

## U.S. DOT Issues New Air Travel Consumer Protection Rulemaking Initiatives

The U.S. Department of Transportation (DOT) has announced a new round of consumer protection-related rulemaking initiatives affecting U.S. and foreign airlines, ticket agents, and air travel consumers. As part of these initiatives, DOT has issued:

- a third final rule (PP3) further strengthening airline passenger protection regulations;
- a final rule amending requirements for airline reporting of mishandled-baggage data and establishing new requirements for airlines to report statistics for mishandled wheelchairs and scooters used by disabled passengers and transported in aircraft cargo compartments;
- an Advance Notice of Proposed Rulemaking (ANPRM) requesting comments on how airlines should refund checked baggage fees when they fail to deliver passengers' baggage in a timely manner, as required by the FAA Extension, Safety, and Security Act of 2016; and
- a request for information regarding airline restrictions on the distribution and display of flight schedules and fare information.

DOT also announced that it plans to issue a Supplemental Notice of Proposed Rulemaking (SNPRM) on the disclosure of ancillary services fees to consumers at all points/channels of sale, including global distribution systems (GDSs). DOT will also issue at a later date a final rule on the definition of "ticket agent," customer service commitments by large ticket agents, and the prohibition of post-purchase price increases for ancillary services and those relating to "mistaken fares."

### Enhancing Airline Passenger Protections III (PP3) Final Rule

DOT's PP3 final rule amends various air travel-related consumer protection regulations contained in 14 C.F.R. Parts 234, 244, 250, 255, 256, 257, 259, and 399. The final rule:

1. expands the number of U.S. carriers required to report service quality data under Part 234 by requiring U.S. carriers that account for at least 0.5 percent of domestic scheduled passenger revenue to submit on-time performance and mishandled baggage reports and post on-time performance of their flights on their websites marketing air transportation to the public (currently, only U.S. carriers that account for at least 1 percent of domestic scheduled passenger revenue are required to submit such reports);
2. amends Part 250 by requiring U.S. carriers that account for at least 0.5 percent of domestic scheduled passenger revenue to submit oversales/denied boarding data to DOT;
3. requires all U.S. carriers that market domestic scheduled code-share flights operated by another U.S. carrier to file separate on-time performance reports under Part 234 for those code-share flights (for on-time performance reporting purposes, marketing carriers will only be required to identify on a monthly basis those "fee-for-service" flights that they market; for fee-for-service flights that are operated by a non-reporting carrier, the marketing carrier will be responsible for providing the full set of on-time performance data for each flight in the same manner as they report for the flights they operate with their own aircraft);
4. requires all reporting carriers that market fee-for-service code-share flights to submit a second set of mishandled baggage monthly reports that contains the data for all reportable fee-for-service flights that they market, and a quarterly oversales report that contains the data for all reportable fee-for-service flights that they market;
5. expands the definition under Part 234 of "reportable flight" to include all airports (i.e., large, medium, small, and non-hub U.S. airports) in the on-time performance and mishandled baggage reporting requirements;
6. requires new reporting carriers to file their initial reports for on-time performance and mishandled baggage for January 2018 operations by February 15, 2018, to file their initial



David Heffernan

**Member**

dheffernan@cozen.com  
Phone: (202) 463-2537  
Fax: (202) 640-5985

**Related Practice Areas**

- Aviation Regulatory
- Transportation & Trade

reports for oversales for the first quarter of 2018 by April 30, 2018, and to load on-time performance disclosure data for each domestic scheduled flight marketed on their websites for flights operated in January 2018 on February 24, 2018, with all subsequent flight performance information loaded on the fourth Saturday of the month following the month that is being reported;

