U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
Aviation Rulemaking Committee Charter

Effective Date: May 1, 2013

SUBJECT: Update of Overflight Fees

1. **PURPOSE.** This charter creates the Aviation Rulemaking Committee (ARC) for Update of Overflight Fees according to the Administrator's authority under Title 49 of the United States Code (49 U.S.C.) 106(p)(5). This charter also outlines the committee's organization, responsibilities, and tasks.

2. **BACKGROUND.** The goal of the ARC is to provide advice and recommendations on future Overflight Fee increases. The ARC shall be comprised of employees or other representatives of the foreign air carriers (or trade associations of those carriers) or other system users that are subject to the FAA's Overflight Fees.

3. **OBJECTIVES AND TASKS OF THE ARC.** The Administrator deems it appropriate to create the Overflight Fees ARC to obtain advice and recommendations on the appropriate amounts for future Overflight Fees. The Committee will:
   a. Evaluate information regarding the services rendered to Overflights by the FAA and the costs of providing those services to Overflights.
   b. Use its evaluation to provide advice and recommendations regarding future overflight fee increases to the FAA.

   Recommendation Report. The ARC will submit a report detailing recommendations for tasks moving forward with the Overflight Fees update process within 3 months from May 1, 2013.

4. **ARC PROCEDURES.**
   a. The ARC advises and provides written recommendations to the Deputy Assistant Administrator for Financial Services, and acts solely in an advisory capacity. Once the ARC recommendations are delivered to the Deputy Assistant Administrator for Financial Services it is within his/her discretion to determine when and how the report of the ARC is to be released to the public.
   b. The ARC may propose additional tasks as necessary to the Deputy Assistant Administrator for Financial Services for approval.
   c. The Industry Co-Chair of the ARC sends the recommendation report to both the Director of the Office of Financial Controls and the Director of the Office of Rulemaking.
   d. The ARC may reconvene following the submission of its recommendations for the purposes of providing advice and assistance to the FAA, at the discretion of the Deputy Assistant Administrator for Financial Services, provided the charter is still in effect.
   e. The ARC will submit a report detailing recommendations within three months from the effective date of this charter, May 1, 2013.

5. **ARC ORGANIZATION, MEMBERSHIP, AND ADMINISTRATION.** The FAA will set up a committee of members of the aviation community. Members will be selected based on their familiarity with overflight fees. Committee members shall be employees or other representatives

of the foreign air carriers (or trade associations of those carriers) or other system users that are subject to the FAA's Overflight Fees. The members shall he selected hy the Deputy Assistant Administrator for Financial Services and, to the extent possible, the membership also shall he geographically diverse and include representatives that conduct primarily En Route overflights and primarily Oceanic overflights. When necessary, the ARC may set up specialized work groups that include at least one ARC member and invited subject matter experts from industry and government.

The Deputy Assistant Administrator for Financial Services is the sponsor of the ARC and will select an Industry Co-Chair from the membership of the ARC and the FAA Co-Chair. The FAA participation and support will come from all affected lines of business.

a. The ARC sponsor is the Deputy Assistant Administrator for Financial Services who:
    1. Appoints members or organizations to the ARC, at his sole discretion;
    2. Receives all ARC recommendations and reports;
    3. Selects industry and FAA members; and
    4. Provides administrative support for the ARC, through the Office of Financial Controls.
b. Once appointed, the Industry Co-Chair will:
    1. Coordinate required committee and work group (if any) meetings in order to meet the ARC's objectives and timelines;
    2. Provide notification to all ARC members of the time and place for each meeting;
    3. Ensure meeting agendas are established and provided to the committee members in a timely manner;
    4. Keep meeting minutes;
    5. Perform other responsibilities as required to ensure the ARC's objectives are met.
c. In addition to the FAA Co-Chair and Industry Co-Chair, the Committee shall be comprised of not more than 15 members, who shall be employees or other representatives of the foreign air carriers (or trade associations of those carriers) or other system users that are subject to the FAA's Overflight Fees. The members shall be selected by the Deputy Assistant Administrator for Financial Services and, to the extent possible, the membership also shall be geographically diverse and include representatives that conduct primarily En Route overflights and primarily Oceanic overflights.
d. Each member may designate one representative and one alternate to serve on the Committee.
e. Members may permit their employees and consultants (including financial, technical and legal professionals) to attend any Committee meeting and review Committee documents.
f. Additional FAA personnel may participate, as directed by the FAA Co-Chair, as adjunct non-members of the Committee.
g. ARC membership is limited to promote discussion.

