BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

ENHANCING AIRLINE PASSENGER PROTECTIONS	)	**Docket No. OST-2010-0140**

COMMENTS OF THE AMERICAN SOCIETY OF TRAVEL AGENTS, INC.

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The American Society of Travel Agents, Inc. (ASTA) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Department in the referenced proceeding. 75 Fed. Reg. 32318 (June 8, 2010).

ASTA is the world's largest association of professional travel agencies. Its membership includes travel agency companies of the traditional, on-line and hybrid varieties, as well as individual travel agents and many others engaged in aspects of retail and wholesale distribution of transportation services.

As a representative of the professional facilitators who place the majority of passengers in airline seats, ASTA has a substantial interest in the airlines' treatment of consumers. We have fulfilled that interest by arguing in earlier proceedings for adoption of many of the rules proposed here.[1] Our concerns about these issues are largely vindicated by the breadth and depth

[1] See Comments of the American Society of Travel Agents in *Enhancing Airline Passenger Protections*, Docket No. OST-2007-0022, filed January 22, 2008, March 4, 2009 and August 25, 2009; Comments of the American Society of Travel Agents in *Oversales and Denied Boarding Compensation*, Docket No. OST-01-9325, filed September 7, 2007 and January 22, 2008, among others. A representative of ASTA also was a member of the 2008 National Task Force to Develop Model Contingency Plans to Deal With Lengthy Airline On-Board Ground Delays.

of the rules proposed in this NPRM which is certainly the most important aviation consumer protection initiative in the modern era.

I. THE MOST IMPORTANT RULE UNDER CONSIDERATION IN THIS RULEMAKING SHOULD BE ADOPTED TO ASSURE CONSUMER ACCESS TO COMPARATIVE PRICE INFORMATION BY ORDERING THE AIRLINES TO MAKE ANCILLARY FEE DATA AVAILABLE TO INDEPENDENT DISTRIBUTERS THROUGH GLOBAL DISTRIBUTION SYSTEMS.

Before turning to the details of the proposed rules and their rationale, we want to address a matter for which comments were requested in this proceeding but for which no rules as such were proposed. This is the issue whether the airlines will be allowed to withhold from the independent distribution system transactable information about unbundled service elements for which separate prices are now charged by most airlines. See 75 Fed. Reg. 32329-23230.

A. The Key Issue Is Assuring Consumer Access to Comparative Shopping Capability Before the Customer Is Committed to Buy

The NPRM proposes to add disclosure requirements for baggage-related fees to airline websites, e-ticket confirmations as well as a general disclosure obligation for all other optional fees. 75 Fed. Reg. 32329. All of these are important for consumer choice and ASTA supports the adoption of each of the proposals.

But the critical issue is not whether the airlines will make the information "available" in lists and the like. The key issue is whether the airlines will be required to provide the information to consumers in a form that enables consumers to make "all in" full-price comparisons incorporating the ancillary services that interest them and most importantly to do so before they have committed to a ticket purchase. The only way this can happen is for the Department to adopt a rule requiring the airlines to make available to the GDSs the same ancillary fee content they place on their own websites and to do so in a timely and fully transactable manner. This will enable the GDSs to flow the information to inquiring travel

agents in a manner that enables full price comparison by the agents and their consumers before the customer is locked into a purchase. Nothing less will suffice to protect consumers.

This disclosure should encompass all fees the airlines offer to the public for direct purchase, not just those somehow deemed "significant." The significance of a fee will depend upon many factors, including the unit price and the number of units the consumer wants to buy, so no *a priori* definition of "significant" is likely to be workable. The standard should be "if the airline sells it, it must be fully disclosed to consumers in direct sale transactions and to the GDSs for sale by travel agents that it has appointed to sell tickets on its behalf."

As to the issue of whether the ancillary fee disclosure rules should apply to "ticket agents," ASTA believes the clear answer is "of course," but only if ticket agents are given access to the information as discussed above. No requirements should be imposed on agents that cannot in reality be satisfied by any reasonable commercial effort. Travel agents cannot disclose that to which they do not have access. It is commercially absurd to suggest that travel agents can simply hunt down the ancillary fee information, transaction-by-transaction, on airline websites whenever they need to know. The Airlines Reporting Corporation shows over 170 participating airlines in its accreditation and settlement regime. Self-evidently, forcing agents to research over such a huge network of carriers would impose a huge and unacceptable increase in the time it takes an agent to conduct a comparative analysis of flight/fare/fee options on behalf of an inquiring customer. No agency, large or small, could afford to do it.

Failure to require airlines to make this information available to retailers such as travel agents[2] through the data systems on which they are almost entirely dependent for air fare and schedule data would undermine one of the most fundamental principles on which the

[2] We use the lay term "travel agent" in this paper, recognizing the legal term is "ticket agent" under the Federal Aviation Act. By "travel agent," we mean agents of all kinds – traditional brick-and-mortar, home-based, online and hybrid business models, unless the context requires a more limited usage.

rulemaking, and all prior Department price-disclosure policy, is based: that consumers should have full notice prior to purchase commitment of all key prices and options that they may wish to buy. After inquiry into this issue, ASTA believes there is no demonstrable technical obstacle to the airlines' providing the necessary information to the Global Distribution Systems in essentially the same way they provide fare information multiple times every day.

Travel agents still account for roughly half of airline sales. Permitting the airlines to withhold at will optional fee information from agents' customers will result in many surprised and dissatisfied travelers and will prejudice many consumers' ability to choose the channel through which they buy air travel.

