BEFORE THE DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC

In the matter of	:	
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NOTICE OF PROPOSED	:	**Docket DOT-OST-2010-0140**
RULEMAKING CONCERNING ENHANCING	:	
AIRLINE PASSENGER PROTECTIONS	:	

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

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COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Air Transport Association of America, Inc. (ATA) submits these comments in response to the Department of Transportation's notice of proposed rulemaking (NPRM) on enhancing airline passenger protections.[1] 75 Fed. Reg. 32318 (June 8, 2010). In addition to the points made in these Comments, we incorporate herein by reference the comments that ATA submitted in response to the NPRM in Docket Number DOT-OST-2007-0022-0250 (March 9, 2009).

I. Introduction and Summary

ATA members are committed to providing superior customer service to airline passengers, especially when extraordinary circumstances disrupt operations. Our members analyze the causes of delays, adapt their policies to meet new challenges and continue to implement new measures that will improve the passenger experience. Our recent efforts to improve customer service have included enhancing contingency plans, coordinating these plans with airports, improving customer service commitments – without regulatory requirements to do so, using new technology to provide passengers with more timely and extensive flight information, and fully participating in the Department's past two passenger protection rulemakings by submitting extensive comments to assist the Department in making important decisions that impact the flying public, airports, and airlines.[2] Indeed, customer service is a

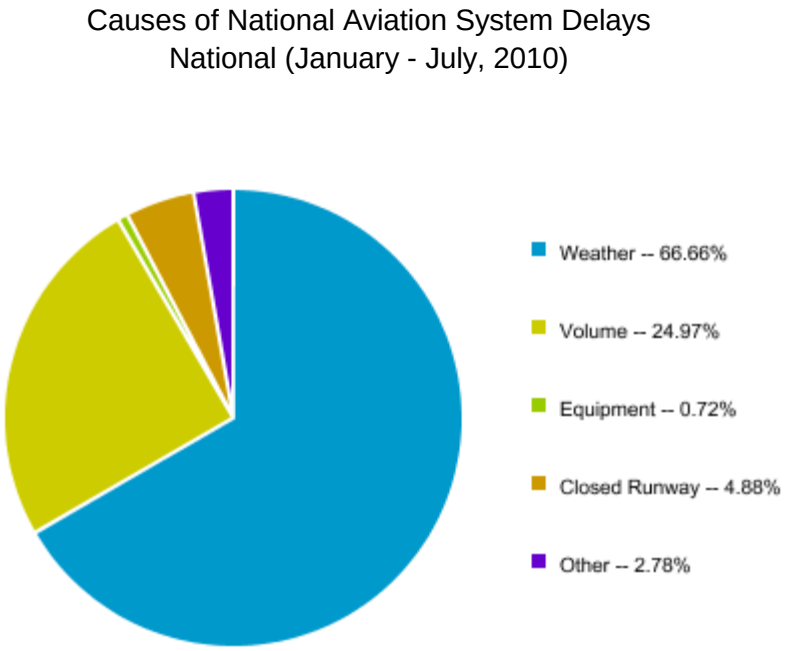
[1] ATA airline members are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Air Lines, Inc.; United Parcel Service, Inc.; and US Airways, Inc. ATA Airline Associate Members are: Air Canada; Air Jamaica Ltd.; and Mexicana.

[2] ATA NPRM comments can be found at DOT-OST-2007-0022-0250.1; ANPRM comments at DOT-OST-2007-0022-189.1.

top priority for airlines, second only to safety. As the Department itself has noted recently, airline performance metrics have improved.[3]

ATA's members understand that the only way to be successful and expect repeat business is to treat customers well, and airlines compete vigorously on their services to differentiate themselves and to earn customer satisfaction and loyalty. A key, perhaps unique, feature of airline customer service is dealing with delays. In a system involving tens of thousands of domestic and international flights, delays are an unfortunate consequence of weather, airport infrastructure constraints and (at least in the U.S.) an outdated air traffic control system. Although often they are necessary for safety, a reason often overlooked, flight delays benefit neither passengers nor airlines from a service and operational standpoint. They frustrate passengers, disrupt schedules, and are costly to airlines and customers alike.

The chart below from the Bureau of Transportation Statistics website illustrates the major causes of delay; so far this year (2010) weather and volume accounted for 90% of the delays.



[3] *See, for example,* Press Release, U.S. Department of Transportation, (Sept. 13, 2010), *available at* http://www.dot.gov/affairs/2010/dot16810.html..

As we have noted before, competition in the marketplace and existing Department regulations supported by fair enforcement are sufficient to ensure airlines continue to deliver good customer service. That is why we believe this set of proposed rules – even though we support or do not oppose most of them – is premature. Only five months have passed since the tarmac delay rule took effect and we continue to believe that the Department should analyze the impact of that rule before proceeding with a new rule that further regulates in this area, displacing the market forces Congress intended to predominate with respect to airline services.

Turning to the NPRM, there is much that ATA and its members support, either as proposed or subject to some clarification or modification. The Department has identified a number of measures, many of which airlines have already adopted or are considering implementing, that will benefit customers. For the most part, the Department's proposals on enhanced information and transparency are rational and reasonable and we support them. Some provisions we think are impractical or will reduce, not improve, customer service, and we explain our concerns below. Not surprisingly, we oppose a small number of provisions. The fault line generally runs between areas where the Department seeks to prescribe conduct that Congress determined should be motivated by market forces, and areas where the Department seeks to enhance information for consumers. Where the Department seeks to prescribe specific conduct or the terms of the relationship between the airlines and their customers, we think the Department has overstepped its authority or made the wrong policy choices. As noted, we generally support the Department's efforts to enhance customer information and transparency.

Thus, in this latest proposed regulation, ATA supports: (1) adopting contingency plans for all airports a carrier regularly serves; (2) coordinating these contingency plans with all regularly served airports and all diversion airports; (3) in conjunction with DOT, coordinate contingency plans with the Transportation Security Administration (TSA) and the Customs and Border Protection (CBP); (4) increasing the maximum required involuntary denied boarding compensation (IDBC) for fare-paying passengers; (5)reporting of additional tarmac delay data; (6) agreeing not to include a choice of forum clause; (7) fee transparency by providing notice of baggage and other fees on carrier websites; (8) agreeing not to increase the price of air transportation after purchase; (9) prohibiting "each way" advertising, and; (10) requiring airports to adopt contingency plans.

In addition, there are several proposals that should benefit consumers if they are implemented fairly and allow an appropriate level of flexibility for airlines, which in turn provides passengers the greatest choice in air travel. Before proceeding, the Department should carefully consider the potential impact of these proposals, maintain flexible standards to permit carrier options and greater passenger choice, and provide additional guidance. These items include consumer notification of flight status changes, passenger tarmac delay updates, and passenger deplaning announcements.

A third category of proposals likely will reduce passenger choice and competition, unnecessarily delay passengers, create confusion, and ultimately affect fares. These areas include a government-imposed tarmac delay time limit for international flights, verbal instead of written explanations about oversale

policies at departure, imposing marketing carrier responsibilities on operating carriers, dictating social networking media use, and not permitting oversales on smaller aircraft.

Finally, a fourth category of proposals should be excluded from the final rule because they are beyond the Department's authority. These areas include the Department's proposals to (1) require airlines to incorporate customer service plans and contingency plans into contracts of carriage, an action the Department lacks authority to take and that would limit carriers' ability to compete in an open market; (2) change the Department's long-established full fare advertising policy, which would provide less transparency to passengers, hide from them the actual cost of government taxation, and not generate the benefits the Department claims, and (3) require airlines to provide optional service and fee information to Global Distribution Systems when this matter is a subject of competition between distribution channels and at issue in contract negotiations.

Finally, we also provide comments on the cost-benefit analysis, which as drafted does not satisfy the standards set forth in Executive Order 12866 and is otherwise insufficient to inform the public about the costs and benefits of the proposed rule.

II. Regulations that would benefit passengers

A. Expansion of Tarmac Delay Contingency Plans

The Department proposes that carriers adopt contingency plans for all U.S. airports they serve with at least 10,000 annual enplanements per year by adding to existing regulatory language "small hub airport and non-hub airports."[4] In addition, contingency plans would have to be coordinated with airport authorities at all U.S. airports served with at least 10,000 enplanements as well as regular diversion airports.[5] Finally, carriers would also have to coordinate contingency plans with TSA and CBP.[6]

ATA members generally support the proposal to expand the number and size of airports where a carrier must coordinate plans but stress that CBP and TSA coordination should be, in the first instance, an inter-agency and, secondly, an airport to CBP and TSA effort. The Department's National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays recognized the need for airport and government coordination for international passengers prior to any potential delay.[7]

Carriers already coordinate with TSA and CBP and will continue to do so. However, requiring carriers to coordinate with these government agencies alone will not get diverted passengers (who so desire) off airplanes. The government needs to take the lead in advance planning to address international passenger screening in the event of a diversion or arrival at an airport with little or no CBP presence or outside regularly scheduled working hours. Recent tarmac delay incidents reflect this problem. For

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4 See proposed paragraph 259.4(a), 75 Fed. Reg. 32339.
5 See proposed paragraph 259.4(b)(7), 75 Fed. Reg. 32339.
6 See proposed paragraphs 259.4(b)(8)&(9), 75 Fed. Reg. 32339.
7 See the National Task Force Report http://airconsumer.dot.gov/publications/TarmacTFModelContingencyPlanningDocument.pdf pages 28, 34, 38, and 42.

example, on June 24, 2010, a Virgin Atlantic flight experienced a tarmac delay after it was unable to off-load its passengers at Hartford's Bradley International Airport, reportedly because CBP agents were not immediately available after hours. As we mentioned in prior comments, a similar event occurred in Portland, Oregon in January 2009,[8] and Los Angeles in 2007.[9] These reports are inconsistent with the Department's statement in the preamble that DHS advised DOT that subject to coordination with CBP regional directors, "passengers on diverted international flights may be permitted into closed terminal areas without CBP screening."[10] In addition, ATA has recently been advised by CBP that in airports where no CBP officers are stationed, passengers may have to remain on board the aircraft longer than three hours, until officers can arrive at the airport for processing to ensure the passengers' physical security.[11] This is a new policy since CBP's previous commitments made during the Long Tarmac Delay Task Force and captured in a letter to the Task Force dated September 4, 2008.

Since the NPRM was issued, DOT, CBP and TSA have met with airline and airport representatives about this issue. We appreciate that effort and are hopeful about it. We would emphasize, however, that improvements to how diversions are handled will require close cooperation among government agencies, airlines and airports. In diversion situations, pilots do not always have the luxury of choosing a CBP-staffed airport. Pilots should, in fact, have no constraint in the best interests of the safety of their passengers and crew, which should be the only priority. This issue needs to be addressed between DOT and DHS before placing any further burdens on the airlines.

Diversions of international flights to U.S. airports with closed or understaffed Federal Inspection Services (FIS), as well as CBP system outages and slowdowns, are a well-known driver of the onboard tarmac delays the Department seeks to reduce. The U.S. government must play the leading role in preparing to prevent or reduce onboard delays driven by lack of FIS facilities or inspectors and CBP system outages and slowdowns.

B. Customer Service Plans

The Department proposes that U.S. and foreign carriers include and adhere to specific customer service standards for scheduled passenger flights to, from, or within the U.S. in their Customer Service Plan (CSP). The changes include (underlined sections reflect proposed changes):

> (1) offering the lowest fare available <u>on the carrier's website, ticket counter, reservations center</u>;
>
> (2) notify customers of known delays, cancellations, and diversions <u>in the gate area, on board the airplane, on calls to a reservation center, and on the carrier's website</u>;
>
> (3) deliver bags on time, <u>with reasonable efforts to return mishandled bags within 24 hours and compensate passengers for reasonable expenses that result due to delay in delivery</u>;

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8 See http://www.oregonlive.com/news/index.ssf/2009/01/passengers_endure_16hour_ordea.html

9 See http://articles.latimes.com/2007/aug/14/local/me-airport14

10 75 Fed. Reg. 32321.

11 See July 8, 2010 letter from Maureen Dugan, Acting Executive Director Admissibility and Passenger Programs Office of Field Operations, CBP to Barbara Kostuk, Managing Director, Passenger Facilitation Air Transport Association of America, Inc.

(4) allow reservations to be held at the quoted fare for at least 24 hours after reservation is made with no penalties for cancelling;

(5) where ticket refunds are due, providing prompt ticket refunds for credit card purchases and for cash and check purchases within 20 days after receiving a complete refund request;

(6) properly accommodating passengers with disabilities as required by Part 382 and for other special-needs passengers as set forth in the carrier's policies and procedures, including during lengthy tarmac delays;

(7) meeting customers' essential needs during lengthy tarmac delays as required by section 259.4 of this chapter and as provided in each covered carrier's contingency plan;

(8) handling ``bumped'' passengers with fairness and consistency in the case of oversales as required by part 250 of this chapter and as described in each carrier's policies and procedures for determining boarding priority;

(9) disclosing cancellation policies, frequent flyer rules, aircraft configuration, and lavatory availability on the selling carrier's website, and upon request, from the selling carrier's telephone reservations staff;

(10) notifying customers in a timely manner of changes in their travel itinerary;

(11) ensuring good customer service from code-share partners, including making reasonable efforts to ensure that its code-share partner(s) have comparable customer service plans or provide comparable service levels, or have adopted the identified carrier's customer service plan;

(12) ensuring responsiveness to customer complaints as required by section 259.7 of this chapter; and

(13) identifying the services it provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections.[12]

ATA members support the proposed changes to the CSP noted above as long as the Department does not require the commitments to be incorporated into contracts of carriage. The contract of carriage is a private contractual matter between the airline and the customer. The Department cannot exceed its authority or impair the ability of airlines and customers to contract with each other and the well-established limitations on government authority with respect to such contracts of carriage. See pp. 37-50 below. The comments below respond to the questions and guidance statements in the preamble and note our concerns regarding the implementation of these provisions.

Guidance: A carrier's failure to adopt a customer service plan for its scheduled service, adhere to its plan's terms, audit its own adherence to its plan annually or make the results of its audits available for

[12] See proposed section 259.5, 75 Fed. Reg. 32340.

the Department's review upon request would be considered an unfair and deceptive practice within the meaning of 49 U.S.C. §41712 and subject to enforcement action.[13]

ATA comment: ATA members do not agree that an alleged violation of a CSP requirement (if mandated as proposed) is also necessarily an unfair and deceptive trade practice. Only violations with conclusive evidence of willful intent to deceive a consumer may be enforced as an unfair and deceptive trade practice.

Question: The Department is soliciting comment on the costs and benefits associated with this requirement (adopt and audit CSP).[14]

ATA Comment: As discussed more fully in our comments regarding the Preliminary Regulatory Analysis (PRA) (see Section VIII below), the Department must take into account the substantial litigation costs the carriers will incur if this proposal is adopted. Without doing so, the cost-benefit analysis is flawed because this rule will vastly increase costs that can be reasonably estimated.

Guidance: We also note that all of the subjects for which we are proposing to require a standard are already required to be included in the customer service plans for U.S. carriers (e.g. oversales/denied boarding compensation, refunds), which should minimize the burden on these carriers to comply with the proposed new requirement to establish standards for those subjects. In addition, when determining what minimum standards to apply to these plans, the Department reviewed customer service plans as currently implemented by a number of carriers, and chose the services already provided by some carriers that appear to be "best practices."[15]

ATA Comment: We note that under current regulations U.S. carriers are required to *address* each of the CSP topics in section 259.5. As the Department notes in the quote above, carriers compete on these customer service items, resulting in a range of practices, providing the public with different options in the marketplace. A deregulated industry produces options for consumers. We agree with the Department view stated in the last passenger protection NPRM that "we are tentatively rejecting the suggestions of those consumers and groups who believe that the Department should set minimum standards for the contingency plans rather than allow each carrier to set its own standards based on its particular circumstances. We continue to be of the tentative view based on the information available to us that the Department should not substitute its judgment in this area for that of the air carriers."[16] The Department does not minimize the burdens of the proposed CSP changes by choosing its view of "best" practices that only a few carriers have adopted; instead it would harm competition and reduce the flying public's options. The dampening effect on innovation in customer service is evident; one ATA carrier has made it clear that it intends to remove a voluntary service commitment if this proposal is adopted because of litigation concerns. The Department has established what it perceives to be "best practices" by a less–than scientific and highly questionable method. If the Department believes minimum standards should be set, a claim which ATA refutes, it must first establish that the regulatory process is appropriate and then it should be carried out in a separate and later proposed rulemaking.

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13 75 Fed. Reg. 32322.
14 75 Fed. Reg. 32322.
15 75 Fed. Reg. 32323.
16 73 Fed. Reg. 74589.

Question: We request comment as to whether it is workable to set minimum standards for any of the subjects contained in the customer service plans and invite those that oppose the notion of the Department setting minimum standards for customer service plans as unduly burdensome to provide evidence of the costs that they anticipate. We further invite comment or suggestions on the type of standards that should be set.[17]

ATA Comment: The Department is asking the wrong question when it comes to standard setting. The issue is not whether the proposal is "unduly burdensome," but whether the Department can make a reasoned determination that the "benefits of the intended regulation justify the costs."[18] Therefore, in making a reasoned determination the Department must identify the market failure and a proposed solution while weighing the costs and benefits of the proposed solution and alternatives. This regulatory standard does not require that carriers prove a proposal is "unduly burdensome."

The current Department effort requiring disclosure by airlines of market driven service policies and requiring carriers to *address* certain customer services in a CSP is the best approach and the most consistent with a deregulated industry. As the Department has found, carriers have varying standards on customer service items, which is a natural result of market competition.[19] Requiring all carriers to adhere to one prescriptive standard removes competition on service terms, reduces the carrier's ability to offer the lowest possible price, and limits passengers' options. We provide additional information on costs in section VIII.

Question: Although the subjects we are proposing that foreign air carriers address in their customer service plans are identical to those U.S. carriers already are required to include in their customer service plans, we request comment on whether any of these subjects [customer service plan] would be inappropriate if applied to a foreign air carrier. Why or why not?[20]

ATA comment: ATA members disagree with the statement that the subjects which foreign carriers must address in CSPs under this proposal are identical to those subjects U.S. carriers already address in CSPs. First, although carriers are required to address certain CSP topics, current regulations do not *mandate* minimum requirements. Second, the proposed minimum standards in section 259.5 are far more detailed and specific than existing subject areas, and if adopted would represent a major change to existing carrier policies in areas where U.S. carriers currently compete. Third, imposing the same standards for foreign carriers and U.S. carriers would discourage marketplace competition. Finally, the Department presupposes that extending such prescriptive regulations to foreign carriers is necessary and justified. But doing so could drive foreign governments to retaliate against U.S. carriers operating outside the U.S., create conflicting standards and unnecessarily drive additional costs. One such example is recently enacted passenger protections from the Government of Brazil. We discuss the potential impact of this proposal in section VII.