6. **COST AND COMPENSATION.** All travel costs for government employees will be the responsibility of the government employee's organization. Non-government representatives, including the Industry Co-Chair, serve without government compensation and bear all costs related to their participation on the committee.

7. **PUBLIC PARTICIPATION.** ARC meetings are not open to the public. Persons or organizations outside the ARC who wish to attend a meeting must get approval in advance of the meeting from either the Industry Co-Chair or the FAA Co-Chair.

8. **AVAILABILITY OF RECORDS.** Consistent with the Freedom of Information Act, Title 5, U.S.C., section 552, records, reports, agendas, working papers, and other documents that are made available to or prepared for or by the committee will be available for public inspection and copying at the FAA Office of Financial Controls, 800 Independence Ave, SW, Rm. 532, Washington, DC 20591. Fees will be charged for information furnished to the public according to the fee schedule published in Title 49 of the Code of Federal Regulations, Part 7.

   You can find this charter on the FAA Web Site at:
   http://www.faa.gov/regulations_policies/rulemaking/committees/documents/

9. **DISTRIBUTION.** This charter is distributed to director-level management in the Office of Financial Services, Office of the Associate Administrator for Aviation Safety, the Office of Aviation Policy and Plans, and the Office of Rulemaking.

10. **EFFECTIVE DATE AND DURATION.** This ARC is effective upon issuance of this charter. The ARC will remain in existence until 2 years from the date of issuance, unless sooner suspended, terminated or extended by the Administrator.

The effective date of this charter is May 1, 2013.

Michael P. Huerta
Administrator

February 14, 2014

BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

IN RE OVERFLIGHT FEES	)
AVIATION RULEMAKING COMMITTEE	)
	)

RECOMMENDATION OF THE INDUSTRY MEMBERS OF THE 2013/2014 FAA AVIATION RULEMAKING COMMITTEE ON OVERFLIGHT FEES

The industry members of the U.S. Federal Aviation Administration ("FAA") Aviation Rulemaking Committee for overflight fees (the "ARC")[1] present this recommendation on user fees charged by the FAA for the provision of air traffic control services to airlines that neither take off nor land in the United States (see appendix I for a historical background).

The industry members of the ARC have engaged in constructive discussions with the FAA in an attempt to reach a suitable adjustment for the increase in fees, following the previous 5 year adjustment set by the FAA ending in FY2015. As a result of the ARC discussions – and conditional upon acceptance, representations and expectations that they have received in connection with the increased fees, – the industry members accept a change in fees as outlined below.

1. COST ACCOUNTING SYSTEM & COST RELATEDNESS

Although the industry members do not challenge the use of the Cost Allocation System (CAS) as a basis for setting the overflight charges, they remain critical regarding elements of the cost base, the traffic and consequently the level of the overflight fees allocated to airlines that neither take off or land in the United States. As an example costs included in the en-route cost base such as flow control into major airports and costs associated with providing approach services at airports and airfields that are not served by a dedicated TRACON are not linked to services provided to overflying carriers and should therefore be removed. The industry members therefore recommend for the cost base to exclude certain elements of FAA's overhead and other non-overflight related costs of the cost base, and therefore do not endorse the currently used methodology as a whole.

[1]The industry members of the ARC are Aeromexico, Air Canada, Air France, Air Transat, Air Transport Association of Canada, Association of Asia Pacific Airlines, British Airways, Plc, Cathay Pacific Airways Limited, International Air Transport Association, KLM Royal Dutch Airlines, Lufthansa German Airlines, National Airlines Council of Canada, Sunwing Airlines.

