BEFORE THE
ANIMAL AND PLANT HEALTH INSPECTION SERVICE
U.S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D.C.

In the matter of:	**:**	
	:	
Notice of Proposed Rulemaking	**:**	**Docket No. APHIS–2022–0023**
User Fees for Agricultural Quarantine	**:**	
and Inspection Services	**:**	

COMMENTS OF AIRLINES FOR AMERICA AND THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

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The members of Airlines for America ("A4A") and of the International Air Transport Association ("IATA") annually operate thousands of safe and affordable passenger and cargo flights into the United States. U.S. and foreign airlines collect and remit millions of dollars of Animal and Plant Health Inspection Service ("APHIS") Agricultural Quarantine Inspection ("AQI") fees imposed on international arrivals. Therefore, A4A and IATA have strong interests in the APHIS notice of proposed rulemaking on User Fees for Agricultural Quarantine and Inspection Services ("NPRM" or "Proposal") which intends to significantly increase AQI fees and significantly change how airlines administer the AQI program.[1]

APHIS is proposing to significantly increase AQI fees for all modes of transportation, including a Commercial Aircraft Fee increase of 66 percent and an Air Passenger Fee increase of 28 percent. In addition, APHIS proposes to charge an hourly rate for and greatly expand actions included in an AQI treatment performed on some goods as a condition of entry. APHIS also proposes to change AQI fee remittances from quarterly to monthly and significantly change AQI

[1] 88 Fed. Reg. 54796.

fee refund requirements. APHIS states that these changes will cost $1.2 billion dollars for the 2024 to 2028 time-period.

We support the mission of APHIS to facilitate the safe trade of agricultural commodities while protecting United States agriculture and the environment from invasive plant and animal pests and diseases. However, the administrative changes to the AQI program lack substantive and substantial information that is critical to the public understanding of the NPRM. Failure to correct the transparency deficiencies of this NPRM will violate the notice and comment requirements of the Administrative Procedure Act ("APA") and result in an arbitrary and capricious final rule. And, on the merits, several aspects of the NPRM are arbitrary and capricious, abuses of discretion and contrary to the law.[2] We respectfully request that APHIS eliminate proposed changes for the remittance period, refund process and worksheet requirements for the reasons indicated below and for all other proposals post the information requested in these comments to the public docket and provide an additional comment period.

I. The Refunds Proposal Does Not Benefit Consumers

With respect to refunds of APHIS fees when a passenger does not travel, the current regulation provides that refunds by a remitter of AQI user fees collected in conjunction with unused tickets or travel documents shall be netted against the next subsequent remittance.[3] This regulation aligns with current practices of airlines and the administration of other taxes and fees insofar as it does not *require* the refund of fees on unused tickets. Rather, it prescribes the mechanism by which remitters may recover fees from the government in the event of a refund.

[2] 5 U.S.C. § 553.
[3] *See* 7 C.F.R. 354.3(f)(ii).

In stark contrast to the current APHIS fee regulations – which generally align with widespread airline industry practices, are consistent with airlines' technical capabilities and promote convenience for customers – the proposed rule would exceed APHIS' statutory authority by requiring the refund of fees and introduce a host of impracticable and unworkable challenges that would harm airlines and their customers, including the substantial financial burden of modifying airlines' technical capabilities.

The NPRM proposes to add a new paragraph (f)(5)(v) to 7 C.F.R. 354.3 to read as follows:

> (v) It is the ticket or travel document-issuing entity's (e.g., air or sea carrier, travel agent, tour wholesaler, or other party) responsibility to make refunds of international passenger AQI user fees to the purchaser for trips not taken. The air or sea carrier, travel agent, tour wholesaler, or other party issuing a ticket or travel document must refund the purchaser in the exact form of payment that the purchaser originally used, and the entity may not issue vouchers, other forms of credit, or other forms of refund different from the purchaser's original form of payment.

First, this proposed rule uses the term "trips not taken" and does not define that term. We are concerned that it is intended to mean that an airline must look at a passenger booking as a single event, without the ability of the passenger to revise or change the booking. This does not reflect widespread and longstanding ticket sales practice in the industry, which is reflected by the regulatory structure for other fees and taxes.

