Rules and Regulations

Federal Register
Vol. 74, No. 249
Wednesday, December 30, 2009

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 234, 253, 259, and 399

[Docket No. DOT–OST–2007–0022]

RIN No. 2105–AD72

Enhancing Airline Passenger Protections

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The Department of Transportation is issuing a final rule to enhance airline passenger protections in the following ways: By requiring air carriers to adopt contingency plans for lengthy tarmac delays and to publish those plans on their Web sites; by requiring air carriers to respond to consumer problems; by deeming continued delays on a flight that is chronically late to be unfair and deceptive in violation of 49 U.S.C. 41712; by requiring air carriers to publish information on flight delays on their Web sites; and by requiring air carriers to adopt customer service plans, to publish those plans on their Web sites, and audit their own compliance with their plans. The Department took this action on its own initiative in response to the many instances when passengers have been subject to delays on the airport tarmac for lengthy periods and also in response to the high incidence of flight delays and other consumer problems.

DATES: This rule is effective April 29, 2010.

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SUPPLEMENTARY INFORMATION:

Background

On November 15, 2007, the Department of Transportation (DOT or Department) issued an Advance Notice of Proposed Rulemaking (ANPRM) in Docket DOT–OST–2007–22 entitled ''Enhancing Airline Passenger Protections.'' This ANPRM was published in the **Federal Register** five days later. *See* ''Department of Transportation, Office of the Secretary, 14 CFR Parts 234, 253, 259, and 399 [Docket No. DOT–OST–2007–0022], RIN No. 2105–AD72, 72 FR 65233 *et seq.* (November 20, 2007). We announced in the ANPRM that we were considering adopting or amending rules to address several concerns, including, among others, the problems consumers face when aircraft sit for hours on the airport tarmac. We observed that, beginning in December of 2006 and continuing through the early spring of 2007, weather problems had kept more than a few aircraft sitting for long hours on the tarmac, causing the passengers undue discomfort and inconvenience. We observed further that passengers were also being harmed by the high incidence of less extreme flight delays. We acknowledged that the industry and interested observers have attributed both the lengthy tarmac waits and many of the other flight delays to a number of factors besides weather, such as capacity and operational constraints, for example. We also noted that some of these issues are being addressed by the Federal Aviation Administration (FAA) in other contexts.

Citing our authority and responsibility under 49 U.S.C. 41712, in concert with 49 U.S.C. 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, we called for comment on seven tentative proposals intended to ameliorate difficulties that passengers experience without creating undue burdens for the carriers. The measures on which we sought comment in the ANPRM covered the following subjects: Contingency plans for lengthy tarmac delays; carriers' responses to consumer problems; chronically delayed flights; delay data on Web sites; complaint data on Web sites; reporting of on-time performance of international flights; and customer service plans.

We received approximately 200 comments in response to the ANPRM. Of these, 13 came from members of the industry—*i.e.,* air carriers, air carrier associations, and other industry trade associations—and the rest came from consumers, consumer associations, and two U.S. Senators. In general, consumers and consumer associations maintained that the Department's proposals did not go far enough, while carriers and carrier associations attributed the current problems mostly to factors beyond their control such as weather and the air traffic control system and tended to characterize the proposals as unnecessary and unduly burdensome. The travel agency associations generally expressed support for consumer protections.

On December 8, 2008, after reviewing and considering the comments on the ANPRM, we issued a Notice of Proposed Rulemaking (NPRM). *See* 73 FR 74586 (December 8, 2008). The NPRM covered the following subjects: Contingency plans for lengthy tarmac delays; carriers' responses to consumer problems; chronically delayed flights; reporting certain flight delay information; and customer service plans. It did not cover complaint data on Web sites or reporting of on-time performance for international flights, both of which were raised in the ANPRM. We decided not to propose to require carriers to publish complaint data on their Web sites because we believe the data would be of little or no value to consumers since consumers already have access to a tabulation of airline complaints filed by passengers with the Department in the Air Travel Consumer Report. These complaints are a reliable indicator of the types of complaints about air travel filed by passengers with airlines. We also decided not to propose to require carriers to report on-time performance of international flights for a number of reasons, including concerns that a reporting requirement could make carriers less inclined to hold flights for inbound connections resulting in hardships for passengers in city-pairs with infrequent service.

The Department received 21 comments in response to the NPRM. Of these, 10 comments were from members

of the industry and the rest came from consumers and consumer associations. On the consumer side, eight individuals filed comments as did three consumer advocacy organizations: Flyersrights.org (formerly the ''Coalition for an Airline Passengers Bill of Rights'' or CAPBOR), the Aviation Consumer Action Project (ACAP) and the Federation of State Public Interest Research Groups (U.S. PIRG). Of the industry commenters, two carriers (US Airways and ExpressJet Airways), and two airport authorities (Dallas-Fort Worth International Airport and The City of Atlanta Department of Aviation) filed comments. Three industry associations filed comments: The National Business Travel Association (NBTA), the Air Transport Association of America (ATA), and the Regional Airline Association (RAA). Two travel agency associations, the American Society of Travel Agents (ASTA) and the Interactive Travel Services Association (ITSA), also filed comments, as did the Airports Council International, North America (ACI–NA).

In general, the consumers and consumer associations maintain that the Department's proposals do not go far enough and contend that additional regulatory measures are needed to better protect consumers. One of the consumer organizations also expressed disappointment that the Department eliminated two of the proposals, while industry commenters generally supported that decision. Overall, carriers and carrier associations continue to characterize some of the proposals as unnecessary and unduly burdensome. ATA also expressed a number of concerns with the Department's preliminary regulatory evaluation and suggests changes are best made by addressing weather-related and air traffic control related issues. The airport authorities support carriers having a contingency plan and coordination of the plans at medium and large hub airports, while the travel agency associations expressed support for consumer protections, with one noting a concern with ''unfunded mandates'' on travel agents to address problems for which they are not the cause. The commenters' positions that are germane to the specific issues raised in the NPRM are set forth below. The Department plans to seek comment on ways to further enhance protections afforded airline passengers in a forthcoming notice of proposed rulemaking by addressing the following areas: (1) Review and approval of contingency plans for lengthy tarmac delays; (2) reporting of tarmac delay data; (3) standards for customer service plans; (4) notification to passengers of flight status changes; (5) inflation adjustment for denied boarding compensation; (6) alternative transportation for passengers on canceled flights; (7) opt-out provisions where certain services are pre-selected for consumers at additional costs (*e.g.,* travel insurance, seat selection); (8) contract of carriage venue designation provisions; (9) baggage fees disclosure; (10) full fare advertising; and (11) responses to complaints about charter service.

Comments and Responses

Tarmac Delay Contingency Plans

1. Covered Entities

The NPRM: Under the proposed rule, a certificated or commuter air carrier [1] that operates domestic scheduled passenger service or public charter service using any aircraft with 30 or more passenger seats [2] would be required to develop and implement a contingency plan for lengthy tarmac delays. As proposed, it would apply to all of a covered U.S. carrier's flights, both domestic and international, including those involving aircraft with fewer than 30 seats if a carrier operates any aircraft with 30 or more passenger seats. We asked for comments on whether the Department should limit this section's applicability to carriers that operate large aircraft—*i.e.,* aircraft originally designed to have a maximum passenger capacity of more than 60 seats—and we asked proponents and opponents of this alternative to provide arguments and evidence in support of their positions.

Comments: We did not receive any comments from individual consumers or consumer groups regarding which carriers should be required to develop and implement contingency plans for lengthy tarmac delays. We did receive comments on this point from carriers, carrier associations, and airports.

RAA takes the position that, if the rule is adopted, it should apply only to those carriers that hold out services to the public, ticket passengers, offer reservation services and control decisions regarding delays and food and beverage service. RAA states that over 90 percent of passengers flying on regional aircraft travel on flights that are ticketed and handled by mainline carriers who schedule the flights, and that most regional carriers have no direct interaction with consumers in this regard. RAA also notes that these passengers' contracts of carriage are with the major carrier, not the regional airline, and that a regional carrier follows the contingency plan of its mainline airline partner. RAA explains that regional airlines that operate under agreements with more than one network partner must in some cases comply with different contingency plans at the same airport. According to RAA, at times multiple network carrier contingency plans could be in effect and even in conflict on the same flight in instances where a regional airline operates a single flight for several different network carriers. As such, RAA contends that requiring a regional carrier to have its own plan would increase the conflicts and inconsistencies that could arise as it is not clear if the regional carrier's own contingency plan would supersede the contracts of the carriers who marketed and sold the ticket to the consumer. RAA further asserts that as proposed the rule unfairly targets regional carriers, which do not make scheduling and/or delay decisions and are most often the first carriers to be subjected to FAA ground stops.

ExpressJet Airlines agrees with the comments submitted by RAA. It emphasizes that regional carriers operate under code-share agreements with mainline carriers and that those contracts dictate scheduling, delay, and cancellation decisions. It asserts that, as a result of a regional carrier having limited control over these decisions, the rule would impose unfair burdens on regional carriers. ExpressJet comments that, should the Department require carriers to have a contingency plan, all Part 121 and 135 carriers should have to abide by the regulations, not just carriers which operate aircraft having 30 or 60 seats or more, since, it is the carrier's opinion, the rule as proposed discriminates against the larger of the small regional carriers.

ACI–NA opposes limiting the application of the rule to air carriers that

[1] A certificated air carrier is a U.S. direct air carrier that holds a certificate issued under 49 U.S.C. 41102 to operate passenger and/or cargo and mail service. Air taxi operators and commuter air carriers operating under 14 CFR Part 298 are exempted from the certification requirements of 49 U.S.C. 41102. Some carriers that would otherwise be eligible for the air taxi or commuter exemption have opted to be certificated. An air taxi operator is an air carrier that transports passengers or property under the authority of Part 298 and is not a commuter air carrier as defined in that rule. A commuter air carrier is an air taxi operator that carries passengers on at least five round trips per week on at least one route between two or more points according to a published flight schedule, using small aircraft—*i.e.,* aircraft originally designed with the capacity for up to 60 passenger seats. *See* 14 CFR 298.2.

[2] We inadvertently stated ''aircraft with a design capacity of more than 30 seats'' in several sections of the NPRM. However, our intention had been to state ''aircraft with a design capacity of 30 or more seats.''

operate aircraft with more than 60 seats and notes that the rule should extend to regional airlines as they serve the vast majority of airports. ASTA also opposes limiting the application of the rule to carriers that operate large aircraft and asserts that the proposal should be extended to all carriers, pointing out that the regional airlines carried 160 million passengers in 2007.