Similar to the documentation provided during the 2009 ARC, records continue to demonstrate that FAA is seeking to recover more than the reasonably related costs for providing ATC and related services to overflights, while the actual revenues from the overflight fee are not reinvested in FAA services provided to overflights but rather are redirected to subsidize Essential Air Services (EAS). Costs for providing ATC and related services to flights that do take off or land in the United States in lieu of overflight fees are partially recovered through a contribution from the General Fund and through taxes that remained unchanged for several years while overflight fees have continued to rise in a steady pace between 2010 and 2014.Overflight fees therefore continue to be assessed on terms that are "less favorable" to foreign airlines which do not take off or land in the United States, than to their U.S. counterparts.

2. TRAFFIC

The industry members recommend FAA includes all traffic receiving services from FAA ATO personnel in en-route and oceanic ATRCC's in the determination of the total flight miles as basis for the rate calculation. It is believed that currently only filed flight plans (IFR/VFR) in the system are being used to determine total flight miles while a significant portion of traffic consists of unfiled VFR traffic using flight following or being actively separated from IFR. Excluding this traffic from the total flight miles artificially increases the cost per NM for the en-route and oceanic portion of the cost base and therefore inflates the rate for overflight fees.

3. TRANSPARENCY / CONSULTATION

As the overflight fees remain the only fees in the FAA that are intended to be related to costs and airlines that do not land or takeoff in the United States are subject to much more frequent changes to their fees. Without economic oversight or a direct influence on the cost base through user consultation, the industry members believe it is essential the FAA continues to engage in meaningful financial consultations with its Stakeholders and provides full transparency on its cost development through CAS. While the discussions with the FAA at the ARC have been constructive and provided the industry members with much needed background information on the CAS and cost / traffic development, the industry members recommend the FAA provides the industry (including the non-ARC members) on an annual basis with year to year comparisons of costs and traffic in a manner that allows future ARC members to better track development and make informed recommendations. The industry members recommend that major changes in allocations between cost centers are accompanied by a high level summary justifying the changes similar to NAV CANADA's Management Discussion & Analysis (MD&A)

4. DEVELOPMENT OF UNIT COSTS & SEQUESTRATION

The information provided to the ARC clearly shows that (excluding the effects of sequestration), the FAA's operational costs continue to increase at a steady pace while the industry as a whole still struggles with a sluggish economic recovery. ATC charges in neighboring States have remained flat in the past 5 years while the FAA raised its overflight fees with respectively 8%

Oceanic charge and 14% Enroute charge per year during the same period, and is likely to continue to do so with the current cost development. The industry members recommend the FAA sets a target on its cost development that remains below inflation and takes into consideration the expected development of traffic.

Similar measures continue to be taken in other parts of the world challenging ATM providers to seek further efficiency and reduce unit costs or keep them flat. The industry members recommend the FAA take a similar approach to internal cost development especially for those cost centers that are directly linked to user fees such as the overflight fee.

5. CONDITIONAL ACCEPTANCE OF INCREASE IN OVERFLIGHT FEES.

The industry member's acceptance of an increase in overflight fees is conditioned upon certain factors, including the lack of any increase until completion of the NPRM process, and a cap on the increase as set forth herein. The industry members have provided this consent pursuant to their desire to work in a collaborative effort with FAA to reach a mutually agreeable resolution with regard to FAA's desire to increase the fees. However, if, for any reason, the conditions which the industry members have placed on their consent are not fulfilled, the members would be free to return to their multi-pronged objections to the fee increase sought by FAA, without limitation. (See appendix II).

As the currently published fees are based on the 2008 cost base and the FAA's growth of costs (CAGR) between FY08 and FY2013 was 1.72% (en-route) and 3.76% (oceanic), the ARC members would not object to an annual increase of 1.7% for en-route fees and 3.76% for Oceanic fees over three consecutive years beginning in October 2015 (FY2016) and ending in FY2018, following FAA's CAGR development.