Question: We seek comment on whether the Department should require that all airlines address any other subject in their customer service plans.[21]

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17 75 Fed. Reg. 32323.

18 See Executive Order 12866.

19 See 75 Fed. Reg. 32323 "…the Department reviewed customer service plans as currently implemented by a number of carriers,"

20 75 Fed. Reg. 32324.

21 75 Fed. Reg. 32324.

ATA Comment: ATA members oppose adding more topics for airlines to address in their CSPs. The proposal already goes too far in setting standards that would limit passenger options and increase ticket prices by stifling competition and re-regulating the industry. The Department has not allowed sufficient time to evaluate the impact of the first set of consumer protection rules, effective April 29, 2010. Moreover any further amendments must be published in another notice for public comment in accordance with the Administrative Procedure Act.

Question: For example, should mandatory disclosure to passengers and other interested parties of past delays or cancellations of particular flights before ticket purchase be a new subject area covered in customer service plans? If so, what should be the minimum timeliness/ cancellation standard? In this regard, there is already a requirement for reporting carriers (i.e., the largest U.S. carriers) to post flight delay data on their websites and for their reservation agents to disclose to customers, upon request, the on-time performance code of a flight. Should more direct and mandatory disclosure be required, e.g., a required warning before the final purchase decision is made regarding chronically late or routinely canceled flights?[22]

ATA Comment: ATA members oppose additional information notices regarding past flight delays or cancellations before purchase of a ticket. The Department has recently adopted new flight information requirements in the consumer protection rules effective July 24, 2010 for June data. In accordance with those rules, the public will see flight delays, cancellations, and flights 30 minutes late more than 50% of the time before purchase on a carrier's website. In the previous NPRM on consumer protections, the Department recognized that additional flight disclosure information would be "excessive and unnecessary," and that "the costs of providing this [additional] and other information to callers whether requested or not would be unduly burdensome and of dubious benefit."[23] Before proposing more requirements the Department must determine that current notice is insufficient and it must also determine that any additional requirement will materially benefit passengers. The Department presents no evidence supporting the need for additional disclosure requirements, which are extremely costly to implement. Any further flight disclosure requirements are likely to apply only to carriers and not other sellers of air transportation, so even with new requirements only some consumers will get the additional information. Finally, as we stated in past comments, flight performance is principally driven by weather events. Disclosing performance information for a period in the past is not necessarily a reliable indicator of future flight performance, and such data disclosure is potentially misleading to the passenger.

Question: We also seek comment on the appropriate minimum timeliness/cancellation standard for U.S. carriers and foreign air carriers that do not report on time performance data to DOT if we were to adopt a requirement that airlines address notification to consumers of past delays or cancellation in their customer service plans.[24]

ATA Comment: As all of our members are reporting carriers we have no comment on this question but note that for reporting carriers, flight information is already provided on (1) carrier websites (2) BTS website, (3) the Department's monthly consumer report, and (4) other independent sources such as Flightstats.com.

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22 75 Fed. Reg. 32324.
23 73 Fed. Reg. 74596.
24 75 Fed. Reg. 32324.

C. Airport Contingency Plans

Question: Should coverage be further expanded to require U.S. airports to adopt tarmac delay contingency plans? Proponents of these or other alternative proposals should provide arguments and evidence in support of their position, as should opponents.[25]

ATA Comment: ATA members support airport tarmac delay contingency plans because airports are an integral part of recovery during delays and should have plans in place to work with airlines and government agencies to deal with contingencies. Airports should be prepared in advance to assist with deplaning of passengers during irregular operations. This may include having airport personnel on-call to keep terminal areas open, 24-hour contact information for TSA and CBP officials, designating areas of an airport for deplaning of passengers away from a gate, and identifying assets that could be used to transport deplaned passengers from an airplane to gate. All of these areas have been concerns in past tarmac delay incidents and requiring airports to address these matters in a contingency plan will help avoid repeat occurrences. In addition, an integral part of any regulatory requirement is the ability of the Department to take enforcement action. The Department should affirm it will investigate and enforce the passenger protection regulations against airports for non-compliance.

Airport contingency plans should be limited, however, to coordinating with airlines and government agencies and assisting airlines during tarmac delays. As the Department has recognized in this and past rulemakings, carriers are ultimately responsible for delayed passengers and therefore carriers are in the best position to decide how to accommodate passengers onboard their aircraft and what assets are needed during a delay. Any airport contingency plan requirement should recognize the carrier as the primary decision-maker during delays.

D. Tarmac Delay Data

In a new part 244, the Department proposes that U.S., foreign, and commuter carriers operating passenger service to U.S. airports with an aircraft designed to have a seating capacity of 30 or more seats report flight information on U.S. airport tarmac delays of 3 hours or more.[26] If a carrier experiences no 3-hour tarmac delays during a given month, it must still submit a monthly report to the Department stating no 3-hour tarmac delays occurred.[27] U.S. part 234 "reporting" carriers must only submit 3-hour tarmac information for public charter flights and international passenger flights, as the Bureau of Transportation Statistics (BTS) already collects domestic scheduled passenger flight information.[28]

Since ATA members already provide domestic passenger flight information to BTS we generally support this proposal because it will provide the Department with additional information on tarmac delays. BTS already has U.S. carrier flight information for domestic passenger operations and will know if a carrier has not had a 3-hour tarmac delay during a given month. Accordingly, the Department should use

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25 75 Fed. Reg. 32321.

26 See proposed paragraph 244.2(a), 75 Fed. Reg. 32337.

27 See proposed paragraph 244,2(b), 75 Fed. Reg. 32337.

28 See proposed paragraph 244.2(c), 75 Fed. Reg. 32337.

existing part 234 data to fulfill this requirement. The Department should also clarify in proposed paragraph 244.3(a) that the part 244 report is due 15 days from the end of the month after the reporting period/month.

E. Oversales

The Department proposes several changes in the oversales rules:

> (1) increasing the involuntary denied boarding compensation (IDBC) maximum compensation amounts from $650 if the carrier arranges for passenger transportation to the originally scheduled airport to arrive within 2 hours of the original flight if domestic or within 4 hours for an international flight. If the carrier does not meet those time periods the maximum compensation is $1300;
> (2) if a carrier offers an involuntarily denied boarding passenger free or reduced rate transportation in lieu of cash the carrier must disclose all material transportation restrictions before the passenger decides to give up the cash;
> (3) a carrier must provide IDBC to a "zero fare ticket" holder;
> (4) the Department will use the Consumer Price Index for All Urban Consumers (CPI-U) every two years to review and adjust the IDBC amounts if needed;
> (5) if a carrier orally advises an involuntarily bumped passenger they are entitled to receive free or discounted transportation, the carrier must also orally advise the passenger of any transportation restrictions and that they are entitled to choose cash or check compensation instead;
> (6) for volunteers, the carrier must disclose the boarding priority rules the carrier will apply to the passenger's specific flight so the passenger may determine if they in are danger of being involuntarily denied boarding, and;
> (7) if a carrier offers free or reduced rate air transportation as compensation to volunteers, the carrier must disclose all material restrictions on such transportation before the passenger decides to give up his or her confirmed reserved space.[29]

ATA members support the proposed increase and do not oppose the use of CPI-U as a means to adjust IDBC amounts periodically. However, the Department should not expect to see, as it suggests, fewer IDB events. This is because passengers are more likely to hold out for IDB compensation when the amount has been increased. Based on the trend the Department has seen since the May 2008 increase, the proposed increased IDBC and extension to foreign carriers with higher international fares (and higher IDBC offers) will likely result in a higher number of IDB passengers. The DOT proposal may, in fact, be counter-intuitive to the identified problem.

ATA members do not oppose compensating many zero fare ticket holders as the Department suggests in the proposal, but we do have concerns with some specific requirements. The primary concern is that the phrase "zero fare ticket" as described in the rule text and preamble is overly broad. The rule states "the fare paid by these passengers for purpose[s] of this calculation shall be the lowest cash, check, or credit card payment charged for a comparable class of ticket on the same flight."[30] This proposal would require airlines to compensate not only those passengers who use frequent flyer miles, industry or

[29] See proposed amended sections 250.2b and 250.5, 75 Fed. Reg. 32338.
[30] 75 Fed. Reg. 32325.

vendor passes, or vouchers to purchase a ticket but would also incorrectly include free "buddy" or employee pass travelers. We accept that carriers should make whole passengers who used some form of currency to travel, such as frequent flyer miles or vouchers. Carriers are prepared to compensate passengers in the same currency used to obtain the ticket. But forcing carriers to compensate passengers who, for example, are employees using travel privileges having the lowest boarding priority would negate the terms and conditions of most staff travel.

As a practical matter, gate agents will not be able to assign a value as suggested above because they do not have the information the Department contemplates such as the lowest payment made for a comparable class ticket on the same flight. We propose that the Department permit the terms and conditions of zero value tickets to apply, and that passengers holding such tickets would, instead of receiving mandatory compensation, be entitled to travel on the next available flight. Additionally, buddy passes and other industry tickets are benefits provided to employees and industry partners (in many cases the passes are for only standby travel) and carriers should not have to compensate these holders for cases where travel is not possible.

Question: We also ask for comment on whether we should completely eliminate minimum compensation limits and simply require that carriers base DBC to be paid to involuntarily bumped passengers on 100% or 200% of a passenger's fare, without limit, and/or whether the 100% and 200% rates need to be increased in line with the proposed increase in the $400/$800 compensation limits proposed above, perhaps to 200% and 400% of the passenger's fare, or higher.[31]

ATA Comment: As an initial matter, we think the Department may have inadvertently made a mistake in this statement by suggesting it would eliminate "minimum" compensation limits, when the regulations refer to "maximum" compensation limits. ATA does not support eliminating maximum compensation limits in favor of compensating strictly as a percentage of fare. The Department presents no evidence of a market failure that would be addressed by increasing IDBC to 200% and 400% of the passenger's fare. As stated above, increasing IDBC amounts and removing the cap would strongly encourage passengers with higher fares not to accept VDB and increase IDB rates. Second, there is a strong argument against tying IDB compensation to an exact fare level; IDB passengers retain the value of air transportation purchased, so IDB compensation has no rational relationship to a "refund" of the fare or some multiple of the fare, but is instead a means of compensating the passenger for lost time, which is unrelated to ticket price. Third, the Department permits overbooking because it promotes efficiency and enables carriers to accommodate passengers on future flights without spoiling inventory. If IDB rates are excessively raised, carriers will need to compensate for that increase with higher cancellation fees for those passengers not arriving for a flight. Under this proposal, a passenger with a $1,000 one-way fare whose arrival is delayed two hours might be compensated at $1,000-$2,000 – or $500 to $1,000 per hour of arrival delay. This rate of compensation is up to 35 times the value of passenger time the Department estimates in its cost benefit analysis.[32] Forcing only air carriers to offer this kind of compensation would increase costs for all air travelers, reducing service on marginally successful routes and would be contrary to the public interest. Should the intent be to force carriers to limit or eliminate overbooking, passengers would be harmed by the lack of flight options and availability and through fare increases to make up for the lost seats.

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31 75 Fed. Reg. 32325.

32 Econometrica estimates the value of passenger time at $24.15 per hour in the PRA.

Question: We seek comment not only on whether zero fare ticket holders should receive DBC under Part 250 but also on whether the cash method described above for calculating DBC to be paid such zero fare ticket holders is reasonable and would truly capture these passengers' losses due to being bumped involuntarily to the same extent as for cash/check/credit ticket holders.[33]

ATA Comment: ATA members agree that many zero fare ticket holders should be compensated if they used some form of "currency" to purchase a ticket, or the ticket has some value such as a voucher. Most airlines already compensate passengers for tickets with a value, in the same currency used to purchase the ticket. However, passengers traveling on tickets with no value and standby passengers should not be eligible for IDBC and the Department provides no justification for requiring it.

Guidance: A possible alternative to the above proposed method of compensation would be to allow carriers to compensate zero fare ticket holders using the same "currency" in which the tickets were obtained. For instance, under this alternative an involuntarily bumped passenger who used frequent flyer miles to purchase a ticket would be eligible to be compensated with mileage, the currency used to obtain that flight. Under the current rule, this would amount to 100% or 200% of the amount of mileage that was used to purchase the ticket, plus a cash amount if appropriate to account for any taxes, fees and administrative costs paid to obtain the ticket. Similarly, involuntarily bumped passengers who used a voucher to purchase a ticket, in whole or in part, would be eligible to be compensated with a voucher worth 100% or 200% of the value of their original voucher, and an appropriate cash payment if a portion of the ticket was paid for in that manner.[34]

ATA Comment: ATA members agree with this guidance and methodology, provided that carriers have the option of compensating passengers either by direct payments or by payments using the "currency" with which they obtained their tickets. But again, free or reduced rate tickets (such as employee travel, industry or vendor passes and buddy passes) that are made available as an employment benefit or accommodation for a vendor and not purchased with a form of currency should not be eligible for IDBC.

Question: We also seek comment on any other alternative method of calculating DBC for zero fare ticket holders that would best quantify the financial loss and inconvenience to those passengers. How should the rule quantify the value of the remaining travel portion (either to the next stopover, or if none, to the final destination) if the DBC were to be paid with frequent flyer miles?[35]

ATA Comment: IDBC compensation for zero fare ticket holders should be allowed in the same currency used to obtain the ticket, e.g. frequent flyer miles, voucher, or, at the carrier's option, cash or credit. For example, a carrier should be able to offer a passenger traveling on a frequent flyer ticket a voucher, frequent flyer miles, or some combination and should retain the ability to compensate by cash or check at the carrier's discretion.

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33 75 Fed. Reg. 32326.

34 Id.

35 Id.

F. Baggage and Other Fees

The Department proposes to require carriers with a website on which tickets can be purchased to promptly and prominently disclose on its website any carry-on or checked baggage fee increase or changes in the checked baggage allowance. Carriers must also provide notice of checked and carry-on baggage fees and baggage allowances in all e-ticket confirmations and on the summary page at the completion of an online ticket purchase for travel to, from, or within the U.S. In addition, U.S. and foreign carriers with websites that advertise or sell air transportation must disclose on their website fees for optional services such as advance seat selection, seat upgrades, or beverages, snacks, or meals.[36]

ATA members generally support displaying changes to checked or carry-on baggage fees or allowances on a carrier's website. Carriers are likely to comply by placing a hyper-link on their homepage that would lead to more detailed and specific information. We also support providing *notice* of checked and carry-on baggage fees and baggage allowances in all e-ticket confirmations and at the conclusion of the online ticket purchase process through a web link with additional information. Finally, we also generally support the requirement to disclose on carrier websites fees for optional services - with some exceptions. Carriers already provide website information on optional fees. We believe that fees for optional services that will vary depending on the itinerary should only require a general description. The best example of this exception is food or beverage items for purchase during travel. The Department should expect carrier websites to provide the general prices of items on an airplane but carriers should not be required to list every single item and its price that may or may not be available for purchase on any given flight. For example, statements such as "alcohol beverages cost x" and "food items on domestic flights cost y through z," etc. should meet the Department's goal of providing notice to passengers. We also note the Department did not, and should not propose in the future a limit on baggage fees.[37]

Question: The Department invites interested persons to comment on this proposal, including whether the time period for displaying such changes [baggage fees] on the homepage should be greater or less than three months.[38]

ATA comment: ATA members support the requirement to display fee changes and believe the proposed three month time period is adequate.

Question: The Department also asks for comment on the best options for displaying such information to the public if it were to adopt a notice requirement[39]

ATA comment: ATA members agree with the Department's suggestion that a hyperlink on the carrier's website is the best form of notice.

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36 See proposed 399.85, 75 Fed. Reg. 32341.

37 The Department would need to provide notice and the opportunity to comment in accordance with the APA.

38 75 Fed. Reg. 32329.

39 Id.

Question: The Department invites comments regarding the proposal to have full, complete disclosure of all fees for optional services on one web page, accessible to the consumer through a prominent hyperlink. In particular, we solicit comment on whether we should limit the requirement to disclose fees to "significant" fees for optional services, including comment on the definition of "significant fee" and whether it should be defined as a particular dollar amount. The Department seeks comment on the alternatives to the proposed link to the information on a carrier's homepage, such as disclosure of these optional fees on e-ticket confirmations or elsewhere.[40]

ATA comment: ATA members generally agree that a hyperlink to a page disclosing optional fees would provide the best notice to passengers. This would include providing a link in an e-ticket confirmation that would lead the consumer to a carrier's homepage with optional fee information.[41] Since carrier websites will have fee information it would be repetitive and unnecessary to require such fee information to be reproduced within each e-ticket confirmation. We see no reason to distinguish significant from other fees, unless the Department would make this distinction to exclude optional fees that may vary by aircraft such as food or beverage menu options as discussed above.

Question: The Department is also seeking comment on the need for a special rule relating to the disclosure of fees and related restrictions in connection with code-share service. We believe that, at a minimum, prospective customers for these code-share flights should be made aware of any significant differences between the ancillary services and fees of the carrier under whose identity their service was marketed and those of the carrier operating their flights. Comments are invited on whether such disclosure by ticketing/marketing carriers should be required through reservation agents, websites, or e-ticket confirmations or through each of those mechanisms. Further comment is invited on whether there are any ancillary services that should not be allowed to vary among code-share partners, e.g., the free baggage allowance or baggage fees. Information on the cost of these proposals is invited.[42]

ATA comment: ATA members agree with the Department that the best way to ensure transparency with varying policies and fees between code-share partners is to require disclosure on carrier websites through a hyperlink.[43] The hyperlink would take the customer from the marketing carrier's policies to the operating carrier's policies. Requiring all code-share partners to have the same optional fees would thwart competition and innovation, provide passengers with fewer options, be inconsistent with a deregulated industry, is impractical, and could violate antitrust laws. In particular, the practical implementation of any such proposal would be extremely difficult for flights that have three or four domestic or foreign code-share partners selling tickets on the same flight. With respect to antitrust concerns, agreements between or among carriers on ancillary fees could be considered anti-competitive behavior, especially among non-immunized carriers. The Department should coordinate with the Department of Justice before pursuing this proposal.