B. The Rule ASTA Supports Will Not Impair Airline Marketing Practices in Direct Sales and Is Not Re-Regulation

We do not argue that this information must be provided to GDSs with whom an airline has not otherwise chosen to distribute airfares, nor do we ask for an exclusive regime in which airlines would be restricted in alternative ways they might offer to see "ancillary services." They would have every marketing and sales option open to them, except the option to choke off the flow of ancillary fee information to independent distributors whom they have appointed to sell their products by withholding ancillary fee data from the GDSs in which they otherwise participate. The issue here is not just one of principle – its resolution requires that the airlines be compelled to provide the ancillary services data in a fully transactable manner through the GDSs, regardless of any other methods they may use to disclose the fees. This is the only way that the consumer interest in comparative shopping can be vindicated.

The rule we seek is a logical extension of the rules the Department otherwise proposes to impose. The new 14 CFR 399.85 would compel prominent disclosure of changes in checked bag fees on airline website homepages as well as information about current baggage fees in e-ticket

confirmations and homepage-linked lists on publicly accessible websites. 75 Fed. Reg. 32329. Those are the minimum disclosure requirements needed to adequately inform the public that chooses to buy travel directly from airlines. Since the list of potential additional charges over and above the airfare exceeds one hundred items, the public, both leisure and corporate, has no chance to continue engaging in comparative price shopping without access to the same information through a travel agent.

The disclosure regime we support is completely consistent with the recommendations of the Government Accountability Office in its July, 2010 report on airline-imposed fees:

> …customers using online travel agencies and traditional or corporate travel agents, which together sell 60 percent of all airline tickets, cannot readily obtain and compare information on complete trip prices that include both the fare and selected service fees. This lack of information also makes it impossible for customers using online travel agencies or for travel agents using a GDS to select or make payment for optional services at the time of booking….[3]

GAO's thorough analysis ends with the recommendation that the Department compel the airlines to disclose optional fees "consistently … across all distribution channels used by the airline."[4]

The GAO report indicates that DOT had expressed some concern about the "disadvantages of government interference with airline competition and the deregulated GDS environment."[5] If these concerns exist, we respectfully suggest that they are misplaced. Airline competition is failing with respect to disclosure of optional fee information, creating a classic case for government intervention to protect the consumer. Testimony by one of the most aggressive imposers of optional fees, Spirit Airlines, has confessed that every airline has a powerful incentive to avoid being the first to disclose optional fees in a way that would permit

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[3] *COMMERCIAL AVIATION: Consumers Could Benefit from Better Information about Airline-Imposed Fees and Refundability of Government-Imposed Taxes and Fees*, United States Government Accountability Office, July 2010, at 16, emphasis added.
[4] *Id*. at 35.
[5] *Id*. at 20.

comparative shopping. The cause of the disincentive is simple: adding fees to the airline's base price would make its fares appear higher than those of competitors who are not making similar disclosures. In such circumstances the only solution is to compel all airlines to make the same type of disclosure, thereby removing the competitive disincentive.

As for interfering with the deregulated GDS environment, there is no risk because the rules we support would not require any airline to do business with any particular GDS. The mandatory disclosure would only apply with respect to GDSs through which the airline was already disclosing its fares.

C. The Regime ASTA Supports Is Consistent with Basic Principles of Agency Law

Once the threshold is crossed by compelling airlines to disclose these fees to consumers, consistency with the principles of agency law supports an additional rule that the information be provided to travel agents for the same purpose. Travel agents are true agents at law of the airlines, a relationship that is well and undeniably established.[6] The act of the airline principal binds the agent and, equally importantly, the principal is bound by the acts of his authorized agent. Thus, in dealing with the public, no travel agent can contravene the directions and policies of the airline principal and, similarly, the airline cannot deny the agency relationship when the agent has sold a ticket in conformity with airline fare and other rules.[7]

Consistency requires that once the airline is required to disclose to the consumer, the agent is likewise required to do so, unless, of course, the disclosure is impossible. And it will be impossible, just as the GAO report cited early found, unless the airlines are required to provide

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[6] See, *e.g.*, Airlines Reporting Corporation, Agent Reporting Agreement (ARA), 4th Whereas Clause: "the Agent engages in the sale of air transportation to the public as agent for and on behalf of the carriers…." In addition: Section I-B of the ARA provides: "This agreement establishes a principal-agent relationship between the Agent and appointing carriers …." See also *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F2d 722 (7th Cir. 1986); *Illinois Corporate Travel, Inc. v. American Airlines, Inc*., 889 F2d 751 (7th Cir. 1989).

[7] The ARA is replete with detailed and mandatory instructions from the airline principals to their travel agent agencies governing all aspects of the sale of air travel.

the essential data regarding optional services to the agent in the first instance. The agent cannot disclose something from nothing and there are no lawful and practical means by which agents can acquire the data otherwise. Even large travel agencies could not arrange sufficient technology and personnel to conduct, in ongoing real time, screen scraping and other forms of online pilferage to track down the staggering variety and irregularly changing ancillary fees and their many exceptions and then reorganize and present to selling agents the information necessary to cover ancillary services on the more than 160 airlines who will certainly be participating in this new revenue boon.

The principal in this relationship has a duty to keep its agent informed of relevant information that the agent needs to do its job. A principal has the obligation of exercising good faith toward his agent in the incidents of their relationship. He is subject to the responsibility in favor of the agent of using care 'to prevent harm coming to the agent in the prosecution of the enterprise,' and this extends in general to his 'disclosing facts which, if unknown, would be likely to subject the agent to pecuniary loss.' Restatement, Agency, 435, Comment a.