FAA ENROUTE COSTS (CAGR) FY2008/FY2013	1.72%
FAA OCEANIC COSTS (CAGR) FY2008/FY2013	3.76%

	FY2015	FY2016		FY2017		FY2018	
	ARC 2009	Proposed		Proposed		Proposed	
ENROUTE FEE per 100NM	$56.80	$57.77	1.7%	$58.75	1.7%	$59.75	1.7%
OCEANIC FEE per 100NM	$21.60	$22.40	3.7%	$23.23	3.7%	$24.09	3.7%

The industry members recommend a new ARC is to be convened to determine the need for a further change of rates for FY2019. As traffic is expected to increase beyond the actual numbers used for FY2012 and FY2013 to establish the fees, revenues from overflight fees are expected to exceed costs, which are expected to grow at a much lower pace.

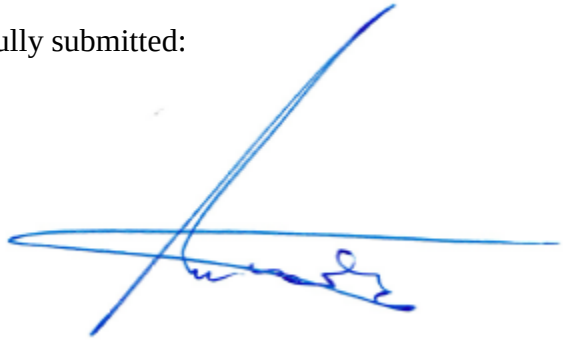
6. CONCLUSION

The industry members would like to acknowledge the continued cooperative attitude FAA has demonstrated during this ARC process and the opportunity to provide our recommendations to FAA. Despite the issues that the ARC members still have with regard to FAA's intention to increase the overflight fees, the members of the ARC, in the spirit of good faith cooperation and collaboration with the FAA, will conditionally not object to the fee increase set forth above, assuming that the above stated conditions are fulfilled.

We assume that FAA will consider further changing their overflight fee structure as a whole based on the concerns mentioned and the ARC members would be more than willing to provide an active role in this process.

In the meantime, please feel free to contact the undersigned or any of the other ARC members if there are any further questions.

Respectfully submitted:



Cyriel Kronenburg

Vice Chairman, Aviation Rulemaking Committee,
International Air Transport Association, IATA

APPENDIX 1: HISTORICAL BACKGROUND

In October 1996, Congress enacted section 273 of the Federal Aviation Reauthorization Act of 1996, Pub. L. 104-264, codified at 49 U.S.C. § 45301, which, for the first time, authorized the FAA to impose a user fee for the provision of air traffic control and related services to aircraft that neither takeoff nor land in the United States. In March 1997, the FAA issued an "Interim Final Rule" which sought to impose nearly $100 million in overflight fees, fifty million of which was set aside by Congress to fund the Essential Air Services program in the United States. In January 1998, the U.S. Court of Appeals for the D.C. Circuit vacated the IFR, ruling that the fees did not comply with the statutory directive that they be "directly related" to FAA's costs of providing services to overflights because of FAA's use of "Ramsey pricing" to determine the fees (footnote 2).

In June 2000 the FAA issued a new IFR which sought to recover approximately $40 million per year in overflight fees. In July 2001, the D.C. Circuit vacated the 2000 IFR because the FAA did not show that the fees were directly related to costs, in that FAA provided no basis for its assumption that FAA incurs the same level of costs to provide services to overflights as to non-overflights.2 The following month (August 2001), FAA issued a final rule for overflight fees (the "Final Rule") which continued to assume that the agency incurred the same level of costs to provide ATC and related services to overflights as to non-overflights.

