

DEPARTMENT OF TRANSPORTATION**Office of the Secretary****14 CFR Part 252**

[Docket No. OST-2000-7473; OST Docket No. 46783; Notice 90-5; OST Docket No. 44778; Notice 91-1]

RIN 2105-AC85; 2105-AB58

Smoking Aboard Aircraft

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule; Disposition of comments; disposition of petition for rulemaking.

SUMMARY: The Department is amending its smoking rule to implement a recent statutory ban on smoking aboard aircraft in scheduled passenger interstate, intrastate and foreign air transportation. This rule is being issued in conjunction with a related FAA final rule on smoking that makes its rules consistent with the statutory ban. The FAA rule is published elsewhere in today's issue of the Federal Register.

This rule also confirms certain portions of the Department's 1990 interim final rule that incorporated a statutory ban on smoking aboard aircraft on almost all flight segments within the United States. The 1990 rule codified a blanket waiver concerning single-entity charters and made other clarifying changes. Finally, this rule responds to a petition for rulemaking to prohibit smoking aboard commercial aircraft

DATES: This final rule is effective June 4, 2000, in order to meet the effective date for the statutory ban on smoking.

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Background

Throughout this preamble and rule, we have used the terms "air carrier" and "foreign air carrier", as defined in 49 U.S.C. 40102, in which an "air carrier" is a citizen of the United States undertaking to provide air transportation, and a "foreign air carrier" is a person, not a citizen of the United States, undertaking to provide foreign air transportation.

In 1973, the Civil Aeronautics Board (CAB) adopted its first regulation (ER-800, 38 FR 12207, May 10, 1973) restricting smoking on air carrier flights. In subsequent years, the CAB and then the Office of the Secretary (OST) of the Department of Transportation, to which CAB functions were transferred on January 1, 1985, strengthened this rule in accord with public input, scientific studies and statutory requirements.

In its initial form, the rule required the separation of smoking passengers from no-smoking passengers. With each revision, the rule provided additional protections to nonsmokers, reflecting findings by the Surgeon General, the National Academy of Sciences, and the U.S. Environmental Protection Agency that exposure to environmental tobacco smoke is deleterious to health.

The increase in restrictions on smoking on air carrier flights also reflected global policy and public trends. In its 1992 session, the Assembly of the International Civil Aviation Organization passed Resolution A29-15, which called on its member nations "to take necessary measures as soon as possible to restrict smoking progressively on all international passenger flights." To reduce the health hazards to passengers and crew and to enhance aviation safety, the governments of Australia, Canada, New Zealand and the United States have since entered into an international agreement banning smoking on all non-stop flights of their airlines between the signatory countries. This ban applies to all locations within the aircraft, including the flight deck.

The Federal Aviation Administration (FAA) also regulates smoking to enhance safe air transportation and to implement statutory bans on smoking. The FAA has issued rules in furtherance of the statutory bans on smoking and the Department's ban on smoking contained in 14 CFR part 252. The FAA, under its safety mandate, has also issued rules to deal with the safety problems that can develop when people on board aircraft violate the statutory ban on smoking

and try to conceal their smoking. For example, smoke detectors are required in lavatories because sometimes people try to hide cigarette butts in paper-towel refuse compartments that could lead to a fire in flight.

The statute on which the current rules are based is Public Law 101-164, which was enacted in 1989 and reads as follows:

* * * it shall be unlawful to smoke in the passenger cabin or lavatory on any scheduled airline flight segment in air transportation or intrastate air transportation, which is—

(i) between any two points within Puerto Rico, the United States Virgin Islands, the District of Columbia, or any state of the United States (other than Alaska and Hawaii), or between any point in any one of the aforesaid jurisdictions (other than Alaska and Hawaii) and any point in any other of such jurisdictions;

(ii) within the State of Alaska or within the State of Hawaii; or

(iii) scheduled for 6 hours or less in duration, and between any point described in clause (1) and any point in Alaska or Hawaii, or between any point in Alaska and any point in Hawaii.

The current 14 CFR part 252, which applies to air carriers and foreign air carriers, incorporates these statutory requirements and also requires air carriers to ban smoking when the ventilation system is not fully functioning, when a plane is on the ground, and on all aircraft with less than 30 seats. It also requires air carriers to ban smoking of cigars and pipes. In addition, on flights where smoking is not banned, the rule provides that each air carrier furnish any confirmed passenger who checks in on time a seat in a no-smoking section, if requested. The air carrier must expand the no-smoking section to accommodate all qualified passengers and must make special provision to ensure that, if a no-smoking section is placed between the smoking sections, the nonsmoking passengers are not "unreasonably burdened." Air carriers are otherwise free to ban smoking if they choose.