Since travel agents are subject to section 41712 of the Federal Aviation Act, they need the fee information to do their job and avoid misleading passengers. Conversely, the principal must refrain from acts that foreseeably will interfere with the agent's ability to carry out the subject matter of the agency. A principal and an agent are in a fiduciary relationship. See *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50, 54 (1997). Because of the fiduciary relationship, the principal owes the agent a duty of good faith and fair dealing in the incidents of their relationship. See *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493, 497 (8th Cir. 1955). Every contract of agency carries with it an implied obligation on the part of the principal to do

nothing that would thwart the effectiveness of the agency. See *Sidella Export-Import Corp. v. Rosen*, 273 A.D. 490, 492 (N.Y. App. Div. 1948) (*per curiam*).

Failure to require the airlines to share their ancillary fee data will leave literally millions of consumers without the ability to use their preferred channel and have the benefit of full comparative price shopping. Compared to the situation that existed prior to the advent of ancillary fee merchandising, the new rule as applied only to airlines will actually be a major step backward in consumer protection.

II. THE RULES SHOULD MANDATE A SPECIFIC TIME FRAME FOR DEPLANING PASSENGERS ON INTERNATIONAL FLIGHTS.

The current rules on tarmac delays impose a three-hour deplanement standard for domestic flights while leaving it up to the airline to set its own standard for international flights in its Tarmac Delay Contingency Plan. The NPRM asks whether "mandating a specific time frame … on international flights is in the best interest of the public." 75 Fed Reg. 32320.

ASTA believes that a specific standard for international flights is critically important. We appreciate that international flights typically operate at lower frequencies than domestic flights and that alternatives will often be fewer if an international flight cancels. On the other hand, it is important that the rule does not require cancellations. It requires only deplanement, or the right to do so, rather than being confined on the tarmac for prolonged periods. Flights can still fly when it becomes possible to do so and passengers who deplaned have the option to await that moment – in the terminal rather than on the tarmac. The very fact that international flights are less frequent will create a stronger incentive to avoid cancellation and fly later rather than not at all. If there are special circumstances for international flights that have not been enumerated, they could be accommodated by using a four hour rather than three hour deplanement rule. Leaving to the airlines the decision on the number of hours before deplaning an international

flight will simply add to consumer confusion and will do nothing to resolve the consumer treatment issues that inspired this rulemaking in the first place. There is certainly no evidence in the early going that the three-hour delay rule has led to the huge number of cancellations that many airlines were claiming.

ASTA therefore urges the Department to apply the deplanement rule to international as well as domestic flights, using a four-hour deplanement threshold if there is evidence that doing so is important to the unique character of international air travel.

III. A CONTINGENCY PLAN RULE FOR FOREIGN AIRLINES SHOULD COVER ALL AIRCRAFT TYPES AND ALL CODE-SHARE PARTIES.

ASTA does not believe that aircraft-size ("originally designed to have a maximum passenger capacity of more than 60 seats") is an appropriate threshold for requiring foreign air carriers to file contingency plans. Passengers know nothing of original aircraft capacity design, making such a standard particularly unhelpful. When it comes to the assurance that a passenger can book a particular airline without being concerned whether it is or is not bound by the protection rules, a technical, obscure and inaccessible aircraft capacity rule is particularly inapt.

Similarly, passengers buying tickets on code-sharing airlines should not have to concern themselves with whether their basic consumer protections will vary depending upon which carrier ends up actually flying the aircraft. If two airlines are going to integrate their operations through code-shares, or other means, they should be responsible for harmonizing their consumer protection processes so that consumers don't have to worry about which carrier did the marketing, the ticketing or the flying. In the long run this approach should be more efficient for the airlines and, in any case, will be much more valuable to the consumer.

IV. THE CONTINGENCY PLAN REQUIREMENT SHOULD INCLUDE AIRPORTS.

ASTA believes the requirement to adopt tarmac delay contingency plans should be extended to airports because airports are a critical component in solving extended tarmac delay situations. The delays, self-evidently, occur on the airport's property and impact its resources in multiple ways.

Airports were vocal and important participants in the extended debates of the 2008 National Task Force to Develop Model Contingency Plans to Deal with Lengthy On-board Ground Delays. The final report, dated October 11, 2008, discusses the role of airports in tarmac delays and contains specific recommendations for steps they should take, including, by example only:[8]

> "Each airport should develop a contingency plan that is aligned with the plans of the other aviation service providers and coordinated with the ground delay committee. As such, the airport contingency plan should include discussions regarding and in consideration of the information in this chapter."

and

> **"4.1 Preplanning**
>
> **a. Developing a coordinated contingency plan**. The key to effectively responding to a lengthy onboard ground delay is for all the aviation service providers to work together to develop coordinated contingency plans and make appropriate preparations that the local responders may rely on should an event occur."

The Department has the full report so we will not quote further from it. Suffice to say that Chapter 4 of the report accounts for twenty percent of the full report and elaborates the vital collaborative role that airports must play in tarmac delay situations. It is time to give meaning to the work of that Task Force by requiring airports to adopt contingency plans.

[8] "Development Of Contingency Plans For Lengthy Airline On-Board Ground Delays," Final Report of the National Task Force to Develop Model Contingency Plans to Deal with Lengthy On-board Ground Delays, October 11, 2008, at 28.

V. CONTINGENCY PLAN COORDINATION OBLIGATIONS SHOULD BE EXTENDED TO SMALL AND NON-HUB AIRPORTS AS WELL AS CBP AND TSA.

Most passengers do not likely understand or care about inside-the-industry technical distinctions among different classes of airports. No air traveler wants to be told that his treatment in an extended delay situation was the result of traveling through the "wrong" airport. Therefore, in ASTA's view, the obligation to coordinate that was imposed on the airlines in the initial passenger protection rulemaking should be extended to all airports. The NPRM has this issue right.