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40 75 Fed. Reg. 32329.

41 A link to optional services should be directly to the carrier's website and should not direct the consumer to a GDS website or require a carrier to provide optional fee information to a GDS as we more fully explain in section V, subpart C.

42 75 Fed. Reg. 32330.

43 See preamble discussion suggesting a hyperlink could be used, 75 Fed. Reg. 32329, col. 2 & 3.

G. Each Way Advertising

The Department also proposes to require that if sellers of air transportation want to advertise an "each-way" price that is contingent on a roundtrip ticket purchase, they must do so with the roundtrip purchase requirement clearly and conspicuously disclosed in a location that is prominent and proximate to the advertised fare amount. The proposal would prohibit seller of air transportation from referring to such fares as ''one-way'' fares that require a roundtrip ticket purchase.[44]

ATA Comment: ATA members do not object to this provision, which is not new. Carriers already comply with such a requirement. However, the Department should clarify that sellers of air transportation are permitted to advertise "one-way" fares when a roundtrip purchase is not required.

H. Post Purchase Price Increases

The Department also proposed to add a new section (399.87) that would prohibit sellers of scheduled air transportation from raising the price of a seat, charging for baggage, or adding a fuel surcharge after air transportation has been purchased by the consumer. In making this change, the Department also removed a companion provision in Section 253.7 that currently permits carriers to raise the price of a ticket after purchase as long as the carrier gives written notice of this policy.

ATA Comment: ATA members support this change as applied to the purchase of scheduled air transportation because it is consistent with industry practice. ATA members urge the Department to clarify that the carrier may charge consumers to check bags post-purchase but before departure, provided that the fee was in effect on the purchase date. For example, a passenger may decide at some point after purchasing an airfare that he/she needs to check a bag; as long as the bag fee existed on the airfare purchase date, the carrier should be able to charge for the checked bag. Regarding section 253.7, we recommend the Department clarify that current e-ticket practices of providing a hyperlink that leads to information on ticket refunds and potential monetary penalties comply with the revised section 253.7 written notice requirements.

Question: One alternative the Department is considering would be to allow post purchase price increases, but only as long as the seller of air transportation conspicuously discloses to the consumer the potential for such an increase and the maximum amount of the increase, and the consumer affirmatively agrees to the potential for such an increase prior to purchasing the ticket.[45] *Another alternative would be to allow post-purchase price increases, with full and adequate disclosure, that the consumer agrees to in advance of purchasing a ticket, but to prohibit price increases within thirty or sixty days of the first flight in a consumer's itinerary.*[46]

ATA members support prohibiting post purchase price increases for scheduled service and do not believe an alternative is necessary.

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44 See proposed paragraph 399.84(b), 75 Fed. Reg. 32340.
45 75 Fed. Reg. 32330.
46 Id.

I. Choice of Forum

The Department proposes to prohibit a choice-of-forum clause in a carrier's contract or carriage that would restrict in what court a passenger may bring a consumer related claim.[47]

ATA members support this proposal.

Question: Consumers should not be forced to litigate in a jurisdiction that could be thousands of miles from their United States residence. The Department believes that such narrow choice-of-forum provisions would operate as a limitation on the right of a consumer to bring legitimate and viable suits. We invite interested persons to comment on this proposal and on the use of such choice-of-forum provisions in contracts of carriage.[48]

ATA members agree that choice-of-forum provisions should not be included in contracts of carriage.

III. Rules that May Benefit Consumers, but the Department Needs to Clarify and Implement Fairly for All Parties

A. Flight Status Changes

The Department also proposes that for domestic flights, including code-share segments of domestic flights, carriers would have to promptly send notice of 30 minute flight delays or flight cancellations to passengers and other interested persons. Follow up notifications to passengers of additional 30 minute flight delays would also have to be sent. These updates would be required in the gate area, by reservation agents and on carrier websites. In addition, if a carrier provides flight status updates through subscription services, the carrier shall provide an update to passengers through this service within 30 minutes of becoming aware or should have become aware of a flight status change. At the airport, each reporting carrier would have to continuously update all flight status updates under its control with flight delays of 30 minutes or more or flight cancellations within 30 minutes of the carrier becoming aware of the flight status change or should have become of the change.[49]

ATA members generally support this proposal to require various flight status updates to passengers and indeed most carriers already provide this information. Keeping passengers informed about flight delays or cancellations is an important goal. We do, however, have some concerns with the practical implementation of the proposal as written and believe it should be modified to permit flexibility. First, for flight status updates through subscription services and at airports, the Department includes a requirement that carriers should update passengers within 30 minutes of becoming aware of a delay or

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47 See proposed section 253.9, 75 Fed. Reg. 32338.
48 75 Fed. Reg. 32332.
49 See proposed section 234.11, 75 Fed. Reg. 32336.

cancellation or "should have become aware" of a delay or cancellation. "Should have become aware" is a subjective standard derived primarily from tort case-law that will be extremely difficult to implement. It is not an appropriate standard in an administrative enforcement context, particularly given the role of third parties such as the FAA in controlling aircraft movement and providing information. Moreover, it is unnecessary given the 30 minute time-frame, which provides a bright-line standard that could be applied and enforced in a much more straightforward manner. Therefore, we ask the Department to remove the "or should have become aware" proviso.

Second, we also have concerns about trying to implement any requirement to give verbal updates to passengers at an airport or on the airplane because it will be impossible to document and prove such updates were given. All carriers currently provide updates to passengers in airports by several means, and verbally on aircraft, but proving a carrier gave verbal updates of a delay or cancellation will be extremely difficult. Therefore, we strongly suggest the Department not require verbal updates but permit a range of update options providing carriers and passengers' flexibility in implementing this rule.[50]

We also note a recent Federal Communications Commission rulemaking that proposed to prohibit proactive call-outs with flight status change information from carriers to passengers' cell phones and possibly land lines without express consent.[51] ATA filed comments in the FCC docket asking for an exception to the proposal for flight status updates but it is not clear at this time what the FCC final rule will require.[52] We understand the Department also filed comments in the FCC rulemaking and encourage continued DOT coordination with the FCC on this matter to prevent a situation where FCC regulations prohibit carrier compliance with the Department's regulations.

Question: This requirement [flight status changes] would apply to all the domestic scheduled flight segments that a reporting carrier "markets." For example, for a code-share flight this proposed notification requirement would be the responsibility of the carrier whose code is used, whether or not it is operated under a fee-for-service arrangement.[53]

ATA comment: ATA members agree that the marketing carrier should be responsible for flight status changes using media (text, email, etc.) up until the day of the flight, but the operating carrier should be responsible for flight status updates at the airport because the marketing carrier may not have a presence at the airport and may not have the required information.

Question: We seek comments on whether it is preferable to require carriers to provide prompt notification of flight status changes and leave it up to the carriers to determine how that notification is

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50 We also question whether not providing flight status updates could be construed as an "unfair and deceptive practice" and whether regulating this practice is within the Department's authority.

51 See FCC Docket Number 02-278, 75 Fed. Reg. 13471.

52 See FCC Docket Number 02-278; http://fjallfoss.fcc.gov/ecfs/document/view?id=7020512961

53 75 Fed. Reg. 32331.

provided, or prescribe particular means by which carriers must communicate or must make available flight status updates.[54]

ATA comment: The Department should leave the means of notification flexible so carriers can implement and passengers can select the optimal mean(s) of communication and adopt new technologies in order to offer passengers the greatest choice in how they receive notifications. The Department should also coordinate with the FCC to ensure that some flight status update options are not prohibited as part of the FCC's current rulemaking.

Question: We ask for comment on the four proposed means of notification: an announcement in the boarding area, carriers' websites, carriers' telephone reservation systems, and airport displays under carriers' control. Commenters should support their opinions with as much detail as possible regarding the practicality, costs, and benefits of any standard they support or oppose.[55]

ATA comment: As stated above, the Department should allow multiple notification options without mandating any one particular method. Requiring only airport announcements or any verbal communication will not be the best method to ensure passenger notification as airports will be loud and crowded during irregular operations when flight status updates are needed most. Passengers may also not hear announcements if they are going through security, on the phone, in a bathroom, in an airport store, or speaking to a carrier agent. All three other options are currently in use by carriers and work well as part of an overall communications system to provide passenger information. Therefore, the Department should adopt a standard requiring at least one means of notification and allowing carriers to use other means of communication, including any new technology that may be developed.

Question: We also seek comment about the cost and benefit of flight status update services.[56]

ATA comment: The Department will maximize the benefits of this rule if it permits flexibility and allows passengers and carriers to choose from several update options. Costs will be minimized if flight status updates are limited to displaying data already known to carrier systems. The Department should not require additional technology or programming to comply with this rule, given the various options currently available to passengers for flight status updates.

Question: It goes without saying that the quicker that changes to a flight's status can be provided to passengers, the more useful the information is likely to be. In addition to seeking comment on the need, in general, for this proposed notification requirement, we specifically ask for comment on whether the standard we propose - "30 minutes after the carrier becomes aware or should have become aware of a change in the status of a flight" - is a reasonable notification standard to apply in requiring carriers to pass along updates to passengers and to the public. Does it provide consumers sufficient lead time in most cases to act to protect themselves? If not, why not, and could carriers be expected to meet a more

54 75 Fed. Reg. 32331.
55 Id.
56 Id.

stringent standard? Is the more stringent standard a reasonable standard for carriers to meet and, if not, why not?[57]

ATA comment: ATA members agree with the Department that the standard "30 minutes after the carrier becomes aware of a change in the status of a flight" is reasonable and appropriate. It is in the carriers' interest to keep passengers informed of any flight changes. A standard of 30 minutes provides adequate time for the carrier to receive flight status change from FAA controllers, communicate the change to all of the carriers' communication channels, and for those channels to relay the information to passengers. As described above, the phrase "should have become aware" is too subjective, does not provide a bright line standard, will pose compliance and enforcement difficulties, and should be eliminated from the final rule.

Question: In addition, we are proposing that notification be provided regarding any changes that affect the planned operation of a flight by at least 30 minutes. While shorter flight delays occur more frequently, we believe they are less likely to significantly disrupt expectations or travel plans. We ask for comment on whether this 30-minute standard is appropriate. Do consumers in most instances require notice of flight delays that are less than 30 minutes? Would changing the standard of delays to less than 30 minutes impose unreasonable burdens or costs on carriers that outweigh any benefits to the public?[58]

ATA comment: A 30-minute standard is reasonable and will provide passengers notice of delays that could impact their travel schedule. Updates for shorter delays would impose unreasonable burdens on carriers and provide little or no benefit to passengers. Moreover, updates on a shorter delay guarantees that the flight will be delayed for the announced period. Once an announcement is made, carriers are locked in and will not be able to depart closer to the original departure time should circumstances change (such as weather conditions). In addition, carriers are only able to forward the information that the FAA provides on delays. The Department should confirm that FAA has the resources to provide an update every 30 minutes on every delayed flight.

We therefore agree with the Department's view stated in the December amendments to part 234, that in general a 30 minute delay and potential update would be useful for passengers, "the Department views the posting of the percentage of arrivals that were more than 30 minutes late as important because consumers are particularly interested in significant delays as these delays are the kind that are likely to result in missed connections and other serious problems."[59]

Guidance: With respect to flight status information outlets at an airport that are not under a carrier's control, e.g., flight arrival and departure displays that are under the control of an airport authority, a carrier's responsibility is limited to providing the updated flight information to the airport authority within the required 30 minutes.[60]

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57 75 Fed. Reg. 32331.
58 Id.
59 74 Fed. Reg. 68996.
60 75 Fed. Reg. 32331.

ATA comment: ATA members agree with the Department's statement because carriers do not control many of the flight information outlets at airports and it is important that passengers receive this information from many different sources. We also recommend that the Department consider requiring airports to update flight information boards (or any other sources of flight status updates) within 30 minutes of receiving information on a flight status change from a carrier.

B. Tarmac Delay Updates

The Department also proposes that carriers commit in their contingency plans to updating passengers on tarmac delays every 30 minutes and include reasons why the flight is delayed.[61]

While ATA carriers do not oppose the idea of flight status updates every 30 minutes we have concerns with how carriers will demonstrate compliance if there is a passenger allegation of no update. For passengers delayed on an airplane, crewmembers already make flight status announcements and will continue to do so. If the Department makes updates a regulatory requirement, it will be extremely difficult for carriers to prove that verbal flight status updates were made. In addition, the Department should ensure that FAA controllers are instructed to provide the reasons for a delay or provide an exception to the rule where a controller does not provide a reason for delay.[62]

C. Onboard Announcements

Question: We also invite comment on whether carriers should be required to announce that passengers may deplane from an aircraft that is at the gate or other disembarkation area with the door open.[63]

ATA Comment: Carriers should not be required to announce that passengers may deplane from an aircraft when at the gate. All carriers already announce when the main cabin door has been closed, and at that time, the fasten seat belt sign is illuminated and customers must be in their seats with baggage stowed, electronic devices turned off, etc. Before the main cabin door announcement has been made, customers can move around the cabin if there is a need to do so and deplane. If passengers are unsure whether they are allowed to deplane they simply should contact a crewmember to clarify the situation. This issue need not be further complicated by unnecessary regulation.

Question: With respect to notifying passengers on board aircraft of delays, we seek comment on how often updates should be provided and whether we should require that passengers be advised when they may deplane from aircraft during lengthy tarmac delays. For example, we have received complaints from passengers that their aircraft has returned to the gate less than three hours after departure for emergency or mechanical reasons but they were not advised that they could deplane. Carriers may feel the 3-hour tarmac delay limit has been tolled by such a gate return, but passengers feel they were not truly afforded the opportunity to deplane within the meaning of this rule.[64]

ATA comment: In general, carriers do not object to providing flight status updates to passengers. All carriers announce when the main cabin door has been closed, and at that time, customers must be in seats, baggage stowed, etc. Before the main cabin door announcement has been made, customers have

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61 See proposed 259.4(b)(5), 75 Fed. Reg. 32339.
62 See Section III, Flight Status Changes for additional comments.
63 75 Fed. Reg. 32321.
64 75 Fed. Reg. 32323.

the freedom to move around the cabin. A passenger can ask to deplane at any time, whether the cabin door is open or closed. The crew will advise whether it is safe or possible to deplane. If passengers are unsure whether they are allowed to deplane they simply should contact a crewmember to clarify the situation. This issue need not be further complicated by unnecessary regulation.

1. Flightcrew Information

Guidance: We do not anticipate that a carrier's flight crews will know every nuance of the reason for the delay, but we do expect them to inform passengers of the reasons of which they are aware and to make reasonable attempts to acquire information about the reason(s) for that delay.[65]

ATA Comment: In many instances, the Federal Government (FAA, TSA, CBP) controls the information provided to crews regarding delays. Flight crews currently provide passengers the reasons for a delay when known. Therefore, the Government should have the only affirmative duty to provide information on the reasons for a delay. Flight crews should not be required to make "reasonable attempts" to require information but should continue the current practice of communicating information made available to them without an affirmative duty to repeatedly request the cause of a delay, especially during irregular operations when FAA controllers will be occupied with safety-related duties. Requiring flight crews to request information frequently and repeatedly will unnecessarily burden flight crews, other airline personnel and the FAA.

IV. Rules that Will Harm Passengers

A. Tarmac Delay Time Limit for International Flights

Question: We ask interested persons to comment on whether any final rule that we may adopt should include a uniform standard for the time interval after which U.S. or foreign air carriers would be required to allow passengers on international flights to deplane. Commenters who support the adoption of a uniform standard should propose specific amounts of time and state why they believe these intervals to be appropriate.[66]

ATA Comment: ATA members continue to object to a hard time limit for international flights because it would not be in the passengers' best interest as described in our prior comments.[67] The Department recognized the potential harm to customers when it declined to adopt a hard time limit in the December 30, 2009 final rule.[68] For example, the Department recognized that "international flights operate less frequently than most domestic flights, potentially resulting in much greater harm to consumers if carriers cancel these international flights."[69] We agree that a hard time limit would result in overly

65 75 Fed. Reg. 32321.
66 75 Fed. Reg. 32320, concerning paragraph 259.4(b)(2).
67 See Docket number DOT-OST-2007-0022-0250.1, page 25.
68 74 Fed. Reg. 68983.
69 74 Fed. Reg. 68985.

conservative tarmac operations and more international flight cancellations to avoid excessive fines. In addition, aircraft used for many international flights are able to comfortably accommodate passengers onboard for longer periods of time, with food service and entertainment options often available given the type of equipment used and the expected length of these flights. Finally, considering the time, costs and planning (including timing for slots at foreign airports) that go into providing international service, carriers have every incentive to operate flights on-time. The Department made the correct decision in the recent rulemaking to allow carriers the flexibility to set their own tarmac delay time limits for international flights and there is no evidence since the implementation of the new rules five months ago that the Department should change its position. We also note that the PRA does not estimate the substantial costs that all carriers would incur due to increased international flight cancellations if a hard time limit is imposed or passenger time in having to wait for future flights after a flight is canceled.[70] Including the cost of international flight cancellations in the PRA would exceed any benefit for imposing a hard time limit for international flights.

B. Marketing Carrier Responsibilities

Question: We also seek comment on whether we should expand coverage of the requirement to adopt tarmac delay contingency plans so that the obligation to adopt such a plan and adhere to its terms is not only the responsibility of the operating carrier but also the carrier under whose code the service is marketed if different.[71]

ATA Comment: ATA members agree with the Department's statement in the Final Rule published in December 2009 that "it is the carrier operating the flight that has direct contact with the passengers on the aircraft during a tarmac delay and that remains directly responsible for serving them."[72] Once the airplane departs the gate, the operating carrier has sole operating authority under part 121 and is in sole control of how a passenger is treated and it would be unreasonable to also hold a marketing carrier accountable for the operating carrier's actions.

A primary concern is that marketing carrier and operating carrier contingency plans may differ, or even be in conflict, creating compliance problems and confusing passengers. For example, for an international code-share flight departing a U.S. airport, the operating carrier may have a four hour tarmac delay self imposed time limit (assuming the regulation is adopted as proposed), whereas a marketing carrier may have a three hour self imposed tarmac delay time limit. Further, if the operating carrier follows its contingency plan and departs after a delay of 3:15, the operating carrier would not comply with the marketing carrier's contingency plan. This situation is further exacerbated when an operating carrier has multiple marketing carrier codes displayed on its operated flight. Finally, holding a marketing carrier responsible for a flight it does not operate will not benefit consumers because carriers will be less likely to code-share, to avoid conflicting policies and fines. Discouraging code-share flights conflicts with Department policy that such arrangements are in the public interest, providing easier and

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70 See PRA Section 6. Estimated Costs of Proposed Requirements, pages 45-58.

