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**GENERAL SERVICES ADMINISTRATION**

**41 CFR Part 102-117**

[Change 2014-03; FMR Case 2012-102-5; Docket 2012-0017,  
Sequence 1]

**RIN: 3090-AJ34**

**Federal Management Regulation (FMR); Restrictions on  
International Transportation of Freight and Household Goods**

**AGENCY:** Office of Government-wide Policy (OGP), General  
Services Administration (GSA).

**ACTION:** Final rule.

**SUMMARY:** GSA is amending the Federal Management Regulation (FMR) provisions pertaining to the use of United States air carriers for cargo under the "Fly America Act"; updating the current provisions in the FMR regarding the Cargo Preference Act of 1954, as amended; and clarifying FMR language to state clearly that this part applies to all agencies and wholly-owned Government corporations except where otherwise expressly provided.

**DATES:** This final rule is effective [insert date of Federal Register publication].

**FOR FURTHER INFORMATION CONTACT:** Lee Gregory, Office of Asset and Transportation Management, Office of Government-wide Policy, General Services Administration, 1800 F Street, NW., Washington, DC 20405, by phone at (202) 507-0871 or by e-mail at [lee.gregory@gsa.gov](mailto:lee.gregory@gsa.gov). Please cite FMR Case 2012-102-5.

## **SUPPLEMENTARY INFORMATION:**

### **A. Background**

GSA reviewed the transportation management policy regarding international shipments and published a proposed rule in the Federal Register on June 19, 2013 (78 FR 36723).

The Fly America Act, 49 U.S.C. 40118, requires the use of United States air carrier service for all air cargo transportation services funded by the United States (U.S.) Government. One exception to this requirement is transportation provided under a bilateral or multilateral air transport agreement, to which the U.S. Government and the government of a foreign country are parties, and which the Department of Transportation has determined meets the requirements of the Fly America Act.

The U.S. Government has entered into several air transport agreements that allow Federally-funded transportation services for cargo movements to use foreign air carriers under certain circumstances. For example, on April 25 and April 30, 2007, the United States-European Union (EU) Air Transport Agreement (U.S.-EU Agreement) was signed, providing EU air carriers the right to transport cargo, including household goods, on scheduled and charter flights funded by the U.S. Government (excluding transportation funded by the Secretary of Defense or in the Secretary of a military

department), between any point in the U.S. and any point in an EU Member State or between any two points outside the U.S. for which a U.S. Government civilian Department, Agency, or instrumentality: (1) obtains the transportation for itself or in carrying out an arrangement under which payment is made by the U.S. Government or payment is made from amounts provided for use of the U.S. Government; or (2) provides transportation to or for a foreign country or international or other organization without reimbursement.

The U.S. Government and the European Union amended the U.S.-EU Agreement with a Protocol signed on June 24, 2010. In the amended agreement, the U.S. further extended the rights of EU air carriers to transport cargo on scheduled and charter flights funded by the U.S. Government between any point in the United States and any point outside the United States, or between any two points outside the United States. Norway and Iceland joined the U.S.-EU Air transportation agreement as amended by the Protocol on June 21, 2011, granting carriers from those countries the same rights.

The U.S. Government has air transport agreements with Australia, Switzerland, and Japan, which allow carriers from those countries to transport cargo subject to the Fly America Act between their respective home countries and the United States and between two points outside the United States. The

provisions in the agreements with Australia and Switzerland became effective on October 1, 2008. The provisions in the agreement with Japan took effect on October 1, 2011.

The U.S. Government previously entered into an agreement with Saudi Arabia regarding Federally-funded transportation services for cargo movements under which Saudi Arabian air carriers are permitted to transport cargo from Saudi Arabia to the United States and from the United States to Saudi Arabia when the transportation is funded by U.S. Government contractors providing services to Federal Government entities.

Accordingly, rather than amend the FMR to include language from agreements, and thereafter amending the FMR each time there is a change in air transport agreements that affect U.S. Government-funded cargo transportation, GSA is issuing this final rule that directs customers to the Department of State Internet-based source of information (<http://www.state.gov/e/eb/tra/ata/index.htm>) relating to such agreements. This approach will allow GSA to provide and quickly update relevant information as new agreements are signed or current agreements are amended without invoking the regulatory process. In the future, if GSA were to determine that further guidance is necessary, GSA may issue FMR Bulletins, or involve the regulatory process, as appropriate.

Additionally, GSA is updating the FMR to include exceptions to the Fly America Act, such as cargo transportation services that are fully reimbursed by a third party, e.g., a foreign government, an international agency, or other organization. As the Federal Government is not expending any of its own funds, such services are not covered by the Fly America Act.

