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Airline Passenger Rights: The Federal Role in Aviation Consumer Protection

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Summary

The 1978 deregulation of the airline industry in the United States eliminated federal control over many airline business practices, including pricing and domestic route selection. However, the federal government continues to legislate and enforce certain consumer protections for airline passengers. Congress largely determines the degree to which the rights of airline passengers are codified in law or developed through regulatory rulemaking.

The House Committee on Transportation and Infrastructure and the Senate Committee on Commerce, Science, and Transportation are the primary congressional committees of jurisdiction over airline passenger rights. Congress can authorize or require the U.S. Department of Transportation (DOT) to enact rules on certain issues, and it can enact requirements for airlines through direct legislation. In specific cases, DOT may take enforcement actions against air carriers that violate consumer protection rules.

Most of DOT's consumer rules are based on 49 U.S.C. §41712, which directs it to "protect consumers from unfair or deceptive practices." Some are based on DOT's authority to require air carriers in interstate transportation to provide "safe and adequate service" (49 U.S.C. §41702). The interpretation of the phrase "unfair or deceptive" can significantly affect the scope of DOT's enforcement authority.

In December 2009, DOT issued a comprehensive final rule, "Enhancing Airline Passenger Protections," that expanded regulatory protections for aviation consumers. The rule established procedures related to extended ground delays involving aircraft with passengers aboard, required air carriers to address chronically delayed flights, and mandated more information disclosure to consumers. In April 2011, DOT completed a further rulemaking that strengthened the rights of air travelers in the event of oversales, flight cancellations, and delays. The rule also required consumer access to accurate and adequate information when selecting flights, and improvements in agency responsiveness to customer complaints. A key provision of the 2011 rules, requiring airlines to prominently disclose to the consumer the total cost of a flight, including all government and airline taxes and fees, was upheld in the federal courts.

The FAA Extension, Safety, and Security Act of 2016 (P.L. 114-190), signed into law by the President on July 15, 2016, included a few provisions regarding the rights of airline passengers and created a firmer statutory basis for certain rules already adopted by DOT. However, the legislation did not address a number of consumer-related subjects, including disclosure of code-share arrangements on domestic flights, compensation of passengers "bumped" from oversold flights, and disclosure of ancillary fees. Proposals to overturn a DOT policy requiring that airline and travel websites give most prominent display to the total cost of a flight, including taxes and fees, were not included in the act. Such action would have allowed airlines to advertise base airfares, even though consumers would not be able to purchase transportation at those prices.

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Introduction

The deregulation of the airline industry in the United States in 1978 eliminated governmental control over most business practices of airlines. However, the federal government continues to regulate certain practices for the protection of the airlines' customers, in addition to its long-standing role in overseeing air safety.

Congressional interest in the rights of airline passengers became intense between 2007 and 2009, when a series of delays stranded passengers aboard airplanes at U.S. airports for 10 hours or longer. Since then, Congress has strengthened passengers' rights under federal law, and many Members of Congress have continued to follow aviation consumer issues closely.

This report examines aviation consumer protections in the post-deregulation era. It explains the roles of Congress and the U.S. Department of Transportation (DOT) in protecting airline consumers, and discusses some major passenger rights issues and related laws and regulations.

Three Levels of Airline Passenger Protection

The rights of domestic airline passengers are set forth at three different levels: in federal laws, in regulations, and in the airlines' own policies. Congress, under its constitutional power to "regulate Commerce with foreign Nations, and among the several States,"¹ has authority over airline passengers' rights. State and local governments are generally preempted by law from regulating "price, route, or service of an air carrier."²

The Role of Congress

By and large, the rights of airline passengers are defined by Congress. Congress determines the extent to which airline consumer rights are codified in law, authorizes federal agencies to enforce those rights, and directs or authorizes federal agencies to define and enforce passenger rights that are not specifically enumerated in legislation. The House Committee on Transportation and Infrastructure and the Senate Committee on Commerce, Science, and Transportation are the primary congressional committees of jurisdiction, and exercise routine oversight over DOT, the principal department responsible for executing and enforcing airline passenger rights laws. In many cases, Members of Congress become aware of passenger rights issues by receiving complaints from constituents, and congressional office staff members are often called upon to advise constituents about their rights as air passengers, to provide guidance on filing complaints with DOT, and to communicate with DOT about constituent concerns.

The controversy surrounding tarmac delays illustrates the ways in which Congress exercises its oversight authority. Between 2007 and 2009, hundreds of incidents occurred in which passengers were held aboard planes that had either departed airport gates but were not allowed to take off or had landed but were not allowed to disembark passengers. These incidents were extensively reported in the news media, and congressional offices received numerous complaints from

¹ U.S. Constitution, Article I, Section 8.