71 75 Fed. Reg. 32321.

72 74 Fed. Reg. 68985.

increased passenger access to cities domestically and around the globe.[73] Disclosing the operating carrier before a passenger purchases a ticket provides transparency and notifies the passenger of the carrier that will have responsibility (under 14 C.F.R. part 121) for the safe operation of the flight as well as responsibility for compliance with these rules.

C. Reservation Hold

ATA members strongly object to a new customer service plan proposal that would require a carrier to hold a reservation "at the quoted fare" for 24 hours after a reservation is made "without payment or cancelled without penalty." Adopting this proposal would allow consumers to hold an unlimited number of reservations at once, without payment during the 24 hour hold, eliminating the carrier's ability to sell these seats to another willing buyer during that period. The Department has not identified a market failure or unfair or deceptive practice (or the potential for one) that merits this extraordinary and market-interfering proposal. This requirement would effectively prevent re-pricing, which ordinarily happens multiple times a day, in response to market conditions. Any such 24-hour hold without payment is a matter of concern since lost bookings can occur at any time, and different flights experience peak booking levels at different times. This proposal would be especially troubling if a consumer were to hold reservations during the last 24 hours before a flight and then cancel, all with zero cost to the individual making the reservation, but *preventing* the carrier from reselling the seats. The effect would be to reduce options to other travelers and increase costs for carriers and passengers. It is conceivable that a meaningful share of inventory could be unavailable for sale if individuals attempt to "game" the system and serially reserve seats that expire at departure time without any payment. As seats are a perishable inventory, the inability to sell them in a timely manner represents a high cost to carriers. A smaller but real concern is the cost to carriers and other intermediaries from predictable spikes in abandoned reservations; even making and canceling reservations places a financial burden on carriers. This regulation will cause additional empty seats that cannot be resold to other passengers and likely will result in higher overall fares to compensate for losses.

Like many other aspects of this proposal, the issue of holding flight reservations without purchase or penalty is a practice on which carriers can and should compete. The Department has already regulated to an extraordinary extent by requiring carriers to refund reservations within a specified time. Moreover, consumers have options in choosing various tickets, and the marketplace should determine how long and when a carrier will hold a ticket without purchase.

This is yet another area where the Department cannot rationally justify treating airlines different than other retail industries. If the Department decides to adopt this proposal notwithstanding our objections, it should provide an exception where carriers do not have to hold reservations for the last 72 hours before a flight to ensure carriers have at least a minimal opportunity to sell seats.

D. Baggage Delivery

Question: With regard to delivering baggage on time, we solicit comment on whether we should also include a standard that (1) carriers reimburse passengers the fee charged to transport a bag if that bag is lost or not timely delivered; and (2) the time when a bag should be considered not to have been timely

[73] See Department policy concerning code-shares at http://ostpxweb.dot.gov/aviation/intlaviationprog.htm

delivered (e.g., delivered on same or earlier flight than the passenger, delivered within 2 hours of the passenger's arrival).[74]

ATA Comment: ATA members oppose this suggestion. As stated above, bag fees are a competitive issue and whether a carrier chooses to refund a fee in all instances is a matter the marketplace should determine. Some passengers may choose to fly a certain carrier to avoid bag fees altogether, while other passengers may not need to check bags for certain trips so baggage fees are not an important factor in choosing a ticket or carrier. In these examples, a passenger may decide to buy a cheaper ticket that would impose bag fees and allow no refunds because the bag fees would not apply to the passenger. Passengers are best served by leaving these options in place, providing consumers the greatest choice in air travel and increasing competition among carriers. Automatic baggage fee refunds will raise prices for those customers that do not need or want to check bags.

Department-mandated policies on baggage fees also raise concerns about compliance and enforcement. For instance, a "timely delivered" bag is a subjective standard and does not address the question of when a bag is available for pickup versus when a passenger may actually possess the bag. An arbitrary "timely" delivered bag standard would also not account for varying conditions, such as passengers who live two hours away from an airport. Existing standards and requirements make additional baggage delivery and refunding standards unnecessary. The Department points to no market failure or deceptive practice to justify proposed additional baggage fee and service regulations. Higher costs to meet a standard and fines for failure to comply will increase the cost of tickets and bag carriage for all passengers. Finally, it is not clear the Department has the authority to prescriptively regulate standards for baggage delivery. DOT cites no express authority for such action.

E. Refunding Tickets

Question: With regard to providing prompt refunds, we seek comment on whether we should also include as a standard that carriers refund ticketed passengers, including those with non-refundable tickets, for flights that are canceled or significantly delayed if the passenger chooses not to travel as a result of the travel disruption.[75]

ATA comment: ATA opposes a requirement that carriers automatically refund non-refundable tickets when a passenger decides not to travel, especially when the cause of the delay is out of the carrier's control and usually caused by weather or an inadequate government operated ATC system. In most cases passengers from a canceled flight are accommodated on another flight soon after the originally scheduled flight. In many other cases carriers issue weather waivers to allow free rebooking. The terms and conditions of when a carrier will refund a ticket (whether refundable or not), including when and under what circumstances such terms and conditions may be waived by the carrier, are best left to the marketplace and individual carrier policies. Today, passengers have a choice in carrier and ticket price when choosing the type of ticket they purchase; imposing mandatory refunds in every instance when a *passenger* chooses not to fly would essentially convert all tickets in cancel or delay situations to fully refundable tickets. DOT is not authorized to interfere in the marketplace in this manner. For example, if a passenger holding a non-refundable ticket is on a flight that returns to a gate to meet the

[74] 75 Fed. Reg. 32323.
[75] 75 Fed. Reg. 32323.

Department's 3-hour tarmac delay rule and the customer chooses to not travel, the carrier should have the *option* of refunding the ticket or accommodating the passenger by some other means rather than mandating only a refund. Further complications arise when the passenger is mid-journey. This regulatory effort to redefine restricted tickets as fully refundable tickets even in many instances when cancellation is desirable (such as proactive cancellation due to impending weather) or required by government order, would impose obligations not present in any other mode of transportation or consumer service industry. We accept that the Department may require carriers to disclose the terms and conditions of refundable or non-refundable tickets, but mandating when those tickets must be refunded limits the types and prices of tickets available in the marketplace, which reduces competition and is not in the public's best interest. Disclosing of carrier refunding and ticket policies should be enough information for passengers to choose the best option for them in an open market. Limiting the carrier's ability to sell non-refundable tickets, impacts how tickets are priced, is beyond the Department's statutory authority post deregulation, and will cause prices to rise for all consumers.

Question: The Department's Aviation Enforcement Office has issued notices in the past advising airlines that it would be an unfair and deceptive practice in violation of 49 USC 41712 for a carrier to apply its non-refundability provision in the event of a significant change in scheduled departure or arrival time, whether it be due to carrier action or a matter out of the carrier's control, including "acts of god." We request comment on the methodology for defining a significant delay in the event such a standard is adopted. Should the Department establish a bright line rule that any delay of 3 hours or more is a significant delay? Should the determination of whether a flight has been significantly delayed be based on the duration of the flight (e.g., is 3 hours a significant delay on flights of two hours or less and 4 hours a significant delay on flights of more than two hours)?[76]

ATA Comment: ATA members oppose any definition of "significant delay" that would essentially create a single government standard and eliminate carrier latitude to create policies on non-refundable tickets that serve customer and commercial needs. As stated above, the application of non-refundable tickets and carrier policies to re-accommodate passengers during an event beyond the carrier's control is best left to the marketplace in a deregulated industry, which will leave customers with more ticketing options. Assigning arbitrary time limits with no basis, and without reference to unique circumstances in place at major airports, would permanently supplant carrier policies that are based on market factors. There is no evidence that customers would prefer a government mandate restricting their options instead of open marketplace options. By regulating in this area, the Department would impede carrier efforts to accommodate delayed passengers on other flights, drive system inefficiencies, create incentives for passengers to change travel plans after a flight has already begun, and degrade service. As DOT is aware, "significant" delays are almost always driven by factors beyond carriers' control such as ATC, weather or mechanical failures and carriers should not be forced to provide automatic refunds in all situations.

Question: As for the customer service commitment to provide prompt refunds where ticket refunds are due, we invite comment on whether it is necessary to include as a standard the requirement that when a flight is cancelled carriers must refund not only the ticket price but also any optional fees charged to a passenger for that flight (e.g., baggage fees, "service charges" for use of frequent flyer miles when the

[76] 75 Fed. Reg. 32323.

flight is canceled by the carrier). Irrespective of whether such a standard is included in a carrier's customer service commitment, the Department would view a carrier's failure to provide a prompt refund to a passenger of the ticket price and related optional fees when a flight is canceled to be an unfair and deceptive practice.[77]

ATA Comment: The idea that flight cancellations are a form of poor passenger service that requires automatic compensation to passengers is unfounded and unwarranted. As the Department is aware, thousands of flights are cancelled each month for many reasons, sometimes well in advance of the travel date including minor retiming, flight number changes and a host of other reasons inconsequential to the traveler. In fact, in some cases the Department encourages proactive cancellations, such as during anticipated or actual severe weather. Frequently the passenger who originally booked on a cancelled flight will travel on a different flight, just an hour before or after the cancelled flight or was given a free weather waiver or other accommodation.

ATA members object to the Department's concept that cancellation in itself should create a right to the refund of optional fees. First, and critically, the Department should clarify that a carrier has the opportunity to accommodate a passenger with other transportation options after a cancellation, instead of automatically refunding a ticket and ancillary fees. Second, the Department should clarify that "where ticket refunds are due" includes only those situations where the passenger is unable to fly due to the carrier's decision to cancel. The most likely scenario is the carrier would accommodate the passenger on another flight. In this case, the passenger travels on a different flight than originally scheduled and both the travel and any services are provided as agreed. Third, if the Department decides to adopt this proposal it should clarify that not all optional fees must necessarily be returned to the passenger; there are a host of services or situations where passenger actions or ticket conditions would not justify the return of a fee. For example, before a flight is canceled a passenger may have opted to purchase food and drink onboard the airplane and already consumed it (this example does not apply to the situation where a carrier is required to provide food and water after a two hour tarmac delay) or the passenger may have called a reservation line incurring a fee, which is a service already consumed. Requiring a fee refund for consumed services does not make sense. As the Department is aware, any excessive obligation to refund fees increases costs to all passengers who purchase services.

Accordingly, ATA members object to a rule that flight cancelations automatically trigger a refund and doubt the Department has the authority to impose such a rule. We request that the Department adopt a narrower definition of "optional fee" refunds, such as fees for services provided by the airline that the passenger has not used because of the carrier's cancellation of a flight. Where refunds are due, carriers already refund promptly in compliance with existing regulations and as a function of customer first commitments.

[77] 75 Fed. Reg. 32323.

F. Social Networking Media

Question: In particular, we are soliciting comments on any operational difficulties U.S. and foreign airlines may face in responding to consumer complaints received through social networking mediums such as Facebook or Twitter. Do airlines currently communicate to customers and prospective customers through social networking mediums?[78]

ATA Comment: The Department has already addressed the topic of consumer complaints received through social networking media in guidance issued on April 8, 2010, concerning the final rule issued in December. In that guidance the Department stated:

> …as a matter of enforcement policy, the Department's Aviation Enforcement Office will not take action against carriers that do not respond to complaints sent through Twitter or posted on their Facebook wall so long as: (1) the carriers' Twitter page and Facebook page clearly indicate that it will not reply to such complaints, and (2) on that page the carrier directs the consumer to the mailing address and e-mail or website location for filing written complaints. The office is adopting this policy because, upon further review of the purpose and use of Twitter and postings on the wall of Facebook, the Aviation Enforcement Office believes that the word "written" in the definition of a complaint was not intended to apply to such social networking sites but rather to refer to the traditional one-on-one methods of text communication (e.g. a letter, email, printed complaint form, or internet complaint form). With respect to the email component of Facebook, a carrier must respond to consumer complaints sent to its Facebook email account and the Aviation Enforcement Office will take action against carriers that fail to do so.[79]

This guidance adequately addresses the issue of consumer postings on social networking media. As the Department notes, the consumer complaint regulation was never intended to apply to this type of social network. Some carriers have in excess of one million subscribers from various sites and face a constant stream of postings, many of which are not easily categorized as complaints. In addition, it is impossible to identify many members of these networks or ensure that they receive a response given the limited information carriers have of network members.

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[78] 75 Fed. Reg. 32325.

[79] See http://airconsumer.ost.dot.gov/rules/FAQ%20on%20Consumer%20Rule%20April%2028%202010.pdf page 11, question 39.

G. Verbal Disclosures at Departure

ATA members oppose the proposal to verbally inform passengers of DBC policies because of the conflict between providing tailored information to each passenger potentially denied boarding while trying to board passengers and achieve an on-time departure. It is impractical to expect gate agents to explain boarding priority policies and transportation restrictions to passengers during the labor-intense, time pressured boarding process of very full flights when such policies are already provided to the customer in writing. The Department has not provided any evidence that current methods of communication, namely the written explanation gate agents give to IDB and VDB passengers are insufficient or ineffective. The Department's proposal would, in practice, have gate agents reading out loud the written statement to passengers. These additional verbal disclosures tailored to individual passengers in DBC situations would not benefit passengers because doing so will result in deteriorated on-time performance and lost time by passengers as flights are delayed to permit the verbal disclosure the Department contemplates.

Question: We ask for comment on our proposals here as well as on whether there are any other forms of notice that might better inform passengers being requested to volunteer to be bumped, or those involuntarily bumped, of their rights and carriers' obligations.[80]

ATA Comment: Information contained in carrier written notices and posted on the Department's and carrier's websites provide sufficient notice. Additional data disclosure, especially if individualized to a particular passenger, at the gate near the departure time would result in reduced on-time performance.

Question: Thus for a passenger who is considering rejecting the volunteer offer in hopes of receiving involuntary DBC, it is material to know how likely it is, if involuntarily denied boarding, that the passenger's delay would exceed the one/two/four hour(s) limits. We seek comments on whether we should require this disclosure to every passenger the carrier solicits to volunteer and if so, what form, e.g., verbal or written, the disclosure should take.[81]

ATA Comment: DOT should not amend the DBC disclosure requirements, as doing so would delay the process of identifying willing volunteers and the general boarding and departure process, especially if several verbal disclosures are required for each individual solicited volunteer. Requiring verbal disclosures also creates enforcement and compliance problems, since it would be difficult to prove that verbal disclosures were or were not given. The additional employee time required to investigate alternative transportation options and provide all of the Department's proposed verbal notices at a critical time when the gate agent is trying to close the airplane door would result in delayed flights with no offsetting customer benefit by being verbally told something they already have in writing.

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80 75 Fed. Reg. 32326.

81 75 Fed. Reg. 32327.

H. Prohibiting Oversales on Smaller Aircraft

Question: We are also considering expanding the applicability of the oversales rule to the operations of U.S. certificated and commuter carriers and foreign carriers using aircraft originally designed for 19 or more seats. ...We have concerns that many carriers use code-share partners for their connecting services to smaller points, some of whom operate aircraft with 19-29 seats. Such flight segments are not covered by Part 250, but are associated with the identity of a large carrier and many, if not most, are "fee for service" flights under the total control of the large carrier, which controls booking. Should we allow those flights to be oversold at all? If we do, should Part 250 be applicable in its entirety?[82]

ATA Comment: The Department should continue to allow oversales of all scheduled passenger flights to preserve competition and flexible travel options for passengers. Permitting the latitude to oversell smaller aircraft helps to ensure the financial viability of what are frequently economically marginal air services. A blanket prohibition on small aircraft oversales would threaten the existence of such services. Moreover, imposing costly IDBC rules for smaller airplanes would mean that carriers will underutilize assets by operating with additional empty seats, which may lead to reduction or elimination of service, especially to small communities, further limiting passenger travel options, which are already limited by reduced schedules. Doing so likely would force higher fares with less service and fewer seats. Prohibiting oversales may also force carriers to charge passengers a "no show" fee, which could prevent a passenger from ever using the ticket again. Finally, it is not clear DOT has the legal authority to regulate what amounts to a pricing decision.

I. Peanut Allergies

At this time, we are considering the following alternatives to provide greater access to air travel for individuals with severe peanut allergies: (1) banning the serving of peanuts and all peanut products by both U.S. and foreign carriers on flights covered by DOT's disability rule; (2) banning the serving of peanuts and all peanut products on all such flights where a passenger with a peanut allergy is on board and has requested a peanut-free flight in advance; or (3) requiring a peanut-free buffer zone in the immediate area of a passenger with a medically documented severe allergy to peanuts if a passenger has requested a peanut-free flight in advance. We seek comment on these approaches as well as the question of whether it would be preferable to maintain the current practice of not prescribing carrier practices concerning the serving of peanuts. We are particularly interested in hearing views on how peanuts and peanut products brought on board aircraft by passengers should be handled. How likely is it that a passenger with allergies to peanuts will have severe adverse health reactions by being exposed to the airborne transmission of peanut particles in an aircraft cabin (as opposed to ingesting peanuts orally)? Will taking certain specific steps to prepare for a flight (e.g., carrying an epinephrine auto-injector in order to immediately and aggressively treat an anaphylactic reaction) sufficiently protect individuals with severe peanut allergies? Who should be responsible for ensuring an epinephrine auto-injector is available on a flight – the passenger with a severe peanut allergy or the carrier? Is there recent scientific or anecdotal evidence of serious in-flight medical events related to the airborne transmission of peanut particles? Should any food item that contains peanuts be included within the definition of peanut

[82] 75 Fed. Reg. 32327.

products (e.g., peanut butter crackers, products containing peanut oil)? Is there a way of limiting this definition?[83]

ATA comment: ATA members do not support regulation in this area because it would be ineffective and costly to implement. A ban on serving peanut products is not equivalent to ensuring that a passenger will not be exposed to such products in flight as neither carriers nor the Department can prevent passengers from consuming peanut products before boarding or bringing peanuts and peanut products onboard. Peanuts and peanut products are sold and consumed in thousands of concessions or facilities at airports around the world. There is no conceivable, practical screening process that would ensure passengers do not bring peanut or peanut products onboard or that passengers who recently consumed peanut products do not have peanut oil or residue on their hands or clothing nor is it conceivable that the Department, TSA, carriers, or any other entity try to create one. In the absence of any regulatory mandate, carriers have developed policies to accommodate passengers with known peanut and other allergies which reduce the risk of inadvertent exposure to the allergen. Moreover, under FAA regulations all commercial passenger aircraft with more than nine seats are equipped with emergency medical kits containing injectable epinephrine that can be used in the rare instances in which someone does experience a severe allergic reaction. The Department should maintain its current policy of not prescribing carrier practices and allowing each carrier to set its own policy in this area. Finally, there is no indication that the Department or Congress has received "a peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact with very small airborne peanut particles of the kind that passengers might encounter in an aircraft" as cited in the Department's June 22 clarification notice and required by Public Law 106-69.[84] In fact, there is virtually no scientific evidence to support the underlying premise that peanut particles can and do become "airborne" in the aircraft cabin environment. As the Department recognized in its June 22 notice, it (and Congress) must receive such a scientific study before taking any further action on the regulation of peanuts on aircraft. Therefore, the Department cannot consider adopting any of the three options until it fulfills the requirements of Public Law 106-69.