Most passengers purchase nonrefundable tickets because such tickets are cheaper than those with a fully refundable fare (this practice also occurs in many industries, such as hotels). For these tickets, if the passenger cancels the ticket and does not travel, the amount paid for the ticket is generally refunded as a credit for use by the passenger in the future. Airlines' policies and terminology differ regarding these credits, but they are generally valid for at least a year (some airlines' credits never expire). Therefore, when a passenger cancels the itinerary, they can

rebook the same itinerary at a later date or exchange it for a completely different itinerary. They may do this at the time of cancellation or at a later time during the life of the credit.

The language in the NPRM is so broad that it might prevent these common cancellation and rebooking transactions and interfere with an airline's ability to offer differentiated products (including lower-priced, nonrefundable fares) to consumers. Because the original ticket was for a "trip not taken," the NPRM seemingly requires an AQI user fee refund to the purchaser's original form of payment, even if the passenger cancels the existing ticket and wants to use its value to cover the AQI user fee on a new ticket simultaneously. In that situation, carriers would seemingly have to refund the AQI user fee to the purchaser's original form of payment, and then collect the AQI user fee for the new ticket from the passenger. Similarly, if a passenger cancels an inbound international flight and wants to apply the value to a different flight to which the AQI user fee does not apply, the NPRM would prevent the passenger from applying the amount originally paid as an AQI user fee to the new ticket. Instead, the AQI user fee would have to be refunded to the purchaser's original form of payment, instead of the passenger being able to use the full value of the purchase toward the new ticket.

A similar situation would occur for passengers who want to cancel a flight before deciding which different flight to take. Again, under the NPRM, at the time of cancellation carriers would seemingly have to refund the AQI user fee to the purchaser's original form of payment, only to then collect the AQI user fee for the new ticket from the passenger (who may or may not be the purchaser) upon rebooking.

The Department's proposal that airlines issue a refund in the original form of payment and forbidding them to issue refunds in the form of vouchers or credits goes against the industry practice and government rules with respect to taxes and other fees and will also sow confusion

among, and remove significant benefits from, the traveling public. A4A and IATA urge the Department to promulgate rules with respect to APHIS fees that are consistent with the rules for other ticket taxes and fees, allowing the value of the taxes and fees to be used on a different flight, either at the time of ticket cancellation or thereafter.

This proposed rule goes beyond the Secretary's rule-making authority granted by 21 U.S.C. section 136a. Paragraph (d) of 21 U.S.C. section 136a provides that the Secretary may prescribe such regulations as the Secretary determines necessary "to carry out the provisions of section 136a." The provisions of section 136a contemplate the *collection* of fees on behalf of the Secretary and the *remittance* of such fees to the Secretary in such manner and at such times as the Secretary may prescribe.[4] Nowhere does the statute provide for, or even contemplate, the refund of fees on behalf of the Secretary, particularly fees that have been collected and already remitted to the Secretary.

It is inconceivable that Congress intended to allow APHIS to require (as opposed to permit) private persons to make refunds that were initially collected as a fee, but that subsequently lose any such character once a passenger cancels the flight and is no longer ticketed for travel. The manner of a refund by an air carrier to a customer is a private matter governed by the carrier's contract of carriage. APHIS has no authority to regulate that relationship. Moreover, APHIS's proposed refund requirement is inconsistent with the administration of other transportation taxes and fees. With respect to transportation excise taxes imposed under 26 U.S.C. sections 4261 and 4271, any person making a refund of any payment on which transportation excise tax has been collected *may* repay the amount of tax collected on such

[4] *See* 21 U.S.C. § 136a(a)(3).

payment.[5] Thus, this refund provision is permissive and not mandatory. Furthermore, when an air carrier makes a repayment of tax to a customer, the carrier may, instead of filing a claim for refund of such taxes, take a credit against taxes due upon any subsequent return.[6]

Other user fees follow similar rules. For example, the September 11th Security Fee, 49 U.S.C. section 44940, expressly provides for refunds in subsection (g) for fees "paid by mistake or any amount paid in excess of that required." But even in that case, the statute only authorizes the government agency receiving the fees, not the airlines, to refund passengers.