In fact, all air carriers ban smoking on all scheduled passenger flights, and most foreign air carriers ban smoking. At present, 97.7 percent of all scheduled passenger flight segments to and from the United States are smoke-free.

Recent Statutory Changes

On April 5, 2000, President Clinton signed H.R. 1000 (P.L. 106-181), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, containing the following section: Sec. 708. Prohibitions Against Smoking on Scheduled Flights

(a) In General * * *

41706. Prohibitions against smoking on scheduled flights.

(a) Smoking Prohibition in Intrastate and Interstate Air Transportation: An individual may not smoke in an aircraft in scheduled passenger interstate air transportation or scheduled passenger intrastate air transportation.

(b) Smoking Prohibition in Foreign Air Transportation: The Secretary of Transportation shall require all air carriers and foreign air carriers to prohibit smoking in any aircraft in scheduled passenger foreign air transportation.

(c) Limitation on Applicability:

(1) In general: If a foreign government objects to the application of subsection (b) on the basis that subsection (b) provides for an extraterritorial application of the laws of the United States, the Secretary shall waive the application of subsection (b) to a foreign air carrier licensed by that foreign government at such time as an alternative prohibition negotiated under paragraph (2) becomes effective and is enforced by the Secretary.

(2) Alternative prohibition: If, pursuant to paragraph (1), a foreign government objects to the prohibition under subsection (b), the Secretary shall enter into bilateral negotiations with the objecting foreign government to provide for an alternative smoking prohibition.

(d) Regulations: The Secretary shall prescribe such regulations as are necessary to carry out this section.

(b) *Effective Date*: The amendment made by subsection (a) shall take effect on the date that is 60 days after the date of enactment of this Act.

Final Rule

The Office of the Secretary's current smoking regulations are contained in 14 CFR Part 252 and require that air carriers and foreign air carriers prohibit smoking on certain flights. This rule amends Part 252 to implement the recent statutory ban on smoking for air carriers and foreign air carriers. This rule bans smoking on all scheduled passenger flights of air carriers, and on all scheduled passenger flight segments of foreign air carriers (1) between points in the U.S. and (2) between the U.S. and foreign points. The statutory ban on passengers smoking on aircraft in interstate and intrastate air transportation is self-executing and goes into effect on the 60th day after enactment of the statute whether or not we update this regulation. Since this rule essentially restates a statutory mandate with an imminent deadline, seeking prior notice and comment on it is unnecessary under 5 U.S.C. 553(b).

The rule also incorporates the waiver provision for foreign air carriers under criteria provided in the statute. That is, a foreign government can object to the rule as an extraterritorial application of U.S. laws and request a waiver of the requirements, once bilateral negotiations with the U.S. have put in

place an alternative smoking prohibition.

Smoking on the flight deck is now prohibited by the government only on scheduled non-stop flights between Australia, Canada, New Zealand and the United States. Consistent with the recent statute, the new section 252.8 in the rule now bans smoking in all locations within the aircraft, including the flight deck. This new ban applies to all air carrier and foreign air carrier flights covered by the rule. The rule does not change the current requirement in §252.11 that air carriers prohibit smoking whenever their aircraft are on the ground. The ban, as it applies to foreign air carriers, is less extensive. In particular, it is flight-specific, applying only from the time the aircraft begins enplaning passengers to the time that all passengers complete deplaning.

The recent statutory ban on smoking applies to individual passengers and flight crew as well as to air carriers and foreign air carriers. This rule applies only to air carriers and foreign air carriers. The companion FAA rule published elsewhere in today's **Federal Register** implements the statutory ban on smoking by such individuals.

We have made nonsubstantive changes to Part 252 to use the terms "air carrier" and "foreign air carrier", as defined in 49 USC 40102, in all sections, changed and otherwise unchanged. As stated above, an "air carrier" is a citizen of the United States undertaking to provide air transportation, and a "foreign air carrier" is a person, not a citizen of the United States, undertaking to provide foreign air transportation.