US Airways suggests that airports, as well as other service providers, should be held equally accountable as a fair way to share the burden among regulated entities, and that international operations should not be part of the proposed requirements. ATA, which strongly opposes any requirement for hard time limits for returning to a gate and/or deplaning passengers remotely, specifically requests that international flights be excluded from any hard time limits, (1) due to the difficulty associated with accommodating passengers if flights are cancelled, (2) because those flights are better equipped to keep passengers comfortable for longer periods of time, and (3) because the time, costs, and planning associated with those flights is much higher.

DOT Response: After fully considering the comments received, the Department maintains that it is reasonable to apply the requirement to any certificated or commuter U.S. air carrier that operates passenger service using any aircraft with a design capacity of 30 or more passenger seats. In determining to do so, we note that, according to RAA's own statistics, regional airlines now carry one out of every five domestic air travelers in the United States. Moreover, most regional flights are operated by regional carriers affiliated with a major carrier via a code-share agreement, a fee-for-service arrangement, and/or an equity stake in the regional carrier. DOT statistics also demonstrate a substantial number of passengers are carried on flights operated by aircraft with 30 through 60 seats. According to data from the Department's Bureau of Transportation Statistics (BTS), a total of 668,476,000 domestic passengers were transported in 2008, 96,310,000 of which were on flights using aircraft with 30 through 60 seats. The large number of passengers carried on such aircraft accompanied by the increase in the ''branding'' of those operations with the codes of major carriers has blurred the distinction between small-aircraft and large-aircraft service in the minds of many passengers. As such, it seems appropriate to extend the rule to these operations in order to better protect the majority of consumers.

In reaching this decision, we have concluded that we cannot agree with RAA's reasoning that regional carriers should be treated differently than their mainline code-share partners and not be responsible to the passengers they transport on the vast majority of their operations because of their relationships to those partners. We recognize that the larger carrier's personnel may provide pre-flight services and make most of the decisions from an operational standpoint on code-shared flights with a regional carrier. As we pointed out in the NPRM, however, even if the determination to cancel a flight or keep it on the tarmac is made by the mainline carrier or results from action by the FAA, it is the carrier operating the flight that has direct contact with the passengers on the aircraft during a tarmac delay and that remains directly responsible for serving them. Accordingly, we have decided to apply the rule to both carriers in a code-share arrangement. We expect that the mainline carriers and their regional code-share partners will collaborate on their contingency plans to come up with standards that suit both parties. When multiple network carrier contingency plans are effective on a single flight operated by a regional carrier, it would likely not be practical for the regional carrier to apply different standards to individuals on the same flight who bought their tickets from different mainline partners. Instead, we expect the regional carrier to choose to use the contingency plan that is most beneficial to all the passengers on that flight.

With regard to the international flights of U.S. carriers, while we understand the concerns about applying hard time limits on deplaning passengers on international flights because of the different environment in which those flights operate, we believe that it is still important to ensure that passengers on international flights are also afforded protection from unreasonably lengthy tarmac delays. Therefore, we have decided to apply the requirement to develop and implement a contingency plan for lengthy tarmac delays to both the domestic and international flights of each U.S. carrier operating any aircraft with 30 or more passenger seats. This requirement applies to U.S. carriers even if they operate only international scheduled or charter service.

However, we have arrived at more flexible requirements with regard to the content of the contingency plans for a U.S. carrier's international flight (*i.e.,* flexibility to determine the time limit to deplane passengers on tarmac) as compared to its domestic flights, recognizing that international flights operate less frequently than most domestic flights, potentially resulting in much greater harm to consumers if carriers cancel these international flights. Although carriers are free to establish their own tarmac delay time limits for international flights, and even to have different limits for different specified situations, these limits must be included in each carrier's contingency plan—they are not to be ad hoc decisions made during the course of a flight delay.

An international flight for purposes of this requirement is a nonstop flight segment that takes off in the United States and lands in another country, or vice-versa, exclusive of non-traffic technical stops. For example, if a U.S. carrier operates a direct flight Chicago-New York-Frankfurt, with some Chicago-originating passengers destined for New York and others destined for Frankfurt, and the aircraft experiences a tarmac delay in Chicago, then we would consider the tarmac delay to be on a domestic flight. This is because Chicago-New York is a domestic flight segment even though the final destination of the flight is Frankfurt, Germany. If, on the other hand, the aircraft only stops for refueling or a crew change in New York and the airline carries no Chicago-New York traffic, then we would consider the tarmac delay in Chicago to be a tarmac delay on an international flight.

We have decided against applying this requirement to carriers that operate using only aircraft with fewer than 30 seats because these entities carry a very small percentage of passenger traffic and we are not aware of incidents of lengthy tarmac delays involving carriers that only operate aircraft of this size (*i.e.,* carriers that exclusively operate aircraft with a design capacity of 29 passenger seats or less). We note that the requirement to develop and implement contingency plans applies to carriers who have any aircraft with 30 or more seats, meaning that it would apply to all aircraft of those carriers, including those with fewer than 30 seats.

2. Content of Contingency Plan

The NPRM: Under the NPRM, each plan would have been required to include at least the following: The maximum tarmac delay that the carrier would permit; the amount of time on the tarmac that would trigger the plan's terms; an assurance of adequate food, water, lavatory facilities, and medical attention, if needed, while the aircraft remains on the tarmac; an assurance of sufficient resources to implement the plan; and an assurance that the plan has

been coordinated with all of the airport authorities at medium and large hub U.S. airports served by the carrier. We specifically asked for comment on whether the Department should set a uniform standard for the time interval that would trigger the terms of carriers' contingency plans and a time interval after which carriers would be required to allow passengers to deplane. If establishing a time interval was recommended, we asked commenters to propose specific amounts of time and explain why they believe those time intervals to be appropriate.

Comments: Consumer associations and individuals generally support a stronger proposal than that proposed by the Department. For example, Flyersrights.org continues to maintain that the Department should establish minimum standards for contingency plans through regulation and should also review and approve the plans rather than allow each carrier the leeway to set what it fears might be overly lax standards. Specifically, the organization requests that the Department set a ''three hours plus'' time limit for an aircraft to return to the gate and deplane passengers, if the pilot determines this can be accomplished safely. It also requests that in any rule proposed or adopted, we refer to ''potable water'' and ''operable lavatories'' rather than simply ''water'' and ''lavatory facilities'' respectively.

Other consumer associations concur with Flyersrights.org. ACAP asserts that this proposal is ''an unlawful delegation of DOT authority and responsibility to regulate airlines in the public interest by delegating this function to the airlines themselves'' and that the proposal will lead to a multiplicity of unenforceable ''standards'' and ''plans'' that will offer fewer passenger protections. ACAP also suggests three hours as the maximum interval before passengers are allowed to deplane and, without being specific, suggests payments should be made to passengers who are confined for longer periods of time.

Individual commenters make similar points. For example, they tend to think the Department should set minimum standards, particularly regarding the amount of time that triggers the provisions of the contingency plans and the maximum amount of time an aircraft can remain on the tarmac before the carrier must return the aircraft to a gate and allow passengers to deplane. Some comments also suggested specific times to trigger the terms of a carrier's contingency plan and/or for passengers to be allowed to deplane. For example, one commenter suggested 1.5 hours and three hours, respectively.

The industry commenters expressed a different point of view. NBTA stated that it does not support DOT requiring carriers to develop contingency plans and specifically the content of those plans. It does support the recommendations issued by the Tarmac Delay Task Force, but does not believe plans should be required by regulation; rather, NBTA contends that airlines, under marketplace constraints, are more likely to resolve tarmac delay issues in a manner most beneficial to the largest number of passengers.

ATA agrees in principle that carriers should have contingency plans covering lengthy tarmac delays on domestic flights, provided that each air carrier is permitted to decide on the details of its own plan based on its own unique facilities, equipment, operating procedures, and network. ATA reports that carriers already have both general contingency plans and airport-specific contingency plans that reflect the diverse facilities, equipment and network of each carrier. ATA notes that the Tarmac Delay Task Force recommends coordination among air carriers, airports, and the appropriate government agencies, and supports coordinating contingency plans with airports, but notes that a carrier cannot force an airport to cooperate in that coordination. As such, ATA thinks this part of the proposed rule should not be adopted, but if it is, suggests that some changes are necessary to ensure, for example, that a carrier is not held responsible for the airport's failure to provide services within its control or for an airport's failure to coordinate with a carrier in executing a plan.

ATA continues to oppose any requirement for a set interval of time after which an aircraft must be returned to the gate, particularly on international flights, claiming that such a requirement would do passengers more harm than good and equate to artificial scheduling restrictions. Among the potential negative consequences ATA lists are potential conflicts with government agency directives governing safety or security that could require that passengers be kept on aircraft, and increased flight cancellations in any one place that could affect passengers further down the line. In addition, ATA suggests that, if the proposal is adopted, the Department should include an exception that exempts carriers from the rule if returning to the gate would conflict with orders of the FAA or other agencies (*e.g.,* Customs & Border Protection), and notes, among other things, that in weather delay situations taxiway configurations are such that returning to the gate may not even be possible.

In general, RAA maintains that the rule requiring contingency plans should not be adopted because, it contends, the rule will not solve the current delay problem and the Department should instead focus on initiatives that increase the efficiency of the Air Traffic Control (ATC) system. Regarding the content of contingency plans, similar to ATA, RAA maintains that the Department should permit airlines to adopt their own plans that allow flexibility and reflect their own circumstances, capabilities, and passenger service standards. RAA also asserts that the proposed requirement of providing ''adequate'' food and water is unreasonable and impracticable for regional airlines because most regional airlines have no catering facilities and do not have storage room on smaller aircraft for contingency supplies. RAA further states that regional airlines serve small community airports that do not have vendors or facilities from which the airlines could readily obtain supplies of food and water.

Similar to comments of the airline associations, US Airways believes that a rule will not reduce tarmac delays, as those delays occur due to circumstances outside a carrier's control (*i.e.,* weather, ATC system, *etc.*), and states that it already has a plan in place that addresses how to handle a tarmac delay of longer than one hour. US Airways states that a carrier should not be mandated to return to the gate at a fixed time, rather this decision should be left to carrier expertise, and that forcing an aircraft to return to the gate at a fixed time may lead to more flight cancellations. Additionally, the carrier notes that it has improved its own performance based on pressure from market forces. ExpressJet Airlines, who also asserts that most delays are beyond the direct control of carriers, thinks that a DOT rule could have unintended consequences for the consumer, which could lead to increased flight cancellations.