The NPRM's proposed rule mandating form-of-payment refunds for "trips not taken" is also inconsistent with the administration of Passenger Facility Charges (PFCs), another user fee. FAA regulations regarding the administration of PFCs require issuing carriers and their agents to collect and remit PFCs, but the obligation, and even the authority, to refund PFCs is limited. For tickets issued in the United States, 14 C.F.R. section 158.45 applies. This regulation provides that "any change in itinerary" initiated by the passenger is subject to collection *or refund* of the PFC as appropriate.[7] This regulation also provides that failure to travel on a nonrefundable or expired ticket is not considered a change in itinerary, and if the ticket purchaser is not permitted any refund of the fare on the unused ticket, the ticket purchaser is not permitted a refund of any PFC associated with that ticket.[8] Thus, issuers are not required to provide refunds of the PFCs for flights not taken because the purchaser is not entitled to a refund of the fare and surcharges in that instance.

[5] *See* 26 U.S.C. § 6415(d).
[6] *See* 26 U.S.C. § 6415(b).
[7] *See* 14 C.F.R. § 158.45(a)(3)(i).
[8] *See* 14 C.F.R. § 158.45(a)(3)(ii).

The FAA's regulation for handling PFCs is consistent with the long-standing practices of airlines and does not create the practical issues that would arise with APHIS's proposed rule. In the case of refunds of fare, which generally must be requested by a customer and are limited to refundable tickets and other limited circumstances, airlines typically refund taxes and fees to the original form of payment. This is a convenience to the customer and avoids the customer having to separately pursue separate refunds of taxes and fees from the various agencies to which the airlines have remitted them. Practical issues presented by APHIS's proposed rule include the following:

- The timing of the ticket-issuing entity's obligation to refund fees is unclear and potentially unworkable. Issuers cannot provide refunds proactively, *i.e.*, without a request from the customer, because of information needed from the customer. For example, issuers often do not retain sufficient credit card data for processing a refund, and even if they did, it is possible that the card would no longer be valid.
- Further, mandatory proactive form-of-payment refunds ignore customer preference. It is certainly possible that a customer does not prefer a refund of fees to their form of payment, particularly in cases where the purchaser is not the passenger and/or prefers to have (or let the passenger have) a credit of the full value of an unused ticket toward the purchase of new a new ticket consistent with the contract of carriage between the customer and the air carrier. If the fee were refunded but the passenger wanted to apply the remaining credit to another itinerary, the fee may need to be collected from the passenger (who may not be the purchaser to whom the NPRM requires the refund be made) at the time of ticketing (which is administratively burdensome and leads to inefficiencies).

Many airlines provide in their contract of carriage that, in the case of a nonrefundable ticket, the airline will not provide a form-of-payment refund of taxes and fees. This is a condition of acquiring a ticket at a lower cost relative to fully refundable tickets, and as noted above most customers prefer this option. If ticket issuers are required to invest in additional staffing, technology and fees to issue form-of-payment refunds for as little as $4.29, these higher costs will be passed on to ticket purchasers.

Purchaser vs. Passenger

Further, the provision would require carriers "to make refunds of international passenger AQI user fees *to the purchaser*" and not to the passenger (emphasis added).[9] Often, the purchaser of an airline ticket is not the person who will be the passenger, such as when an employer purchases a ticket for an employee, a traveler purchases a ticket for a travelling companion or an individual purchases a ticket as a gift for a friend. In these instances, and depending on the carrier's contract of carriage, the ticket belongs to the passenger and not the purchaser from the time of ticket issuance. Thus, such passengers should be free to elect to use the full value of their tickets to take a different flight, to exchange the flight for credit on a future flight, hold travel credit for future use or (if applicable) cancel the ticket for an eligible refund.

The NPRM would disrupt that normal process and, at least in some instances, require the carrier to refund the AQI user fee to the purchaser but to refund or apply the value of the rest of the ticket price to the passenger. That would be extremely burdensome for carriers to implement and would cause confusion for both the purchasers and passengers and could deny some passengers the right to the full value of their flights not taken.

Another government agency – U.S. Customs and Border Protection (CBP) – takes the view in guidance to the industry that the Customs and Immigration passenger user fees for unused flights are "refundable *to the passenger*."[10] Again, differing rules for the multitude of applicable fees and taxes only adds to the complexity. For these reasons, we believe it is unwise to impose special refund rules applicable to a user fee only.

[9] *See* 7 C.F.R. 354.3(f)(v).
[10] CBP letter to IATA, dated October 28, 2010 (emphasis added).

Revised Worksheet Requirement

New paragraph (f)(5)(vi) provides that an air carrier may request that APHIS credit its account for the net amount refunded to the purchaser and that APHIS will apply that credit against remittances in future months until the credit is expended.