Further, in accordance with 49 U.S.C. 40118(c), GSA is amending regulations under which agencies may expend appropriations for cargo transportation using foreign air carriers when it is deemed necessary. There have been limited circumstances in the past where the use of a foreign air carrier was deemed necessary. For example, when the Government Accountability Office (formerly the General Accounting Office), had responsibility for implementing the Fly America Act, the Comptroller General held that when time requirements could not be met the use of a foreign flag carrier was deemed necessary (See The Honorable Norman Y. Mineta Chairman, Subcommittee on Aviation Committee on Public Works and Transportation, House of Representatives, Comptroller General, B-210293, June 13, 1983).

The use of foreign carriers should be very limited and agency approval should only be granted after a determination that one or more of these circumstances exist: no U.S. flag

air carrier can provide the specific air transportation needed; no U.S. flag air carrier can accomplish the agency's mission; no U.S. flag air carrier can meet the time requirements in cases of emergency; there is a lack of or inadequate U.S. flag air carrier aircraft, or to avoid an unreasonable risk to safety when using a U.S. flag air carrier.

Further, this final rule updates FMR section 102-117.135(b) to include the current telephone number, e-mail address, and Web site for the Department of Transportation Maritime Administration (MARAD), Office of Cargo Preference and Domestic Trade. This final rule also identifies the Web site for agencies to go to for information that MARAD requires to be submitted by the shipping Department or Agency when cargo is shipped subject to 46 U.S.C. 55305, the Cargo Preference Act of 1954, as amended.

Finally, GSA is revising the language in FMR section 102-117.15 to state clearly that this part applies to all agencies and wholly-owned Government corporations except as otherwise expressly provided.

## **B. Public Comments and Responses**

In the proposed rule, GSA provided the public a 30-day comment period which ended on July 19, 2013. GSA received five recommendations from the National Air Carrier Association

(NACA). NACA represents 16 member carriers who transport cargo and passengers on both scheduled and non-scheduled U.S. domestic and international flights. NACA comments related to the focus of the proposed change; how GSA will monitor and control compliance with the Fly America Act; and questioned how there will be consistency of interpretations by U.S. Government agencies for the exceptions listed.

Comment: There must be a mechanism to ensure U.S. Government agencies arrange flights using foreign flag air carriers only when it is a matter of necessity, on a case-by-case basis, according to the exceptions listed in the amendment.

Response: Regulatory and other guidance already exists that allows agencies to use foreign flag air carriers only when it is a matter of necessity. These include the Comptroller General Decision B-138942, issued March 31, 1981, requiring agency decision and certifications to be attached to the voucher; the Federal Acquisition Regulation (FAR) that governs Federal contracts for civilian agencies in Part 47, Transportation, which contains guidance for the implementation of the Fly America Act (48 CFR 47.403 and 47.404); the Federal Travel Regulation (FTR) which addresses Federal travel and relocation (41 CFR 301-10.141, et seq.), and agency policy that regulates the use of foreign flag carriers.

Comment: Each of the exceptions is subject to interpretation, but the one referring to "...an unreasonable risk to safety" appears to be particularly questionable. Which U.S. Government agency will be responsible to make the determination that the flight is too risky for an U.S. flag carrier? U.S. flag carriers must be included in the risk assessment.

Response: Additional language for clarification regarding "an unreasonable risk to safety" has been incorporated into this final rule. An agency decision must be supported by an advisory alert issued by the Federal Aviation Administration, Department of State, or the Transportation Security Administration.

Comment: There must be proof supplied in every case by agencies arranging flights using foreign flag air carriers.

Response: As identified in the response to the first comment above, regulatory and other guidance already exists for agencies to follow for flights using foreign flag air carriers.

Comment: GSA should announce to the public, in advance, all flights proposed by U.S. Government agencies that would use foreign flag air carriers in accordance with this amendment, including the proof as to why a foreign flag air carrier is proposed to be used. This will allow U.S. air



carriers the opportunity to comment, object, and appeal the intent to use a foreign flag carrier. GSA should propose a simple method to announce these flights to the public.

Response: The comments are outside the scope of this rule.

Comment: Note following (3)(v) of this amendment: The use of foreign flag air carriers should be rare. NACA urges GSA to replace this note with: (1) a transparent mechanism to allow advance notice of proposed use of foreign carriers, (2) an appeal process for U.S. flag carriers to object, and (3) a commitment to continue monitoring use of foreign flag air carriers by U.S. Government agencies. Only then will it be possible to ensure strict compliance with all provisions of the Fly America Act.

Response: The proposed amendment "note" text following (3)(v) has been placed into the regulation at section 102-117.135(a), Air Cargo. GSA agrees that the use of foreign-flag air carriers should be rare.

The comments regarding the three steps are outside the scope of this rule. It is each agency's responsibility to procure and manage their foreign air carrier transportation requirements.

### **C. Changes**

This final rule-

- Applies to all agencies and wholly owned Government corporations as defined in 5 U.S.C. 101, et seq., and 31 U.S.C. 9101(3), except as otherwise expressly provided.