Of the airports and airport authorities that commented on this proposal, Dallas-Fort Worth International Airport approves of the elements of the rule that require air carriers to (1) develop and implement contingency plans for lengthy tarmac delays, (2) include in their plan the maximum delay that will trigger the plan's terms in order to provide adequate warning to service providers that may be called upon for support during the event, and (3) ensure that the plan has been coordinated with airport authorities at large and medium hub airports that the carrier serves. It also states that ''coordination of each air

carrier's contingency plans with the airports they serve is an important part of this process to enable shared situational awareness and timely response to lengthy delay events in an effective manner.''

The City of Atlanta, Department of Aviation, supports the guidance as provided by the DOT Tarmac Delay Task Force, and the Department's proposal for carriers to coordinate contingency plans for lengthy tarmac delays with medium and large hub airports. It states that 2 hours is an appropriate time to trigger the terms of a carrier's contingency plan and agrees that passengers should be provided basic services as proposed by the Department. Finally, it states that carriers' plans should provide for communication, coordination, and collaboration among airport operator, airlines, Federal agencies, and other service providers.

ACI–NA supports the proposal, in general. ACI–NA opines that DOT should not impose a maximum time limit for deplaning passengers during lengthy tarmac delays and that airport-specific plans should not be required, in order to give airlines flexibility, but it does support requiring carriers to post information regarding their plans at their ticketing and gate areas. ACI states that DOT should review the plans prior to their implementation and that airlines should coordinate their plans with all airports at which they provide scheduled or charter service, not just medium and large hub airports. ACI also suggests a template be developed that can be used to assist airlines and airports in addressing the appropriate elements for coordination.

As for the travel agency associations, ASTA strongly supports the notion of carriers adopting and complying with contingency plans and believes that the DOT should review the plans to ensure they contain specific promises that are enforceable. ASTA also supports the imposition of a single mandatory deplanement time limit, the three hours provided in the legislation introduced by Senators Boxer and Snowe and Representative Mike Thompson. However, in its initial comments, ASTA took a different position and opposed the Federal government mandating a specific time after which passengers must be deplaned. Rather, it suggested allowing each carrier to adopt its own time limits for each requirement, and requiring carriers to publish their policies in print ads and on their Web sites. ITSA did not comment on this proposal.

DOT Response: We have decided to adopt a final rule along the lines set forth in the NPRM, with one important exception: We are strengthening the protections for consumers from those initially proposed by setting time limits (1) for carriers to provide food and water to passengers; and (2) to deplane passengers when lengthy tarmac delays occur on domestic flights. In adopting this approach, we have carefully considered all the comments in this proceeding and believe that our action strikes the proper balance between permitting carriers the freedom to make marketplace-based decisions while ensuring consumers can count on receiving the protections they deserve in the unlikely event of an extended tarmac delay.

The final rule requires that each plan include, at a minimum, the following: (1) An assurance that, for domestic flights, the air carrier will not permit an aircraft to remain on the tarmac for more than three hours unless the pilot-in-command determines there is a safety-related or security-related impediment to deplaning passengers (*e.g.,kiiii* weather, air traffic control, a directive from an appropriate government agency, *etc.*), or Air Traffic Control advises the pilot-in-command that returning to the gate or permitting passengers to disembark elsewhere would significantly disrupt airport operations; (2) for international flights that depart from or arrive at a U.S. airport, an assurance that the air carrier will not permit an aircraft to remain on the tarmac for more than a set number of hours, as determined by the carrier in its plan, before allowing passengers to deplane, unless the pilot-in-command determines there is a safety-related or security-related reason precluding the aircraft from doing so, or Air Traffic Control advises the pilot-in-command that returning to the gate or permitting passengers to disembark elsewhere would significantly disrupt airport operations; (3) for all flights, an assurance that the air carrier will provide adequate food and potable water no later than two hours after the aircraft leaves the gate (in the case of a departure) or touches down (in the case of an arrival) if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security requirements preclude such service; (4) for all flights, an assurance of operable lavatory facilities, as well as adequate medical attention if needed, while the aircraft remains on the tarmac; (5) an assurance of sufficient resources to implement the plan; and (6) an assurance that the plan has been coordinated with airport authorities at all medium and large hub airports that the carrier serves, including medium and large hub diversion airports. Failure to do any of the above would be considered an unfair and deceptive practice within the meaning of 49 U.S.C. § 41712 and subject to enforcement action, which could result in an order to cease and desist as well as the imposition of civil penalties.

There is little, if any dispute that passengers stuck on an aircraft during a lengthy tarmac delay deserve to be provided some type of food, potable water, working lavatories, and, if necessary, medical care. We believe a two-hour time limit is a reasonable maximum time after which carriers should ensure that passengers experiencing a tarmac delay are provided food and potable water. Carriers, of course, are free to establish an earlier time at which they will provide these services. As pointed out by ATA and confirmed in reports to Congress by the Department's Inspector General, most large carriers already have contingency plans providing for such services. As for RAA's assertion that most regional airlines lack the resources to provide adequate food and water during lengthy tarmac delays, it seems to be based on a misconception that extensive supplies are needed. The Department would consider snack foods such as pretzels or granola bars that carriers typically provide on flights to suffice as ''adequate'' food. We have clarified in this rule, as suggested by at least one commenter, that the water required under our rule must be ''potable,'' *i.e.,* drinking water.

We are also persuaded that the Department should require a set time limit, in the case of domestic flights, for the point in time after which carriers would be required to allow passengers to deplane, with exceptions for issues related to safety, or security or other government requirements that may arise. Passengers on flights delayed on the tarmac have a right to know that there is a reasonable limit and that the limit will be enforced by the Department. We conclude that a three-hour time limit is the maximum time after which passengers must be permitted to deplane from domestic flights given the cramped, close conditions on aircraft and the typical scheduled time for these flights. We have not selected a maximum delay time of less than three hours because taxi times of an hour or more are not unusual at certain large airports, such as the New York airports. By holding the airlines to a bright line rule of three-hours after which passengers must be deplaned, the Department has

established a tarmac delay limit that is both reasonable and easier to enforce.

While we agree with consumers and consumer groups that passengers should have protection from remaining on an aircraft on the tarmac for an extended period of time, we agree with ATA and other commenters that operational and safety-related concerns, such as ATC-related concerns or an inability to return to the gate without delaying other aircraft, should be taken into consideration. Thus, we have also included an exception for safety, security, or instances where Air Traffic Control advises the pilot-in-command that returning to the gate or permitting passengers to disembark elsewhere would significantly disrupt airport operations. We believe this strikes an appropriate balance between allowing air carriers flexibility to address their operational concerns while also providing passengers with a reasonable time after which they can expect to return to the gate and deplane, as well as make alternate travel arrangements, if necessary. Those arrangements could include re-boarding the same aircraft if the carrier decides to continue the same flight to its original destination, in which case a new three-hour period would begin when the aircraft left the gate. The Department views the three hour time limit as the outside limit at which time an aircraft should have returned to the gate or another appropriate disembarkation area in order to deplane passengers. If the carrier has reason to know that a gate or other appropriate means by which to deplane passengers will not be available at the three hour mark, we expect the carrier to make reasonable attempts to deplane passengers earlier.

With regard to deplaning passengers on international flights, we are persuaded by comments that mandating a specific time frame for deplaning passengers on these flights may be harmful to consumers because of the different environment in which those flights operate. Because international flights are of much longer duration on average, it is possible that delays may not have as negative an impact on consumers and their expectations. Also, because international flights tend to operate less frequently than most domestic flights, flight cancellations may result in much greater harm to consumers who are less likely to be accommodated on an alternate flight in a reasonable period of time. As such, while this rule requires U.S. carriers to establish time limits for deplaning passengers who experience lengthy tarmac delays on international operations, we are permitting carriers the flexibility to determine this time limit. This limit will also allow exceptions for consideration of safety, security and instances where Air Traffic Control advises the pilot-in-command that returning to the gate or permitting passengers to disembark elsewhere would significantly disrupt airport operations. We note that the Department is considering revisiting the issue of whether carriers should set specific time limits to deplane passengers on international flights in a supplemental notice of proposed rulemaking.

Some consumer groups and individuals requested that the Department include in the rule a requirement that the contingency plans be filed with and be reviewed and approved by the Department. Such a requirement is beyond the scope of this rulemaking. Moreover, we are not convinced that this requirement is necessary or the best use of Department aviation consumer protection resources at this time. Carriers are required to adhere to all Department rules, and it would be a departure from Department practice to require carriers to file with it proof that they have done so. The Department and its predecessor in such matters, the Civil Aeronautics Board, have issued numerous other consumer protection rules that detail specific requirements carriers must follow without having carriers file with the government proof that they have or are prepared to comply with the rule. We see some merit in approving carrier contingency plans if the Department were to dictate more detailed requirements regarding their contents and we plan to explore this approach in a future rulemaking. In the meantime, we will review the larger carriers' plans and, randomly, other carriers' plans within a year of the rule's effective date to ensure the plans contain the provisions as required by this rule.

With regard to coordination of plans, because tarmac delays are particularly problematic in situations where flights must be diverted from their intended destination airports, this rule requires carriers to coordinate their plans not only with medium and large hub airports to which they regularly operate, but also with airports that serve as diversion airports for such operations. The Department is not convinced by comments that it should remove the requirement for airlines to coordinate with airports because a carrier cannot force an airport to cooperate in that coordination. It is essential that airlines involve airports in developing their plans to enable them to effectively meet the needs of passengers. As recommended by the Tarmac Delay Task Force, we also urge carriers to include in their coordination efforts appropriate government authorities such as Customs and Border Protection and the Transportation Security Administration, when appropriate.

3. Incorporation of Contingency Plan Into Contract of Carriage

The NPRM: The NPRM proposed that each covered carrier would be required to incorporate its plan in its contract of carriage and make its contract of carriage available on its Web site. We also invited interested persons to comment on the implications of a private right of action based on a carrier's failure to follow the terms of its contingency plan and to address the potential for multiple lawsuits by classes as well as individual plaintiffs and the potential for inconsistent judicial decisions among various jurisdictions. Additionally, we asked commenters to address whether and to what extent requiring the incorporation of contingency plans in carriers' contracts of carriage might weaken existing plans by making carriers more reluctant to be specific and possibly expose themselves to liability.