The netting of refunds against the next subsequent remittance is generally workable when there are collections against which the refunds can be netted. However, during the pandemic, refunds of fees exceeded collections, putting airlines in the position of using their own funds to advance refunds on behalf of the government. Airlines should be given the option to file refund claims in lieu of credits, consistent with refunds or credits of transportation excise taxes under 26 U.S.C. section 6415.

Further, to record the credit, the NPRM in (f)(5)(vi) states:

> To request such a credit, the ticket or travel document-issuing entity must submit a revised remittance worksheet indicating the revised number of passengers and international passenger AQI user fees amount collected. The revised remittance worksheet must be completed and filed for each month during which the ticket or travel document-issuing entity certifies that there was a decrease in the number of passengers and international passenger AQI user fees collected . . .

It appears that the Department intends to require airlines to revise or amend worksheets for previous periods to report refunds. Such a requirement is administratively burdensome and could lead to amending worksheets as old as two years. With the change from quarterly to monthly reports, this adds to the burden. We urge the Department to make clear that airlines can report refunds in the periods during which they occur, and not be required to revise previous worksheets.

II. APHIS Should Not Change from Quarterly to Monthly Fee Remittances, Because it Would Increase the Paperwork Burdens on Airlines.

APHIS proposes to change from quarterly to monthly fee remittances.[11] In part, APHIS argues requiring monthly remittances for the commercial aircraft fee and international air passenger fee will make its revenue stream more stable.[12] However, its argument that "regular and predictable remittance of user fee collections helps with the financial management of the account and trend prediction for future operation planning" lacks quantitative substantiation.[13] Specifically, APHIS provides an overarching simplification of the paperwork burdens presumed without sourcing the data corroborating its conclusions.

To begin, APHIS assumes having commercial airlines use remittance worksheets will reduce paperwork burdens by one-third.[14] However, APHIS' analysis presupposes current reporting times "ordinarily take[] about 10 minutes per airline submission."[15] APHIS, however, provided zero evidence discerning from where the 10-minute timeframe was deduced, rather this number is assumption without basis.

Per the Paperwork Reduction Act, agencies are to provide the facts and opinions regarding the collection of information underlying the burden associated with the time, effort or financial resources expended by organizations to generate, maintain or provide information to or for a federal agency.[16] Here, APHIS argues that the new worksheet would reduce paperwork burdens, because airlines would have fewer elements to report.[17] If APHIS were to factor in the three-time increase in reporting requirements, *i.e.*, moving from a quarterly to monthly reporting

[11] 88 Fed. Reg. 54796, 54821 (Aug. 11, 2023) (affecting § 354.3(e)(3)).
[12] *Id*. at 54796.
[13] *See id*. at 54907.
[14] *Id*. at 54817–8.
[15] *Id*.
[16] 44 U.S.C. § 3501, 3502(2)–(3) ("Paperwork Reduction Act of 1995").
[17] 88 Fed. Reg. at 54817.

time period, then it is facially apparent that airlines' paperwork burdens would increase and not decrease, as presupposed.[18]

Further, APHIS repeatedly refers to the remittance worksheets, yet it not once provided an example what the worksheet would look like.[19] Without understanding how the remittance worksheets are "designed to simplify the data elements respondents report," airlines cannot accurately estimate the potential burdens associated with them.[20] Presently, to complete their quarterly remittances, airlines undertake a structured response process, which entails compiling data – via data extraction, analysis, and computation – that requires, on average, one to two hours to complete. Thereafter, supervisory review takes another 30 minutes to complete prior to payment and subsequent Agency submission. Ultimately, monthly reports will increase airlines' workloads, as team members would be obligated to perform the same tasks eight more times than current reporting methods mandate.

APHIS, therefore, has failed to provide any indicia of support explaining how the preparation and submission of monthly statement submissions for commercial aircraft and user fees for international air passengers would decrease. In contrast, the NPRM has many unsupported and unsubstantiated assumptions that would heighten the paperwork burdens on airlines. We request that the current quarterly reporting requirements remain unchanged.