- Updates current provisions pertaining to the use of U.S. air carriers for cargo under the provisions of 49 U.S.C. 40118, commonly referred to as the "Fly America Act," and the 46 U.S.C. 55305, the Cargo Preference Act of 1954, as amended.

- Clarifies the exceptions to the requirement of using U.S. flag air carriers.

- Revises contact information and Web sites for the Department of Transportation, Maritime Administration (MARAD).

#### **D. Executive Orders 12866 and 13563**

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This is not a significant regulatory action, and therefore, would not be subject to review under Section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September

30, 1993. This rule would not be a major rule under 5 U.S.C. 804.

#### **E. Regulatory Flexibility Act**

While these revisions are substantive, this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. This final rule is also exempt from the Regulatory Flexibility Act per 5 U.S.C. 553(a)(2) because it applies to agency management or personnel.

#### **F. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FMR would not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, et seq.

#### **G. Small Business Regulatory Enforcement Fairness Act**

This final rule is also exempt from Congressional review prescribed under 5 U.S.C. 801 since it relates to agency

management or personnel.

**List of Subjects in 41 CFR Part 102-117**

Air Cargo, International Transportation, Ocean Cargo,  
Transportation Management, U.S. flag carriers.

Dated: April 3, 2014.

Dan Tangherlini,  
Administrator of General Services.

For the reasons set forth in the preamble, 41 CFR Part  
102-117 is amended as follows:

**PART 102-117—TRANSPORTATION MANAGEMENT**

1. The authority citation for 41 CFR Part 102-117  
continues to read as follows:

**Authority:** 31 U.S.C. 3726; 40 U.S.C. 121(c); 40 U.S.C.  
501, et seq.; 46 U.S.C. 55305; 49 U.S.C. 40118.

2. Revise § 102-117.15 to read as follows:

**§ 102-117.15 To whom does this part apply?**

This part applies to all agencies and wholly-owned  
Government corporations as defined in 5 U.S.C. 101, et seq.  
and 31 U.S.C. 9101(3), except as otherwise expressly provided.

3. Revise § 102-117.135 to read as follows:

**§ 102-117.135 What are the international transportation  
restrictions?**

Several statutes mandate the use of U.S. flag carriers for international shipments, such as 49 U.S.C. 40118, commonly referred to as the "Fly America Act", and 46 U.S.C. 55305, the Cargo Preference Act of 1954, as amended. The principal restrictions are as follows:

(a) Air cargo: The use of foreign-flag air carriers when funded by the U.S. Government should be rare. International movement of cargo by air is subject to the Fly America Act, 49 U.S.C. 40118, which requires the use of U.S. flag air carrier service for all air cargo movements funded by the U.S. Government, including cargo shipped by contractors, grantees, and others at Government expense, except when one of the following exceptions applies:

(1) The transportation is provided under a bilateral or multilateral air transportation agreement to which the U.S. Government and the government of a foreign country are parties, and which the Department of Transportation has determined meets the requirements of the Fly America Act.

(i) Information on bilateral or multilateral air transport agreements impacting U.S. Government procured transportation can be accessed at <http://www.state.gov/e/eb/tra/ata/index.htm>; and

(ii) If determined appropriate, GSA may periodically issue FMR Bulletins providing further guidance on bilateral or

multilateral air transportation agreements impacting U.S. Government procured transportation. These bulletins may be accessed at <http://www.gsa.gov/bulletins>;

(2) When the costs of transportation are reimbursed in full by a third party, such as a foreign government, an international agency, or other organization; or

(3) Use of a foreign air carrier is determined to be a matter of necessity by your agency, on a case-by-case basis, when:

(i) No U.S. flag air carrier can provide the specific air transportation needed;

(ii) No U.S. flag air carrier can meet the time requirements in cases of emergency;

(iii) There is a lack of or inadequate U.S. flag air carrier aircraft;

(iv) There is an unreasonable risk to safety when using a U.S. flag carrier aircraft (e.g., terrorist threats). Written approval of the use of foreign air carrier service based on an unreasonable risk to safety must be approved by your agency on a case-by-case basis and must be supported by a travel advisory notice issued by the Federal Aviation Administration, Department of State, or the Transportation Security Administration; or

(v) No U.S. flag air carrier can accomplish the agency's mission.

(b) Ocean cargo: International movement of property by water is subject to the Cargo Preference Act of 1954, as amended, 46 U.S.C. 55305, and the implementing regulations found at 46 CFR Part 381, which require the use of a U.S. flag carrier for 50% of the tonnage shipped by each Department or Agency when service is available. The Maritime Administration (MARAD) monitors agency compliance with these laws. All Departments or Agencies shipping Government-impelled cargo must comply with the provisions of 46 CFR 381.3. For further information contact MARAD, Tel: 1-800-996-2723, Email: [cargo.marad@dot.gov](mailto:cargo.marad@dot.gov). For further information on international ocean shipping, go to: <http://www.marad.dot.gov/cargopreference>.

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