Similarly, the Customs and Border Protection Agency and the Transportation Security Administration should be on the "mandatory coordination" list. Experiences cited in the NPRM have shown the importance of this and both agencies have previously committed to work actively and constructively to assist in tarmac delay situations so that deplaning at diversion airports is possible even when security personnel may be absent.[9]

VI. COMPULSORY ANNOUNCEMENTS OF REASONS FOR FLIGHT DELAYS AND OPPORTUNITY TO DEPLANE ARE A LOW-COST WAY TO REDUCE CONSUMER DISSATISFACTION

ASTA has believes that one of the primary reasons for public angst over flight delays is the lack of consistent and truthful information about the reasons for delays. This should also be one of the easiest problems to cure. A good faith effort by carrier managements to establish procedures for getting this information into the flight crews' hands and diligence by flight crews in passing on accurate information are essential prerequisites to consumer satisfaction regarding the handling of extended delays. An announcement every 30 minutes is a very small obligation -- its fulfillment will go a long way in relieving passenger frustration.

[9] These welcome commitments were made during the deliberations of the Tarmac Delay Task Force.

Similarly, the exercise of the right to deplane under the rules should not depend entirely on the individual passenger's knowledge of the Department's regulations. If the plane is at the gate and the doors are open, it should be no great burden to announce the right to deplane. This announcement could, and should, include warnings about the potential for rapid departure and the importance of remaining in the gate area. This rule would only apply in cases of extended delay. It would not, as we understand it, permit passengers to leave the aircraft randomly while awaiting final boarding for on-time departures.

VII. THE CUSTOMER SERVICE PLAN RULES AND STANDARDS SHOULD APPLY EQUALLY TO FOREIGN AIR CARRIERS WITH NO AIRCRAFT-SIZE EXCEPTIONS.

The scope issue raised in connection with foreign carrier compliance with the Customer Service Plans and other standards comes down to whether there is a rational basis for denying to travelers on foreign airlines the protections being mandated for US citizen airlines. We can think of none. And, again, original aircraft design for seat capacity should not be a factor. Consumer protection should not depend on such obscure and, from a consumer standpoint, unknowable facts about aircraft design. Simplicity in the scope of the rules will yield rewards for everyone in the form of avoided mistakes and, ultimately, be less costly to administer than a tiered and complex set of rules that vary by whether an airline has a single plane designed to fly with less or more than 30 seats.

VIII. DOT SHOULD MANDATE MINIMUM STANDARDS FOR CUSTOMER SERVICE PLANS.

ASTA strongly urges the Department to adopt minimum standards for airline customer service plans. ASTA has objected for many years to the vague and aspirational character of many of the so-called voluntary passenger service commitments that are shown on airline websites. A promise that cannot be understood and enforced is no promise at all. Given the

comprehensive purpose of the present rulemaking, it is timely and appropriate to include the specific minimum standards outlined in the NPRM. We have specific comments on some of the proposed minimum standards.

A. The 24 Hour "Reservation Hold" Rule Should Apply to Travel Agent Bookings

Proposed standard number four requires airlines to permit consumers who buy directly to hold a reservation without payment, or cancel without penalty, for at least 24-hours. If the Department is going to make this a formal requirement, it should do so with respect to all passengers, including those who buy through the airline's authorized agents.

Under the principles of agency law, those agents, called "ticket agents" in Federal Aviation Act, stand in the shoes, and vice versa, of the airline when acting on its behalf to make a reservation. The standard proposed in the rulemaking here would give the airlines a significant competitive advantage over their agents by requiring them to hold reservations from direct-dealing customers for 24-hours while allowing the airlines to deny that same privilege to consumers who choose to buy through a travel agent. There is no basis for such implicitly government-sanctioned discrimination. The rule should state that every airline must also provide the 24-hour "hold" privilege to all consumers who deal with it through authorized agents.

B. Code Sharing Disclosures Should Be Strengthened.

Proposed standard number eleven imposes a "reasonable efforts" requirement on the airlines with respect to code-share partners that is tied to the airline's customer service plan. ASTA believes the rule should go further. The rule should require that in all cases when a code-sharing airline takes a booking for a flight to be operated by its code-share partner, the confirmation codes of both airlines are provided immediately to the passenger and/or the passenger's travel agent, and that it is made explicitly clear to the passenger which airline's

baggage and other rules will apply to the transportation booked. If the rules are those of the operating airline, the traveler and/or her agent should be provided with links to the relevant rules.

Our proposal does not require airlines to impose rules on strangers. By definition they have entered into an agreement with a well-known partner to operate flights under shared airline name designators. In these circumstances it should be an easy matter to accomplish the disclosure we are advocating here.

C. Baggage Fees Should Be Refunded For Lost Bags or Delayed Delivery.

Now that airlines are regularly charging fees for checked baggage in addition to the airfare, it is only reasonable that failure to provide the service paid for will result in a refund. Absent such a requirement, there is little incentive to assure timely delivery. It would be classic unjust enrichment to permit an airline to charge for checking a bag, but not require a refund if the bag did not timely arrive with the passenger.

The same principle applies with respect to canceled or significantly delayed flights where the passenger ultimately elects not to travel because the service being provided defeats the passenger's expectations and needs that were paid for in the airfare. The purchase of a ticket becomes a gambling contract for the consumer if the airline can, without consequence, fail to deliver the service purchased. This principle should apply to all of the myriad ancillary fees that are being established by airlines serving the United States.