² 49 U.S.C. §41713(b) (1). Consumers may sue airlines for damages or breach of contract in a state or local court, but state or local consumer protection laws generally do not apply to air carriers. In one recent case, a federal court dismissed a lawsuit filed in a New York state court by passengers who claimed to have been stranded for more than seven hours aboard JetBlue flights on October 29, 2011, under "inhumane and intolerable" conditions. The court ruled that all the claims were preempted by federal law. *Joseph v. JetBlue*, No. 5:11-CV-1387 (TJM/ATB), April 11, 2012.

constituents who had been aboard planes that were unable to provide passengers with drinking water or on which lavatories stopped functioning. Congressional hearings ensued in 2009.³ In the wake of this attention, DOT issued rules on tarmac delays in 2010. Language on this subject, providing a firmer statutory footing for the federal rules that had already entered into effect, was incorporated into the FAA Modernization and Reform Act of 2012 (P.L. 112-95). The 2016 FAA reauthorization incorporated language that defined excessive tarmac delays, but also altered how the tarmac delay threshold is measured, which could afford airlines more leeway in dealing with delayed flights.

Some Members of Congress also have expressed concern about issues related to flight schedules, aircraft capacity, and frequency of service. Although these matters are no longer subject to federal regulation, they are often raised in the context of business dealings between air carriers that do require federal approval, such as mergers and code-share arrangements. For example, the proposed merger between American Airlines and US Airways led to objections that the combination would reduce competition and limit consumer choices. These concerns were expressed by some Members of Congress and witnesses during congressional hearings in February and March 2013,⁴ before completion of the merger in December 2013 and the final court approval of a settlement between the airlines and the U.S. Department of Justice Antitrust Division was granted in April 2014.

The Role of the U.S. Department of Transportation (DOT)

DOT Regulatory Authority

DOT is responsible for executing and enforcing airline consumer rights laws established by Congress. It may also develop regulations based on more general statutory authority, giving it broad powers to prescribe regulations, standards, and procedures related to air travel.⁵ More specifically, DOT has authority “under 49 U.S.C. Section 41712, in concert with 49 U.S.C. Sections 40101(a)(4), 40101(a)(9), and 41702 to protect consumers from unfair or deceptive practices and to ensure safe and adequate service in air transportation.”⁶ DOT’s authority in this

³ Congressional Testimony, Airline Delays and Consumer Issues; Committee: House Transportation and Infrastructure; Subcommittee: Aviation, May 20, 2009; Bill McGee, “Passenger rights debate on glide path to Congress,” *USA Today*, September 30, 2009.

⁴ House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law, hearing on “Competition and Bankruptcy in the Airline Industry: The Proposed Merger of American Airlines and US Airways,” February 26, 2013; Senate Judiciary Committee, Subcommittee on Antitrust, Competition Policy, and Consumer Rights, hearing on “The American Airlines/US Airways Merger: Consolidation, Competition, and Consumers,” March 19, 2013.

⁵ 49 U.S.C. §40113.

⁶ Department of Transportation, “Enhancing Airline Passenger Protections,” 74 *Federal Register* 68982-69004, December 30, 2009. DOT may also issue passenger protection rules governing international flights to and from the United States, depending on practicality and within the bounds of international agreements and treaties. Liability issues, such as compensation for lost baggage and passenger injury on international flights, are generally covered by international agreements ratified by the United States, notably the Montreal Convention of 1999, rather than by U.S. laws or regulations. Itineraries between certain countries may be subject to the older Warsaw Convention. DOT consumer-protection regulations may not apply to flights between foreign points undertaken by U.S. carriers’ code-share partners, even if the flight carries a U.S. airline’s flight number. For example, a United Airlines passenger traveling from Newark, NJ, to Istanbul, Turkey, might be booked from Newark to Munich, Germany, aboard a United flight, and then from Munich to Istanbul aboard a flight operated with a United flight number by Lufthansa, a German carrier. In such a case, the flight between Munich and Istanbul would not be subject to U.S. regulations concerning tarmac delays, overbooking, and other consumer matters.

area is exercised by the Office of the Secretary, not by the Federal Aviation Administration (FAA), which is responsible for aviation safety. DOT does not have authority over matters related to aviation security and airport security screening, which are administered by the Transportation Security Administration (TSA), an agency of the Department of Homeland Security.

DOT's statutory authority is generally used as the basis for rulemaking. Occasionally, it is also used in direct enforcement actions. Most of DOT's consumer rules are based on the "unfair or deceptive practices" provision, with a few based on the "ensure safe and adequate service" provision. The definition and interpretation of the phrase "unfair or deceptive practices" can significantly affect the scope of DOT's rulemaking and enforcement authorities.