7. strengthens code-share disclosure requirements under Part 257 to codify the statutory requirement that carriers and ticket agents marketing to U.S. consumers disclose any code-share arrangements with respect to flights within, to or from the United States in a format that is “easily visible” to consumers on their websites on the first fare display presented in response to a search of a requested itinerary for each itinerary involving a code-share operation;
8. codifies the requirement that code-share disclosures be “immediately adjacent to the itinerary displaying the flight operated under a code-share arrangement and in a font size that is not smaller than the font size of the flight identified under the marketing carrier’s name and/or code in the itinerary display;”
9. adopts a “simplified format” for code-share disclosures displayed via mobile websites and apps by allowing the disclosure of only the corporate name of the operating carrier;
10. requires code-share disclosures made during oral communication to be provided at the first time the flight is offered by a carrier or ticket agent or in the first response to a consumer’s inquiry;
11. clarifies that if an airline provides schedule information to a GDS, it is required to provide code-share information to the GDS, which, will, in turn, provide the information to ticket agents and consumers;
12. retains the requirement that written disclosure of code-share arrangements be provided in ticket confirmations “at the time of purchase,” with each flight segment involving a code-share arrangement that has its own flight number identified individually with the disclosure information immediately adjacent to the flight number (if a single-flight-number service involves one or more code-share segments, each code-share segment must be identified individually with the disclosure information immediately adjacent to that flight if there are different operating carriers on the segments);
13. adds a new Part 256 on “Electronic Airline Information Systems,” which DOT defines as “systems that combine air carrier or foreign air carrier schedule, fare, or availability information for transmission or display to air carriers or foreign air carriers, ticket agents, other business entities, or consumers;”
14. prohibits undisclosed biasing based on carrier identity by carriers and ticket agents in any electronic displays of the fare, schedule or availability information of multiple carriers (the rule applies not only to ticket agents’ websites but also to airline and airline alliance websites; the rule also applies to corporate booking tools but is limited to undisclosed bias that is not based on contractual arrangements);
15. amends the definition of “lengthy” tarmac delay for purposes of tarmac delay reporting under Part 244 to be any tarmac delay that lasts “more than three hours” to be consistent with Part 259 (any tarmac delay that lasts exactly three hours would not be covered under the reporting requirements of Part 244);
16. does not adopt DOT’s proposed tarmac delay rule amendment that would have clarified that DOT may impose penalties for tarmac delay violations on a per-passenger basis, but, instead, retains DOT’s discretion to assess civil penalties for tarmac delay violations on a per-passenger basis;
17. requires carriers to provide oral notification of any material restrictions on travel vouchers offered to both voluntarily and involuntarily bumped passengers (DOT believes that a brief oral summary of the material restrictions applicable to the travel vouchers delivered through the carrier’s gate PA system following the announcement of a request for volunteers would be sufficient for offering consumers a “clear and precise summary description of what they are receiving in exchange for giving up their seats”);
18. codifies DOT’s guidance that limits the flight status change notification requirement in 14 C.F.R. Section 259.8 to any qualified flight status changes that occur within seven calendar days prior to the scheduled date of a flight operation;
19. clarifies that flight status change notifications should be provided not only to passengers but also to any member of the public who may be affected by the changes and who subscribes or attempts to subscribe to a flight status notification system, including persons meeting

- passengers at airports or escorting them to or from airports; and
20. eliminates the rebating provisions in 14 C.F.R. Section 399.80(h) that states that “it is an unfair or deceptive practice or unfair method of competition for a ticket agent to advertise or sell air transportation at less than the rates specified in the tariff of the air carrier, or offer rebates or concessions, or permit persons to obtain air transportation at less than the lawful fares and rates” (DOT recognizes this regulation to be an obsolete vestige of the period before airline deregulation).

The final rule will be effective 30 days after its publication in the Federal Register.

### **Final Rule on Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments**

DOT’s mishandled baggage and wheelchair/scooter reporting final rule:

1. changes the mishandled-baggage data that U.S. air carriers are required to report, replacing the current formula that uses the number of Mishandled Baggage Reports (MBR) filed by passengers and the total number of passengers enplaned, with a formula that uses the actual number of mishandled bags and the number of domestic enplaned bags, excluding charter flights (a bag will be counted as “enplaned” on each flight of a passenger’s journey, and DOT will be using the actual number of mishandled bags per unit of checked bags rather than the number of MBRs filed by passengers per unit of domestic scheduled-service passenger enplanements);
2. includes in DOT’s revised mishandled baggage methodology all checked bags, including those checked at the gate and “valet” bags (the rule does not require air carriers to provide passengers with individual bag claims that must be matched to bags on arrival, but instead, air carriers must only ensure that the “valet” bag is properly counted in the data reported to DOT);
3. requires U.S. air carriers to report separate statistics in their mishandled baggage reporting for mishandled wheelchairs and scooters used by disabled passengers and transported in aircraft cargo compartments;
4. applies DOT’s definition of “mishandled” as found in 14 C.F.R. Section 234.1, which includes “loss, delay, damage, or pilferage,” to mishandled wheelchairs and scooters;
5. does not adopt the proposal that air carriers report mishandled wheelchairs and scooters transported in the passenger cabin, or other assistive devices transported by carriers, since airlines have no “mechanism” for tracking items carried in the passenger cabin; and
6. requires carriers to comply with the new reporting requirements for air transportation taking place on or after January 1, 2018 (data using the new formula for mishandled baggage for the month of January 2018 and data on mishandled wheelchairs and scooters transported in aircraft cargo compartments for the month of January 2018 will both be due February 15, 2018).

The final rule will be effective 30 days after its publication in the Federal Register.

### **ANPRM on Baggage Fee Refunds for Delayed Checked Bags**

The FAA Extension, Safety, and Security Act of 2016 (FAA Extension Act or Act) signed into law on July 15, 2016, mandated that DOT issue a rule requiring air carriers to provide refunds to passengers for any fee charged to transport a bag if the bag is delayed. The Act requires U.S. and foreign carriers to “promptly provide an automated refund for any ancillary fees paid by the passenger for checked baggage if the carriers fail to deliver the bag to passengers within 12 hours of arrival for domestic flights and within 15 hours of arrival for international flights, if the passenger notifies the carrier about the delayed or lost baggage.” The Act also allows DOT to extend these timeframes to up to 18 hours for domestic flights and up to 30 hours for international flights if DOT determines that the 12-hour or 15-hour standards are not feasible and would adversely affect consumers. DOT has issued an ANPRM requesting comments on its proposal to require air carriers to refund checked baggage fees when they fail to deliver passengers’ bags in a timely manner. The ANPRM seeks comments on the following:

1. how DOT should define a “baggage delay” and the appropriate length of delay within the statutory parameters that would trigger the refund requirement;

2. how the rule should deal with a passenger itinerary that consists of an international flight connecting to a domestic flight and whether or not this itinerary should be considered an “international flight” within the meaning of the statute;
3. whether the refund requirement should distinguish between a standard interline (i.e., multiple-carrier) connection on a single ticket and a connection constructed by the passenger using two tickets (e.g., where the carriers do not interline with each other);
4. who should be responsible for issuing fee refunds for delayed bags in situations where an entity other than the carrier, such as a ticket agent, is involved in collecting baggage fees;
5. the best way to ensure that bag fees are refunded in a timely manner and avoid passengers being sent back and forth between two entities to determine which entity is responsible for issuing the refund;
6. whether other criteria, such as the flight duration and/or the frequency of service in question, should be used to determine the length of delay that triggers a refund;
7. how DOT should determine when the “clock stops running” for purposes of measuring the delay triggering a required refund and how DOT should determine that bags have been “delivered” to the passenger and therefore stop the clock from running in situations where the carrier delivers the bags to the passenger’s residence or a designated location requested by the passenger or the passenger chooses to receive notice when their bags arrive and picks up the bags at the carrier’s baggage office at the destination airport;
8. the number of bags delayed annually based on the 12- and 18-hour and 15- and 30-hour statutory timeframes; and
9. the appropriate method or process for providing a refund for delayed baggage.

Comments on the ANPRM are due 30 days after its publication in the Federal Register.