V. Rules That Are Likely Illegal[85]

A. Incorporating Contingency Plans and Customer Service Plans into Contracts of Carriage

[83] 75 Fed. Reg. 32332.

[84] See Docket Number DOT-OST-2010-0140-0316.

[85] The proposals included in this section raise the most obvious legal concerns, e.g. the Department lacks statutory authority to regulate. However, as noted throughout our comments, we question the Department's authority to regulate in several other areas.

As in the tarmac delay rulemaking, which culminated in a regulation adopted less than six months before the current notice was published, ATA opposes the Department's proposal to require carriers to include the terms of their contingency plans in their contracts of carriage. ATA also opposes the Department's new proposal to require carriers to incorporate Department-prescribed customer service plans into their contracts of carriage. ATA opposes both proposals on three interrelated grounds.

First, the Department's proposals to create a private cause of action under contract law for violating a provision in a contingency plan or any of the terms of Department-prescribed customer service plans exceeds the Department's regulatory authority and contravenes Congress's choice of the appropriate enforcement mechanism for alleged violations of the Department's regulations or the consumer protection provisions of the statute. Courts have uniformly held that Congress neither created nor implied a private cause of action for alleged violations of the Department's rules against unfair or deceptive practices, *see* 49 U.S.C. § 41712, and the Supreme Court has made it abundantly clear that agencies cannot create by regulation a cause of action that Congress has declined to create by statute, *see Alexander v. Sandoval*, 532 U.S. 275, 291-292 (2001). Even more fundamentally, efforts to create a private cause of action as a means of enforcing section 41712 would be inconsistent with the enforcement mechanism that Congress *did* create—namely, one in which *the Department* exercises both the authority and the responsibility to fashion and enforce appropriate rules against unfair practices in commercial aviation.

Second, the actions the Department is proposing to take cannot be squared with the terms of the statute. The law permits the Secretary to order air carriers to "stop" engaging in any action the Secretary finds to be "an unfair or deceptive practice or an unfair method of competition." 49 U.S.C. § 41712. To date, however, the Department has failed to identify any theory under which tarmac delays would violate section 41712. Yet, even if tarmac delays were deemed to be an unfair or deceptive practice, and even if failing to have a well-publicized contingency plan to deal with tarmac delays were an unfair practice, it stretches the words of the statute beyond their meaning to contend that failing to incorporate an already well-publicized plan for tarmac delay into the contract of carriage constitutes an unfair or deceptive practice. This is equally true of the proposed requirement to include Department-prescribed customer service plans in contracts of carriage. Indeed, the Department offers no explanation for how an airline's failure to incorporate these proposed regulatory requirements into its contract of carriage—which is a unilateral offer of the terms on which a carrier is willing to provide service—could constitute the kind of "practice" contemplated by the statute, especially in light of the injunctive relief that section 41712 specifies as its exclusive remedy. However broadly the terms of section 41712 might be read, they cannot be read to reach the supposed practice of failing to incorporate contingency or customer service plans in the contract of carriage.

Third, the record is devoid of evidence supporting the proposed regulations and is laden with reasons to avoid adopting them. The Secretary has suggested that incorporating contingency plans (and customer service plans) into the contract of carriage will help make passengers more aware of their rights, but both the contingency plan (and service plan) and the contract are available on carrier websites, and no evidence suggests that consumers are better aware of contract terms than plan terms. Nor is there any indication that Departmental enforcement proceedings—and the substantial penalties they can entail—are insufficient to deter carrier violations of contingency or government-mandated service plans. To the contrary, the threat of class action proceedings may entice carriers to weaken their plan terms before incorporating them into the contract of carriage, or carriers may adhere too strictly to the maximum delay terms, worried about the costs of class-action discovery and the risk of convincing a

jury, rather than the Secretary, that "there [was] a safety-related or security-related impediment to deplaning passengers." Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983, 68,987 (Dec. 30, 2009). At a minimum, the record contains nothing that would justify the Secretary's abandonment of his decision, reached a mere six months before this new round of rulemaking commenced, to make incorporation voluntary and to assess the success of that approach in providing sufficient protection to air passengers before considering whether any additional regulatory action may be required.

In general, ATA is concerned about two related, problematic turns in the Department's development of national transportation policy, embodied in these proposals, to require the inclusion of particular terms in carriers' contracts of carriage. The first is a willingness on the Department's part affirmatively to regulate the commercial terms that carriers *must offer* to their customers, rather than cautiously to police the marketplace for terms that carriers *must not* offer because they are deceptive or unfair. Such prescriptive regulation ofindustry behavior represents a step backwards towards the regulated-industry scheme that Congress rejected in the Airline Deregulation Act more than 30 years ago and is inconsistent with the Department's proscriptive authority under §41712 . The second is an abdication of the Department's authority and responsibility to assess alleged violations in their unique factual contexts, and to exercise the discretion granted and intended by Congress to decide whether enforcement action—either injunctive relief or monetary penalties—is warranted. ATA members have every incentive to treat their customers fairly (and indeed do) and to avoid delays, and the Department should trust those incentives—together with the Department's own substantial oversight authority—to ensure that carriers comply with the requirements of contingency (or customer service) plans. The Department, meanwhile, has an important public policy role to play in determining when certain decisions by carriers and their pilots are consistent with safety and the public interest. Inserting the private, class-action bar into the judgment calls of carriers and their pilots will serve only to increase the costs of doing business in a way that is bad for carriers and consumers alike, and to distort existing incentives to supply passengers with the safest, timeliest, and most comfortable service possible at the lowest possible price.

1. DOT Lacks the Authority to Create a Private Cause of Action in Contract for Violating the Terms of a Contingency (or Government-Mandated Service) Plan.

Section 41712 neither creates nor implies a private cause of action. In the words of the Sixth Circuit, "[e]very court faced with the question of whether a consumer protection provision of the [Airline Deregulation Act] allows the implication of a private right of action against an airline has answered the question in the negative." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1252 (6th Cir. 1996) (collecting cases). The various Courts of Appeals to consider the matter have broadly held that there is no private cause of action, express or implied, in section 41712 or any other consumer section of the Act.[86] Indeed, far from creating an "especial benefit" for a specific class as

[86] *See*, *e.g.*, *Statland v. American Airlines*, *Inc.*, 998 F.2d 539, 541 (7th Cir. 1993) ([§ 411, later renumbered § 41712] "does not create a private right to sue"); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 408 (9th Cir. 1983) ("Federal Aviation Act does not contain an implied private right of action."); *Wolf v. Trans World Airlines*, 544 F.2d 134, 136 (3d Cir. 1976) ("[§ 41712's statutory predecessor] does not create a private right to sue"); *Polansky v. Trans World Airlines*, 523 F.2d 332, 338-40 (3d Cir. 1975) (same); *see also Casas v American Airlines*, 304 F.3d 517, 523 (5th Cir. 2002) (no private right of action under Airline Deregulation Act); *Musson Theatrical*, 89 F.3d at 1252 (same); *Hodges v. Delta Airlines*, *Inc.*, 44 F.3d 334, 340 n. 13 (5th Cir. 1995) (en banc) (same); *Montauk-Caribbean Airways*, *Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986) (no private right of action under

required for the implication of a private cause of action, *see, e.g.*, *Cort v. Ash*, 422 U.S. 66, 78 (1975), section 41712 "is expressly premised on a finding that the '*public* interest' is involved," and so "'may not [be used] to vindicate private rights.'" *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 302 (1976) (quoting *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 83 (1956)) (emphasis added).[87] This leads to the unavoidable conclusion that Congress did not create a private right of action under section 41712.

The legal issue at stake in these proposals thus resolves into the narrow but fundamental question of whether an administrative agency may create a cause of action that Congress did not. The answer to that question is plainly no. This is especially so where, as here, Congress specifically decided to vest the agency with the authority and responsibility to distinguish between reasonable measures and unfair or deceptive practices, and to take action against the latter only "in the public interest." At base, creating a private cause of action under section 41712 that bypasses any review by the Secretary would inescapably entail an abdication of the Secretary's responsibility to assess the public interest before initiating a proceeding for unfair or deceptive practices.

a) The Supreme Court Has Expressly Held That an Agency Cannot Create a Private Cause of Action That Congress Did Not.

The Department's effort to create a private cause of action is squarely at odds with Supreme Court precedent. In *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), the Supreme Court held that where a statute itself does not explicitly or implicitly provide for a private right of action, an administrative agency enforcing that statute cannot create a private judicial enforcement mechanism by regulation. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id.* As the Court made clear:

> Language in a regulation may invoke a private right of action that Congress through statutory text created, but *it may not create a right that Congress has not*. . . . [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Id. at 291 (emphasis added). Here, no amount of dexterity will allow the Department to make a private cause of action appear out of a statute that has none. This is because Congress, not the agency, has the power to decide both the "substantive federal law" and "private rights of action" that will entitle a private party to recover in court.

The Court of Appeals for the Fifth Circuit has specifically affirmed this principle with respect to the Department of Transportation. In *Casas v. American Airlines*, 304 F.3d 517 (5th Cir. 2002), the plaintiff brought a class action against American Airlines for losing his video camera. At the time, American had a provision in its contract of carriage disclaiming all liability for valuables such as video cameras, but a Departmental regulation prevented American from limiting its liability for any lost

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the Federal Aviation Act); *Diefenthal v. CAB*, 681 F.2d 1039, 1047, 1048-50 (5th Cir. 1982) (in an action brought by commercial airline passenger, holding that no private right of action exists to enforce Federal Aviation Act provision requiring air carriers to maintain a certain level of service); *see also Angela Cummings, Inc. v. Purolator Courier Corp.*, 670 F. Supp. 92, 94 (S.D.N.Y. 1987).

[87] The Supreme Court has emphasized that "individual consumers are not even entitled to initiate proceedings under [§ 41712]" before the agency, let alone in court. *Nader*, 426 U.S. at 302.

property "'to an amount less than $1250 for each passenger.'" *Id.* at 520 (quoting 14 C.F.R. § 254.4). The district court had held that the plaintiff had a cause of action under the Department's regulation and that American's liability was limited only as to amounts over $1250 per passenger. The Court of Appeals readily rejected this position under *Sandoval*. *See id.* at 524. It did allow that the plaintiff had a cause of action under federal common law to seek recovery on the loss, but in finding that claim barred by American's liability limitation, the Court of Appeals articulated a holding that squarely covers these proposed regulations.

According to the Court of Appeals, the plaintiff's contention that American's liability limitation was contrary to the Department's regulation did not save his case. This was because:

> [t]o hold otherwise would be, in substance, to *craft a private right of action for violations of* 14 C.F.R. § 254.4—and thus to circumvent the conclusion that the [Airline Deregulation Act], and therefore the regulations enacted pursuant to it, creates no private right of action for the wrong of which Casas complains. Casas has not demonstrated that Congress intended to alter the contours of the federal common law in this way when it enacted the ADA.

Casas, 304 F.3d at 525 (emphasis added). In short, a regulatory provision from the Department cannot be allowed to dictate the terms of a contract between a carrier and a passenger in a civil case without running afoul of *Sandoval*'s rule against regulatory creation of causes of action. As a regulator and not a legislator, the Department simply lacks the power to do what it is proposing to do here.

b) The Department Cannot Abdicate to Plaintiffs' Lawyers the Authority and Responsibility Vested in the Secretary by Congress.

It is particularly inappropriate to create a private right of action to enforce the terms of contingency plans and government-mandated service plans—rather than to leave it to the Department to enforce those provisions itself—because Congress expressly conditioned the enforcement of section 41712 on the exercise of the sound discretion of the Secretary. The intent that the Departmental enforcement mechanism be exclusive is evident in the text and structure of the statute and is confirmed in numerous cases. Indeed, ATA's opposition to involving the private class-action bar and the contract doctrines of the several states in the regulation of these aspects of consumer protection is of a piece with ATA's continued support for the congressionally mandated role of the Department and the Federal government as the centralized authority for airline consumer protection and regulation. *See generally Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *West v. Northwest Airlines, Inc.*, 995 F. 2d 148 (9th Cir. 1993). The Department must not abdicate that authority in such a way as to create what "Congress obviously did not intend"—namely "a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 173 (1st Cir. 1989).

Congress has specified exactly how section 41712's prohibition on "unfair or deceptive practice[s]" should be enforced, relying exclusively on direct enforcement by the Secretary or by the Department of Justice acting on his behalf. Section 41712 itself gives the Secretary the authority to issue cease and desist orders. *See* 49 U.S.C. § 41712. The Secretary may also impose civil penalties for violations after providing notice and a hearing, *see id.* § 46301, and these penalties are explicitly limited by Congress to $2,500 per violation for an individual or small business and $25,000 per violation

otherwise, *id.* § 46301(a)(1), (a)(5)(D).[88] Congress further authorized the Department to bring a civil action in federal district court to enforce the statutes it administers and any implementing regulations, or to request that the Attorney General bring an action for the same purpose. *Id.* §§ 46106, 46107(b)(1)(A). Yet, while Congress did permit private parties to file written complaints with the Secretary alleging unfair or deceptive practices by airlines, *see id.* § 46101(a), Congress did not permit private parties to sue for violations of section 41712 in court—in clear contrast to other related statutory provisions in which Congress did expressly allow private suits, *see, e.g.*, *id.* § 46108 (permitting interested persons to bring a civil action in federal court to enforce the statutory provision requiring air carriers to hold a Department of Transportation certificate).

Numerous courts have held that the Department-directed enforcement mechanism that Congress specified is *exclusive* and have refused, for that reason, to permit private parties to go to court to enforce section 41712. These decisions recognize that Congress would not have gone to such great lengths to specify multiple enforcement mechanisms—all of which rely on Departmental action or direction—if it had also intended to allow private parties to circumvent those mechanisms. *See, e.g.*, *Casas*, 304 F.3d at 522-523 (finding no evidence in the legislative history that Congress intended to allow private judicial enforcement, and noting that "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 407 (9th Cir. 1983) ("Because of the [Federal Aviation] Act's emphasis on administrative regulation and enforcement, we conclude that it is highly improbable that Congress absentmindedly forgot to mention an intended private action." (internal quotations and citations omitted)); *Diefenthal v. CAB,* 681 F.2d 1039, 1049 (5th Cir. 1982) ("When Congress has established a detailed enforcement scheme [for the Federal Aviation Act] which expressly provides a private right of action for violations of specific provisions, that is a strong indication that Congress did not intend to provide private litigants with a means of redressing violations of other sections of the Act.").

These precedents further acknowledge that judicial enforcement by private parties would be inconsistent with the enforcement mechanisms that Congress specified. *See Polansky v. Trans World Airlines*, 523 F. 2d 332, 339 (3d Cir. 1975) (refusing to find a private cause of action under statute giving the Civil Aeronautics Board the authority to prevent unfair or deceptive methods of competition, in part because "[t]he considerable discretion required in weighing the public interest can best be exercised by an agency knowledgeable in all aspects of the regulated airline industry."); *Diefenthal*, 681 F.2d at 1050. Indeed, private enforcement is inconsistent with the very terms of the statute, which require the Secretary to consider whether action is in "the public interest," rather than in the interest of particular parties. *See Nader*, 426 U.S. at 302.

Revealingly, it has long been *the Department's own position* that allowing private enforcement of Section 41712 conflicts with the Secretary's responsibility to assess the public interest. Before the Court of Appeals for the Fifth Circuit in *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), the Department argued that private judicial enforcement of section 41712 is inconsistent with a legislative scheme designed to give the Secretary authority over the direction and development of enforcement policy:

[88] These amounts are adjusted periodically pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, and now stand at $27,500 for other than small businesses.

> [A]llowing private enforcement actions would risk interfering with Congress's intent to exercise discretion in determining whether and how to take action against particular business practices. The statute provides that "if the Secretary considers it is in the public interest," he may investigate and restrain a particular unfair or deceptive practice. 49 U.S.C. § 41712. These provisions are intended to give the Secretary enforcement discretion and some flexibility in fashioning an appropriate remedy. *See Nader*, 426 U.S. at 302. Private suits would arguably interfere with the exercise of such discretion.

Brief for the United States as Amicus Curiae at 12, *Sam L. Majors Jewelers*, 117 F.3d 922 (No. 96-50146), 1997 WL 33560672.

The Department should recognize the force of its own logic and abstain from inviting second guessing by plaintiffs' attorneys and state court juries of safety and service decisions best left to experienced pilots—subject, of course, to the regulatory oversight mechanisms that Congress created. Maintaining its traditional role as policeman rather than legislating rules for private plaintiffs to enforce ensures that the Department remains within its regulatory authority and conforms to Congress's express intent regarding the proper method of enforcement against unfair and deceptive practices. Section 41712 requires that the investigation of whether a particular practice is unfair or deceptive be undertaken in "the public interest." Attempting to pass that judgment off to private litigation not only violates the rule against regulatory invention of causes of action, but also abdicates the responsibility that Congress specifically entrusted to the Department, and so violates the statute.

2. The Terms of the Statute Do Not Permit the Department to Label the Failure To Incorporate a Ground Delay Contingency Plan or a Government-Mandated Customer Service Plan into the Contract of Carriage an "Unfair or Deceptive Practice."