[18] *Id*. at 54818 ("Using an estimated 331 airlines × 3 (a tripling of their current submission frequency) = 993 new occurrences. These occurrences will take 6.67 minutes [2/3 of the normal 10 minutes submission time assumption used as a starting point for burden (h)]/60 minutes—an overall impact of this change to be an increase of 110 respondent hours per year.").
[19] *See generally* 88 Fed. Reg. 54796.
[20] *Id*. at 54817.

III. The Record Retention Proposal Does Not Align with Other Federal Agency Policies

The NPRM proposes in new paragraph (j) of 7 C.F.R. 354.3 that airlines must maintain for at least 5 years sufficient documentation – such as records, reports, contracts and remittance worksheets – for APHIS and CBP to verify the accuracy of fee collections.

The proposed rule does not align with current industry practice or other regulatory requirements. Some documentation, such as for cargo and certain foreign contracts, is kept for 5 years, but these are exceptions. The FAA only requires air carriers to retain records for a maximum of 3 years.[21] The NPRM's proposal would place new administrative burdens on air carriers, and we urge the Department to maintain the requirement of 3 years.

IV. Greater Transparency is Needed for Treatment Costs

The NPRM proposes to (1) change from charging for treatment of imported goods from a per treatment cost to an hourly cost structure and (2) add several cost items to "treatment monitoring". In describing how APHIS would calculate an hourly cost, it states that in 2022 dollars, the Federal employee weighted average for an inspector is $37.52 per hour, overtime rate for Monday through Saturday and holidays is $45.21 per hour and for Sundays $75.05 per hour.[22] However, the hourly treatment rate proposed in the NPRM Table 12 indicates that hourly rate charged to those requiring a treatment of goods starts at $292.37 for 2024 and increases to $316.83 in 2028.[23] There is no explanation in the docket concerning how APHIS calculated a $292 to $316 hourly treatment rate when personnel costs are a fraction of the proposed hourly rate. APHIS should supplement the docket to disclose a complete breakdown of the $292 to $316 hourly treatment fee.

[21] *See* 14 C.F.R. 249.20.
[22] *Id.* at 54810.
[23] *Id.* at 54826

The NPRM states that "While AQI treatments are usually provided by private entities who charge the importer for their services, from time-to-time APHIS will provide the treatment, especially for propagative materials."[24] However, the docket contains no information on the number of treatments that take place per year or the number of treatments provided by APHIS. The public should know how many treatments take place per year so there can be a review and comment to determine the accuracy of APHIS estimates. Without further information APHIS fails to fulfill public notice and opportunity for public comment requirements under the APA.

V. The Regulatory Impact Analysis Omits Necessary Information to Understand the NPRM

On the surface, the proposed revisions for the cost recovery of AQI services appear to be reasonable. In addition to assigning both direct and indirect costs to user activities and allocating such costs based on the number of inspection units, APHIS proposes to consider labor hours spent on a given activity as a third dimension for cost recovery considerations. APHIS also proposes including future capital planning and staffing needs as well as an annual inflation adjustment using the Bureau of Economic Analysis's chained-consumer price index.

Allocating future costs is straightforward in principle, but how does APHIS propose to manage its program costs and protect the public and the stakeholders who have and will continue to pay APHIS user fees? How will APHIS ensure that its programs remain relevant and necessary to protect the public interest? How will the public be protected from a potential endless cycle of higher costs that are simply passed through?

In this context, APHIS' regulatory impact analysis is disappointing, not for what it says, but for what it does NOT say. There is extraordinarily little substance in the analysis beyond what was already summarized in the NPRM.

[24] *Id.* at 54809.

- There is no information (summary or detailed) on projected APHIS program costs for the next five years and how such costs are allocated amongst the various user groups (e.g., aviation, trucking, sea vessels).
- There is no information to identify what program costs are necessary and relevant to aviation users.
- There is no detail and justification of future capital costs and labor requirements, and which stakeholders are driving such needs – the public has no basis to judge whether these future costs are relevant and justifiable.
- How are inbound international air passengers assured that their APHIS user fee is appropriately set and justified when they are not greeted by an APHIS official, but by a CBP representative upon arrival who is funded by a separate international customs user fee?
- Apart from discussing the qualitative benefits of the proposed rule ("The proposed rule would better align AQI expenditures and revenues by class"), there is zero quantification of any benefits and there is no commensurate discussion of the effectiveness of the proposed costs.