Effective Date

The Administrative Procedure Act, 5 U.S.C. 553(d)(3), states that regulations may not go into effect less than 30 days after publication except where good cause is shown. The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century directs the Secretary of Transportation to issue regulations to prohibit smoking on scheduled flights within 60 days of its enactment. Therefore, we must make this amendment effective by June 4, 2000. We have determined that good cause exists to make this amendment effective on June 4, 2000, rather than 30 days after publication. All air carrier flights and nearly 98 percent of foreign air carrier flights to and from the U.S. already meet this requirement. As a result, making the rule effective in less than 30 days after publication will burden very few foreign air carriers.

Disposition of Comments to the 1990 Interim Final Rule (Docket No. 46783)

On February 13, 1990, the Office of the Secretary published an interim final rule in the **Federal Register** (55 FR 4991) implementing Public Law 101-164. That act banned smoking on most scheduled airline flight segments within the United States. The rule also codified a blanket waiver concerning single-entity charters and made other clarifying changes. In addition, the interim rule requested comments on changing the applicability of section 252.13 from "less than 30 seats" to "30 seats or less" in order to conform to the terminology used in the Federal Aviation Administration's (FAA) carrier operating rules found in 14 CFR Parts 135 and 121. We did not receive any comments on the proposed change. Accordingly, this final rule adopts the change.

We received four comments in response to the interim final rule. One commenter, a private citizen, expressed his opposition to the act because it had the effect of "alleviat[ing] any fiscal responsibilities the airline industry may encounter" to install more efficient airplane ventilation systems. However, the smoking ban should improve the efficiency of existing ventilation systems.

Sun Country Airlines suggested that the smoking ban be extended to all carriers, whether scheduled or charter operations. Both the 1989 and 2000 legislation apply only to "scheduled flights." Both rules simply implement the legislation. Nevertheless, there has never been a requirement to permit smoking aboard aircraft, and charter operators have always been free to ban smoking on any or all of their flights.

Another private citizen commented that smokers also have rights and suggested that proper ventilation would solve the problem of "germ ridden" air. The Tobacco Institute [TI], a trade association of cigarette manufacturers, stated that the Department's "broad statements [in the interim final rule's preamble] as to 'rights' of smokers and nonsmokers" is "neither necessary nor supported by the legislation." DOT's use of the word "rights" merely emphasizes that smokers do not have the right to demand that an airline provide a "smoking seat." We did not intend the discussion in the interim final rule's preamble to be a policy statement of the overall rights of smokers versus nonsmokers.

TI also asserted that air carriers would "likely suffer competitive disadvantage" if smoking is banned on those air carriers' international flights. Finally, TI

asserted that the rule exempting "single-entity charters" should avoid imposing unnecessary administrative burdens on charter operators. Specifically, TI believes that the advance notice provisions of §252.19 preclude "administrative flexibility" for charter operators. The advance notice provisions of §252.19 merely codified a blanket waiver for single-entity charter operators that has been in effect since 1982 with no serious problems. In addition, we note that no charter operator has commented in opposition to this section.

Petition of David James Biss (Docket No. 44778)

On April 7, 1987, Mr. David Biss petitioned the Department to ban all smoking on passenger-carrying commercial aircraft operating under the jurisdiction of the DOT. This final rule addresses most of Mr. Biss' concerns. Accordingly, this rule disposes of his petition for rulemaking.

Regulatory Process Matters

This rule is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and has not been reviewed by the Office of Management and Budget under that order. This rule is also not significant under the Regulatory Policies and Procedures of the Department of Transportation, 44 FR 11034, (February 26, 1979), because it primarily implements a statutory directive. This rule is expected to have a minimal economic effect, therefore further regulatory evaluation is not necessary.

Regulatory Assessment

The additional number of flights on which airlines will be required to ban all smoking will be a very small percentage of all those between the United States and foreign countries. A total of 159 air carriers and foreign air carriers performed departures from the United States to foreign countries in 1998. Of these, 35 were certificated in the U.S., and none of them permits smoking. Of 124 foreign air carriers, only 17 permitted smoking on any flight. Except for Aeroflot and Olympic Airways, all major European airlines ban smoking. So do most of those in other regions, excepting certain foreign air carriers in South and Central America, Asia, and the Middle East. Out of 191,000 departures from the U.S. by foreign air carriers, only 11,000, or 5.4 percent, permitted smoking in 1998. Since more than half of the departures are performed by air carriers, this represents an average of 2.3 percent of all departures. Even this figure probably

overstates the proportion of passengers newly affected by this legislation and rule, because the majority of such flights are by smaller airlines on less densely traveled routes. For example, 2,800 departures are performed by the Mexican carrier Aero California, which operates DC-9 aircraft seating fewer than 100 passengers.