### **Request for Information on Airline Industry Practices on Distribution and Display of Fare, Schedule, and Availability Information**

DOT has published a Request for Information on airline practices that restrict the distribution and/or display of airline flight information by certain online travel agencies (OTAs), metasearch entities, and other “stakeholders” involved in the distribution of flight information and sale of air transportation, and whether such airline practices are anticompetitive and cause consumer harm. Specifically, DOT is requesting information on the following:

1. whether airline restrictions on the distribution or display of airline flight information harm consumers and constitute “an unfair and deceptive business practice and/or an unfair method of competition;”
2. whether any entities are blocking access to “critical resources” needed for competitive entry into the air transportation industry;
3. whether DOT action is unnecessary or whether DOT should intervene in these areas and whether such intervention would promote “a more competitive air transportation marketplace or help ensure that consumers have access to the information needed to make informed air transportation choices;”
4. the extent to which airline practices to restrict the distribution and display of information on its flights benefit consumers;
5. the proprietary nature of flight information and whether the wide-spread availability of such information is relevant to airline restrictions on the distribution or display of their flight information;
6. whether when airlines release flight information to consumers and such information is made generally available to the public (e.g., published on an airline’s website), such stakeholders consider this flight information to be non-proprietary information;
7. whether stakeholders consider airline schedule, fare or availability information, singularly or in combination, the proprietary information of the airline that produces the information;
8. whether stakeholders consider the schedule, fare, and availability information proprietary only when this information is combined in one product but not when distributed separately;
9. the value that OTA or metasearch entity flight search tools provide to consumers;
10. the extent to which consumers (i.e., leisure travelers, small businesses and corporate customers) benefit from saved search costs, greater confidence in search results, access to lower fares, or more travel options than they would have obtained from separate searches of individual airline websites;

11. the types of actions airlines have taken that impact OTA and metasearch entity websites and the effect such actions have on the utility of OTA and metasearch entity websites for consumers;
12. the effect that the inability to display schedule, fare or seat availability information of a large, well-known airline, or group of airlines, has on the utility of air travel comparison sites for consumers;
13. the effect that airline restrictions currently placed on the distribution and/or display of airline flight information have on the ability of consumers to identify the best flight options available to meet their needs;
14. whether the existing limitations of OTA or metasearch entity websites limit the ability of consumers who use those websites to identify the best flight options available to meet their needs;
15. the reasons why airlines are restricting the sharing and use of their flight information;
16. the scope and magnitude of websites or entities that airlines believe are disreputable or do not use the airlines' flight information in an appropriate manner, including the portion of the OTA and metasearch market these entities represent, the number of consumers that use these websites, the average number of consumer complaints airlines receive relating to use of these websites, and whether DOT action is necessary to allow airlines to protect their legitimate interests and also ensure that consumers can make informed flight choices;
17. whether a reduction in the availability of airline flight information on non-airline websites due to airline restrictions on the distribution and/or display of such information would have a significant negative impact on consumers;
18. whether an airline's complete withdrawal of its information from ticket agent websites would reduce or eliminate the ability of consumers to identify the most suitable flight options, and if not, how many airlines would have to withdraw from ticket agent websites to eliminate the ability of consumers to identify the most suitable flight options; and
19. information essential for consumers to be able to view as many airline flight options as possible on OTA and metasearch entity websites to identify the best flight options.

DOT stated that it is not proposing to take any specific action on these airline distribution issues at this time. Information responses are due 60 days after the Request for Information is published in the Federal Register.

DOT also announced the extension of its Advisory Committee for Aviation Consumer Protection and the selection of its new members, including New Orleans Mayor Mitch Landrieu as the chair of the committee and the representative of state and local governments, David Berg of Airlines for America, Mario Rodriguez of the Indianapolis Airport Authority, and Charlie Leocha of Travelers United. The committee is designed to provide consumers with the opportunity to discuss consumer issues and assist DOT in addressing such issues. The twice yearly committee meetings are open to the public and comments from members of the public are invited.

Air travel-related consumer protection issues will continue to receive much attention from Congress during the next session, and it can be expected that a number of consumer-related provisions may be included in any FAA reauthorization bill introduced next year.

---

**Please contact David Heffernan, a member of the Cozen O'Connor Aviation Regulatory Practice Group, for more information regarding aviation regulatory issues. For additional information regarding legislative developments affecting aviation, please contact Robert Freeman, Government Relations Principal of Cozen O'Connor Public Strategies.**