Although an agency often has some latitude in the interpretation of broadly phrased statutory provisions, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Department's proposal would improperly supplant the administrative, case-by-case process contemplated by section 41712. Moreover, the proposal would stretch the phrase "unfair or deceptive practice" well beyond any reasonable construction of the statute. This is so for three reasons. *First*, there is nothing unfair or deceptive—and the Secretary has thus far articulated nothing unfair or deceptive—about failing to incorporate into a contract of carriage a contingency plan or other government-mandated service plan that is already fully enforceable by the Department through cease and desist orders and substantial civil penalties. *Second*, failing to incorporate the largely mandatory terms of a contingency plan into the contract of carriage cannot be an "unfair or deceptive practice" because it is not a practice at all within the meaning of section 41712, especially in light of the injunctive enforcement mechanism contemplated by the statute. *Third*, interpreting the phrase in a manner that allows the Department to dictate common contract terms that every airline must affirmatively offer runs directly counter to the policy of the Airline Deregulation Act to "rely[] on actual and potential competition to provide efficiency, innovation, and low prices and to decide on the variety and quality of . . . air transportation services." 49 U.S.C. § 40101(a)(12).

a) Failing to Incorporate Contingency Plans and Government-Mandated Service Plans into Contracts of Carriage Is Neither Unfair Nor Deceptive.

The Department's sole explanation for its authority to implement its proposal is that its "broad authority under 49 U.S.C. 41712 to prohibit unfair and deceptive practices encompasses this power." Enhancing Airline Passenger Protections, 73 Fed. Reg. 74,586, 74,590 (Dec. 8, 2008). The Department has yet to explain, however, why the failure to incorporate a contingency plan or customer service plan into a contract of carriage would be "unfair or deceptive"—or even whether it considers that failure to be "unfair," or "deceptive," or both. It is neither.

First, failure to incorporate these plans into the contract is in no way deceptive. Assuming the Department proceeds to mandate the terms of carriers' customer service plans, neither plan would make any promise or hold out or advertise any service to passengers that the airline is not obligated to provide. Indeed, under the most recent rule, the Department has already specified that "failure to comply with the assurances required by this rule and as contained in [a] Contingency Plan for Lengthy Tarmac Delays will be considered an unfair and deceptive practice . . . subject to enforcement action by the Department." 74 Fed. Reg. at 69,003. Thus, carriers are already obligated to comply with the terms of a contingency plan, making it extremely difficult even to hypothesize a customer who could be deceived about the obligations of the carrier. To be able to show deception, the Department would have to assume that there are passengers who: (1) review the contract to know their rights; (2) also review the contingency (and service) plans; (3) fail to appreciate that the guarantees in the contract are different from the guarantees in the contingency (and service) plans; and (4) mistakenly believe that if a carrier fails to adhere to the terms of its customer service or contingency plan that the passenger has a cause of action against the carrier for breach of contract. Unsurprisingly, the record is utterly devoid of any indication that even one such passenger exists.[89] To construe "deceptive practice" to capture the failure to incorporate a contingency (or prescribed service) plan into the contract of carriage is accordingly unreasonable and unambiguously contrary to the statute.

For similar reasons, there is no apparent sense in which the failure to incorporate the contingency (or prescribed service) plan into a contract is "unfair." Passengers subject to contingency plans are protected by the prospect of Departmental enforcement; the existing rule already guarantees them substantial protections in the event of ground delay with civil penalties available as a sanction if a carrier falls short of what the plan requires. The underlying unfairness (if there is any) is the ground delay itself. It is not at all clear why it is unfair to passengers to provide them with a regulatory guarantee against such delay—that is, Departmental enforcement through imposition of substantial civil penalties and the entry of a cease and desist order—rather than a guarantee enforceable through an action for breach of contract. Indeed, the fact that Congress provided for regulatory enforcement of section 41712 and failed to provide a separate, private cause of action demonstrates that Congress did not believe that there was anything inherently "unfair" in this remedial structure.

The Code of Federal Regulations, moreover, is replete with consumer and employee protection provisions that are subject only to administrative enforcement, including—in a noteworthy example—the drug-testing regulations of the Federal Aviation Administration. *See Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996) (holding that an employee has no private right of action to enforce drug-testing regulations). There is thus nothing unfair about such an enforcement system, and the Department cannot use section 41712 to transmute every regulation into a private cause of action by

[89] In fact, as discussed below, *infra* Section I.C.3., all the record evidence suggests the exact opposite.

declaring it "unfair" not to incorporate that regulation into the terms of a service or employment contract.

Section 41712 is concerned with instances of unfair or deceptive behavior by air carriers; it is not an all-purpose invitation to the Department to announce best practices and to require carriers to incorporate them into their contracts. The Department cannot bootstrap its finding that lengthy ground delays are unfair to passengers into a finding that failing to incorporate a contingency plan for dealing with lengthy ground delay into the contract of carriage is also unfair to passengers. And it certainly cannot do so absent a *specific* account of why that failure to so incorporate the contingency (or prescribed service) plan is unfair in itself. Such an account is absent from the record, likely because the words "unfair or deceptive" simply cannot be read to apply here.

b) Failure to Incorporate Contingency (or Prescribed Service)Plans into Contracts of Carriage Is Not the Kind of Practice the Secretary Can Enjoin Under Section 41712.

The Department's proposal reflects an overly expansive reading not only of the terms "unfair or deceptive," but of the very statutory concept of an "unfair or deceptive *practice*." According to the Department's apparent theory, carriers are currently engaged in the "practice" of having contingency plans for lengthy ground delay while failing to incorporate them into their contracts of carriage. The Department's remedy is not to order carriers to "stop" doing anything, 49 U.S.C. § 41712, but rather to order them to *start* incorporating contingency (and other prescribed customer service) plans in their contracts. This is contrary to the plain terms of the statute. When combined with the Department's overly expansive reading of "unfair or deceptive," this interpretation would allow the Department not merely to police the market for occasional misconduct, but instead to prescribe the precise rules for doing business.

The specific terms and articulated enforcement mechanism of section 41712 are instructive in this regard. The statute provides that:

> [i]f the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall *order the air carrier, foreign air carrier, or ticket agent to stop the practice or method*.

49 U.S.C. § 41712 (emphasis added). The terms of the statute contemplate a "practice" that the carrier is "engaged in" and that the Secretary may order it to "stop," rather than the other way around. The Secretary's power is primarily injunctive—he has the power to identify and root out certain actions that carriers are taking that are unfair or deceptive to consumers. This power does not include the authority to dictate that carriers *add* provisions to their contracts of carriage that the Department simply believes may be beneficial to passengers but that do not alter the underlying regulatory obligations of the carriers. The ability to prescribe the commercial terms on which carriers and passengers will do business is an exceedingly broad and powerful regulatory authority. Congress would not have created it in such a peculiar, and seemingly unlimited, way. Indeed, the words of the statute indicate that Congress intended to create the exact opposite kind of scheme.

c) The Department's Interpretation Is Directly Contrary to Congress's Goal of Airline Deregulation.

While contingency plans for ground delay are a narrow subject matter, the authority that the Department is claiming is at bottom a broad and sweeping regulatory power that is fundamentally at odds with the Airline Deregulation Act. By combining an expansive vision of the terms "unfair or deceptive" with a willingness to dictate affirmative obligations rather than enjoin particular "practices," the Department essentially claims the ability to use section 41712 to tell carriers the terms on which they must agree to provide service—in essence, to write (or re-write) the terms of every contract of carriage This represents a dramatic about-face from the congressional policy of allowing competition and consumer choice to dictate the practices that either fail or prevail in the marketplace of business ideas.

For over three decades, it has been the policy of the United States to "plac[e] maximum reliance on competitive market forces and on actual and potential competition," to "decide on the variety and quality of . . . air transportation" and to provide the necessary incentives for "efficiency, innovation, and low prices." 49 U.S.C. § 40101(a)(6), (12). Of course, Congress also recognized the need for regulatory oversight, and so empowered the Department to police the market for anticompetitive or anti-consumer abuses. The Department's proposal turns that scheme on its head, using it as a power to mandate terms the Secretary considers more beneficial rather than the power to enjoin unfair ones. The Department, however, is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n. 4 (1994). To treat section 41712 as an invitation to return to pervasive regulation is contrary to both the means and ends that Congress articulated, and so an unreasonable construction of the statute.

All of these objections apply with equal or greater force to the Department's off-handed references to its authority under section 41702 to ensure "safe and adequate transportation," *see, e.g.*, 75 Fed. Reg. 32,324. Of course, under *Sandoval*, the Department may no more create a cause of action through this provision than through any other. Yet the terms "safe and adequate" are even further removed from the contract issues under consideration than the terms "unfair and deceptive." Clearly, incorporation of contingency (or prescribed service) plans into contracts of carriage would have no effect on the safety or availability of air travel, especially where the relevant obligations are already fully enforceable by the Department through cease and desist orders and sizeable civil penalties. Nevertheless, the Department's position appears to be that section 41702 applies because a mandate over "safe and adequate transportation . . . clearly encompasses the regulation of contingency plans." 75 Fed. Reg. 32,324. Most importantly, the issue here is not the regulation of contingency plans but the regulation of contracts of carriage. Yet it is also important to note that the Department's position is nothing short of a bid to return to the days of pervasive regulation under the Civil Aeronautics Board. If the Department's most general mandate—to "ensure safe and adequate transportation"—gives it the power to dictate not the parameters of safe air travel but rather the commercial contract terms on which it is offered, Congress and the industry will have achieved very little in thirty years of airline deregulation.

3. The Department's Proposal is Unsupported by the Record and Contrary to Sound Public Policy.

Less than six months before initiating this round of rulemaking, the Department determined it was unnecessary to require the incorporation of contingency plans into contracts of carriage. *See* 74 Fed. Reg. at 68,989 ("[T]he Department has decided that it will not require such incorporation at this time. Instead, the Department strongly encourages carriers to incorporate the terms of their contingency plans in their contracts of carriage . . . . [and] will undertake a series of related measures to ensure the dissemination of information regarding each airline's contingency plans."). In the latest notice, the Department does not explain the reasons for its hasty change of direction. It does note that, in the previous rulemaking, it "indicated that it would address this issue in a future rulemaking and take into account, among other things, whether the voluntary incorporation of contingency plan terms had resulted in sufficient protections for air travelers." 75 Fed. Reg. 32,324. It also suggests that incorporation will be "an important means of providing notice to consumers of their rights, since that information will then be contained in a readily available source." *Id.* Yet the Department offers no basis to conclude that incorporation will lead to more informed customers, nor does it point to any evidence that the plan it adopted only six months prior to its latest proposal failed to provide "sufficient protections for air travelers." The Department, moreover, fails to offer any reasoned explanation for switching course so quickly and rejecting its prior determination that the decision whether to compel adoption of contingency plans should turn, at least in part, on the sufficiency of the protection actually achieved for consumers. Accordingly, the record does not support the Department's proposal; rather, incorporation will in fact undermine protections for air travel safety and convenience in two important respects. Thus, for the foregoing reasons, implementing the Department's proposal would be arbitrary and capricious.

a) The Record Fails to Justify Incorporation on Notice Grounds.

Attempting to justify its proposal, the Department has suggested that incorporating contingency plans into contracts of carriage would improve passenger notice. This claim is in tension with the facts. As of now, both the contingency plan and the contract of carriage are available in the exact same place: the carrier's website. *See* 14 C.F.R. § 259.6(b), (c) (requiring carriers to post both contract of carriage and contingency plan on the website). As of July of this year, not a single commenter at any stage of either this or the prior passenger protections rulemaking has suggested that passengers would better know their entitlements under the contingency plan if those entitlements were incorporated into the contract. To the contrary, all the commenters that have opined on the issue at any stage in these proceedings have suggested that "most passengers do not read the contract of carriage," Public Submission of Ryan P. Mikolajczyk, Comment on DOT-OST-2007-0022-0005 (DOT Nov. 28, 2007); that "a few passengers out of a thousand read the specific carrier's contract of carriage," Public Submission of Ryan McCord, Comment on DOT-OST-2007-0022-0220 (DOT Feb. 2, 2009); and that consumers often express uncertainty about rights even when they are contained in the contract of carriage, *see* Public Submission of Mindy A. Bockstein, NYSCPB, Comment on DOT-OST-2010-0140-0424 (DOT July 16, 2010) (noting that "several consumers have called . . . to ask what the rule is if they encounter a tarmac delay, or if they experience a problem such as lost luggage," despite the fact that baggage loss terms are among those contained within the contract). In short, the only record evidence available suggests the opposite of what the Department contends—namely, that requiring incorporation of contingency plans (available on carrier websites) into contracts of carriage (also available on the carrier websites) will do little if anything to improve consumer notice of contingency plan terms.

b) The Record Fails to Justify the Need for an Alternative Enforcement Mechanism.

The Department has also failed to explain why, after so little time and with virtually no actual experience with the new rule's application in real world settings, it became convinced that Departmental enforcement would provide inadequate protection for consumers. The Department has the authority to seek substantial monetary penalties. *See* 49 U.S.C. § 46301. Given the size of that sanction, and the strong commercial and operational incentives carriers already have to avoid ground delays, there is no indication that carriers have failed or will fail faithfully to implement their delay contingency plans. Indeed, there is not a single piece of record evidence suggesting that a private cause of action is necessary to shore up the Department's new—and still largely experimental—regime. Changing course so early is not only unsupported by the evidence, it also denies to carriers and to the Department the opportunity to show that the current regime is fully capable of protecting the interests of passengers.

Indeed, the Department's rapid change of course represents the very definition of "capricious" decision making. *See* 5 U.S.C. § 706(a). The Department's stated goal for airline contingency plans in its very recent rule was to ensure "sufficient protection for air travelers." 74 Fed. Reg. 68,989. In issuing the latest notice, the Department does not even endeavor to show that this goal has not been met. Instead, it merely notes that many carriers have declined to do voluntarily what the Department abstained from requiring them to do in its rule. The Department's apparent unwillingness to even consider the question of whether the scheme it already adopted has resulted in sufficient protection for air travelers undermines its explanation for *both* its initial decision to abstain from regulation and its current decision to reconsider. Rather than articulating a reasoned public policy goal and attempting to ensure that its chosen tactics serve that end, the Department appears to be choosing and changing its strategies on a whim.

Most notably, the Department's own public statements belie the need for any additional enforcement mechanisms with regard to tarmac delays. On September 13, 2010, the Department issued a press release indicating that tarmac delays over three hours had fallen between July 2009 and July 2010 by over 98%. *See* Press Release, U.S. Department of Transportation, Long Tarmac Delays in July Down Dramatically from Last Year (Sept. 13, 2010), *available at* http://www.dot.gov/affairs/2010/dot16810.html. According to the Department itself, July witnessed only three delays of three hours or more, all of which were attributable to severe electrical storms at O'Hare International Airport on July 23. The same year-over-year data for May and June indicated an even steeper fall in long-term tarmac delays. *Id.* Although the data substantiates the predication that maximum tarmac delay rules would lead to greater numbers of cancellations,[90] it also shows that the rules are achieving the end to which they were enacted, and that further action such as mandatory incorporation into contracts of carriage is completely unnecessary to achieve "sufficient protection for air travelers."

In sum, the Department has implemented a more efficient and less expensive mechanism of enforcing its recent ground delay rule, yet has failed to even allow that plan the chance to demonstrate its effectiveness. It would be a serious error to jump headlong into a class action lawsuit creating scheme that will raise costs for carriers and consumers with no offsetting benefits. There is no evidence

[90] The cancellation rate grew from 1.2 percent in July 2009 to 1.4 percent in July 2010, an increase of over 16%.

or other basis to support such a step and no reason to take it. The ATA thus respectfully submits that the Department should refrain from enacting this ill-considered, harmful and unlawful proposal.

B. Full Fare Advertising

The Department proposes to fundamentally change the advertising practices in the aviation industry by prohibiting sellers of air transportation, including ticket agents, from providing full disclosure of taxes and other government mandated charges in advertised prices. In addition, carriers seeking to advertise "each way" fares requiring a roundtrip purchase would have to prominently and conspicuously note in the advertisement the roundtrip requirement and could not advertise such flights as "one-way" fares. Also, sellers of air transportation would be prohibited from automatically including optional services in connection with air transportation (such as insurance or entertainment options) in the purchase price if the consumer fails to opt out.

ATA members fully support fare transparency but raise policy and legal objections to the Department's proposal that would require any advertising or solicitation by air carriers or agents to be one ticket price that includes all mandatory government taxes and fees. The original Full Fare Advertising rule was first issued in 1984.[91] Soon after the Department issued an enforcement statement clarifying that advertising a base fare with a separate listing of government taxes and fees meets the intent of the regulation.[92] This policy statement stood for 25 years and was reaffirmed in 2006 when the Department withdrew a proposal similar to this one. In the 2006 rulemaking the Department stated:

> We find the reasons for maintaining the status quo to be most compelling. As enforced, § 399.84 protects consumers, facilitates price comparison, fosters fare competition, and affords sellers an appropriate degree of freedom to innovate. We have reviewed the Federal Trade Commission's written policies on pricing activities, including its guidelines for activities on the Internet, and have concluded that our enforcement policy produces approximately the same balance between consumers' and sellers' needs as that which would result if air carriers were subject to the Commission's jurisdiction. It would therefore be poor public policy to weaken or abolish our rule only to have to work our way back to the present equilibrium, case by slow and costly case, via enforcement under section 41712.[93]

The Department continued…

> …comments fail to establish a rationale for undoing over 20 years of permitting exceptions to the rule's strict terms as a matter of enforcement policy. Strict enforcement of § 399.84 would still create marketing difficulties for sellers *without necessarily making prices more transparent to consumers.*[94] (Emphasis added).

In this NPRM, the Department suddenly proposes to reverse its longstanding and recently affirmed determination without any explanation of what has changed in the past four years to suddenly make current advertising practices unfair and deceptive. Simply declaring advertising practices unfair or

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91 49 Fed. Reg. 49440, December 20, 1984.

92 See 70 Fed. Reg. 73960, 73961, Price Advertising Notice of Proposed Rulemaking.

93 71 Fed. Reg. 55401, September 22, 2006, Price Advertising Withdrawal of Notice of Proposed Rulemaking.

94 Id. at 55402.

deceptive without some explanation, justification or basis in fact would be arbitrary and capricious. Without an identified unfair or deceptive trade practice the Department cannot rely on section 41712 as authority to propose this change.