In April 2003, the D.C. Circuit vacated the Final Rule (footnote 3). The Court stated that: "For the third time, we must review the lawfulness of a Federal Aviation Administration regulation establishing fees for air traffic control services for 'overflights' . . . . For the third time, we find that the FAA disregarded its statutory mandate." The Court found that the airlines' experts had made "a substantial case refuting the agency's unexplained insistence that miles of overflights and non-overflights in the Enroute and Oceanic airspaces are approximately equivalent in their per-mile generation of costs." The Court acknowledged the FAA's assertion that some overflights spend some time at low altitudes, but pointed out that this did "not undermine petitioners' claim that they fly predominately in the high altitude sector, to a degree far greater than do non-overflights." The Court also rejected FAA's contention that fixed and common costs dominate, and therefore any difference in the marginal cost of servicing an additional overflight versus an additional non-overflight is immaterial.

During the interim between the July 2001 and April 2003 D.C. Circuit decisions, Congress enacted Section 119(d) of the Aviation Transportation and Security Act of 2001 ("ATSA"). Section 119(d) amended the 1996 overflight fee statute to provide that (1) overflight fees must be "reasonably related" (rather than "directly related") to the FAA's costs of providing services to overflights, and (2) the FAA's determination of its costs for providing services to overflights is not subject to judicial review. Although the D.C. Circuit, in its April 2003 decision, ruled that

[2] *Air Transport Association of Canada v. FAA*, 254 F.3d 271 (D.C. Cir. 2001).

[3] *Air Transport Association of Canada v. FAA*, 323 F.3d 1093 (D.C. Cir. 2003).

Section 119(d) did not apply retroactively to the FAA's final rule on overflight fees, in December 2003 Congress enacted certain legislative language in Section 229 of Vision 100, which was intended to retroactively nullify the April 2003 Court ruling. Section 229 states: "The interim final rule and final rule referred to in subsection (a), including the fees issued pursuant to those rules, are adopted, legalized, and confirmed as fully to all intents and purposes as if the same had, by prior Act of Congress, been specifically adopted, authorized, and directed as of the date those rules were originally issued." The new law also purported to make ATSA Section 119 applicable to the overflight fees.

Pursuant to a settlement reached between FAA and the parties that had successfully challenged the 2000 IFR and the 2001 Final Rule, FAA agreed to "make payments to the litigating [carriers] from previously collected fees" based on a formula agreed to by the parties "in addition to whatever refunds and credits" were otherwise available to the litigating carriers. Following the settlement, FAA resumed assessment and collection of overflight fees based on the methodology of the Final Rule. As a result, the carriers have been paying $33.72 per 100 nautical miles for Enroute services, and $15.94 per 100 nautical miles for Oceanic services.

As part of the settlement with the litigating carriers, the FAA agreed to the creation of the ARC, which was to consist of FAA and industry representatives working to examine in depth the FAA's methodology for overflight fees and to recommend whether it should be modified. Section 4 of the ARC Charter states that the "Committee's primary task is to identify the services rendered to overflights by the FAA, to determine the FAA's costs of providing services to overflights, and, based upon that determination, to make recommendations to the Administrator regarding the level of future overflight fees that would be consistent with the provisions of the 1996 Act, as amended." Section 5(a) of the Charter states that the "Committee is to evaluate information regarding the services rendered to overflights by the FAA and the costs of providing those services to overflights, and, based on that evaluation, to make recommendations regarding future overflight fees, including possible modification to, or replacement of, the fees currently being charged by the FAA." Section 6(h) states that "Committee recommendations to the Administrator must be approved by at least a two-thirds vote of the members. The Chair shall have the right to submit a separate report or recommendation to the Administrator."

The first meeting of the ARC occurred in April 2005. It was followed by a visit of the ARC to the Enroute center near Cleveland, Ohio, in June 2005. In December 2008, the FAA issued a Federal Register notice to reconstitute the ARC. The reconstituted ARC held formal meetings in April and July of 2009. During these meetings FAA has discussed with the industry members possible ranges of increases in the overflight fees to be paid by affected carriers. FAA also provided certain items of information to the ARC industry members in connection with the increase in overflight fees which FAA announced it intended to seek. Also in 2009, both Houses of Congress proposed or otherwise considered statutory language for an update in the overflight fees.