Separately, DOT enforces regulations to ensure that individuals with disabilities have nondiscriminatory access to the air transportation system, and that airlines do not subject passengers to unlawful discrimination on the basis of race, gender, religion, or national origin.⁷

The DOT Aviation Consumer Protection Division's booklet *Fly-Rights: A Consumer Guide to Air Travel* is published online. It covers a wide array of topics, from flight delays and cancellations to travel scams. It also provides information about DOT rules on consumer complaints.⁸

DOT Enforcement Authority

The Office of the Assistant General Counsel for Aviation Enforcement and Proceedings in DOT (OAEP), including its Aviation Consumer Protection Division, monitors airline compliance, investigates reported violations of DOT regulations, and enforces rules and regulations. It may negotiate consent orders with air carriers and fine violators. In 2015, DOT issued 15 consent orders related to aviation consumer rule violations and assessed \$2,435,000 in civil penalties.

OAEP considers a number of factors in determining the civil penalty it would seek in an enforcement proceeding, such as the harm caused by the violations, the alleged violator's compliance disposition, the alleged violator's financial condition and ability to pay, how long the violations continued, and the strength of the case.⁹ Currently, air carriers are subject to a maximum civil penalty of \$32,140 per violation, under 49 U.S.C. §46301 and 14 C.F.R. §383. Small businesses¹⁰ or individuals are subject to a maximum penalty of \$1,414. Notwithstanding this limit, small businesses and individuals are subject to higher maximum penalties for discrimination (\$12,856 per violation) and for engaging in unfair or deceptive practices (\$3,214 per violation).¹¹

OAEP may look into possible violations based on complaints from individuals, groups, other government agencies, or its own staff members' observations and research. Usually, its first action is to send a letter to the air carrier, setting forth the complaint or issues involved and requesting a response. This gives the air carrier a chance to look into the matter and to resolve the complaint, deny the complaint, or provide an explanation. This may be the end of the process, but

⁷ 14 C.F.R. §382.

⁸ <http://www.dot.gov/airconsumer/fly-rights>.

⁹ Office of Aviation Enforcement and Proceedings, DOT, "Answers to Frequently Asked Questions Concerning the Enforcement of the Final Rule on Enhancing Airline Passenger Protections," April 28, 2010, p. 2.

¹⁰ A domestic or foreign air carrier is a small business if it provides air transportation only with small aircraft (i.e., aircraft with up to 60 seats/18,000-pound payload capacity). See 14 C.F.R. 399.73 Definition of small business for Regulatory Flexibility Act.

¹¹ 14 C.F.R. §383.2 (b). The penalty amounts were adjusted August 10, 2016; see *Federal Register*, Vol. 81, No. 154, pp. 52763-52766.

OAEP may issue a warning letter if it concludes violations occurred but were inadvertent or minor.

If OAEP believes enforcement action is appropriate, it would seek a civil penalty and consent order. A consent order typically relates the facts of the case to law and regulation, sets forth the penalty the violator has agreed to pay, and incorporates language ordering the air carrier to cease and desist from further violations. If the air carrier refuses to settle, the case may go to an enforcement hearing before a DOT administrative law judge.¹² DOT also may request injunctive relief from a federal district court, although this is unusual.

Airline Deregulation and Contracts of Carriage

The third source of airline passengers' rights is each air carrier's "Contract of Carriage," the legal agreement between an airline and its ticket holders. Contracts of carriage typically define the rights, duties, and liabilities of parties to the contract. For example, United Airlines' contract of carriage lists 30 rules, covering matters from reservations and ticketing to cancellation and refund policies to medical ground transfer services.¹³

Before the age of electronic tickets, contracts of carriage were usually evidenced by standard terms and conditions printed on the reverse of paper tickets. Now, they are often available for download via airlines' websites or at an airline's ticketing facilities. Passengers may take legal action in federal courts based on the contracts.

Contracts of carriage replace the pre-deregulation-era-rules "tariffs" that were subject to approval by the Civil Aeronautics Board (CAB).¹⁴ The CAB could take action against an air carrier that violated its approved tariffs. Since the economic deregulation of the domestic airline industry in 1978, the federal government no longer has control over airlines' prices or routes, and contracts of carriage are not subject to federal review or approval. However, a contract of carriage that conflicts with federal laws or regulations may not be enforceable by the airline.

With respect to passenger rights, the deregulated environment differs from the former regulated environment in two major ways. First, under regulation, the CAB had authority to approve carriers' proposed fares and even to set fares itself. The airlines' profitability was protected by this price setting and by barriers to the entry of new competitors. Airlines, for the most part, competed on service and frequency rather than price. Since deregulation, and especially with the advent of low-cost carriers, the primary means of competition has become price, not service.

In recent years airlines have "unbundled" their offerings, charging separately for services that once were included in the price of a ticket. Among these charges are fees for checked baggage, early/priority boarding, and seat change on a flight. Such ancillary fees have become major causes of consumer complaints.

Second, because the CAB used a cost-plus basis for approving fares, airlines could afford to maintain a significant amount of extra capacity, which made it relatively simple for them to deal with problems arising from flight delays or cancellations. Carriers' treatment of passengers booked on delayed or canceled flights is now a major cause of complaints (see **Text Box**).