Comments: Flyersrights.org supports requiring carriers to incorporate their contingency plans into their contracts of carriage in order to provide passengers an avenue for redress for breach of contract. ASTA also strongly supports the notion of carriers incorporating the contingency plans into their contract of carriages in order to enable consumers to more effectively enforce their rights. With regard to the potential for inconsistent judicial decisions if airlines must include their plans in their contracts of carriage, ASTA points out that this means merely that airlines will face the same litigation risks that all businesses face, and notes that the Task Force recommendations can be used as a defense.

According to RAA, regional carriers should not be required to incorporate a contingency plan into their contract of carriage because most regional passengers are subject to the ticketing carrier's contract of carriage. ExpressJet also states that, because a passenger is flying under the contract of carriage of the mainline carrier, a passenger's recourse should be against the mainline carrier, and not the regional carrier.

ATA explains that it shares the Department's goal of enhancing service for airline passengers but disagrees that rules are required to achieve this goal and strongly opposes incorporation of a contingency plan into a contract of carriage. ATA challenges the Department's legal authority to do this

in the aftermath of deregulation. ATA argues that the Department may not substitute a different enforcement process other than the one Congress intended (*i.e.,* there should not be a private right of action for violations of section 41712) and states that such an imposition would subject carriers to the vagaries of law in the fifty States.

DOT Response: The Department disagrees with the arguments of ATA and other carrier commenters that we lack the authority to require incorporation of contingency plans in contracts of carriage and that such incorporation would subject carriers to the risk of inconsistent standards among various jurisdictions. However, the Department has decided that it will not require such incorporation at this time. Instead, the Department strongly encourages carriers to incorporate the terms of their contingency plans in their contracts of carriage, as most major carriers have done voluntarily with respect to their customer service plans. At the same time, the Department will undertake a series of related measures to ensure the dissemination of information regarding each airline's contingency plans. As proposed in the NPRM, the Department requires that each air carrier with a Web site post its entire contract of carriage on its Web site in easily accessible form, including all updates to its contract of carriage. The Department also requires each air carrier with a Web site that chooses not to include their plan in its contract of carriage post the plan itself on its Web site in easily accessible form. Finally, the Department will shortly commence a new rulemaking proceeding addressing possible further enhancements to airline passenger protection in which it may consider, among other things, whether the voluntary incorporation of contingency plan terms urged here has resulted in sufficient protection for air travelers.

The airlines' incorporation of their contingency plans into their contracts of carriage is an important means of providing notice to consumers of their rights, since that information will then be contained in a readily available source. Carriers' contracts of carriage are generally posted online and must, by Department rule, be available at airports. Better informed consumers will further improve the Department's enforcement program as consumers are more likely to know of and report incidents where airlines do not adhere to their plans. Better consumer information will also create added incentive for carriers to adhere to their plans. We believe the incorporation of airline contingency plans in contracts of carriage to be in the public interest.

For these reasons, we strongly encourage carriers to include their contingency plans in their contracts of carriage and are requiring that carriers with a Web site post either their contracts of carriage containing the plans or the plans themselves (if they chose not to include the plans in their contracts of carriage) on their Web sites in easily accessible form. Additionally, to provide carriers with added incentive to incorporate their plans into their contracts of carriage, we will publicize a list of carriers that do and do not so incorporate their plans via regular press releases, the Department's Web site, and other means available to us. We will also be closely monitoring carriers' responses to our efforts in this regard and will not hesitate to revisit our decision here in the airline consumer protection rulemaking that we plan to commence in the near future. Finally, if necessary, we will consider using our authority to condition carrier certificates, as required in the public interest, to ensure that our consumer protection goals are met. *See* 49 U.S.C. 41109.

As noted above, while the Department has decided not to require at this time incorporation of contingency plans in airline contracts of carriage, we disagree with ATA's contentions that we lack the authority to require such incorporation and that the exercise of such authority would risk creating inconsistent standards across jurisdictions. Our broad authority under 49 U.S.C. 41712 to prohibit unfair and deceptive practices, and under 49 U.S.C. 41702 to ensure safe and adequate transportation, clearly encompasses the regulation of contingency plans. We have consistently exercised that authority for decades and will continue to do so. Moreover, while we have chosen not to require the incorporation of contingency plans in airline contracts of carriage at this time, there is nothing new, or unfair to carriers, about airlines being subject, through civil proceedings in State courts, to action for failing to comply with their contracts of carriage for air transportation. To the contrary, carriers have historically been subject to such actions and, indeed, the Department has for years published advice to consumers about pursuing claims against airlines, if necessary, in appropriate State small claims courts precisely because the Department has no authority to adjudicate individual claims and make monetary awards.

4. Retention of Records

The NPRM: The NPRM proposed that covered carriers retain for two years the following information for any tarmac delay that either triggers their contingency plans or lasts at least four hours: The length of the delay; the cause of the delay; and the actions taken to minimize hardships for passengers. Our proposal did not contemplate that the Department would review or approve the plans, but we stated that the Department would consider failure to comply with any of the above requirements—including implementing the plan as written—to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 and therefore subject to enforcement action.

Comments: ATA questions the need for the proposed record-retention requirement covering lengthy tarmac delays, asserting that the Department's BTS already has reporting requirements covering similar issues, with the exception of how carriers respond to delay situations. With regard to this category of information, ATA suggests that a record retention requirement of six months would be sufficient and argues that retention of record for long periods of time will impose additional and unnecessary costs.

DOT Response: The Department does not believe that it is advisable to remove the record-retention requirement for a number of reasons. First, certificated U.S. carriers that account for at least one percent of domestic scheduled passenger revenue currently provide delay data to BTS but the requirement to retain information for lengthy tarmac delays under this final rule would apply to additional carriers—any certificated or commuter air carrier that operates scheduled passenger service or public charter service using any aircraft with 30 or more passenger seats. Second, most of the delay information that this rule requires carriers to retain is more specific than the delay data the largest airlines currently submit to BTS. This rule requires carriers to retain for two years the following information on any tarmac delay that either triggers their contingency plans or lasts at least three hours (as opposed to four hours in the NPRM): The length of the delay, the specific cause of the delay, and the steps taken to minimize hardships for passengers (including providing food and water, maintaining lavatories, and providing medical assistance); whether the flight ultimately took off (in the case of a departure delay or diversion) or returned to the gate; and an explanation for any tarmac delay that exceeded three hours, including why the aircraft did

not return to the gate by the three-hour mark. Aside from the length of the delay and whether the flight ultimately took off or returned to the gate, the remaining information that this rule requires carriers to retain is not available through data that the largest airlines submit to BTS. As for the cause of a delay, although the largest airlines do submit information to BTS about the nature of ground delays, this information is very general (*i.e.*, air carrier, extreme weather, National Aviation System, security, and late arriving aircraft). This rule requires carriers to retain information on the specific cause(s) of the tarmac delay. We note that the Tarmac Delay Task Force dealt with this issue in its report to the Secretary, and listed a number of lengthy on-board ground delay causal factors.[3] We recommend that carriers use that list for examples of the types of delay causes that the Department is looking for carriers to include in their retained records. Third, to the extent that carriers already collect and submit to BTS certain elements of the information that this rule requires, then there is no real burden to them of complying with the requirement.

Response to Consumer Problems

1. Designated Advocates for Passengers' Interests

The NPRM: The NPRM proposed to require certificated and commuter air carriers that operate domestic scheduled passenger service using any aircraft with 30 or more passenger seats to designate, at its system operations center and at each airport dispatch center, an employee to monitor the effects on passengers of flight delays, flight cancellations, and lengthy tarmac delays and to have input into decisions such as which flights are cancelled and which are subject to the longest delays.

Comments: ATA supports the idea of designating an airline employee at a carrier's operation center to monitor the effects of flight delays and cancellations, provided that the designee is a current employee who carries out other responsibilities as well. It does not support requiring such an employee at each airport dispatch center, claiming that this would duplicate existing procedures and would strain carriers' resources without easing the problems that consumers face. In general, RAA thinks this provision is unnecessary as airlines have no incentive to leave a plane full of passengers on the tarmac. RAA further notes that regional airlines are unable to designate personnel with responsibility for influencing delay decisions since delay decision-making is not a function of regional airline employees. NBTA characterizes this proposal as micromanagement of airline customer service and unnecessary to meet the needs of its business travelers. NBTA maintains that an air carrier's response to cancellations and delays is a key factor by which purchasers make their buying decisions, and opposes a mandate that airlines create new customer service positions at each airport. FlyersRights.org defers to the Department and the airlines to determine the best use of airline manpower to mitigate the effects of flight delays, cancellations and lengthy tarmac delays.

DOT Response: The Department has decided to require carriers to designate an employee to monitor performance of their flights; however, we are persuaded that we should not require carriers to designate an employee at their systems operations center as well as at each airport dispatch center, as long as whatever employee(s) are designated can monitor flight delays and cancellations throughout the carriers' systems and have input into decisions regarding how to best meet the needs of passengers affected by any irregular operations. By adopting this performance standard, the Department leaves it up to each carrier to determine the most efficient and effective method to monitor the effects of flight delays and cancellations (*e.g.*, designate individual(s) at its systems operations center, designate individual(s) at each airport dispatch center, designate individual(s) at another location). This rule does not require carriers to hire new employees to comply with this provision as these responsibilities may be borne by current employees in addition to their other responsibilities.

We disagree with RAA's assertion that regional carriers have no control over decisions on delays, diversions and cancellations and thus should not be required to designate an employee to monitor such occurrences. We recognize that, as a rule, regional carriers' mainline partners make most of the decisions from an operational standpoint on code-shared flights with a regional carrier; however, this does not lead to the conclusion that regional carriers are or should be totally removed from the process. Even if the determination to cancel or delay a flight or keep it on the tarmac is made by the mainline carrier, the regional carrier as the carrier operating the flight is the entity that knows first-hand the situation within and surrounding the aircraft, that is responsible for passing information about that situation to the mainline partner, and that has direct contact with the passengers and remains the sole means for directly serving them. As such, this final rule requires all airlines operating scheduled passenger service using any aircraft with 30 or more passenger seats to designate an employee to monitor the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers and to provide input into decisions on which flights to cancel and which will be delayed the longest. It applies to all of a covered U.S. carrier's scheduled flights, both domestic and international, including those involving aircraft with fewer than 30 seats if a carrier operates any aircraft with 30 or more passenger seats. The requirement to designate advocates for passenger interests applies to U.S. carriers even if they operate only international scheduled service.