D. A "Significant Delay" Standard To Govern Refunds Should Be Related to the Rule Governing Lengthy Tarmac Delays.

The Department has requested comment on the appropriate method for defining a "significant delay" for purposes of a customer service plan standard that requires refunds for delayed or canceled flights. 75 Fed. Reg. 32323. ASTA believes that the preferred methodology

is to tie the refund to the standard used for deplaning passengers during a prolonged tarmac delay, the three-hour rule established in the prior rulemaking.

Tying the refund right to the deplaning right will in effect create a single standard that can easily be understood by passengers and airline personnel alike. A variable standard, tied to the length of flight, for example, is more likely to cause passenger confusion and to conflict with airline personnel.

E. Mandated Refunds Should Include "Optional Fees" Paid by a Passenger.

Since the Department has, correctly in our view, determined that failure to refund optional fees when flights are cancelled is an unfair practice, this requirement should be included in the standards applied to customer service plans, thereby assuring uniformity across the board for all airlines. This would also reduce guess-work by travelers as to what their rights are, since the customer service plans must be disclosed on websites and elsewhere. Consumers should not have to conduct legal research to understand their air travel rights. Including this requirement in customer service plans will eliminate that need.

IX. ON BOARD UPDATES REGARDING DELAYS SHOULD BE REQUIRED AT LEAST EVERY THIRTY MINUTES AND, IN LONG DELAY CASES, AIRLINES SHOULD BE REQUIRED TO TELL PASSENGERS WHEN THEY MAY DEPLANE.

The issue of keeping passengers informed during lengthy tarmac delays is perhaps the easiest of all questions raised in this rulemaking. As we have repeatedly stated in other contexts, much of the customer dissatisfaction regarding on board treatment of passengers would be eliminated if the airlines routinely kept passengers accurately informed about the delay situation. Most passengers understand that delays can happen in air travel for a host of reasons and can tolerate them better if they feel they are getting the true story and being kept up-to-date on developments, or lack of them.

Therefore, ASTA strongly believes the Department should impose a requirement that each carrier update passengers not less frequently than every 30 minutes regarding the status of a delay.

The same reasoning applies to the question of when passengers may deplane during a prolonged tarmac delay. The three-hour rule will be useless if the one party in control of the key information about the extent of the delay is not forthcoming with the passengers. There is no reason to create a guessing game about this simple question. When the three-hour limit has been reached, the airline should be required to tell the passengers about their right to deplane, adding such other information as may be relevant and helpful.

X. FOREIGN AIRLINES SHOULD BE SUBJECT TO THE SAME CONSUMER PROTECTION REGIME AS U.S. CARRIERS.

The Department has asked whether foreign air carriers should be exempted from any of the subjects of customer service plans. We think not.

From the customer standpoint, we can see no reason that travelers should receive fewer protections when flying on foreign air carriers. As a public policy, it makes no sense, in our view, for a competitive gap to be created between foreign and domestic airlines in this regard. Providing proper service for all travelers does involve costs so that differentiating between foreign and domestic carriers would implicitly give foreign carriers a cost advantage. Absent a truly compelling showing that full consumer protection will unreasonably burden foreign carriers, ASTA believes they should adhere to the same protective regime as U.S. domestic airlines with respect to service from the United States.

XI. MANDATORY DISCLOSURE OF PAST FLIGHT PERFORMANCE IN CUSTOMER SERVICE PLANS AND MANDATORY WARNINGS REGARDING TROUBLED FLIGHTS ARE UNNECESSARY AT THIS TIME.

ASTA continues to believe that the flight delay data now available to consumers is sufficient to enable consumers to distinguish and plan for flights that are routinely delayed. Requiring the insertion of flight-specific information in customer service plans could force the constant updating of those plans with little gain in consumers' actual knowledge. Similarly, requiring a mandatory pre-booking warning to consumers seems to us to be overkill. There is little or no data to support the idea that consumers generally value and rely on individual flight performance data, so a mandatory warning would likely only inject an element of uncertainty into the booking process. The Department's existing requirements for disclosure of frequently delayed/canceled flights strike a reasonable balance between providing information and attempting to guide the consumer's decision-making.

XII. CONTINGENCY PLANS AND CUSTOMER SERVICE PLANS SHOULD BE ACTIONABLE ELEMENTS OF ALL AIRLINES' CONTRACTS OF CARRIAGE.

Nothing speaks louder than the airlines' failure to include their contingency plans and customer service promises in their contracts of carriage following the Department's invitation to do so or face possible regulation. The airlines have no incentive to do this voluntarily, yet it is one of the most important steps that can be taken to ensure sensitivity to consumer needs. Inclusion of these provisions in the contract of carriage will enable consumers to bring legal actions for breach of contract without fear that federal preemption will leave them with no remedy.

In practice, however, we do not believe there will be very many lawsuits, because of the complexity of and time consumed by even a small claims case and, more importantly, because

the exposure to legal redress will lead the airlines to remedy many of the problems that could lead to customer litigation. Other industries operate multi-state and even global businesses without the protection of federal preemption of state law breach of contract claims. Airlines can do it too.

The importance of incorporation into the contract of carriage of the airlines' customer service obligations cannot be overstated. Up to now the airlines have avoided responsibility to consumers by invoking federal preemption or, as is most relevant here, by failing to make any real and enforceable promises in their contracts of carriage which are enforceable in the courts. The combination of contingency plans and customer service plans containing mandatory inclusion of key consumer protections with incorporation of those promises into the contract of carriage will create a powerful force for change in the way consumers are treated by the carriers.