The benefits of protection against environmental tobacco smoke in aircraft include improved comfort of passengers and crew, as well as lower risk of both acute and chronic adverse health impacts associated with increased incidence of respiratory illnesses, lung cancer, heart disease, and fetal defects for those repeatedly exposed over a long period. Safety will be augmented by reduced risk of fire, preventing impairment of the alertness of crews resulting from smoke intoxication, and improved reliability of equipment that will not be subjected to accumulated deposits of smoke residues. It is possible that smokers will suffer some discomfort through being prevented from smoking during the flight, but they too will receive the stated health and safety benefits.

The airlines required to discontinue their present policies of permitting smoking in flight will benefit from reduced maintenance costs for cleaning and replacing upholstery, servicing no-smoking lights, and emptying ashtrays. They will suffer no loss of revenue through diversion of smoking passengers; because there are no close substitutes for scheduled airline flights in international transportation, and all flights will be covered by the same no-smoking rule.

Small Business Impact

Congress enacted the Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, to ensure that small entities are not unnecessarily and disproportionately burdened by government regulations. The act requires agencies to review proposed regulations that may have a significant economic impact on a substantial number of small entities. For purposes of this rule, small entities include smaller air carriers.

All small air carriers already meet the requirements of this rule, since all air carriers already ban smoking on all scheduled passenger service. This rule contains no direct reporting or record-keeping requirements that would affect small entities. There are no other federal rules that duplicate, overlap, or conflict with this rule. Therefore, I certify under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this regulation will not have a

significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

This proposal contains no collection-of-information requirements subject to the Paperwork Reduction Act, Public Law 96-511, 44 U.S.C. Chapter 35.

Federalism Implications

We have reviewed this rule in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and determined that it will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The rule will not limit the policymaking discretion of the States. Nothing in it would directly preempt any State law or regulation. Because the rule will have no significant effect on State or local governments, no consultations with State and local governments on this rule were necessary and it does not warrant the preparation of a Federalism Assessment.

National Environmental Policy Act (NEPA)

Issuing this rule is exempt from any requirement to prepare an environmental impact statement under NEPA because the Department's action is ministerial without discretion. In addition, the department has determined that this rule will not have any significant impact on the quality of the human environment. Smoking within an aircraft has a negligible effect on the environment outside of the aircraft and its elimination would also have a negligible effect.

Within the aircraft, smoking can result in non-smoking passengers and crew being exposed to environmental tobacco smoke (ETS). A study by the Department showed that ETS contaminants are not restricted to the smoking section of an aircraft but are found throughout the cabin, particularly in the no-smoking area closest to the smoking section. The effect of a smoking ban would be to reduce the health risk to passengers and crew from exposure to ETS. It would also enhance aviation safety by reducing the risk of (a) fire, (b) failure of compartments holding oxygen masks to open because of the accumulation of tobacco tar residue and (c) degradation of the crew's ability to function properly.

The issuance of a rule banning smoking on all scheduled passenger flights to and from this country by foreign air carriers and on all

international scheduled passenger flights of air carriers would have no adverse effect on the environment. In fact, the rule would improve air quality within the aircraft, reduce the risk of adverse health effects, and enhance aviation safety.

Therefore, the department has found that the rule will have no significant adverse economic impact. A copy of the environmental assessment has been filed in the public docket.

List of Subjects in 14 CFR Part 252

Air carriers, Aircraft, Consumer protection, Foreign air carriers, smoking.

Accordingly, the Office of the Secretary of the U.S. Department of Transportation revises 14 CFR part 252 to read as follows:

PART 252—SMOKING ABOARD AIRCRAFT

Sec.

- 252.1 Purpose.
- 252.2 Applicability.
- 252.3 Smoking ban: air carriers
- 252.5 Smoking ban: foreign air carriers.
- 252.7 No-smoking sections.
- 252.8 Extent of smoking restrictions 252.9 Ventilation systems.
- 252.11 Aircraft on the ground.
- 252.13 Small aircraft.
- 252.15 Cigars and pipes.
- 252.17 Enforcement.
- 252.19 Single-entity charters.

Authority: Pub. L 101-164; 49 U.S.C. 40102, 40109, 40113, 41701, 41702, 41706, as amended by section 708 of Pub. L 106-181, 41711, and 46301.

Cross Reference: For smoking rules of the Federal Aviation Administration, see 14 CFR 121.317(c), 121.571(a)(1)(i), 129.29, 135.117(a)(1), and 135.127(a).

§ 252.1 Purpose.