2. Informing Consumers How To Complain

The NPRM: Under the proposed rule, a certificated or commuter air carrier that operates domestic scheduled passenger service using any aircraft with 30 or more passenger seats would be required to inform consumers how to file a complaint with the carrier (name of person, address, telephone number, and e-mail or Web-mail address) on its Web site, on all e-ticket confirmations, and, upon request, at each ticket counter and gate.

Comments: Flyersrights.org supports the proposal requiring airlines to provide information to passengers on how to file a complaint. ACI–NA states that consumers should be provided information regarding how to file a complaint, which should include the appropriate contact information, including a contact name, address, telephone number and e-mail or Web address.

ATA supports the proposal for carriers to provide passengers complaint contact information but contends that the Department should not dictate the particular communication method to be used (*e.g.*, e-mail, carrier's Web site, traditional mail, telephone). Instead, ATA states that the Department should allow carriers the flexibility to choose the contact method for customer complaints, as each of these various methods carries with them associated costs. In particular, ATA emphasizes the expense of telephone ''talk time'' and explains that this would impose a high cost on airlines without countervailing benefits, given other complaint methods available to consumers. ATA points out that all of its members already provide

[3] The model contingency plan is available at *http://www.regulations.gov* [Docket No. DOT–OST–2007–0108–0124.2].

complaint contact information on their Web sites. ATA also reiterates its strong opposition to the proposal that would require carriers to include complaint contact information on e-tickets. It states that this proposal is unnecessary and costly as it believes there is no indication that finding complaint contact information is a problem and views e-ticket space as being limited and having significant commercial value to the carrier and third parties. ATA estimates that the ''value to the U.S. industry as a whole of the e-ticket space, which it asserts the Department proposes to 'confiscate' is $5 million annually,'' an amount it claims far exceeds the DOT's estimate of the proposal's value. ATA also suggests that the Department not require airlines to name a specific employee contact person for complaint purposes since airline personnel change frequently, and recommends that carriers be required to provide a position/office so complaints are directed to the right department.

RAA notes that most regional airlines already have systems in place to handle passenger complaints and to coordinate those systems with their mainline partners. If the Department adopts a proposal for carriers to provide passengers complaint contact information, RAA asserts that any requirement to post complaint information on airline Web sites or e-ticketing confirmations should apply to the ticketing carrier and not to regional airlines. According to RAA, many regional airlines do not have their own Web sites upon which to post complaint information and states that only the ticketing airline should have a ''legal'' responsibility to consumers claiming breach of contract. RAA also asserts that in some cases there is no regional airline employee at the gate, ticket counter, or elsewhere in the airport.

DOT Response: The Department rejects carriers' suggestions that it leave completely to the discretion of each carrier the methods that carriers must make available to consumers to contact an airline. While generally the Department prefers specifying ends rather than means, it is important to identify a sufficient number of contact methods for customer complaints and require carriers to accept such complaints to ensure that all passengers who wish to express their dissatisfaction are able to do so easily. For example, if an airline were to only accept complaints by e-mail then those without access to the Internet would face significant difficulty in filing a complaint. On the other hand, if an airline were to only accept complaints by traditional mail then a number of individuals may decide against sending a complaint because of the ''hassle'' they see in writing a letter, addressing an envelope, and mailing the letter. However, we are persuaded that not all of the contact methods for customer complaints listed in the proposal are necessary. In this regard, we agree with ATA that we need not require carriers to receive complaints by telephone. In reaching this conclusion, we do not mean to imply that carriers should not have in place some mechanism for resolving consumer problems in real time, and failure to do so may require us to revisit this decision in the future. We also do not see the necessity in requiring carriers to accept complaints by fax. As a result, this rule only requires carriers to provide passengers their e-mail or Web-form address and their mailing address. Of course, in addition to accepting complaints by e-mail and traditional mail, airlines are free, and we encourage them, to accept customer complaints through other methods. This final rule also clarifies that it is sufficient for airlines to identify the designated department within the airline with which to file a complaint instead of identifying a specific employee contact person.

We require that complaint contact information be provided on carrier Web sites, on all e-ticket confirmations, and upon request at all airline ticket counters and boarding gates. In reaching this decision, we note that the comments do not demonstrate that including complaint contact information on e-ticket confirmations would impose substantial costs on airlines despite such assertions. Only a limited amount of space on an e-ticket space is needed to provide complaint contact information. Moreover, a carrier can comply with this requirement for providing contact information on an electronic e-ticket confirmation or itinerary by including a link to a Web site containing the complaint information in lieu of displaying the entire text of the contact information, which will take up even less space on an e-ticket. It is our opinion that requiring complaint contact information on e-tickets and, upon request, at each ticket counter and departure gate would be beneficial to consumers as a large number of passengers do not have access to the Internet while traveling and would not be able to access the complaint contact information through the airlines' Web sites.

In response to RAA's comment that many regional airlines do not have their own Web sites and there is no regional airline employee at the gate or ticket counter in some airports, we wish to make clear that the requirement to have complaint contact information in those locations would not apply to those airlines as the rule does not require regional carriers that do not have Web sites or a presence at an airport to provide information on filing complaints via these channels. However, we see no reason to narrow the coverage of this requirement to exclude regional airlines. Passengers who wish to complain to regional airlines should be able to find out how to do so.

3. Response to Consumer Complaints

The NPRM: Under the NPRM, a certificated or commuter air carrier that operates domestic scheduled passenger service using any aircraft with 30 or more passenger seats would be required to acknowledge receipt of each consumer complaint within 30 days of receiving it and send a substantive response to each complainant within 60 days of receiving it.

Comments: ASTA and Atlanta's Department of Aviation strongly support this proposal. Atlanta's Department of Aviation states that acknowledging a complaint within 30 days and providing a substantive response within 60 days is reasonable considering airline concerns about increased staffing and the need for consumers to know their complaints have been received and concerns will be addressed. Flyersrights.org also supports the proposal but takes the position that carriers should be required to provide a ''proposed final resolution'' rather than a ''substantive response'' within 60 days.

Of the carrier associations, ATA supports requiring carriers to respond to consumer problems and cites the voluntary commitments to do so that a number of carriers have long had in place. ATA states that its members agree that consumers should receive an acknowledgment within 30 days after their complaints are received, and a substantive response within 60 days, with an exception to the 30 day acknowledgement requirement for extenuating circumstances such as mail delivery and address problems, or when carriers need to obtain additional information from a passenger. ATA adds that the Department needs to clarify the term ''complaint'' as meaning a complaint that raises customer service concerns and that is submitted to the carrier's customer relations department. ATA notes that complaints made through other means cannot be tracked by the carriers and the response coordinated. ACI–NA supports the Department's proposal that carriers should have 30 days to acknowledge a

complaint and 60 days to provide a passenger with a substantive response. ACI–NA also believes the proposal should apply to all airlines operating aircraft with more than 30 seats, including regional carriers.

DOT Response: We have decided to adopt a rule along the lines set forth in the NPRM. The Department believes that 30 days to acknowledge a complaint and 60 days to provide a passenger with a substantive response represent standard practice in the industry and should allow carriers adequate time to investigate and respond appropriately. By ''substantive response'' we mean a response that addresses the specific problems about which the consumer has complained. This type of response often results in a resolution of the complaint. We are also clarifying that by ''complaint'' we mean a specific written expression of dissatisfaction concerning a difficulty or problem which the person experienced when using or attempting to use an airline's services and that contains sufficient information for the carrier to identify the passenger. Airlines will be required to acknowledge and respond to all such complaints even if a passenger does not submit it directly to the carrier's customer relations department. The Department would expect, as we find is largely already the case, that a passenger complaint sent to the wrong office or department at an airline would be expeditiously forwarded to the appropriate office within the airline.

Chronically Delayed Flights as Violations of 49 U.S.C. 41712

1. Covered Entities

The NPRM: Under the proposed rule, the Department would consider any chronically delayed flight of a certificated U.S. carrier that operates passenger service and/or cargo and mail service and that accounts for at least one percent of domestic scheduled passenger revenue to be an unfair and deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712.

Comments: RAA takes the position that this requirement should only apply to airlines that hold out services to the public and ticket passengers. RAA reasons that regional airlines lack the ability to engage in the behavior the Department is seeking to prevent since regional airlines fly schedules established by major airlines and do not advertise or publish flight times independent of the mainline partner. Similarly, ExpressJet states that this requirement should not be applied to regional carriers because they are not responsible for making scheduling decisions. ExpressJet explains that typical regional carriers operate under a code-share agreement with one or more larger air carriers which agreements grant to the larger carrier the right to make non-safety related decisions regarding the regional carrier's schedule of flights. ACI–NA expressed disappointment that the Department defined ''covered carrier'' as only those that account for at least one percent of domestic scheduled passenger revenue and did not propose to provide all consumers the same level of protection. ACI–NA maintains that the requirement should apply not only to large carriers but also to the operations of regional or feeder carriers. ACI–NA points out that delays harm passengers just as much regardless of which certificate holder operates the aircraft. ACI–NA further notes that regional airlines operate half of the daily domestic flights and provide the only scheduled service to approximately 70 percent of U.S. airports.

DOT Response: The Department continues to believe that the substantial cost burden that compliance with this requirement would impose on the smaller carriers, which are not required to collect or report on-time performance data, would outweigh any corresponding public benefits. Therefore, the chronically delayed flight provision should not apply to those smaller carriers.

Under 14 CFR Part 234, any certificated U.S. carrier that accounts for at least 1 percent of domestic scheduled-passenger revenues is required to file an ''On-Time Flight Performance Report'' with the Department's Bureau of Transportation Statistics on a monthly basis, setting forth specified information for each of its flights held out in *Official Airline Guide* (OAG), in the computer reservations systems (CRS), or in other schedule publications. As a result, the Department's Office of Aviation Enforcement and Proceedings can obtain data from BTS that enable the office to determine whether the schedules that the reporting airlines cause to be listed in the OAG and CRS are indicative of the schedules that the carriers could reasonably be expected to achieve and whether the reporting airlines are operating flights that we would consider to be chronically late. These data do not currently exist in a single location for other carriers, *i.e.*, smaller carriers, and these carriers would incur significant costs in setting up the infrastructure to collect, compile and report this information. Unless the Department requires smaller carriers to also report on-time performance data, a prohibition against smaller carriers operating chronically delayed flights as defined in this rule would be difficult and impractical to enforce as there is no mechanism in place for the Department to independently determine whether such carriers are complying with the requirement. The Department believes that the cost of requiring smaller carriers to report on-time performance data in order to be able to determine whether these carriers operate chronically delayed flights outweighs the benefits to consumers in light of the fact that the operations of the reporting carriers account for nearly 90 percent of all domestic passenger enplanements. As such, we will not apply this requirement to smaller carriers. We are also clarifying that this requirement does not apply to certificated U.S. carriers that only operate cargo and mail service as the concern about chronically delayed flights involves passenger service. The final rule applies to certificated U.S. carriers that operate passenger service and that account for at least one percent of domestic scheduled passenger revenue.