As with the other issues in this rulemaking, we see no reason to exempt foreign carriers from this new regime. While they may now be required to answer to U.S. courts, the alternative seems to be to force U.S. consumers to pursue the airlines in foreign countries. On balance, the former approach will create the greatest incentive to taking actions that will avoid the problems in the first place and reduce actual litigation to a manageable level.

ASTA sees little risk that airlines will remove key protections from their contracts of carriage, as the Department intimates. If the requirements for inclusion in the contingency plans and customer service plans are tightly drawn, as they should be, the airlines will not be able to water down their contracts of carriage. If they do, the Department can always write even more encompassing regulations, a result we think the airlines will want to avoid.

XIII. FOREIGN CARRIERS SHOULD BE REQUIRED TO DESIGNATE A CONSUMER RESPONSE EMPLOYEE.

The Department raises the question whether, like domestic carriers, foreign air carriers should have to designate and identify an employee to monitor and address flight delay issues, disclose the contact information for the complaint department and respond to complaints within specified time periods.

In the age of electronic communication this should be an easy lift for the airlines. The proposal does not require the person or department to be physically located in the United States. They simply have to exist and be accessible and responsive. Surely this is not too much to ask of firms that enjoy the benefits of a federally conferred license to use U.S. airspace, infrastructure and to sell to U.S. consumers.

XIV. THE PROPOSED CHANGES TO THE OVERSALE/DENIED BOARDING RULES SHOULD BE ADOPTED AND EXPANDED.

The NPRM proposes five significant changes to Part 250. All of them are essential to making the rules fair to consumers and should be adopted. They are identical to or consistent with recommendations ASTA made in the previous rulemaking that focused specifically on denied boarding.[10]

We also agree with the suggestion that the compensation limits be replaced with a requirement that an involuntarily bumped passenger be reimbursed based on the actual fare paid. This is the closest general measure of the damage inflicted on the passenger by an involuntary bumping and has the advantage of being easily determined, objective and easily understood by the consumer. Basing the compensation on fares paid also removes the Department from having

[10] See Comments of the American Society of Travel Agents in the DOT rulemaking, *Oversales and Denied Boarding Compensation*, Docket OST-2001-9325, filed January 22, 2008.

to periodically determine the adequacy of the compensation levels, which will fluctuate with air fare levels in the ordinary course.

ASTA does not favor the alternative forms of compensation suggested by the NPRM. Introducing compensation for some passengers based on the type of consideration they paid for that particular ticket will unduly complicate the process and likely be confusing to passengers. Under some carriers' current rules, some tickets may be paid for by a combination of mileage awards and cash. The miles were, of course, originally earned by expending cash, so while they become a medium of exchange, they are economically just a discount from the price of a trip earned by paying for other trips. This sensitive area of airline-passenger relations should, in ASTA's opinion, be kept as simple as possible.

Beyond what has been proposed in the NPRM, ASTA continues to believe that it is inappropriate to allow airlines to discriminate in denied boarding practices based on the fare the passenger paid, even if those discriminatory rules are disclosed to the passenger when they are solicited to accept voluntary denied boarding. Permissible airline discriminations under current policies include the fare the passenger paid and the frequent-flyer status the passenger enjoys with the airline.

We do not understand what these factors have to do with the purposes of denied boarding compensation. Why, for example, should a person with a non-refundable discounted fare be presumed to face less inconvenience that a full fare passenger when the question of involuntary bumping arises on an oversold flight? Some passengers may have had no choice about the airline they flew and no real choice about the price they paid, yet the fact that they have no repeat flying miles accumulated with that airline will mean they are singled out for involuntary bumping ahead of other passengers who have both choice and resources.

As for the issue of whether the passenger has a seat assignment before reaching the departure gate, ASTA believes that the denied boarding compensation rules should encompass the principle that no one who has a confirmed seat assignment should ever be bumped. To do otherwise implies that the airline is either (1) assigning the same seat locations to two or more passengers (as opposed to simply selling more tickets than there are seats on the aircraft), or (2) willing to force a confirmed seat holder off the plane in favor of someone without such a seat assignment whom the airline has chosen to prefer for some undisclosed reason.

The corollaries to the above principle are that (a) the airline should be required to disclose to the ticket purchaser at the time of purchase the rules governing, and the risks assumed, by the purchaser if he does not secure a seat assignment; and (b) the airline should be prevented by regulation from gaming the situation to make it difficult or impossible for the passenger to get a seat assignment, thereby leaving him exposed to the risk of denied boarding and without a means to remove the risk.[11]

In practice we understand the general approach to be that a confirmed seat holder is not bumped in favor of anyone. That practice should continue but should be engrafted into the regulations. But since airlines often refuse to give seat assignments to some purchasers at the time of purchase (low fares, Web specials, frequent flyer points redeemers, etc.) even for cash payment and even though the booking is "confirmed," they should be required to explain the implications of that practice to the passenger so the passenger can exercise his privilege (usually limited to 24 hours) to cancel the booking and seek another airline.

[11] We are not speaking here about the issue of unbundled airfares whereby the airline demands an additional payment to secure a seat. The discussion and proposal relates to the case where the passenger is told "you must come to the airport on day of departure to get your seat assignment." In that case the passenger is at complete risk of disaccommodation and should be warned.

The present system has an element of elitism in it that seems inappropriate to the spine of the national transportation system. As presently practiced, a consumer may buy a ticket and find that the airline refuses to give a seat assignment until check in. At check in the consumer learns that the flight is oversold and because he has no seat assignment, he may be bumped. He is then displaced by a "higher ranking" purchaser who arrives at the last minute with a frequent flyer premium level card who is moved to the top of the wait list and then is given the last remaining seat.