This part implements a ban on smoking of tobacco products on air carrier and foreign air carrier flights in scheduled intrastate, interstate and foreign air transportation, as required by 49 USC 41706. It also addresses smoking on charter flights. Nothing in this regulation shall be deemed to require air carriers or foreign air carriers to permit the smoking of tobacco products aboard aircraft.

Note to § 252.1: As defined in 49 U.S.C. 40102, an "air carrier" is a citizen of the United States undertaking to provide air transportation, and a "foreign air carrier" is a person, not a citizen of the United States, undertaking to provide foreign air transportation.

§ 252.2 Applicability.

This part applies to all operations of air carriers engaged in interstate, intrastate and foreign air transportation

and to foreign air carriers engaged in foreign air transportation, but does not apply to the on-demand services of air taxi operators.

§ 252.3 Smoking ban: air carriers.

Air carriers shall prohibit smoking on all scheduled passenger flights.

§ 252.5 Smoking ban: foreign air carriers.

(a) Foreign air carriers shall prohibit smoking on all scheduled passenger flight segments:

- (1) Between points in the United States, and
- (2) Between the U.S. and any foreign point.

(b) A foreign government objecting to the application of paragraph (a) of this section on the basis that paragraph (a) provides for extraterritorial application of the laws of the United States may request and obtain a waiver of paragraph (a) from the Assistant Secretary of Transportation for Transportation Policy, provided that an alternative smoking prohibition resulting from bilateral negotiations is in effect.

§ 252.7 No-smoking sections.

(a) Except as provided in paragraph (b) of this section, air carriers operating nonstop flight segments to which §§ 252.3 and 252.13 do not apply shall provide, at a minimum:

- (1) A no-smoking section for each class of service;
- (2) A sufficient number of seats in each no-smoking section to accommodate all persons in that class of service who wish to be seated there;
- (3) Expansion of no-smoking sections to meet passenger demand; and
- (4) Special provisions to ensure that if a no-smoking section is placed between smoking sections, the nonsmoking passengers are not unreasonably burdened.

(b) On flights for which passengers may make confirmed reservations and on which seats are assigned before boarding, an air carrier need not provide a seat in a no-smoking section to a passenger who has not met the carrier's requirements as to time and method of obtaining a seat on the flight, or who does not have a confirmed reservation. If a seat is available in the established no-smoking section, however, an air carrier shall seat there any enplaning passenger who so requests, regardless of boarding time or reservation status.

§ 252.8 Extent of smoking restrictions.

The restrictions on smoking described in §§ 252.3 through 252.7 shall apply to all locations within the aircraft.

§ 252.9 Ventilation systems.

Air carriers shall prohibit smoking whenever the ventilation system is not fully functioning. Fully functioning for this purpose means operating so as to provide the level and quality of ventilation specified and designed by the manufacturer for the number of persons currently in the passenger compartment.

§ 252.11 Aircraft on the ground.

(a) Air carriers shall prohibit smoking whenever the aircraft is on the ground.

(b) With respect to the restrictions on smoking described in § 252.5, foreign air carriers shall prohibit smoking from the time an aircraft begins enplaning passengers until the time passengers complete deplaning.

§ 252.13 Small aircraft.

Air carriers shall prohibit smoking on aircraft designed to have a passenger capacity of 30 or fewer seats.

Note to § 252.13: This section, like the rest of this part, does not apply to on-demand services of air taxi operators; see § 252.2 in this part.

§ 252.15 Cigars and pipes.

Air carriers shall prohibit the smoking of cigars and pipes aboard aircraft.

§ 252.17 Enforcement.

Air carriers and foreign air carriers shall take such action as is necessary to ensure that smoking by passengers or crew is not permitted in the passenger cabin or lavatories on no-smoking flight segments. Air carriers shall take such action as is necessary to ensure that smoking by passengers or crew is not permitted in no-smoking sections or at other times or places where smoking is prohibited by this part, and to maintain required separation of passengers in smoking and no-smoking areas.

§ 252.19 Single-entity charters.

On single-entity charters operated pursuant to §§ 207.50 or 208.300 of this title, air carriers need not comply with the procedures of this part 252 if such a request is made by the charterer, provided that each passenger on such flights is given notice of the smoking procedures for the flight at the time he or she first makes arrangements to take the flight.

Issued in Washington, D.C. on June 2, 2000, under authority delegated by 49 CFR 1.56a (h)2.

Robert S. Goldner,

Acting Deputy Assistant Secretary for Aviation and International Affairs.

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