In addition, as the Department mentioned in 2006, FTC advertising rules permit advertising without including government taxes and fees. Several industries present examples where market competition resulted in unbundling of prices and associated advertising to present consumers with more options. These industries include hotel,[95] telecommunications,[96] legal services,[97] brokerage,[98] pipelines,[99] automobile selling, leasing or renting, utilities,[100] and real estate. In several areas, the FTC has affirmed the lawfulness of unbundled advertising practices.[101] Given the wide and varied practice of unbundling services and advertising such services, it is not clear why the aviation industry should be treated differently and why the Department believes excluding taxes and fees until purchase is an unfair and deceptive practice contrary to the practice of these other industries This is especially concerning because the Department has consistently allowed posting of air transportation prices separate from government taxes and fees for the past 25 years and has not explained what has changed to reverse this longstanding practice

Contrary to the Department's stated claims, this proposal would actually provide less transparency than current advertising practices because the cost of providing one price inclusive of taxes and fees with additional information in "fine print" about taxes and fees, along with carrier concerns over enforcement, will effectively suppress information on government taxes and fees. This will provide the public with less, not more transparency. The Department's policy here does not meet the goal of the regulation, which is to provide full disclosure of a price for air transportation, not air transportation and all other fees an airline would not include in a price but for a government mandate to do so. This lack of transparency will be substantial. Government add-on fees and taxes can amount to more than 20% of the cost of a fare. The proposal would mask the amount of taxes and fees passengers must pay, and provide no consumer benefit. This restriction on advertising may also be an unconstitutional restriction on commercial free speech.[102]

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95 http://travel.yahoo.com/p-interests-35116808

96 http://www.fcc.gov/wcb/cpd/triennial_review/

97 http://www.civiljusticenetwork.org/pages/unbundled.html

98 http://bannronn.com/market_basics/us_brokers/online_discount_stock_broker.html

99 http://www.ferc.gov/legal/maj-ord-reg/land-docs/restruct.asp

100 http://www.energyvortex.com/energydictionary/unbundled_services.html

101 Automobile Leasing, http://business.ftc.gov/documents/bus18-advertising-consumer-leases; Automobile Renting, http://www.ftc.gov/opp/advocacy/1989/V890027.PDF; Real Estate Services (p3, p6), http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf

102 The Department's abandonment of more than 20 years of enforcement policy allowing the separate listing of taxes and fees imposed by governments on air travelers on a per passenger basis also raises serious concerns under the First Amendment, which protects commercial speech – expressions related solely to the economic interests of the speaker and its audience, *Virginia Pharmacy Bd. v. Virginia Citizen Consumer Council*, 725 U.S. 749, 762 (1976) – from unwarranted governmental regulation. *Id*. at 761-762. See also *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995), and *Greater New Orleans Broadcasting Assoc. Inc. v. United States*, 527 U.S. 173 (1999).

In *Central Hudson*, the Court adopted a four part test for assessing the constitutionality of restrictions imposed on commercial speech:

Special Aviation[103] Tax or Fee	1972	1992	1/1/2010
AIRPORT & AIRWAY TRUST FUND (FAA)			
Passenger Ticket Tax [1a] (domestic)	8.0%	10.0%	7.5%
Flight Segment Tax [1a] (domestic)	---	---	$3.70
Frequent Flyer Tax [2]	---	---	7.5%
International Departure Tax [3]	$3.00	$6.00	$16.10

> [whether the speech] concern[s] lawful activity and [is] not … misleading[,] whether the asserted governmental interest [in regulating the speech] is substantial[,] [and if both questions are answered in the affirmative,] … whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

> The Court extended First Amendment protections to commercial speech because:
>
> [c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interests in the fullest possible dissemination of information. In applying the First amendment to … [commercial speech, the Court has] rejected the highly paternalistic view that government has complete power to suppress or regulate [such] … speech.

Id. at 561-562 quoting *Virginia Pharmacy Bd.* (internal quotation marks omitted).

These are the very principles that led the Department to accept the separate listing of government-imposed taxes and fees that carriers are required to collect from passengers for remittance to the levying agency. As the Department explained,

[s]eparate listing of these charges is not deceptive because it informs consumers of the exact amount that will be collected and passed on to the government. The carrier retains no part of these charges. Not only is separate listing of these charges not deceptive, but we believe that passengers benefit from knowing how much they are paying to government entities apart from the fares they pay the carriers.

Clarification of Amendment of Exemption to Allow Separate Listing of Service Fees in Advertisements for Air Transportation, Order 88-8-2, August 2, 1988, at 3. *See also* Price Advertising, 54 Fed. Reg. 31,052, 31,053 (July 26, 1989) (with the separate listing of government-imposed taxes and fess, an ordinary person reading such an ad would be aware of the total amount to be paid for the transportation and would also be provided valuable information on government-imposed charges).

Although the First Amendment does not extend to commercial speech that does not "accurately inform the public about lawful activity," or is "more likely to deceive the public than to inform it[,]" *Central Hudson* at 563-564, the separate listing of government-imposed taxes and fees suffers from neither of these limiting characteristics, as the Department has previously acknowledged. Nor has the Department identified an important governmental interest that would be served by burdening carriers with restrictions on their ability to inform the public of the taxes and fees governments impose on air travel, as the Department's 1988 and 1989 discussions highlight. As such, the Department's sudden about face on the issue of the separate listing of such taxes and fees simply cannot be squared with the First Amendment protections accorded to truthful, non-deceptive commercial speech.

[103] See http://www.airlines.org/Economics/Taxes/Pages/GovTaxesandFeesonAirlineTravel.aspx

International Arrival Tax [3]	---	---	$16.10
Cargo Waybill Tax [1b] (domestic)	5.0%	6.25%	6.25%
Commercial Jet Fuel Tax (domestic)	---	---	4.3¢
Noncommercial Jet Fuel Tax (domestic)	7.0¢	17.5¢	21.8¢
Noncommercial AvGas Tax (domestic)	7.0¢	15.0¢	19.3¢
ENVIRONMENTAL PROTECTION AGENCY (EPA)			
LUST Fuel Tax [4] (domestic)	---	0.1¢	0.1¢
LOCAL AIRPORT PROJECTS			
Passenger Facility Charge	---	Up to $3.00	Up to $4.50
DEPARTMENT OF HOMELAND SECURITY (DHS)			
September 11th Security Fee [5]	---	---	$2.50
Aviation Security Infrastructure Fee [6]	---	---	Varies
APHIS Passenger Fee [7]	---	$2.00	$5.00
APHIS Aircraft Fee [7]	---	$76.75	$70.50
Customs User Fee [8]	---	$5.00	$5.50
Immigration User Fee [9]	---	$5.00	$7.00

Including all taxes and fees in an advertised price would also impact carrier competition because fees vary from airport to airport. Carriers that operate from airports with higher or additional fees would be at a competitive disadvantage to carriers operating at nearby airports with lower fees. The only truly comparable price is the base fare. In addition, carriers providing routing with multiple legs will be disadvantaged compared to carriers providing direct service because all taxes and fees from each airport would have to be included in the advertised price, making it artificially higher. Disadvantaging multiple leg routings could impact service to smaller communities; if direct flights are favored carriers may opt to provide more service to larger hubs and provide less frequent or no service to smaller communities. For carriers to be asked to provide a fare that includes government imposed taxes and fees appears to be an attempt by the Department to hide the fact that airline passengers pay high taxes and fees for air travel, which is already taxed more than alcohol, tobacco and firearms.

Finally, this proposal will drive carrier direct costs by requiring additional route pricing analysis to determine if each route is viable. This additional analysis will be separate and distinct from any pricing analysis that airlines currently undertake and will drive significant costs. Carrier marketing departments would also have to spend additional time determining how best to advertise within the prescriptive proposal. Carriers would also have to make internal programming changes, website changes, and expend audit and compliance resources to test and ensure compliance with the new rule.

Question: We also seek comment on the costs and benefits of requiring that two prices be provided in certain air fare advertising – the full fare, including all mandatory charges, as well as that full fare plus the cost of baggage charges that traditionally have been included in the price of the ticket, if these prices differ. We would regard charges for one personal item (e.g., a purse or laptop computer), one carry-on

bag, and one or two checked bags as baggage charges that traditionally have been included in the price of a ticket.[104]

ATA comment: ATA members strongly object to this proposal because having two prices would provide less transparency and would be more confusing to passengers, especially when not all passengers use optional services. In effect the Department is imposing an "opt out" concept that it seeks to prohibit in proposed section 399.84(c). Many passengers (in some cases as many as half) do not check bags and others pay no baggage fee because of their status with a carrier's frequent flyer program, charge card or other carrier exemptions.. In addition, the European Union has taken the opposite approach of this proposal, allowing carriers such as Ryan Air, a successful low fare innovator operating in Europe, to advertise unbundled fares. The operating environment in the EU permits Ryan Air to offer exceedingly low fares, promote the fares in advertising, resulting in a very successful business model and greater consumer options. The Department should reconsider this proposal and continue to allow the same innovation currently permitted in the U.S. and in other countries. The best solution is to require a link that discloses all fees, so passengers can choose their preferred optional services.

It is also unclear how a carrier would comply with a rule to advertise a fare that includes baggage fees when many passengers do not know if or how many bags they will use until well after the point of booking and the carrier will not know how many bags a customer will check or how large or heavy the bags may be, which would also impact baggage fees. Because passengers must choose which options they would like during the search process or after purchasing the air fare, two prices - one for a fare and one for fare with passenger selected options - could only be provided at the very end of the ticket purchase process or as a separate transaction after purchasing airfare. The Department has presented no evidence that airline customers, unlike theatre-goers or patrons of professional sporting events, are deceived by advertising that shows the cost of air transportation alone, without including the cost of optional ancillary services. Additionally, any requirement that an advertised price must include baggage fees fails to recognize widespread consumer awareness of ancillary fees. It does not make sense to require bundled prices when most passengers understand that baggage charges exist on some carriers for some passengers. Airline customers do not have rights different than theatre or sporting event customers simply because the airline business model has evolved over time.

Question: Should such a requirement for a second price, if adopted, be limited to the full fare plus the cost of baggage charges? Should the Department require carriers to include in the second price all services that traditionally have been included in the price of the ticket such as obtaining seat assignments in advance? Why or why not?[105]

ATA Comment: The Department's questions indicate it currently does not have enough information to determine whether additional disclosure of fees is in the public interest. Moreover, the Department has not quantified the costs or benefits in accordance with Executive Order 12866. It is also clear the Department has not decided how such an advertisement would be practically implemented given that a full fare with optional services cannot be known until each individual passenger selects options during the purchase process. The Department has also provided no rational basis for determining the service items that have been "traditionally included in the price of a ticket." For example, advance seat selection practice has varied widely among carriers for more than a decade, some not charging at all,

104 75 Fed. Reg. 32329.
105 75 Fed. Reg. 32329.

some charging prices for seats with extra leg room, some assigning many seats at the gate or offering no advanced seating assignment, and some providing access to early boarding. Therefore, like many ancillary fees, it would be impossible to include seat selection in a second price because carrier practices vary and many passengers have the option to choose a different seat and boarding priority up until the time of check in at the airport.

Question: In the alternative, the Department is considering requiring sellers of air transportation to display on their websites information regarding a full price including optional fees selected by the passenger when a prospective passenger conducts a query for a particular itinerary. In other words, passengers would be able to conduct queries for their specific needs (e.g., air fare and 2 checked bags; air fare, 1 checked bag, and extra legroom). The benefit of this approach is that consumers would be able to more easily compare airfares and charges for their own particular itinerary and options. We invite comment on this approach, including its feasibility, as well as its costs to airlines and ticket agents.[106]

ATA comment: The Department's questions in effect ask the public how to draft a proposal in this area. The Department does not have enough information to make a decision or publish proposed regulatory text (or include this alternative in its cost benefit analysis). Without specific regulatory text it is impossible to provide substantive comments on this pre-decisional material (and provide potential costs). If the Department chooses to pursue this matter, additional notice and opportunity for comment in accordance with the APA would be necessary. Because carriers vary on (1) what optional services are available on a particular flight; (2) which customers can choose optional services, and (3) what services if offered incur a fee, it would be impossible to mandate a set of criteria that carriers would have to include in a query. In addition, carriers support transparency of fees and ample information on the cost of such services is already available on carrier websites.

C. GDS Distribution

Question: The Department is also considering requiring that carriers make all the information that must be made directly available to consumers via proposed section 399.85 available to global distributions systems (GDS) in which they participate in an up-to-date fashion and useful format. This would ensure that the information is readily available to both Internet and "brick and mortar" travel agencies and ticket agents so that it can be passed on to the many consumers who use their services to compare air transportation offers and make purchases. We invite comments on this proposal, including the present ability of carriers to meet this requirement, the potential costs of the requirement, including costs of developing new software or systems to deliver such information to GDS's, if necessary, and the benefits of this requirement.[107]

ATA comment: Carriers are currently developing new systems and expanding existing systems to sell optional services on their websites at the time customers purchase tickets. Whether carriers should provide fee schedules for optional services to GDSs, or authorize travel agents to sell such services and collect the fees from customers, are among the principal competitive issues presently under consideration or negotiation among carriers, GDSs, and travel agents.

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106 75 Fed. Reg. 32329.

107 75 Fed. Reg. 32329.

Although not explicitly stated in this preamble question, the Department presumably would seek to rely on its unfair and deceptive statutory authority if it were to take action in this area. However, the Department has failed to identify what unfair and deceptive practice it would seek to prevent in this instance. There is nothing unfair or deceptive about private parties negotiating to determine what information is provided between them. The Department cannot rely on its unfair and deceptive statutory authority if it will not in fact prevent some action harmful to the public and acting without such a determination would be arbitrary and capricious.

The parties may or may not reach commercial agreement on this highly contested matter. A government mandate that carriers must provide GDSs with fee schedules would further strengthen GDS market power, thwart the entry of new competitors in the GDS market, and expose consumers to higher prices necessary to recoup excessive GDS booking charges.

When the Department deregulated GDSs in 2004, with support from the Department of Justice, it voiced concern over GDS market power.[108] Nonetheless, citing changes in GDS ownership and developing technologies, DOT and DOJ expressed some degree of optimism that competitive forces in a deregulated market would reduce the market power held by GDSs.

GDSs have been forced to change many of their anti-competitive practices. Nonetheless, six years later, the GDS market is more concentrated than ever as new entrants have either failed or been acquired by the biggest players. In 2004, the U.S. GDS market was divided among four companies, none of which had more than a 50% share, and several alternative GDSs promised to re-invigorate competition.

By 2009, the U.S. market had been transformed into a duopoly, with Sabre accounting for almost 60% of U.S. point-of-sale bookings and together with Travelport (which by that point had acquired both Galileo and Worldspan) accounting for more than 90%. These CRSs are threatened by internet innovations and would like to thwart the many new internet distribution firms.

Three new entrants have attempted to enter the GDS market since 2004, and none has succeeded. ITA left the market to focus on serving as an airline hosting system. G2 Switchworks was acquired by the same group that owns Sabre, sold its code to Travelport, and was liquidated. Farelogix was unable to penetrate the GDS market, turned to providing direct connections for airlines, and remains under attack by the GDS duopoly

In the final CRS rule in 2004, the Department was careful not to take any action that would strengthen the superior bargaining leverage already enjoyed by GDSs. In maintaining the prohibition against contract clauses requiring a participating airline to provide all web fares as a condition to participation (sometimes referred to as most-favored-nation provisions), the Department said that to do otherwise "would deny the airline the ability to use its control over access to its web fares as a bargaining leverage to obtain better terms and prices for system participation."[109] The Department went on to state that "such a clause would additionally tend to prevent the development of alternative sources of information and booking channels, for a travel agency would have less incentive to use alternatives if the system used by the agency already provided complete information on web fares."[110]

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108 69 Fed. Reg. 976, January 7, 2004.

109 69 Fed. Reg. 992, col. 1.

110 Id.

In the final rule, the Department also stated that "airlines should have some bargaining power against systems if each airline can choose which services and fares will be saleable through each system and the level at which it will participate in each system."[111] Put another way, airlines should be able to use their control over access to their web fares as a bargaining tool for getting better terms for CRS participation. The airlines' ability to deny access to their web fares has caused two of the systems, Sabre and Galileo, to give airlines booking fee reductions in exchange for the ability to sell their web fares."[112] Despite limited progress against the GDS duopoly, carriers have been repeatedly retaliated against by GDS vendors for attempting to reduce GDS fee and practices. In 2004, after the repeal of the GDS rules, Northwest Airlines attempted to charge back all GDS fees by Sabre to travel agents. Sabre sued Northwest and pulled all of Northwest's international displays.

A similar situation is presented here, except that instead of mandatory access to web fares, the issue is mandatory access to ancillary fee information. For all the reasons stated by the Department in the 2004 CRS rule with respect to bargaining leverage, carriers should not be compelled to provide fee information to GDSs. This is without question a matter for bargaining in contract negotiations, and a critical element of disciplining the growing market power that GDSs hold over airlines. Additionally, in the case of at least one ATA carrier, providing fee information for certain services is impossible. In this carrier's case many charges for non-transportation services vary depending on the frequent flyer status of the customer (a status that can extend to the traveling party or family); whether the passenger has a carrier loyalty credit card; and whether the passenger has purchased, among other options, an annual subscription to some ancillary services. Any fee information provided to GDSs would not necessarily apply to all passengers and these fees and services at the present time are not tailored to be sold by intermediaries. DOT should not let the GDS's acquire more market power, acquire content for free or injure airline sources in the distribution network. Doing so will hurt consumers because fares will be under pressure to cover the power granted to GDS systems. For instance, international GDS costs are about $25 per ticket.[113]

VI. Proposals for which we have no comment

A. What are the costs and benefits for narrowing or expanding contingency plans

Question: We also seek comment on the cost burdens and benefits should the requirement to have a contingency plan be narrowed or expanded. For example, while we are proposing here to include foreign carriers that operate aircraft originally designed to have a passenger capacity of 30 or more seats to and from the U.S., we invite interested persons to comment on whether, in the event that we adopt a rule requiring foreign carriers to have contingency plans, we should limit its applicability to foreign air

111 69 Fed. Reg. 1005.

112 69 Fed. Reg. 1029, col. 3.

113 Southwest Airlines supports these comments except with respect to the GDS fee disclosures as discussed in Section V(C). Southwest's position on this issue is set out in its own comments filed in this docket.

carriers that operate large aircraft to and from the U.S.—i.e., aircraft originally designed to have a maximum passenger capacity of more than 60 seats.[114]

ATA members have no comments to this question.

B. Expansion of Tarmac Delay Data Reporting Requirements

Question: We are tentatively of the opinion that we should expand the pool of carriers that must file information with the Department regarding tarmac delays to U.S. carriers and foreign carriers that operate any aircraft originally designed with a passenger capacity of 30 or more passenger seats with respect to their operations at U.S. airports.[115]

ATA members have no comment to this question.