2. Definition of a Chronically Delayed Flight

The NPRM: In the NPRM, we proposed to define a chronically delayed flight as a flight by a covered carrier that is operated at least 30 times in a calendar quarter and arrives more than 15 minutes late, or is cancelled, more than 70 percent of the time during that quarter. We proposed that the Department would consider a chronically delayed flight to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 if it is not corrected before the end of the second calendar quarter following the one in which it is first chronically delayed. We invited interested persons to comment on an alternate definition of a chronically late flight as one that is operated at least 30 times in a calendar quarter and that arrives at least 30 minutes late at least 60 percent of the time. We also asked whether we should adopt an even stricter definition favored by the Department's Inspector General (IG), *i.e.* a flight that is delayed 30 minutes or more, or cancelled, at least 40 percent of the time during a one month period. We noted that we were considering the option of not treating a flight that remains chronically delayed for three consecutive quarters as an unfair and deceptive practice and an unfair method of competition if every prospective passenger using any available channel of purchase is informed before buying a seat on that

flight that the flight is chronically delayed. The NPRM also broadly asked for comments on other possible chronic delay standards.

Comments: Flyersrights.org favors a stricter definition of a chronically delayed flight than the one proposed in the NPRM, specifically, that a chronically delayed flight should be defined as a flight that operates at least 30 times in a calendar quarter and arrives more than 15 minutes late more than 50 percent of the time during that quarter. Flyersrights.org further states that it finds woefully lax a requirement that would allow a carrier to operate a chronically delayed flight for three consecutive calendar quarters (9 months) and asserts that carriers should not be allowed two calendar quarters (six months) to correct chronically delayed flights. Instead, Flyersrights.org suggests that carriers be provided one calendar quarter (3 month period) to fix the problem. Flyersrights.org also disagrees with the option suggested by the Department not to consider a chronically delayed flight as an unfair and deceptive practice if all the passengers are informed that the flight is a chronically delayed flight before purchasing a ticket, as it allows a carrier to continue providing poor service. It also states that DOT should provide for a parallel regulatory approach for ''chronically cancelled'' flights as well. Of the consumer associations that commented on this provision, ACAP concurs with Flyersrights.org. Several individual commenters stated that they believe a chronically delayed flight should be considered an unfair and deceptive practice.

Of the carrier associations that commented, ATA supports the proposed definition of a chronically delayed flight as a flight that operates at least 30 times in a calendar quarter and arrives 15 minutes late, or is cancelled, more than 70% of the time during that quarter. ATA supports the proposal not to consider it an unfair and deceptive practice if a passenger is informed when purchasing a ticket that a flight is chronically delayed. RAA asserts that a prohibition on chronically delayed flights is unnecessary as airlines are already motivated to provide delay-free service since airlines incur costs (*e.g.*, must pay crews overtime, burn fuel), negative publicity and adverse consumer reaction when on-time performance suffers. RAA emphasizes that, rather than penalizing airlines, the Department should focus on improving the efficiency of our nation's ATC system.

ACI–NA maintains that delays cause passengers to lose confidence in an airport's operations, which can impact both the airport's finances and the local community's economy. ACI–NA disagrees with the option put forth in the rulemaking that the Department not treat a chronically delayed flight as an unfair and deceptive practice if the passenger is informed that a flight is chronically delayed prior to purchase, as it questions how DOT could determine that every passenger has been appropriately informed. ACI–NA also questions whether it is reasonable to define a chronically delayed flight as a flight that is delayed more than 70% of the time in a calendar quarter. ACI–NA explains that a 50% standard is more reasonable as air travelers should be able to expect that airlines can arrive at the promised time for at least half of their operations. ACI–NA supports the proposal to consider chronically delayed flights operated for three consecutive calendar quarters as an unfair and deceptive practice.

Of the travel agency associations, ASTA, supports defining a chronically delayed flight as an unfair and deceptive practice, but suggests that the proposal can be improved in a number of ways. First, ASTA argues that a chronically delayed flight should be defined as a flight that is late more than 50 percent of the time as this is in tune with the way most people think of this issue. As an alternative, ASTA notes that it could also support the DOT Inspector General's recommendation of a 40 percent factor with a 30 minute trigger. Second, ASTA asserts that airlines should be able to cure a chronic delay problem in three months rather than six months. ASTA notes its concern that as proposed an airline can operate a flight that is delayed 70 percent of the time for nine months before there is a remedy. ASTA also strongly opposes the ''option'' of excusing chronically delayed flights from being considered an unfair and deceptive practice if a consumer is informed of the chronic delay. ASTA explains that this option encourages the airlines to continue operating chronically delayed flights while shifting the cost burden onto the retail distribution system to inform the public about the practice on a flight-by-flight basis.

DOT Response: The Department agrees with commenters advocating the need to strengthen the definition of a chronically delayed flight and is adopting a more rigorous set of criteria for determining what constitutes a chronically delayed flight in an effort to further improve carrier performance. The final rule defines a flight as chronically delayed if it is operated at least 10 times in a month and arrives more than 30 minutes late (including cancelled flights) more than 50 percent of the time during that period. We find persuasive the comments that suggested that the Department should define a flight as chronically delayed if it is late more than 50 percent of the time rather than 70 percent of the time, as a flight that is delayed ''more often than not'' is commonly viewed by consumers and the public at large as being chronically delayed. From the standpoint of the consumer, the offering of scheduled service and the acceptance of reservations by a carrier give rise to the justifiable expectation that the carrier has the intent and the capability to arrive at the promised time. Consumers rely on carrier schedules and, to the extent they are chronically inaccurate, consumers are seriously harmed. We are also changing the criteria in the definition of a chronically delayed flight related to the number of operations that must take place in a given time period from at least 30 operations in a calendar quarter to at least 10 operations in a month, as we believe a monthly standard is a more precise, simplified and rigorous standard by which to determine a chronic delay. Further, we are amending the threshold defining a flight delay for purposes of this requirement from 15 minutes late to 30 minutes late because while no consumer likes delay, the real concern appears to be with significant delays, the kind that result in missed connections and other problems.

With regard to when to classify a chronically delayed flight as an unfair and deceptive practice, the Department agrees with comments that the proposal provided too much time for airlines to act to correct chronically delayed flights. The final rule specifies that a flight that remains chronically delayed for more than four consecutive one-month periods is an unfair or deceptive practice within the meaning of 49 U.S.C. 41712 and subject to enforcement action. This more stringent standard will better ensure that airlines do not schedule flights that they reasonably know or should know are going to be seriously late most of the time, thereby providing consumers more reliable information about the actual arrival time of a flight. We also believe this provision provides carriers adequate time to adjust their schedules. Carriers know at the beginning of month two whether the flights they operated during month one were chronically late. We believe that carriers can make adjustments to their schedules within 60 days; therefore, we expect that

during months two, three and four carriers would adjust their schedule for each of their chronically late flights to make the schedule for that flight more realistic by month five. While flight delays for weather, mechanical, or other operational reasons occur frequently in the airline industry, the Department considers the continued publishing of schedules that list chronically late flights to be one form of unrealistic scheduling and an unfair or deceptive practice and unfair method of competition within the meaning of 49 U.S.C. 41712.

In the NPRM, we expressed some concern that if a significantly larger number of flights are defined and identified as chronically delayed flights then carriers may choose to cancel these flights rather than operate them. The Department believes that the definition of chronically delayed flight in this final rule, while more stringent than the one proposed, will nevertheless not lead to a large number of flight cancellations as we have found, based on calendar year 2008 data provided by BTS, that the vast majority of the chronically delayed flights as defined in this rule were not chronically delayed for four or more consecutive months. This indicates that carriers were able to ensure that these flights operated on schedule without canceling flights.

We are not adopting the option we suggested in the NPRM of not treating a flight that remains chronically delayed for three consecutive quarters (now after four consecutive months) as an unfair and deceptive practice if every prospective passenger using any available means of purchase is informed before buying a seat on that flight that the flight is chronically delayed. We are concerned that this proposal could result in more chronically delayed flights and that it would be difficult for the Department to determine if all passengers were properly notified prior to purchasing a ticket that the flight is a chronically delayed flight.

3. Unrealistic Scheduling of Flights (Other Than Chronically Delayed Flights)

The NPRM: Other than an editorial change (the removal of references to ''Board''), the proposal would not make any other changes to the existing rule which states that unrealistic scheduling of flights by any air carrier providing scheduled passenger air transportation or the use of any figures, with respect to the advertising of schedule performance, purporting to reflect schedule or on-time performance without providing detailed information about the basis of the calculation would be an unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712.

Comments: We received only one comment on this issue. ATA opposes the proposal to continue requiring that advertising of on-time performance reveal the detailed information about basis of the calculation. ATA states that the effect of requiring so many data points will be to prevent the use of this statistic. ATA also asserts that the Department should not adopt this proposal as there isn't any consumer demand for this level of detail and it would create a burden with no public benefit.

DOT Response: This rule continues to prohibit carriers providing scheduled passenger service from engaging in unrealistic scheduling, which can be many things beyond the Department's definition of a chronically delayed flight that a carrier continues to hold out for more than four consecutive months. For example, a flight that is cancelled 30 percent of the time for a sustained period of time could be considered to be unrealistic scheduling. The posting of unrealistic schedules can have a significant and harmful impact on consumers. When a carrier publishes schedules, it assumes an obligation to adhere to those schedules insofar as is reasonable. A carrier's practice of publishing schedules that it knows or should know it probably will not achieve can also adversely affect competition, which ultimately redounds to the further detriment of consumers, whose choices in air travel may have been reduced by the carrier's artifice.

