If you are filing comments on behalf of an organization or group of individuals, we encourage you to include the name of your group or organization. However, anonymous comments will be considered if they are timely filed. Including your name/group along with your comment is completely optional.

*Docket*: Comments received may be read at http://www.regulations.gov at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** For technical questions concerning this action, contact Kevin Schlemmer, Chief, Essential Air Service and Domestic Analysis Division, Office of Aviation Analysis, Department of Transportation, 1200 New Jersey Avenue, SE, Room W86-309, Washington, D.C. 20590; telephone: (202) 366-3176; Kevin.Schlemmer@dot.gov. For legal questions concerning this action, contact Claire McKenna, Attorney, Office of the General Counsel, Department of Transportation, 1200 New Jersey Avenue, SE, Room 96-309; telephone: (202) 366-0365; email: Claire.McKenna@dot.gov.

**SUPPLEMENTAL INFORMATION:**

**Background**

The Airline Deregulation Act, passed in 1978, gave airlines almost total freedom to determine which markets to serve domestically and what fares to charge for that service. The United States Congress (Congress) established the EAS program to guarantee that small communities that were served by certificated air carriers before deregulation maintain at least a minimal level of scheduled air service. Since its inception, the EAS program has provided a vital

link for eligible small communities to the National Airspace System (NAS). Indeed, this program ensures that small communities across America can tap into the economic and quality of life benefits that scheduled air services offer.

Over the years, Congress has made a number of statutory changes to the program (most recently in 2011 and 2012), but the fundamental purpose of the program remains unchanged. Given the socio-economic importance of this program, DOT remains committed to preserving the EAS program for eligible communities and ensuring the sustainability of the program for the future.

This proposed enforcement policy concerns the statutory mandate that prohibits DOT from providing EAS funds to any community in the 48 contiguous states that requires a per-passenger-subsidy in excess of $200 unless the community is located more than 210 miles from the nearest large or medium airport. Congress first imposed a $200 subsidy per passenger cap for communities in the 48 contiguous States in FY 1990 appropriations language. Such language was repeated in several later appropriations acts, throughout the 1990s, and was made permanent by the Department of Transportation and Related Agencies Appropriations Act, 2000, Public Law 106-69, 113 Stat. 986 (Oct. 9, 1999). Specifically, the Act provided that:

> Hereafter, notwithstanding 49 U.S.C. 41742, no essential air service subsidies shall be provided to communities in the 48 contiguous States that are located fewer than 70 highway miles from the nearest large or medium hub airport, or that require a rate of subsidy per passenger in excess of $200 unless such point is greater than 210 miles from the nearest large or medium hub airport.

The Department always has expected communities less than 210 miles from the nearest large or medium hub airport to work together with air carriers providing EAS to keep the subsidy per passenger below the $200 cap or risk termination of eligibility from the EAS Program. DOT also has routinely provided notice of this statutory mandate to communities that were or appeared to be at risk of exceeding the cap, and a number of EAS communities have lost their eligibility as a result of the cap.

Although the $200 subsidy cap is a longstanding statutory provision, in 2012, Congress added a provision that allows the Secretary to grant waivers in limited circumstances. To effectuate that new provision and to ensure the fair and consistent treatment of all EAS communities subject to the $200 subsidy cap prospectively, DOT is issuing this proposed enforcement policy. Specifically, the Department is considering a policy that will defer future enforcement of the $200 subsidy cap until January 2016. The proposed policy, if finalized, would set September 30, 2015, as the date by which any EAS community with a per passenger subsidy exceeding or approaching the $200 subsidy cap must ensure compliance with the cap. Under the proposed policy, DOT would determine each community's subsidy per passenger cap based on data compiled from October 1, 2014, through September 30, 2015. Consistent with past practice and our obligations under 49 U.S.C. 41733(f)(2), DOT would continue to encourage potentially affected communities to work with air carriers providing subsidized EAS to maximize use of the service awarded under their respective carrier-selection orders to avoid exceeding the $200 subsidy cap.

If after September 30, 2015, a particular community's subsidy per passenger remains above $200 and its location is less than 210 miles from the nearest large or medium hub airport, the Department would initiate proceedings, consistent with 49 U.S.C. 41733(f) and Public Law

112-97 (Feb. 14, 2012), Section 426(e), directing interested persons to show cause why the Department should not terminate the eligibility of the community in question under the EAS Program. This process will provide each potentially affected community with a fair and reasonable opportunity to demonstrate compliance with the $200 subsidy cap prior to a final decision by DOT. To provide the Department with sufficient time to receive and evaluate the FY 2015 data for potentially affected communities, DOT does not intend to begin the show cause process until January 2016.

After September 30, 2015, the Department would continue enforcement of the $200 subsidy cap on an annual basis based on data compiled at the end of every fiscal year and submitted to DOT after the close of the most recent fiscal year. Regardless of whether this proposed enforcement policy is adopted in any form, the EAS program contains certain statutory protections that an adversely impacted EAS community may invoke. First, in the event that DOT determines that a community is ineligible because it exceeds the $200 subsidy cap provision in a given fiscal year, the community may petition the Secretary of DOT for a waiver pursuant to Pub. L. 112-97, Sec. 426(e) (c) (Feb. 14, 2012). Under this provision, "[s]ubject to the availability of funds, the Secretary may waive, on a case-by-case basis, the subsidy-per-passenger cap." The law further provides: "A waiver . . . shall remain in effect for a limited period of time, as determined by the Secretary." Second, a community that is deemed ineligible based on the $200 subsidy cap and removed from the program may petition the Secretary for reinstatement into the program in a subsequent year if the community can demonstrate that it will be able to comply with the $200 subsidy cap on an annual basis going forward.

The Department seeks comments from all interested parties regarding this proposed enforcement policy.

Issued in Washington, DC, on April 23, 2014.

Brandon M. Belford,

Deputy Assistant Secretary for Aviation and International Affairs