As presented, aviation users have been asked to accept the proposed fees at face value without any means to review how APHIS arrived at the proposed user fees outlined in the NPRM. This is unacceptable. Moreover, APHIS attempts to justify the proposed higher fees by asserting that they are either a tiny portion of the value of goods being transported and/or a small portion of the user's operating costs. This justification is irrelevant. Moreover, and on a separate but related matter, there is no clarity as to how these APHIS user fee revenues are allocated within the agency and with CBP, especially given the plethora of other international arrival user fees paid by aviation stakeholders (CBP fee and INS User fee). We provide specific examples of incomplete or missing data in the paragraphs below.

<u>The Regulatory Impact Analysis Fails to Disclose Important Information</u>

The Regulatory Impact Analysis ("RIA") attempts to estimate the costs and benefits of the NPRM but excludes key data that is essential to understanding how this proposal impacts the public. The RIA used only the years 2017-2019 as a proxy to estimate costs for the future

regulatory period from 2024 to 2028.[25] The NPRM states there was an AQI program budget shortfall from 2017 to 2019 of approximately $166 million per year.[26] However what is not clear is whether the AQI program had deficits in other years. For example, were there budget shortfalls from 2013 to 2016 and 2020 to 2022? If there was no deficit or a much smaller deficit for these other time periods why didn't APHIS use an average or median budget deficit to be much more representative of the AQI program over several years?

The RIA Uses CPU to Estimate Adjusted AQI Fees But Fails to Disclose Any Surpluses

The RIA discusses what the AQI fees would have been if the AQI fees were adjusted for inflation prior to this rulemaking.[27] However, the RIA excluded data showing if there would have been AQI program surpluses from 2016 to the present if AQI fees had been adjusted for inflation in the 2015 rulemaking. The RIA should be amended to provide complete data that shows the surpluses or deficits if AQI fees were adjusted for inflation starting in 2016.

Greater Transparency is Needed for Capital Costs

APHIS includes a new general category of capital costs but provides very little information on what is included in that category. For example, APHIS does not describe whether capital costs include only airport costs or if off location and headquarter costs are included. The RIA and other docket information also therefore cannot explain how costs are allocated for areas that include both AQI and non-AQI functions such as APHIS headquarter capital costs, which includes many other functions other than AQI. If APHIS seeks to include capital costs it should be transparent about what is and is not included to better inform the public.

[25] 88 Fed. Reg. 54803.
[26] *Id.* at 54797.
[27] *See* Regulatory Impact Analysis ("RIA") page 15.

APHIS Should Disclose the Number of Commercial Aircraft Inspections

APHIS provides no information on how many aircraft inspections take place per inspector, per day, so that the public can understand the estimated costs for those AQI program inspections. The docket does not include data on how many invasive species were found in these aircraft inspections per day, month, or year, so the public and Congress lack vital information on the effectiveness of aircraft inspections. APHIS should publish the number of aircraft inspections and the number of invasive species found during aircraft inspections to provide better transparency of the AQI program.

The NPRM Statements Suggests Cross-Subsidization of Modes

APHIS fails to provide information in the docket that shows no cross-subsidization of fees is or will take place. For instance, the NPRM states:

> In fiscal year (FY) 2017 to FY 2019, commercial aircraft collections averaged over 23 percent of total collections annually, or nearly $188M. Also, from FY 2017 to FY 2019, commercial aircraft passenger collections averaged over 61 percent of total collections annually, or nearly $486M. Collections from the air sector (commercial aircraft and commercial air passenger) are a combined annual average of *over 85 percent* of total AQI collections. If this rule is adopted as proposed, APHIS estimates that by FY 2028 the combined air sector would account for *approximately 68 percent* of total collections, assuming future arrivals match average arrivals for FY 2017 through FY 2019.[Emphasis Added][28]

APHIS fails to explain why the NPRM proposes to reduce the percentage of AQI fees collected from the air sector from 85 percent to 68 percent if the number of air section arrivals remain the same.[29] Is APHIS doing so because the air sector paid in excess of air sector costs from 2017 to 2019 and 68 percent of AQI fees represents the air costs for the AQI program? The public and Congress cannot determine whether each mode is paying its fair share – and there is

[28] 88 Fed. Reg. 54807.
[29] "The number of aircraft arrivals from around the world has remained relatively steady, averaging approximately 844,000 arrivals per year over this seven-year time period." *See* RIA page 17.

no cross-subsidization – without knowing the costs of AQI program for each mode of transportation. APHIS should provide the number of inspections for 2017 to 2019 and the number of associated costs by mode so the public can better understand cost allocations.