This type of practice should be stopped. The difficulty of trying to explain to solicited passengers at the gate the impact of boarding priority rules on the likelihood of their being involuntarily bumped if they do not accept the solicitation may, in the end, deter the airlines from applying these rules, but there are perceived strong marketing reasons for keeping them and the result will most likely be more chaos at the gate and less consumer comprehension of the denied boarding regime.

Finally, ASTA believes that the rules should abolish the use of vouchers as denied boarding compensation. Only cash payments will create a full incentive for airlines to closely manage DBC. Vouchers are offered in lieu of cash in circumstances in which it is often hard for the consumer to make an informed decision. Vouchers typically can be redeemed only in person at an airport and they usually have no residual cash value if the ticket purchased with them is less than the value of the voucher. Two vouchers may not normally be applied to a single ticket. It may also be the case that the consumer cannot use the voucher on the denied-boarding airline during its validity period, so that the voucher ends up being worthless. There are, therefore, many disincentives to the redemption of the vouchers and many are not redeemed. Pressure to accept vouchers may increase as the DBC maximums are increased, which is a further reason to

require cash offers to passengers prior to involuntary removal. Cash offers would likely find more takers, thereby reducing the likelihood of involuntary removal.

XV. PART 250 SHOULD BE EXPANDED TO INCLUDE ALL CARRIERS IN A CODE-SHARE OR OTHER JOINT SERVICE AGREEMENT WITH CARRIERS OPERATING AIRCRAFT WITH MORE THAN 30 SEATS.

ASTA believes the coverage of Part 250 should be expanded to include any airline that participates in a code-share or other form of joint/affiliated service with a carrier that is currently covered by the rule. Such airlines play an important role in the air transportation network and their overbooking practices applied on typically short-haul routes can have a drastic effect on the ability of a traveler to complete her plans on the long-haul carrier. Moreover, consumers are unlikely to be aware of the distinction and thus may be unpleasantly surprised to be denied boarding on the feeder carrier and told that they have no protection. Absent proof that feeder and code-share carriers do not engage in the same types of overbooking practices as the larger airlines, there is no reason for them to be exempted from the notice and compensation rules applicable to their larger partners.

XVI. THE "FULL PRICE RULE" SHOULD BE ENFORCED AS WRITTEN AND SHOULD ENCOMPASS ALL MANDATORY FEES REGARDLESS OF SOURCE.

ASTA concurs in the proposal to enforce the so-called "full price rule" as written and require that all published prices include mandatory fees and surcharges regardless of source. This approach to fare advertising would eliminate the fine print about mysterious (to the passenger) government taxes and airport fees that must be paid but are typically excluded from the price published as "the fare." The aggregate impact of such charges can be a significant percentage of the airfare and could be material to a consumer's decision to buy. Enforcement of a true "full price" policy will assist travel agents in their task of helping travelers with

comparative shopping and helping them understand how to optimize their travel expenditures. If the taxes or other surcharges are determinable in advance and cannot be avoided by the passenger, they should be included in the initial and all other advertisements and publications of the fare.

In this regard, ASTA is aware, as the Department notes, that the full price policy of the past has on numerous occasions been applied to "ticket agents" as well as airlines. Travel agents sell the fares that their airline principals set. We therefore have no objection to the explicit inclusion of ticket agents in the scope provisions of the rule.

ASTA further agrees with the addition of a rule forbidding the use of "one way" to refer to fares that are contingent on buying a roundtrip service. Such references may lead some consumers to believe they can buy the fare for a one-way trip, confusing their ability to comparison shop among fare quotes.

With respect to the "double occupancy" issue, however, we think there is a distinction that should affect the treatment of these fares. The requirement of double occupancy does not affect what the individual pays for the service. It means that two people must buy the same service to get that price. As long as the price is labeled "per person," and they usually are, the double occupancy requirement makes it clear that the price is only available if two people buy it together. The only circumstance in which double occupancy pricing would seem to be misleading is if there is no "per person" associated with the price and double occupancy is required. The case for bringing this form of advertising into the "full price" policy is therefore not as strong as the case of "one way" advertising.

Finally, ASTA agrees that "opt out" advertising should be brought within the rule. Especially in an environment in which the airlines want to unbundle the historical components of

the "airfare," they should not be permitted to then attempt to re-bundle certain items in a manner that may mislead consumers. Similarly, tour operators should let the optional elements of tours stand on their own merits and not force travelers to say "no" to components they do not want.

XVII. ON CODE-SHARE FLIGHTS, THE GOVERNING ANCILLARY FEES SHOULD BE THOSE OF THE MARKETING CARRIER.

ASTA certainly concurs with the Department's proposal to require buyers of code-shared flights to be made aware of material differences between the ancillary fees of the marketing carrier and the operating carrier. However, we recommend that the Department simply eliminate this issue by requiring that the services/fees always be those of the marketing carrier. It is quite common for a traveler to seek the services of one carrier without any knowledge that a code-share is in place that will lead to the flight being operated by another carrier. The burden should not be on the traveler, or the traveler's agent, to divine which carrier may be actually operating the flight (regardless of the disclosures in GDS records, in the case of alliances the operating carrier might change following the booking). If the traveler buys from Carrier A, then Carrier A's fares, rules, services and fees should apply. This simple approach will enable the consumer to understand what they are buying and places the burden, properly, on the partnering airlines to deliver in accordance with what was marketed to the traveler and led to the purchase.