APPENDIX II

1. The FAA is utilizing a methodology which the U.S. Court of Appeals for the D.C. Circuit ruled in 2003 failed to comply with the statutory standard that the fees be "directly related" to FAA's costs of providing ATC and related services to overflights. The fact that the language has been changed to "reasonably related" from "directly related" does not change the core fact that the FAA incurs a lower level of costs (in terms of manpower and otherwise) to provide ATC and related services to overflights than to aircraft that operate at lower, transitional altitudes throughout the air traffic control system. This evidence was clearly placed before the FAA in connection with the litigation over the second IFR and the Final Rule, and there has been no development that has changed this fact or the import of the Court's 2003 decision. In sum, in order for the fees to be truly cost based, the fee methodology would need to reflect the fact that the agency incurs more costs to provide service to non-overflights than to overflights. The members also believe that there is no basis for including the cost of overhead in the overflight fee methodology.

2. The industry members object to the multiple efforts to deprive airlines of the right to obtain judicial review of FAA's derivation of the overflight fees. Following the first two successful legal challenges to overflight fees, and commencing with Section 119 of ATSA in November 2001, and continuing with Section 229 of Vision 100 in December 2003 and language in proposed legislation being considered by Congress at this time, the FAA appears to have sought and obtained language to deprive airlines subject to overflight fees of the right to seek and obtain judicial review with regard to certain aspects of the fees. The timing of Section 119 of ATSA and Section 229 of Vision 100 appears to indicate that the legislation was intended to change the result of independent decisions of the judiciary branch, which would not have been appropriate. Beyond that, it is contrary to international norms and good policy to prohibit airlines from being able to obtain judicial review of user fees. The fact that Article 84 of the Convention on International Civil Aviation ("Chicago Convention") and various bilateral and multilateral air services agreement to which the United States is a party provide for independent review of user charges demonstrates the international consensus that no State should be permitted to dictate the user charges imposed on foreign airlines without having a suitable review process before a disinterested dispute resolution body. However, the dispute resolution remedies in the international air services agreements are complex and time consuming. It is incumbent on each State that imposes user charges on aviation to provide for independent judicial review in the courts of that nation, so that the dispute resolution provisions which are binding on each State do not need to be needlessly invoked. Stated simply, the international airline community merely wants the ability to have an independent national judiciary review compliance by the fee-charging entity with applicable legal requirements. That should not be objectionable to FAA or the U.S. Congress.

3. Finally, the proposed overflight fees are not consistent with bilateral and multilateral air services agreement (with which the United States is a signatory), which require, among other things, that foreign airlines (which are the carriers subject to overflight fees) be assessed user charges on terms "not less favorable than the most favorable terms available" to other carriers.

See, e.g., Article 12(1) of the "Air Transport Agreement" between the European Union and the United States (April 25, 2007) ("User charges that may be imposed by the competent charging authorities or bodies of each Party on the airlines of the other Party shall be just, reasonable, not unjustly discriminatory, and equitably apportioned among categories of users. In any event, any such user charges shall be assessed on the airlines of the other Party on terms not less favorable than the most favorable terms available to any other airline at the time the charges are assessed"); Article 9(1) of the "Air Transport Agreement Between The Government of the United States of America and The Government of Canada" (March 12, 2007) ("User charges that may be imposed by the competent charging authorities or bodies of each Party on the airlines of the other Party for the use of air navigation and air traffic control services shall be just, reasonable and not unjustly discriminatory. In any event, any such user charges shall be assessed on the airlines of the other Party on terms not less favorable than the most favorable terms available to any other airline"); see also Article 15 of the Chicago Convention ("like uniform conditions shall apply to the use, by aircraft of every contracting State, of all air navigation facilities . . . which may be provided for public use for the safety and expedition of air navigation") ("charges . . . imposed . . . for the use of air navigation facilities by the aircraft of any other contracting State hall not be higher . . . than those that would be paid by its national aircraft engaged in similar international air services").