Question: We seek comment on whether we should limit the requirement to file tarmac delay data to U.S. and foreign air carriers that operate large aircraft to and from the U.S.—i.e., aircraft originally designed to have a maximum passenger capacity of more than 60 seats. Commenters should explain why they favor such a limitation and suggest alternate approaches to capturing tarmac delay data.[116]

ATA members have no comment to this question.

Guidance: We recognize that carriers subject to our new contingency plan rule that went into effect April 29, 2010, are required to retain for two years certain information regarding tarmac delays of 3 hours or more. We note that the reporting requirement proposed in this notice is separate and distinct from that information retention requirement, with a different purpose. Where that rule is focused on carrier compliance with consumer protection-related requirements and requires only that carriers retain the information for a limited period of time, we propose here that carriers report monthly a set of data regarding tarmac delays that will provide the Department more complete information on lengthy tarmac delays throughout the air transportation system in the U.S.[117]

ATA members have no comment to this guidance.

Question: We welcome suggestions from the public and the industry on whether there are other means to further reduce the carriers' burden yet still effectively achieve the goal of this proposal.[118]

ATA members have no comment to this question.

C. Customer Service Plan Expansion to Foreign Carriers

Question: We ask interested persons to comment on whether the proposed requirement for foreign air carriers to adopt, follow and audit customer service plan should be narrowed in some fashion – e.g., should never apply to aircraft with fewer than 30 seats?[119]

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114 75 Fed. Reg. 32320.
115 75 Fed. Reg. 32321.
116 75 Fed. Reg. 32322.
117 75 Fed. Reg. 32322.
118 75 Fed. Reg. 32322.

ATA members have no comment to this question.

Question: We would like foreign carriers to comment on whether similar plans already exist, and if so, how they currently implement such plans.[120]

ATA members have no comment to this question.

D. Response to Consumer Problems

The Department proposes to extend the December 2009 final rule on responding to consumer complaints to foreign carriers and carriers operating smaller aircraft (by expanding the term "covered carrier"). These changes include adding a designated advocate for passenger's interests, informing consumers how to complain, and setting complaint response times. The only proposed change for ATA members is to add that complaint procedures should also be provided upon request at ticket counters and boarding gates staffed by carrier contractors.[121]

ATA members have no comment on these proposed changes.

Question: We invite interested persons to comment on this proposal. What costs and/or operational concerns would it impose on foreign carriers and what are the benefits to consumers?[122]

ATA members have no comment to this question.

E. DBC Limits

Question: We seek comments on whether the proposed increase in DBC minimum limits is called for and whether any such increase based on the CPI-U calculation is a reasonable basis for updating those limits or whether some other amounts would be more appropriate to adequately compensate passengers for the inconvenience and financial loss brought about by involuntary denied boarding. If not, by how much should the amounts be increased, if at all?[123]

ATA members have no comment to this question.

F. Expansion of Baggage Fee Notice

Question: The proposed section 399.85 would apply to all U.S. and foreign air carriers that have websites accessible to the general public in the United States through which tickets are sold, as well as to their agents. The Department invites comment on alternative proposals, including limiting the applicability of the proposed section 399.85 to all flights operated by U.S. carriers, U.S. and foreign carriers that operate

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119 75 Fed. Reg. 32322.
120 75 Fed. Reg. 32322.
121 See proposed section 259.7, 75 Fed. Reg. 32340.
122 75 Fed. Reg. 32325.
123 75 Fed. Reg. 32325.

any aircraft with sixty (60) or more seats, or U.S. and foreign carriers that operate any aircraft with thirty (30) or more seats. In addition, we invite comment on whether the rule should apply to all ticket agents, as defined in 49 U.S.C. § 40102, which includes not just agents of carriers, but also others who, as a principal, "sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for air transportation."[124]

ATA members have no comment on this question.

G. Expansion of Post Purchase Price Increase Proposal

Question: We ask for comment on whether the [post purchase price increase] regulation should cover a greater number of carriers and operations, including operations of smaller U.S. carriers and/or international operations of U.S. and foreign carriers. What would be the cost or benefit of expanding coverage to those additional carriers?[125]

ATA has no comment on the potential expansion of this proposal.

VII. International Analysis

The Trade Agreements Act (19 U.S.C. 2531-2533) prohibits agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The Department did not include a Trade Agreements Act analysis in its proposal and it must do so before proceeding given the proposed expansion to foreign carriers and international flights. For instance, the Department should consider whether any of the proposed items conflict with foreign regulatory requirements. In particular the Department should weigh whether foreign governments will retaliate against U.S. carriers operating outside the U.S., given the application of this proposal to foreign carriers.

VIII. Cost and Benefit Analysis Comments

The Department contracted with Econometrica, Inc. to conduct a Preliminary Regulatory Analysis (PRA) for this proposal. The PRA assessed the cost and benefits of eleven subject areas and concluded that the expected present value of passenger benefits from the proposed requirements is $87.59 million and the expected present value of costs to comply with the proposal is $25.98 million.[126] However, for seven of the eleven analyzed subject areas the Department fails to provide either a cost or benefit estimate and only one of the eleven subjects include an estimated benefit higher than estimated cost. With such

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124 75 Fed. Reg. 32330.
125 75 Fed. Reg. 32331.
126 75 Fed. Reg. 32332-32333, Docket Number DOT-OST-2010-0140-0003, page 2.

incomplete data, the Department has not met its obligations under Executive Order 12866 to "propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs."

To meet its obligations under E.O. 12866 the Department will need to provide an estimate for each of the incomplete/not estimated items in PRA Table 33, which is included as Attachment 1. Without estimates and analysis it will impossible for the public, the Department, or the Office of Management and Budget to determine the true estimated impact of this rulemaking and whether this proposal will provide more benefits than costs. We provide comments on various provisions of the PRA and respectfully request the Department consider them before proceeding.

A. Litigation Costs

One of the areas where the PRA does not provide any estimate of benefits or costs is the Department's renewed proposal to require contingency plans and customer service plans in carrier contracts of carriage. Econometrica stated that it is not possible to develop quantitative estimates of benefits for this requirement; the Department speculated that this particular requirement, if adopted, would provide consumers with notice of their rights, "since that information will then be contained in a readily available source."[127] Given that carriers currently are required to post their CP and CSP's on their websites, the estimate of an additional benefit is illusory. Indeed, as discussed above, this requirement may have a negative impact on consumers.

In terms of costs, ATA has previously submitted the results of a member survey of incremental litigation costs that would result from a requirement that carriers incorporate contingency plans and customer service plans in their contracts of carriage.[128] We incorporate by reference our prior comments on the cost of this item. Our survey indicates that, on average, each member would see an increase of 250 claims per year if customer service plans are incorporated into contracts of carriage resulting in an additional $500,000 annual litigation costs per member or $5.5 million in ongoing additional litigation costs for ATA members. Of course these estimates do not include the Department's expansion of this rule to regional carriers and foreign carriers operating to or from the U.S.; expanding the number of carriers subject to this requirement would greatly increase the estimated cost.

The Department should have started with the ATA estimate or used another reasonable estimate of the incremental litigation costs that would arise from this proposal, multiplied by the number of affected U.S. and non-U.S. carriers. Even conservatively assuming that including smaller and foreign carriers adds 50% in incremental litigation costs to previous ATA estimates, the incremental litigation costs would be $17.5 million per year. The Department's claim that litigation costs could not be reasonably estimated is not credible, particularly in light of the benefit it was able to estimate from the full fare advertising proposal. Clearly the multi-million dollar annual cost of incremental litigation alone means that this proposal fails on a cost-benefit basis.[129]

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127 75 Fed. Reg. 32324.

128 See pp 40-43, Docket number DOT-OST-2007-0022-250.1

129 We also note that carriers could opt to remove items from its CSP that exceed the Department's proposed regulatory standards in order to minimize its liability, which would further reduce any potential benefit of this proposal.

B. Full Fare Advertising

Econometrica estimates that the full fare advertising proposal would generate the greatest benefit of all eleven topics, so much so that it and the Department rely on this single item to justify the entire rulemaking. The Department should not rely on the alleged positive benefits from a single, severable proposal to justify all other aspects of this rulemaking. Fully 84% of all benefits from the rulemaking come from the full fare advertising proposal, which translates to a net present value of $73.50 million over ten years.[130] The majority of this benefit derives from Econometrica's estimate of reduction of "dead weight loss," $5.8 million per year and $58 million over ten years. Econometrica asserts that this deadweight loss arises from prospective air travelers misallocating their expenditures to air travel that they would have spent elsewhere if they knew earlier in the booking process the total travel costs including taxes and fees. Econometrica calculates that fewer passengers would purchase air transportation if they were aware of total air travel costs earlier in the booking process. It estimates 438,086 passengers who would have purchased tickets absent this proposal will elect not to do so if the rule is adopted as proposed. Oddly, this is considered a benefit rather than a cost. Econometrica supports its theory with a study of grocery store shoppers, which supposedly showed that shoppers purchased fewer products when posted prices included taxes.[131]

We disagree with Econometrica's analysis and conclusions because this aspect of the proposal would not result in fewer purchased tickets. Moreover, if that were the result, fewer traveling passengers should not be considered a benefit. First, the assertion that this aspect of the proposal would result in over 400,000 fewer ticket sales per year is incorrect; passengers currently see a base fare with all government mandated taxes and fees and all optional services fully disclosed during the ticket buying process – commonly early in the price comparison process and always at a point before purchase. Thus, there is no basis in fact to conclude that fewer sales would occur. In any case, even if the decrease in passengers materialized as Econometrica theorizes, this loss in passengers would be a cost to carriers, not a societal benefit.[132] The Department must also include the cost to airports and small communities as well as to tourism if a substantial number of passengers do not book flights as result of this proposal. Also, as shown above, this proposal will drive less fee transparency and result in skewed price comparisons.[133]

Second, Econometrica determined that a decrease in passengers would be a benefit, it never explains why that is so. We fail to see how fewer passengers is positive, especially where alternate modes of transportation advertise prices without government mandated taxes or fees or additional options, so passengers would be in the same place regardless of the mode of transportation. Given the distortions

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130 PRA page 61.

131 PRA page 40.

132 Additionally, Econometrica's estimate for "revealed" prices of 5% is low. PRA Table A-15 states that in addition to the 7.5% excise tax, taxes and fees revealed under full fare advertising would be 5%. In fact, taxes and fees incremental to fare and excise tax commonly exceed 5%, see for example the Burea of Transportation Statistics Passenger Origin and Destination Survey indicates 9% and some estimates range as high as 20%. See http://www.airlines.org/Economics/Taxes/Pages/GovTaxesandFeesonAirlineTravel.aspx

133 Prices would be skewed not only among carriers but also in contrast to all other goods and services that do not require all taxes and fees be included in advertising.

this proposal would introduce, we disagree that there would be a reduction in deadweight loss resulting from display of the full cost of travel earlier in the booking process.

Third, the Econometrica analysis systematically ignores the costs to air carriers of the full fare advertising proposal. According to Econometrica, this proposal will ensure that some share of sales will be diverted to other distribution means that are more costly than carrier websites. Also, higher costs to comply with the rule in traditional and online advertising are excluded, as are regulatory fines.

Finally, the study Econometrica relies on justify its deadweight loss theory applies more closely to current practice than to the proposal. DOT proposes to require that advertising include all taxes and fees, while the study upon which Econometrica relies does not apply to advertising, but illustrates that display of a higher price at the place and close to the time of purchase (supermarket aisle) depresses expenditures. In fact, consumers currently see the full price prior to purchase at the place and time of purchase (like the supermarket study) and therefore, Econometrica cannot rationally claim any reduction in deadweight loss for this proposal because consumers are already aware of the full price of their air travel prior to purchase. The Department's analysis fails to demonstrate (directly or by analogy) that a requirement that advertisements must include all taxes and fees will have any effect on the decision to purchase air travel. The claimed benefits of more optimal purchasing decisions (and reduced deadweight loss) in this proposal are simply wrong. Even if there were net positive benefits from the full fare advertising proposal, which there are not, these purported benefits cannot be used as the means by which all other proposals in this rulemaking are justified.

We also note the following weaknesses of the cost/benefit analysis of the full fare advertising proposal:

- The PRA overstates the number of passengers impacted by this proposal because it uses passenger enplanements. The appropriate metric is origin-destination (O&D) traffic, commonly called one-way passengers.[134]
    - For example, according to the PRA, a customer traveling from DCA to SEA via ORD would be represented in the analysis as two passengers (DCA to ORD and ORD to SEA).
    - If the O&D metric is used, then this same customer would be represented as one passenger (DCA to SEA).
    - In an attempt to determine the true number of customers who are purchasing tickets, a 1995 American Travel Survey from BTS is cited showing the average travel trip party size is 2.6 passengers – this overstates current observations by nearly 85%
        - An ATA survey from 2008 shows that the average number of passenger bookings per passenger name record was 1.37
        - A study from the Travel Industry Association of America (2007) shows that the average party size for air trips is roughly 1.4 persons
    - The PRA inappropriately relies on a PhoCusWright study from 2009 which estimated that 72% of total passengers book their trip online (carrier websites + OTAs)[135]
        - An ATA survey from 2008 shows this value to be 52%

134 See PRA Table 15, page 41.
135 See PRA page A-29.

- DOT assumes that the "savvy passenger" would save five minutes as a result of the full fare advertising proposal – but there is absolutely no evidence or basis to support this assertion, which does not meet the data quality standards required for a cost benefit analysis under Executive Order 12866.
- DOT uses *American Express Business Travel* as a source for average airfare prices.[136] However, AmEx's customer base is, as the title "Business Travel" reveals, primarily driven by corporate travelers. These travelers tend to rely on traditional travel agencies, not websites and online agencies. The ticket prices used in the analysis are not representative of the average traveler or travelers who primarily book online
  - BTS's O&D survey is the appropriate source for industry airfares paid for the purposes of this rulemaking.
- The Final Regulatory Analysis for the previous rule shows just 1,983 annual advertising-related complaints made to the Department. It is highly unlikely that all of these complaints were from passengers stating that they were deceived about taxes and fees and/or the price of ancillary services. Even imagining that every fare advertising complaint DOT received was a complaint about full fare advertising, and that the $6.8 million cost to carriers of the proposed rule is correct, the Department's regulatory "solution" would cost $3,459 per complaining party. Even using DOT's multiplier of 61 for the share of consumer complaints relative to complaints to DOT, the "solution" to this perceived problem would cost $56.70 per complaint – a cost far in excess of the general benefit of this proposed rule.[137]

C. Miscellaneous Comments

We note several areas the Department should consider in drafting its Final Regulatory Evaluation for this proposal:

- Costs concerning increased refunds to passengers experiencing "significant delay" are not included in the PRA. As recent carrier experience shows, the December tarmac delay rules already push more flights over any threshold of "significant" delay since flights must return to gate prior to three hours to avoid significant penalties. The combination of the existing three hour rule, which may be extended to additional carriers, and the potential new requirement to refund tickets if a passenger decides not to travel because of a delay, could create substantial costs that must be quantified before proceeding. According to the Final Regulatory Analysis for the December rulemaking, about 200,000 passengers averaged 3+ hr taxi out delay in 2007 and 2008.[138] . Therefore the Department should include a cost associated with a percentage of passengers choosing not to travel after a delay caused when an aircraft must return to the gate

136 Id.

137 Final Regulatory Evaluation, Enhancing Passenger Protections, DOT-OST-2007-0022-0265, Table 19, p 48.

138 DOT-OST-2007-0022-0265, p. 40.

to comply with the 3 hour rule. The Department cannot reasonably ignore this potentially significant cost.

- The PRA underestimates the cost to extend customer service plan requirements to foreign carriers and regional carriers. The Final Regulatory Analysis for the prior passenger protection rulemaking lists the cost to create and audit a customer service plan to be about $91,000 per year for carriers that do not currently have a plan.[139] The PRA cost estimate of extending customer service plans to foreign carriers and regional carriers is $3.24 million.[140] Given its earlier estimate of the cost per plan, it would take just 36 carriers at a cost of $91,000 each to reach the PRA estimate. DOT has understated the costs of this aspect of its proposal since there are 86 foreign carriers that will have to develop and audit a customer service plan.[141]
- The Department also asks whether it should expand this proposal to require marketing carrier responsibility for flights operated with its code.[142] As we discuss in section III, operating carrier compliance with a contingency plan and customer service plan for each of its code-share partners would be virtually impossible. The Department would have to estimate the cost for carriers to adhere to code-share partner policies before deciding whether to adopt this proposal.
- In addition, the Department asks whether it should change its policy regarding carrier responses to comments made on social media websites such as Facebook or Twitter.[143] The Department would also need to include costs for additional staff to research and respond to such comments before deciding to change its policy in this area.
- The Department also would have to include cost estimates if it were to change the IDBC formula to a percentage of a fare (200%/400%) with no cap,[144] and a cost estimate for compensating zero fare ticket holders, including costs for compensating passengers that did not pay for a ticket.[145]
- The Final Regulatory Analysis of the previous rulemaking showed the benefits of the existence of CS plans as unquantified.[146] That Final Regulatory Evaluation states that that no good estimate has been found of value of improved customer service.[147] By contrast, the present NPRM asserts specific quantified benefits of these Customer Service plans. The Department should provide the source of its ability to quantify benefits arising from the mere existence of such plans.

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139 DOT-OST-2007-0022-0265, Table 28, p. 36
140 PRA, Table 33, p. 60.
141 PRA, Fn. 5, p. 6.
142 75 Fed. Reg. 32321.
143 75 Fed. Reg. 32325.
144 75 Fed. Reg. 32325.
145 See proposed 14 CFR 250.5(c), 75 Fed. Reg. 32338.
146 DOT-OST-2007-0022-0265, p. 66.
147 Id at page 76.

IX. Conclusion

Carriers are committed to providing excellent customer service and compete fiercely in a deregulated industry. Recent Department passenger protection regulations and an upgraded ATC will provide the framework to accomplish that goal. While carriers will continue to implement policies and practices to improve passenger services in response to market forces, it is important that the Department closely analyze current rules to determine their impact before proceeding with a new rule. In addition, it is clear that several items will not positively impact customer service, will reduce competition and customer options, will lead to increased ticket prices, and should be eliminated. It is in the best interest of all parties, and the Department's responsibility, to further analyze these issues before proceeding to a final rule.

Respectfully submitted,

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September 23, 2010