With respect to the advertising of schedule performance, this rule continues to regard as an unfair or deceptive practice the use of any figures purporting to reflect schedule or on-time performance without indicating the basis of the calculation, the time period involved, and the pairs of points or the percentage of system-wide operations thereby represented and whether the figures include all scheduled flights or only scheduled flights actually performed. We are not persuaded by ATA's assertions that this requirement is not beneficial to consumers. Without this requirement, a carrier's advertising of on time performance could be very misleading and consumers would not have any basis for determining whether a statistic provided by a carrier is trustworthy or even relevant to their particular circumstance.

Delay Data on Carriers' Web Sites

1. Covered Entities/Scope

The NPRM: Under current rule, certificated air carriers that account for at least 1 percent of domestic scheduled passenger revenues (''reporting carriers'') are required to track on-time performance, report it to DOT, and provide, during the course of reservations/ticketing discussions or inquires about flights, the on-time performance percentage for a flight upon request. In the NPRM, we proposed to continue requiring reporting carriers' reservations agents to disclose on-time performance information to consumers only upon request although we had solicited comment in the ANPRM as to whether reservations agents should disclose this information to consumers without being asked and whether any disclosure requirement should be expanded to cover more types of carriers or travel agents. In the NPRM, we also proposed requiring reporting carriers to provide certain flight delay data on their Web sites. We proposed to require this delay data only for flights of reporting carriers but asked commenters if we should in addition require the reporting carriers to post delay data on their Web site for all their domestic code-share partners' flights, including those carriers that are not themselves required to report on-time performance. We decided not to propose requiring on-line travel agencies to post delay data on their Web sites (a proposal upon which we solicited comment in the ANPRM) because of concerns that the cost would outweigh the benefits.

Comments: No one commented as to whether the proposal to continue requiring reporting carriers to disclose the on-time performance code for a flight upon request should or should not be expanded to cover more carriers (*e.g.,* domestic scheduled passenger service using aircraft with 30 or more seats) or more types of flights (*e.g.,* code-share flights). The comments received on scope/coverage addressed only the proposal to require carriers to publish delay data on their Web sites. Flyersrights.org recommends that the regulation require covered carriers to post flight delay information only for code-share flights operated by carriers that report on-time performance, as this will narrow the amount of information required. Flyersrights.org suggests that the Department can expand the requirement later based on consumer comments. ACI–NA believes that it is important for consumers to have access to comprehensive on-time performance data and strongly supports requiring

that flight delay data be made available on reporting carriers' Web sites for all the domestic code-share flights of that carrier.

ATA states that, given the Department's proposal not to impose any data reporting requirements on travel agents, the proposal unfairly burdens the reporting carriers as these carriers would uniquely bear the cost of collecting data, programming, and updating their booking sites to reflect such data. ATA also contends that the proposal is unfair to the approximately thirty percent of passengers who book through carriers' Web sites as they would be burdened with having to see performance information that they did not request and likely do not want. ATA suggests that the ''excessive performance data display'' may even discourage booking travel through carriers' Web sites. ATA's comments indicate that it supports extending the requirement for disclosure of flight delay information on Web sites to cover online travel agencies if the Department imposes such a requirement on reporting carriers. On the other hand, ITSA supports the preliminary conclusions reached by the Department that the cost of imposing a requirement for online travel agencies to post flight delay information would vastly outweigh the benefits to consumers. ITSA urges the Department to make final its tentative decision not to apply this requirement to online travel companies, global distributions systems and other third party online reservation services. ASTA notes that the Department wisely exempts travel agencies from the requirement to disclose flight delay information.

DOT Response: We have decided to continue to require reporting carriers to disclose the on-time performance code for a flight upon request as there were no comments received on this point and the rule as is works well from the Department's perspective. The final rule requires a reporting carrier to display on its Web site flight delay information for each flight it operates and for each flight its U.S. code-share partners operate for which schedule information is available. The Department believes that requiring a reporting carrier to display on its Web sites flight delay information for each domestic flight it holds out as its own will help consumers make better informed decisions when selecting flights. In adopting this approach, we are rejecting arguments that requiring a reporting carrier to provide flight delay information for domestic code-share flights operated by carriers that do not report on-time performance would unduly burden them. There are currently only 21 non-reporting U.S. carriers that code-share with reporting carriers, and the on-time performance data for these carriers may be collected through third party entities at a reasonable cost. FlightStats is an example of a third party which collects detailed on-time performance data for many airlines. Moreover, the benefit of flight delay data to consumers does not differ based on whether the flight is operated by a reporting carrier, its reporting code-share partner or its non-reporting code-share partner. We note that if more than one reporting carrier has an agreement with the same code-share partner, each reporting carrier must display on its website the on-time performance information for the covered flight that bears the reporting carrier's code.

We again considered applying the requirement to publish delay data to online travel agencies, but we continue to view the cost of requiring on-line travel agencies to post the flight delay information as outweighing the benefits to passengers. The cost to on-line travel agencies of complying with such a requirement is much higher than it is for the reporting carriers because of costs associated with reformatting the Global Distribution Systems (booking engines used by travel agencies) and Online Travel Companies (online agencies with independent airline ticket booking capabilities).

2. Disclosure of Flight Delay Information by Airline Reservation Agents

The NPRM: This proposal would not make any changes to the existing rule which requires covered carriers to disclose upon request the on-time performance of a flight during the course of reservations/ticketing discussions, transactions, or inquires about flights between a carrier's employees and the public. We decided not to propose that the carrier reservations agents be required to disclose a carrier's on-time performance at the time of booking without being asked (an issue upon which we solicited comment in the ANPRM) because of concerns that the costs of providing this information to all callers, whether requested or not, would be unduly burdensome to carriers and of dubious benefit to consumers, particularly if the rule provides for flight delay information on the carriers' Web sites.

Comments: Flyersrights.org states its continued belief that passengers would like to be told, without having to ask, about the past on-time performance of the flight they are discussing on the phone or in person with a carrier employee or travel agent. ATA did not comment on this provision of the NPRM. However, at the ANPRM stage, ATA expressed its strong opposition to requiring carriers' reservations agents to disclose on-time information without being asked, because of its belief that the high cost of compliance would outweigh its speculative benefit.

DOT Response: We have decided to issue a rule along the lines set forth in the NPRM. Specifically, the final rule requires a reporting carrier to disclose upon request the on-time performance of a flight during the course of reservations discussions or inquires about flights. We note that requiring carriers to provide passengers on-time performance data during discussions, transactions or inquires, even if not requested, would be burdensome to a degree and of dubious benefit. We note that the rule has been amended to clarify that the requirement to provide on time performance data upon request applies whether a member of the public is speaking with a carrier's employee or contractor.

3. Disclosure of Flight Delay Information on Web Site

The NPRM: This proposal would require covered carriers to include for each listed flight in the flight inquiry/booking stream on their Web sites, at a point before the passenger selects a flight for purchase, the following information for the flight for the most recent calendar month for which the carrier has reported on-time performance data to DOT: (1) The percentage of arrivals that were on time (within 15 minutes of scheduled arrival time); (2) the percentage of arrivals that were more than 30 minutes late; (3) special highlighting of any flight that was late (*i.e.,* arrived more than 15 minutes past scheduled arrival time) more than 50 percent of the time; and (4) the percentage of cancellations. We proposed that this information be provided by either showing the percentage of on-time arrivals on the initial listing of flights and disclosing the remaining information on a later page at some stage before a consumer buys a ticket, or by making available all the required information via a hyperlink on the page with the initial listing of flights. We also proposed to require that carriers load the delay information for the previous month into their internal reservations systems between the 20th and 23rd day of the current month to ensure that all carriers are posting information covering the same period.

Comments: In general, individual commenters (as opposed to organizations) who addressed this issue agree that carriers should be required to

disclose flight delay information on their Web sites. One commenter notes that she has concerns that the cost to modify and provide delay information on a carrier's Web site may be too burdensome and, consequently, may be passed on to consumers. FlyersRights.org urges that airlines be required to post the on-time performance data for all their flights rather than just the nonperforming flights.

ATA supports requiring disclosure of on-time arrival percentages for each flight on a carrier's Web site for the most recent reported calendar month as this information is already reported to BTS. However, ATA objects to a requirement for carriers to report and display any flight delay data not currently required by BTS. ATA asserts that collecting and reporting on the data categories proposed by the Department in its NPRM would be expensive and overly burdensome because it would require substantial efforts to capture this information, significant reprogramming of internal software, rebuilding of portions of Web sites and delay of other critical technology projects. ATA also contends that the requirement does not have any offsetting benefits. ATA reiterates its comment to the ANPRM that past delay information is unlikely to predict future performance because of variations in seasonal weather. It notes that 70 percent of delays and cancellations are due to weather, which makes performance data from previous periods a poor predictor of the passenger's probable flight experience. ATA also states that the additional data that the Department is proposing carriers make available on their Web sites would provide little additional consumer benefit since many carriers already post on-time data on their Web sites. ATA further expresses concern that flight on-time statistics can be misinterpreted by passengers and provides an example of a passenger erroneously assuming a flight will be delayed in September because it was delayed in August and arriving late for the flight and missing that flight.

Similar to ATA, NBTA supports requiring carriers to provide on-time performance information to consumers only ''so long as these requirements are aligned with performance reports that carriers must file with DOT.'' ASTA states that it is not ''convinced of the efficacy'' of the publication of delay data on a carrier's Web site. ITSA thinks this is a matter best left to the marketplace, and concurs with ATA that data will be of no use due to the unpredictability of weather-related delays. As such, ITSA does not support inclusion of this proposal in the final rule.

DOT Response: The final rule requires that covered carriers provide on their Web sites the following on-time performance information: (1) Percentage of arrivals that were on time—*i.e.,* within 15 minutes of scheduled arrival time; (2) the percentage of arrivals that were more than 30 minutes late (including special highlighting if the flight was late more than 50 percent of the time); and (3) the percentage of flight cancellations if 5 percent or more of the flight's operations were canceled in the month covered. The Department recognizes that industry representatives support only the requirement to post on-time (within 15 minutes of scheduled arrival time) arrival percentages for each flight on a carrier's Web site because this information is already reported to BTS. However, the Department views the posting of the percentage of arrivals that were more than 30 minutes late as important because consumers are particularly interested in significant delays as these delays are the kind that are likely to result in missed connections and other serious problems. The Department is also requiring special highlighting of flights if they are late more than 30 minutes of scheduled arrival time more than 50 percent of the time to enable consumers to make more informed travel decisions. For example, chronic lengthy delays on short flights may result in passengers choosing other modes of transportation, choosing earlier flights or selecting a different airline. Without a requirement for carriers to publish such information, knowing which flights are often late can be difficult for passengers to determine, which can lead to frustration and confusion. Similarly, without a requirement for carriers to post information about flights that are cancelled more than 5% of the time, consumers would be unaware prior to purchasing a ticket on that flight that it is regularly cancelled. We agree with carriers that publishing data on the percentage of cancellations for all flights is an unnecessary burden and may result in too much ''clutter'' on the Web site.