VI. Removal of the Small Aircraft Exemption is Not Justified

APHIS proposes to eliminate an existing exemption to the AQI fee for aircraft with 64 or fewer seats.[30] APHIS cites its *own* study in support of eliminating the exemption; however, the justifications provided lack merit as they rely on ambiguous conclusions.[31] Specifically, the APHIS report inquired whether the exemption is still warranted by comparing "the likelihood that commercial passenger aircraft with 64 or fewer seats will serve as a pathway for the introduction of hitchhiking pests into the United States to that of aircraft with 65 or more seats."[32]

On first review, it is questionable that APHIS would preface its analysis of whether the exemption should still be granted on speculative reasoning. The USDA study warned that its own data and metrics used to quantify the potential for "hitchhiking pests" were inaccurate, stating "The comparison on number of flights between the two types of aircraft must be seen with caution."[33] Recognizing the shortfall of its own analysis, the USDA explained there was a "[l]ack of data on the number of aircraft involved for both aircraft types."[34] Yet, instead of foregoing the study, because there was no justifiable basis, the USDA chose a workaround that involved assessing the "likelihood of exposure" to hitchhiking pests.[35] The fact there is no data on the number of incidents stemming or related to "hitchhiking pests" should have clearly indicated to

[30] 88 Fed. Reg. 54807.
[31] *Pathway Analysis for Commercial Aircraft with 64 or Fewer Seats*, United States Department of Agriculture Animal and Plant Health Inspection Service Plant Protection and Quarantine (Jun. 13, 2022) (hereinafter, "USDA Pathway Analysis").
[32] APHIS implemented the commercial aircraft user fee on February 9, 1992.
[33] USDA Pathway Analysis at 10.
[34] *Id. 2, 10.*
[35] *See id.* at 2.

the USDA that there is no basis to eliminate the exemption. The USDA study, then, is an attempt to create both a problem and solution, where there is none.

Similarly, the NPRM informed, "Because we [the USDA] do not have explicit data on the per-flight revenue, profit margins and competitive landscape affecting international arrivals of commercial aircraft with 64 or fewer seats, we cannot make specific conclusions as to how the collection of this user fee will affect individual businesses."[36] That is, the USDA is attempting to revoke small aircraft's exemption from AQI fees based on incomplete knowledge and manipulated data that does not reflect the actual number of instances in which "hitchhiking pests" were found. Instead, the USDA published and referenced a study that identified the "potential" (or in USDA terms, "pathways") to hitchhiking pests.[37] If there were actual instances of pests found, arguably they would be found with the transport of agricultural goods or during the inspection of passenger baggage – both instances that already incur separate user fees.[38] The USDA should not regulate in an area based wholly on the theory that there is the potential for "hitchhiking pests" when no actual problem has been documented.

In fact, the basis for the study is entirely misplaced. The study was based on an assumption that the number of seats originally chosen served as the criteria for the user fee exemption.[39] It did not. When the USDA first promulgated the AQI fees, it based the calculation of fees on each service, where each "category was considered separately" and "through user fee receipts, return enough money to APHIS, up to the maximum allowed for certain categories . . . to cover the cost

[36] 88 Fed. Reg. 54796 at 253.
[37] *See generally* USDA Pathway Analysis.
[38] *See* 7 C.F.R. § 354.39.
[39] *See* USDA Pathway Analysis at 6.

of providing AQI services to that particular category."[40] That is, a user fee was not a funding stream, its purpose was (and is) to recover expenditures for a service the Department provided.[41]

In 1993, the AQI fees were amended to exempt commuter aircraft with 64 or fewer seats, expanding the previous limitation of 30 seats or fewer—**because they "require little to no inspection."**[42] Concomitantly, the decision to exempt aircraft with 64 seats or fewer was predicated on the per-passenger cost differential that made it "difficult for small commuter airlines to compete with larger airlines for business."[43] Ultimately, the goal was to "ease the regulatory burden that APHIS user fees place[d] on small entities" and were "appropriate when considering the differences in resources required for APHIS inspection services for small commercial commuter aircraft and low value cargo."[44]

Accordingly, the USDA's study is predicated on a complete misunderstanding of the reason for the exemption. If the USDA were to remove the exemption, it would be burdening small aircraft with a user fee for a service not provided, which is antithetical to Congressional intent.[45] APHIS should also revise and republish the Initial Regulatory Flexibility Analysis ("IFRA") for this proposal because the small aircraft fee exemption was originally provided to reduce burdens on small entities and the IRFA for this NPRM fails to mention or analyze the impact of the elimination of the exemption on small entities.