¹² This is a simplified description of the process. Underlying this process is usually an ongoing process of negotiation between OAEP and the air carriers and OAEP and the complainants.

¹³ https://www.united.com/web/format/pdf/Contract_of_Carriage.pdf, viewed on August 3, 2016.

¹⁴ Pursuant to the Airline Deregulation Act of 1978, the CAB ceased operations on December 31, 1984.

Clarification of “Rule 240” and Rerouting of Stranded Passengers

During the era of regulation, Tariff Rule 240 was the number commonly used in air carrier tariffs that stated the airline’s rules on rerouting of passengers when a flight was canceled or delayed. Since fares and routes were then regulated, airlines generally had comparable price structures. This made it easier for them to enter and/or honor interline agreements for rerouting passengers at times of service disruption. Although Tariff Rule 240 has often been referred to in the press as a “federal rule,”¹⁵ it was not. Each airline’s version of Tariff Rule 240 was written by the carrier itself, although it was subject to CAB approval.

Today, competing airlines’ fares on a given route may differ, and the fares paid by passengers on any single plane may vary widely, depending upon the date of purchase, the passenger’s ability to change flights without penalty, and other factors. Although some airlines maintain interline agreements with other carriers allowing passenger rebooking in the event of cancellation or delay, others, particularly “low-cost” carriers, may not have such agreements. An airline that cancels a flight may be unable to rebook its passengers aboard another carrier without significant costs, which it may be unwilling to incur.

Additionally, in a deregulated environment in which profitability is not guaranteed, market forces have led many airlines to reduce the number of seats they offer to improve load factors. According to DOT’s Bureau of Transportation Statistics (BTS), air carriers’ average load factor on domestic flights in 2015 was nearly 85%, meaning that many flights operated at or near capacity. The lack of spare capacity can make it difficult for carriers to accommodate passengers in the event of flight disruptions. Consequently, today’s airline contracts of carriage are less likely to provide for rerouting of passengers on competing airlines’ flights than was the case prior to deregulation.

Major Passenger Air Service Provisions in 2016 FAA Reauthorization

The FAA Extension, Safety, and Security Act of 2016 (P.L. 114-190), signed into law on July 15, 2016, included a few provisions relating to passenger rights.¹⁶ Some of the passenger-rights provisions put forth during the debate over FAA reauthorization were not included in the final bill, as similar protections had meanwhile been implemented through the DOT rulemaking process. Relevant passenger-rights provisions of P.L. 114-190 are summarized below.

Training Policies Regarding Assistance for Persons with Disabilities

Section 2107 requires the Government Accountability Office to submit a report to Congress assessing air carrier personnel and contractor training programs regarding assistance to persons with disabilities, as well as reporting instances since 2005 in which DOT has requested an air carrier to take corrective action following a review of its training programs.

Section 2107 also requires DOT to disseminate to air carriers such best practices as it deems necessary to improve the reviewed training programs.

Air Travel Accessibility

Section 2108 requires DOT, no later than one year from enactment of the law, to issue a supplemental notice of proposed rulemaking regarding accessibility-related matters such as pressurized oxygen in a tank, transport of service animals, and provision of accessible lavatories.

¹⁵ *Wall Street Journal*, “Passenger Rights? What Passenger Rights?,” March 28, 2013.

¹⁶ P.L. 112-95, Title IV Air Service Improvements, Subtitle A—Passenger Air Service Improvements.

Refunds for Delayed Baggage

Section 2305 requires DOT to issue a final rule requiring domestic and foreign airlines to provide a refund of a checked-bag fee if a bag is delayed 12 hours or longer on a domestic flight or 15 hours on an international flight.

The provision provides DOT latitude to expand the aforementioned window (up to 18 hours for domestic flights and up to 30 hours for international flights), if the Secretary decides that a shorter time frame is not feasible or would adversely affect consumers in certain cases.

Tarmac Delays

Section 2308 amends 49 U.S.C. §42301, which addresses airline tarmac delays. It specifies that “excessive tarmac delay” means a delay that lasts more than three hours for an interstate flight or more than four hours for an international flight. The section directs DOT to issue regulations to implement the statute.

Language in Section 2308(a) alters how excessive tarmac delays are defined. Under existing DOT regulations (14 C.F.R. §259.4), excessive delay is measured from the time that passengers last have an opportunity to deplane, which could be well before an aircraft actually departs the gate to the point at which the air carrier permits passengers to deplane in the event of delay. The statutory change requires that delay be measured from the time the main aircraft door is closed in preparation for departure to the point at which the air carrier “shall begin to return the aircraft to a suitable disembarkation point.” Depending upon the length of time required to move the aircraft from its position during the delay to a disembarkation point such as a gate at the terminal, the actual amount of delay permitted before passengers are allowed to disembark may be significantly greater than under the previous regulations.