XVIII. REGULATION OF POST-PURCHASE PRICE INCREASES SHOULD PROTECT ALL PARTIES TO A TRAVEL TRANSACTION.

If the Department proceeds with its stated plan to regulate this aspect of air travel sales, ASTA submits that it should do it in a manner that protects all parties to the transaction. As we understand the proposal, it would effectively prohibit the post-purchase imposition of fuel surcharges on transactions entered into many months before the actual travel. Alternatively, the

Department propounds two alternatives that would permit increases but only with notice at the time of purchase or with a "black out" period before travel.

ASTA believes no post-purchase price increases, by surcharge or otherwise, should be permitted on ticketed reservations. In addition, the prohibition should apply to (1) contracted group travel arrangements, and (2) B-2-B transactions between airlines and tour operators, so that the operators are protected against post-contract increases that must otherwise be passed on to consumers.

If, however, the Department determines to adopt one of the two discussed alternatives, ASTA believes that the best approach to this is the first alternative: allowing increases if prior notice is given, but only if the notice is delivered of the maximum potential of such an increase and in a way that cannot be ignored. In addition, the notice should be accompanied by a statement of the last time the airline or agent actually imposed such a post-purchase charge. This approach assures, as much as can be, that the consumer understands his potential exposure to a post-purchase surcharge. The approach we recommend will give airlines some measure of protection from large and volatile fuel price increases on long-advance-purchase tickets while assuring that consumers understand the risk as much as it can be understood and predicted.

XIX. ALL SCHEDULED AIRLINES SHOULD BE REQUIRED TO NOTIFY PASSENGERS OF SCHEDULE DEVIATIONS.

In ASTA's opinion the single greatest cause for passenger dissatisfaction with airline performance is the failure to keep passengers at the gate and on the aircraft consistently, timely and accurately informed about known information regarding flight schedule deviations. The Department wisely proposes to require the airlines to do better, but initially states that the requirement would apply only to the largest scheduled airlines.

ASTA can see no reason why passengers' need for information about flight delays has anything to do with the size of annual revenue the airline earns each year. Delays of 30 minutes are a reasonable threshold for requiring information from the airline and, as suggested earlier, we strongly believe the responsibility for notification prior to the day of departure belongs with the marketing carrier. On the day of travel, however, it would seem to make more sense to have the operating carrier assume this responsibility. However, this shift of responsibility would only work if the marketing/selling carrier has effectively communicated all the passenger's information to the operating carrier. It is not uncommon, and indeed maybe standard practice, that the marketing and operating carriers use different confirmation codes for the same reservation. If the handoff of information is not perfected, and/or the passenger has not been given both confirmation codes, the passenger may find himself in a neverland of confusion. Ultimately the responsibility for avoiding this should rest with the marketing carrier.

Given the persistence of the notification problem, we do not believe it is prudent to leave the means of communication up to the airline. The Department should mandate the means as applied to specific circumstances. For example, when it is reasonable to believe that passengers are gathering at the boarding gate, there should be a responsibility to make announcements in that area and in any airport displays that the airline controls. If the delay issue is known before, say, two hours before flight, then announcements should also be published electronically to those passengers who have asked for such communication. ASTA does not know whether it is feasible to post this information on the carrier's website in 30 minutes, but if it is, then the airline should be required to do so. Once the traveling public comes to understand that this information is regularly and reliably being made available, they will seek it out through smart-phones, laptops and other such devices.

With respect to the proposed requirement to notify airports so that notification outlets not under the airline's control can be appropriately updated, we suggest that the Department direct the Federal Aviation Administration to order airports to take steps to fulfill the purpose of the notification rules for the airlines so that the work of the airlines to improve this important information flow does not result in conflicting information posted at different points around an airport. It is equally important that the information on the airline's website and other notification facilities is concurrent with what the airport is posting, so that passengers do not, for example, see one flight time on the airport's boards and another on the airline's websites while possibly receiving a third time from an online notification from the carrier.

XX. UNILATERALLY IMPOSED CHOICE-OF-FORUM PROVISIONS SHOULD BE ABOLISHED.

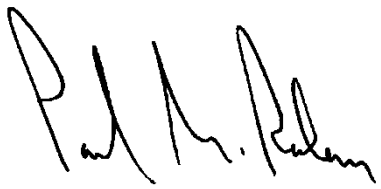
The airline practice of inserting choice-of-forum provisions in contracts of carriage has worked to deprive passengers with non-preempted claims against an airline from any realistic redress through the courts. In addition to the other proposed rules strengthening the contract of carriage, the elimination of forum-restrictions will go a long way to inducing better consumer behavior from the airlines. Rather than leading to thousands of lawsuits all over the country, we believe airlines will pay more attention to the customer service issues that give rise to litigation and will commercially preempt the suits by eliminating the root causes. Beyond that, they are entitled to no more protection from litigation than other multi-state businesses that are unable to impose choice-of-forum provisions on their customers and who do not have the benefit of federal preemption of most causes of action that might be brought against them.

XXI. CONCLUSION

ASTA believes this is the single most important rulemaking in the history of the Department's consideration of such matters. The historical practice of proceeding primarily by

guidance letters and the occasional enforcement action has not proved equal to the task of protecting consumers in an almost constantly consolidating and constantly imperiled airline industry. Some regard will, we suspect, have to be had for how much change of this nature the airlines can effectively implement in a short time frame, but one thing that cannot wait is the overarching issue of providing access to third-party distributors of ancillary fee information as discussed in Section I of this paper. Fully half of all air travelers will be affected if the Department allows the airlines to withhold this information from the GDSs, which are the only pipeline through which travel agents and other third-party distributors can access and transact this information in an affordable and efficient manner.

Respectfully submitted,



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