<u>The Removal of The AQI Exemption for Small Aircraft is Not a Valid Alternative and Equitable Funding Mechanism.</u>

[40] 7 C.F.R. § 354, 758 (Jan. 9, 1992) ("User Fees-Agricultural Quarantine and Inspection Services, Phytosanitary Certificates, Animal Quarantine Services, Veterinary Diagnostics, Export Health Certificates").
[41] *Id*. at 757 ("APHIS user fees reflect the actual cost of providing a service, up to any limit which may have been imposed by Congress, if we can reduce the cost of a service, we can reduce the user fee for that service.").
[42] 7 C.F.R. § 354, 14305–06 (Mar. 17, 1993) ("User Fees-Agricultural Quarantine and Inspection Services, Phytosanitary Certificates, Animal Quarantine Services, Veterinary Diagnostics, Export Health Certificates").
[43] *Id*. at 14306.
[44] *Id*.
[45] *See* 7 C.F.R. § 354, 757 (Jan. 9, 1992).

Historically, the U.S. Senate has raised concerns about augmenting regulations for the Department's financial gain.[46] Flagging APHIS' attempts for "reform," in 2020, the Senate cautioned that "the restructured commercial aircraft fees for the APHIS Agriculture Quarantine Inspection [AQI] program may not be equitable to small aircraft."[47] In effect, such redistribution of fees "imposes disproportionate impacts on industry and user groups at certain key ports of entry."[48] Concerned with the impact on small aircraft, the Committee on Appropriations then informed the Secretary "*to specifically consider any comments submitted on the impact of the AQI fee structure on small aircraft* as part of its regulatory review process and to provide the Committee *with detailed rationale for its decision if regulatory relief is not granted in this area*."[49]

That is, the Senate overtly expressed its dubiousness about the need to reform AQI regulations applicable to small aircraft. Without ambiguity, it directed the USDA "to continue *evaluating alternative and equitable funding mechanisms* in consultation with relevant stakeholder groups."[50] In its NPRM, the USDA failed to provide another method of funding.[51] Yet, it – several times—called attention to the Department's need for funding.[52] Rather than heed the Senate's recommendation, the USDA moved forward with "hitchhiking pests" to justify "more accurately assign[ing] costs."[53] If the USDA were to revoke the AQI exemption presently granted to small aircraft, it will be acting in immediate opposition to Senate guidance.[54]

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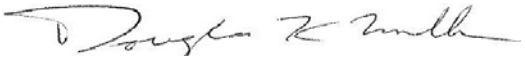
[46] *See* Sen. Rep. No. 116–110, at 44 (2020) ("Agriculture, Rural Development, Food And Drug Administration, And Related Agencies Appropriations Bill, 2020"); *see also* Sen. Rep. No. 117–34, at 48–49 ("Agriculture, Rural Development, Food And Drug Administration, And Related Agencies Appropriations Bill, 2022"); Sen. Rep. No. 115–259, at 39–40 ("Agriculture, Rural Development, Food And Drug Administration, And Related Agencies Appropriations Bill, 2019").
[47] *Id. (Emphasis added.).*
[48] *Id.*
[49] *Id. (Emphasis added.).*
[50] *Id.*
[51] 88 Fed. Reg. 54796.
[52] *See, e.g.*, at 75 ("Without adequate funding, the AQI program is likely to fail to keep pace with growing demand and become less effective[.]").
[53] 88 Fed. Reg. 54796 at 210.
[54] *See id.*

Accordingly, the USDA should not revoke the exemption to act as a "funding mechanism" where such revocation would "impose[s] disproportionate impacts" on small aircraft in order to fund its AQI program.[55]

VII. Conclusion

We respectfully request that APHIS eliminate proposed changes for the remittance period, refund process and worksheet requirements for the reasons indicated above and for all other proposals supplement the docket with the additional information requested and provide an additional 60-day comment period.

Respectfully submitted,



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[55] *Id.*