In addition, the new legislation does not specify the maximum time an air carrier has to complete the deplaning of passengers after returning to a disembarkation point. This may require a change in the existing DOT rule, which simply requires that passengers be given the opportunity to deplane no later than the three-hour or four-hour point in a tarmac delay.

Family Seating

Section 2309 requires DOT to review and, if appropriate, to establish a policy directing airlines to establish policies that would enable a child who is age 13 or under to be seated adjacent to an accompanying family member over age 13 “to the maximum extent practicable” at no additional cost.

This requirement would not apply when assignment to an adjacent seat would require an upgrade to another cabin class or a seat with extra legroom or seat pitch for which additional payment is normally required.

Advisory Committee for Aviation Consumer Protection

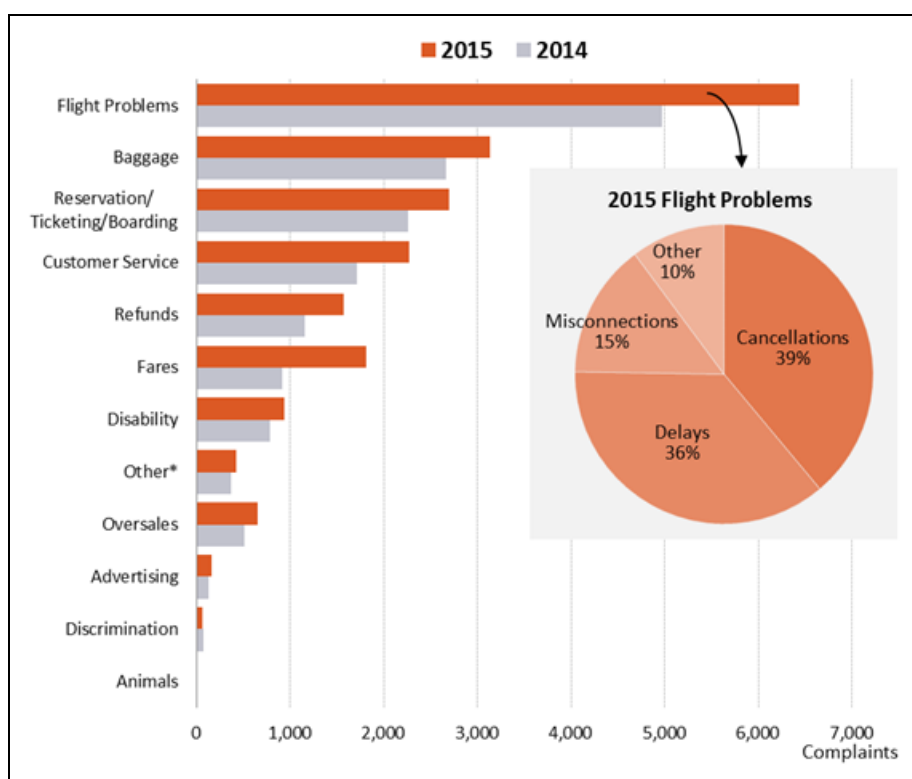
Section 1102(j) extends the Advisory Committee for Aviation Consumer Protection through FY2017. This advisory committee was established by the Secretary of Transportation in 2012, fulfilling the requirement in the 2012 FAA reauthorization to establish a four-member committee

for aviation consumer protection to advise the Secretary in carrying out passenger service improvements.¹⁷

Consumer Complaints to DOT

Despite the fact that the 15 largest U.S. airlines' on-time arrival rate was nearly 80% in calendar year 2015, flight delays and cancellations continue to be a prevalent passenger complaint to DOT. In 2015, there were about 6,433 such complaints in total, accounting for nearly 32% of all complaints.¹⁸ Mishandled baggage, problems with reservations, ticketing, and boarding, customer service, and refunds are also among the most frequent complaints (see **Figure 1**).

Figure 1. Number of Airline Consumer Complaints Filed with DOT
2014-2015



Source: U.S. Department of Transportation, Air Travel Consumer Report (February 2016), p. 43.

Note: "Other" includes complaints regarding frequent flyer programs, smoking, cargo problems, airport facilities, security, etc.

While DOT continues to receive many complaints about mishandled baggage, improved tracking systems have helped U.S. air carriers reduce the proportion of bags that are lost or sent to the wrong destinations. In 2015, the U.S. carriers reported 4.04 mishandled bags per 1,000

¹⁷ See <http://www.gpo.gov/fdsys/pkg/FR-2012-06-13/html/2012-14456.htm>.

¹⁸ Flight-related problems are predominantly delays and cancellations, but also include any other deviations from schedule.

passengers, which was among the lowest annual rates of mishandled baggage since DOT first collected data on the subject in 1987.¹⁹

How DOT Handles Aviation Consumer Complaints

When DOT receives a consumer complaint about an airline, it sends a copy to the airline and asks it to reply directly to the customer. If it is a complaint about a subject covered by DOT rules, DOT requires the airline to send DOT a copy of its response to the consumer, which DOT may evaluate to determine if the reply complies with DOT rules. A pattern of violations of a rule as reflected in complaints can lead to enforcement action. Even where no rule applies, if DOT determines an airline's practice, as reflected in complaints, to be deceptive, it may conduct an investigation, initiate a rulemaking, or commence enforcement action. This possibility gives airlines an incentive to monitor complaints made to DOT.

On the other hand, airlines often receive complaints directly from customers. The number of consumer complaints submitted directly to the air carriers is believed to be much higher than the number filed with DOT. However, airlines are not required by law to report consumer complaints to DOT, except those related to treatment of disabled passengers. The Air Carrier Access Act (49 U.S.C. §41705) prohibits discriminatory treatment of persons with disabilities in air transportation. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (P.L. 106-181) requires the Secretary of Transportation to "regularly review all complaints received by air carriers alleging discrimination on the basis of disability" and "report annually to Congress on the results of such review."

DOT's annual reports to Congress on disability-related air travel complaints are available on its website: <http://www.transportation.gov/airconsumer/annual-report-disability-related-air-travel-complaints>. In 2014, a total of 27,556 such disability-related complaints were submitted to DOT by airlines, of which 24,044 came from U.S. carriers.²⁰

DOT Regulatory Actions

Airline flight delays and cancellations were addressed in a final rule issued in December 2009 by DOT, "Enhancing Airline Passenger Protections."²¹ The rule expanded on previous regulations to address tarmac delays and chronically delayed flights and to require greater information disclosure to consumers. While language in the FAA Extension, Safety, and Security Act of 2016 (P.L. 114-190) alters how tarmac delays are measured, the rest of the tarmac delay rule is unaffected by the statutory change.

The existing rule requires large U.S. carriers to provide assurance that they will not permit an aircraft to remain on the tarmac for more than three hours without providing passengers an opportunity to deplane. An air carrier's failure to comply subjects the carrier to civil penalties of up to \$32,140 per passenger.²² This final rule contains the following mandates:

- Each air carrier is required to develop and implement a contingency plan for lengthy tarmac delays.
- Each contingency plan must include an assurance that, for domestic flights, the air carrier will not allow a tarmac delay to exceed three hours unless the pilot-in-

¹⁹ Data pertain to all U.S. airlines with at least 1% of total domestic scheduled-service passenger revenues, as determined by DOT's Bureau of Transportation Statistics (BTS). More information on rules, guidance, and other related issues regarding aviation baggage can be found on the DOT website: <http://www.dot.gov/airconsumer/baggage>. The lowest annual rate of mishandled baggage since 1987 was the 2012 rate of 3.09 mishandled bags per 1,000 passengers. In 2015, the rate of mishandled baggage was 4.04 mishandled bags per 1,000 passengers. See U.S. Department of Transportation, Air Travel Consumer Report (February 2016), p. 30.

²⁰ <http://www.transportation.gov/airconsumer/2014-disability-related-complaints-overview>.

²¹ <http://www.dot.gov/airconsumer/final-rule-enhancing-airline-passenger-protections>.

²² Ibid.

command determines there is a safety-related or security-related impediment to deplaning passengers, or unless air traffic control has advised the pilot-in-command that deplaning would significantly disrupt airport operations. The plan must include assurance that adequate food and water will be provided within two hours after the aircraft leaves the gate, as well as assurance of operable lavatory facilities and adequate medical attention.

- For international flights, air carriers must commit to a set number of on-tarmac hours to be determined by air carrier and set forth in its plan.²³

The tarmac delay rule took effect for domestic flights in April 2010. There has been a significant reduction in lengthy tarmac delays since the rule was published. In 2014, airlines reported the lowest number of tarmac delays longer than three hours on record—30 domestic flights with tarmac delays longer than three hours and nine international flights with tarmac delays longer than four hours at U.S. airports.²⁴

- The rule issued in December 2009 also contained several other consumer protection provisions: Air carriers must display flight delay information for each domestic flight they operate on their websites and designate employees to monitor the impacts of flight delays and cancellations, respond to consumer complaints, and tell consumers where and how to file complaints.
- Air carriers are prohibited from applying changes to their contracts of carriage retroactively.
- Under the rule, any chronically delayed flight²⁵ scheduled by an air carrier is considered an unfair and deceptive practice and an unfair method of competition within the meaning of 40 U.S.C. §41712.

On April 25, 2011, DOT issued a further rulemaking to strengthen the rights of air travelers in the event of oversales, flight cancellations, and delays; to ensure consumers have accurate and adequate information when selecting flights; and to improve responsiveness to customer complaints.²⁶ These rules, fully effective January 26, 2012, include the following:

- Baggage fees must be reimbursed for lost bags;
- Additional fees must be prominently disclosed on airline websites; and
- The ban on excessive tarmac delay is expanded to foreign airlines' operations at U.S. airports, with a four-hour limit on international flights.

²³ A year later, the ban on lengthy tarmac delays was expanded to foreign airlines' operations at U.S. airports, with a limit of four-hour delay set for international flights.

²⁴ DOT press release DOT 13-15, February 10, 2015. See http://www.rita.dot.gov/bts/press_releases/dot013_15. However, critics have argued that the rule may have caused more cancellations by air carriers, as cancelling a flight eliminates the risk that it might be delayed extensively after boarding.

²⁵ A chronically delayed flight is defined as any domestic flight that is operated at least 10 times a month, and arrives more than 30 minutes late (including canceled flights) more than 50% of the time during that month (<http://www.gpo.gov/fdsys/pkg/CFR-2012-title14-vol4/pdf/CFR-2012-title14-vol4-sec399-81.pdf>).

²⁶ <http://www.dot.gov/airconsumer/rule-two-amendment-concerning-baggage-and-other-consumer-issues-pdf>.

Ongoing Airline Passenger Consumer Issues

Code-Share Agreements²⁷

Over the past few decades, large U.S. carriers (also known as mainline carriers) have increasingly moved to joint marketing agreements, known as “code-share agreements.” In domestic code-share agreements, mainline carriers, such as Delta and American Airlines, purchase seat capacity from regional airlines or contract for the services of regional carriers to fly passengers to their hub airports. Such agreements often allow a regional carrier to (1) use the mainline carrier’s airline designator code to identify flights and fares in computer reservation systems; (2) use the mainline carrier’s brand—for example, logos and uniforms; and (3) participate in joint promotion and advertising activities.

It is also common for major U.S. carriers to establish international alliances with foreign carriers, which almost always include a code-share component, although in international code-share agreements there is no distinctive large or mainline carrier. The DOT code-share disclosure rule (14 C.F.R. §257) applies equally to domestic and international air transportation to and from the United States. It requires that U.S. airlines and foreign air carriers that participate in code-share agreements or long-term “wet leases” tell consumers clearly when the air transportation involves such an agreement, and that they disclose the transporting carrier’s identity.²⁸

DOT does not review most domestic code-share agreements,²⁹ but does require ticket sellers to disclose which airline is operating the flight prior to booking to ensure consumer transparency.³⁰ However, some confusion still appears to exist among passengers because airlines, travel agencies, and advertisers may disclose this information differently. In some cases, the name of the operating carrier may not be displayed prominently. Also, some regional carriers have code-share agreements with multiple mainline carriers and use different “doing business as” names when operating on different domestic routes.³¹

²⁷ More information on disclosure of code-share air service can be found on the DOT website, <http://www.dot.gov/airconsumer/notice-codeshare>.

²⁸ 14 C.F.R. §257.3 (e); long-term wet lease means a lease by which the lessor provides both an aircraft and crew dedicated to a particular route(s) for more than 60 days or is part of a series of such leases that amounts to a continuing arrangement lasting more than 60 days.

²⁹ Under 49 U.S.C. §41720, DOT’s Office of the Secretary (OST) must review any agreement “between two or more major air carriers that affects more than 15 percent of the total number of available seat miles offered by the major air carriers.” OST is required to assess the potential economic impact on competition of domestic code-share agreements between major carriers. An international code-share agreement, on the other hand, needs DOT approval. For more information, see <https://www.transportation.gov/policy/aviation-policy/competition-data-analysis/alliance-codeshares>.

³⁰ In 2011, DOT added a new subsection (c) to 49 U.S.C. §41712 that specifically requires airlines and ticket agents to disclose in any oral, written, or electronic communication to the public, prior to a ticket sale, the name of the carrier providing the service of each segment of a passenger’s itinerary. In addition, the amendment explicitly requires that on websites, disclosure must be made “on the first display of the Web site following a search of a requested itinerary in a format that is easily visible to a viewer.” Office of the Secretary, DOT, “Guidance on Disclosure of Code-Share Service Under Recent Amendments to 49 U.S.C. §41712,” January 14, 2011 (<http://www.dot.gov/airconsumer/notice-codeshare>).

³¹ Office of Inspector General, U.S. Department of Transportation, “Growth of Domestic Airline Code Sharing Warrants Increased Attention,” report AV-2013-045, February 14, 2013, p. 4.

Oversale/Overbooking³²

Most airlines overbook their scheduled flights to a certain degree to compensate for “no-shows.” Such oversale or overbooking is not illegal. When a flight is oversold, DOT requires airlines to ask passengers to give up their seats voluntarily (voluntary bumping), in exchange for compensation, before bumping anyone involuntarily.

A DOT rule (14 C.F.R. §250) requires airlines to properly inform and compensate passengers who are bumped involuntarily. Air carriers are required to establish and disclose boarding priority rules and criteria for determining which passengers shall be denied boarding on an oversold flight. Boarding priority criteria may include factors such as a passenger’s time of check-in, the fare paid, and passenger’s frequent flyer status.³³

In April 2011, DOT issued an amended final rule to address issues regarding denied boarding or involuntary bumping compensation, especially inadequate denied boarding compensation to passengers. The amendment increased denied boarding compensation rates and dollar limits, with dollar limits subject to inflation-related adjustment every two years. When a passenger is bumped involuntarily and the airline arranges substitute transportation that is scheduled to reach the passenger’s final destination within one hour of the original arrival time, no compensation is required. However, if the scheduled arrival time via substitute transportation³⁴ is more than one hour later than the original arrival time, the following rules apply:

- If the substitute domestic transportation arranged by the airlines is scheduled to arrive between one and two hours later than the original arrival time, the airline must pay the passenger an amount equal to 200% of the one-way fare (including all taxes and mandatory fees), with a \$675 maximum, effective August 25, 2015.³⁵ On international flights departing the United States, this limit applies when a bumped passenger is delayed up to four hours.
- If the substitute transportation is scheduled to arrive more than two hours later on domestic flights (four hours on international flights), or if the airline does not make any substitute transportation arrangements for the passenger, the compensation doubles to 400% of the one-way fare, with a \$1,350 maximum, effective August 25, 2015.³⁶
- An air carrier must refund any unused ancillary fees for optional services paid by a passenger if he or she was denied boarding, voluntarily or involuntarily.

Ancillary Fees and Disclosure of Full Fares³⁷

Many U.S. air carriers have held down ticket prices by advertising cheap base airfares and adding separate optional fees for services that traditionally have been included in the price of a ticket. These ancillary charges, including checked baggage fees, reservation cancellation or change fees,

³² More information on oversales can be found at <http://www.dot.gov/airconsumer/oversales>.

³³ http://www.ecfr.gov/cgi-bin/text-idx?SID=54358562bcfe8b187765c7395f37bc33&mc=true&node=se14.4.250_13&rgn=div8.

³⁴ Substitute transportation may involve flights by the same or another carrier or transportation by train or bus.

³⁵ http://www.transportation.gov/sites/dot.gov/files/docs/Inflation_2015.pdf.

³⁶ Ibid.

³⁷ More information on this topic can be found on DOT websites, <http://www.dot.gov/airconsumer/advertising> and <http://www.dot.gov/airconsumer/baggage-optional-fees>.

seat selection fees, priority boarding fees, and charges for in-flight meals, are generating considerable revenue. In 2015, the U.S. passenger airline industry collected more than \$3.8 billion in baggage fees³⁸ and over \$3 billion in reservation cancellation/change fees.³⁹

In order to make it easier for consumers to know how much they will have to pay for airline transportation and to ensure that airlines' fee-related practices are fair and transparent, the DOT rule issued in 2011 requires that an airline's most prominently advertised airfare must be the full cost of the ticket, with government taxes, mandatory fees, and optional surcharges included. For both domestic and international markets, carriers must disclose the full price to be paid, including government taxes and fees and any carrier surcharges, in their advertising, on their websites, and on the passenger's e-ticket confirmation. In addition, carriers must disclose all fees for optional services through a prominent link on their home pages, and must include information on e-ticket confirmations about the free baggage allowance and applicable fees for the first and second checked bags and carry-on bags. Airlines must refund charges for lost bags.

Spirit Airlines, Allegiant Air, and Southwest Airlines challenged in federal court that portion of DOT's April 2011 rule that requires airlines and ticket agents to most prominently display the total cost of a ticket, including taxes, when advertising airfares. In July 2012, the U.S. Court of Appeals for the Washington, DC, circuit rejected the airlines' contention that the rule violates their rights to engage in commercial and political speech and is an effort by the government to conceal taxes in airfares.⁴⁰ The airlines subsequently appealed to the U.S. Supreme Court, which, on April 1, 2013, refused to consider their challenge and left the rule intact.

On July 28, 2014, the House of Representatives passed the Transparent Airfares Act of 2014 (H.R. 4156, 113th Congress) by a voice vote. The bill would have allowed airlines' advertisements and websites to give greatest prominence to "base airfare," as long as they "clearly and separately" disclose government taxes and fees and the total cost of air transportation. While the bill would have enabled airlines to call greater attention to the many government taxes and fees on passenger aviation, it could have made price comparisons more difficult, as some advertisements or websites might have displayed the "base airfare" most prominently while others might have advertised the after-tax price. The Senate did not act on the legislation.

The FAA Extension, Safety, and Security Act of 2016 (P.L. 114-190), signed into law on July 15, 2016, did not address disclosure of ancillary fees.

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³⁸ http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/subject_areas/airline_information/baggage_fees/html/2015.html.

³⁹ http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/subject_areas/airline_information/reservation_cancellation_change_fees/html/2015.html.

⁴⁰ *Spirit Airlines v. U.S. DOT*, 402 U.S. App. D.C. 70, July 24, 2012.