With regard to the manner in which this information must be posted on carriers' Web sites, we have amended the rule so carriers must show all the delay data on the initial listing of flights or by a hyperlink on the page with the initial listing of flights. We were concerned that if we permitted carriers to simply display flight delay information at any stage before a consumer buys a ticket it could result in passengers not having access to that information until just before they click the ''Buy Now'' button. By providing flight delay data to consumers at an earlier stage, they can choose during the browsing/shopping phase whether or not to abandon consideration of a given flight that is canceled regularly or has a high percentage of delays longer than 30 minutes. To ensure that all carriers are posting flight delay information covering the same month, the final rule maintains the language in the proposal that carriers load data for the previous month into their internal reservation systems between the 20th and 23rd day of the current month.

Carriers' Adherence to Customer Service Plans

1. Covered Entities

The NPRM: This proposal would require carriers covered by 14 CFR Part 234 (''Airline Service Quality Performance Reports'')—*i.e.,* certificated air carriers that account for at least one percent of domestic scheduled passenger revenue (''reporting carriers'')—to adopt customer service plans for their scheduled service and for public charter flights that they sell directly to the public and audit their adherence to their plans annually. We explained in the NPRM that we are proposing that the rule include public charter flights because the operating carrier is the party responsible for ensuring that charter passengers receive many of the promised services in those customer service plans. The NPRM did not provide an explanation as to the reason that the Department tentatively decided not to cover all U.S. airlines that operate scheduled passenger service using any aircraft with 30 or more passenger seats as proposed in the ANPRM.

Comments: ATA believes that the Department should require all carriers to adopt customer service plans, not just U.S. airlines that account for at least one percent of scheduled domestic passenger revenue. ACI–NA also supports imposing this requirement on all carriers, as it does not believe there is any justification for protecting only a portion of the traveling public. RAA identifies six regional carriers that account for at least one percent of scheduled domestic passenger revenue and argues that this requirement should not apply to any of them since none of them offer their own reservations services and do not ticket passengers for the vast majority of their services. ExpressJet also filed comments contending that the requirement for customer service plans should not apply to regional carriers operating as code-

share partners of mainline airlines because these carriers do not sell or hold out transportation to customers, as their mainline partners do.

DOT Response: In response to comments, the Department has changed the types of carriers that are covered by this requirement. We agree with commenters that the benefits afforded consumers by airlines' customer service plans should be expanded beyond consumers who purchase tickets for flights on U.S. airlines that account for at least one percent of scheduled domestic passenger revenue. A substantial number of domestic air travelers in the United States are carried on flights using aircraft with 30 through 60 seats. As mentioned earlier, in 2008, according to data received from BTS, a total of 668,476,000 domestic passengers were transported, 96,310,000 of which were on flights using aircraft with 30 through 60 seats. Many of these were carried by non-reporting carriers. Because of the use of smaller aircraft to carry a significant number of domestic passengers, we conclude that it is appropriate to extend the rule to these operations in order to better protect the majority of consumers. Moreover, in a Final Report on Airline Customer Service Commitments issued on February 12, 2001, the Department's IG recommended that all U.S. carriers be required to adopt customer service plans. Subsequently, in a Status Report on Actions Underway to Address Flight Delays and Improve Airline Customer Service issued on April 9, 2008, the IG recommended that U.S. airlines that provide domestic scheduled service using any aircraft with more than 30 passenger seats be required to self-audit such plans.

With regard to the comments from RAA and ExpressJet that this requirement should not apply to regional carriers when conducting operations under code-share agreements with larger carriers, we disagree. We recognize that regional or other airlines that code-share with mainline carriers generally do not offer their own reservations and ticketing services or directly perform certain other customer service elements. However, we cannot agree that they should not be responsible at all to the passengers they transport during many of their operations because of their relationships to those larger airlines. Instead, we have decided to apply the requirement to adopt and audit customer service plans in a more flexible manner, as described below, that takes into account their role, including the fact that certain carriers that may not hold out and sell air transportation to consumers. Consequently, this final rule requires U.S. airlines that operate scheduled passenger service using any aircraft with 30 or more passenger seats (including carriers that code-share with mainline carriers) to adopt and audit a customer service plan, and to publish this plan on their Web sites. It is important to note that this requirement applies to all of a covered U.S. carrier's scheduled flights, both domestic and international, including those involving aircraft with fewer than 30 seats if a carrier operates any aircraft with 30 or more passenger seats. The requirement to adopt and audit a customer service plan, and to publish this plan on the Web site applies to U.S. carriers even if they operate only international scheduled service.

2. Content of Customer Service Plan

The NPRM: We proposed in the NPRM that, at a minimum, each plan would have to address the same subjects as the customer service elements adopted from the ATA's Customers First initiative: (1) Offering the lowest fare available; (2) notifying consumers of known delays, cancellations, and diversions; (3) delivering baggage on time; (4) allowing reservations to be held or cancelled without penalty for a defined amount of time; (5) providing prompt ticket refunds; (6) properly accommodating disabled and special-needs passengers, including during tarmac delays; (7) meeting customers' essential needs during lengthy on-board delays; (8) handling ''bumped'' passengers in the case of oversales with fairness and consistency; (9) disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration; (10) ensuring good customer service from code-share partners; and (11) improving responsiveness to customer complaints. We solicited comment on whether we should also require carriers to describe in their customer service plans the services they provide to mitigate passengers' inconvenience resulting from flight cancellations and missed connections and to specify whether they provide these services in all circumstances or only when the cause of the cancellations or missed connections were within their control.

Comments: Flyersrights.org and its members support the proposal and take the position that the Department should also establish minimum standards for carriers to meet their obligations under the plans, review the plans for adequacy, and approve them if appropriate. ASTA also recommends that the Department undertake to review the customer plans at least for the purpose of a preliminary determination of whether they are sufficiently specific and enforceable. NBTA thinks that customer service is best left to market forces, but a baseline standard for passengers' rights should exist. ATA supports the proposal that carriers adopt and adhere to their customer service plans and states that its members adopted customer service plans in 2000 and have made these plans available to the public. In response to the Department's question as to whether it should require carriers to describe in customer plans the services a carrier provides to mitigate passenger inconveniences resulting from cancellations and misconnections, ATA states that carriers need flexibility to take action that will minimize the impact of delays. In this regard, ATA explains that carriers should not be required to provide a list of services, as it would ultimately diminish passenger satisfaction due to the loss of flexibility to deal with specific situations. ATA also notes that services can be very specific, change over time, and include competitively sensitive information.

RAA contends that many of the subjects proposed to be addressed in a customer service plan would be inappropriate if applied to an airline that does not hold out, market, sell or ticket its services. RAA states that most regional carriers do not offer fares, take reservations, ticket passengers, receive payment from passengers, provide refunds to passengers, or have their own frequent flyer rules or cancellation policies. ExpressJet asks that the Department eliminate elements in the customer service commitments, such as the requirement that a customer service plan ''ensure good customer service from code-share partners,'' that it asserts has no applicability to carriers that do not hold out and sell air transportation to individuals.

DOT Response: The Department agrees with comments from RAA and ExpressJet that some of the subjects proposed to be addressed in the customer service plan would only apply in the context of the relationship between a seller of the air transportation and a buyer, and it would thus not be appropriate to mandate that carriers that do not offer their own reservation services or ticket passengers adopt a plan for addressing these elements. More specifically, we view the customer service elements concerning offering the lowest fare available, allowing reservations to be held or cancelled without penalty for a defined amount of time, and providing prompt ticket refunds as having no applicability to an airline that does not hold out, market,

sell or ticket its services. Similarly, the commitment concerning disclosing travel itinerary, cancellation policies, frequent flyer rules and aircraft configuration would also not be applicable to an airline that does not sell or ticket its services to the extent these travel-related disclosures are made at the point of sale. We are further persuaded that only an airline that sells air transportation to individual customers should be required to adopt a plan ensuring good customer service from its code-share partners. As such, airlines that do not offer their own reservations and ticketing services may comply with the provisions of the customer service elements that address functions they do not perform by including in their customer service plan under each of these elements an explanation that this service is not provided by them and identifying the airline that provides the service. With regard to the other required elements in a customer service plan, including the promise to handle overbooked passengers with fairness and consistency, we believe that the covered airlines, whether or not they sell air transportation to passengers, have responsibilities in this area and must fully address these subjects in their customer service plans.

The Department has decided to require carriers to describe in customer plans the services a carrier provides to mitigate passenger inconvenience resulting from cancellations and misconnections. Consumers deserve to know up front what to expect in such an event. We believe that carriers already note in their contracts of carriage many of the services they will provide to mitigate passenger inconveniences due to flight irregularities. Moreover, our requirement here is in no way a limitation on carriers. They always retain the flexibility to provide additional services, when necessary.

The Department also agrees with commenters that there should be some baseline standard in place to ensure that the carriers' customer service plans are specific and enforceable. The NPRM, however, did not propose to establish such standards. Consequently, the Department plans to seek comment about establishing standards for ensuring compliance with customer service plans in a forthcoming notice of proposed rulemaking. The preamble to that NPRM will discuss this issue in more detail.

3. Incorporation of Customer Service Plan Into Contract of Carriage

The NPRM: The NPRM proposed that each covered carrier be required to incorporate its customer service plan in its contract of carriage and make its contract of carriage available on its Web site. As in the case of contingency plans for lengthy tarmac delays, we invited interested persons to comment on the implications of our creating a private right of action here, particularly potential benefits to passengers, potential negative consequences, and the costs to carriers.

Comments: Flyersrights.org notes that incorporating customer service plans into a contract of carriage is important as it provides an avenue for individual passengers to enforce airline promises. Flyerrights.org also supports providing contract of carriage information on a carrier's Web site, stating that it provides passengers an opportunity to educate themselves on the carrier's stated obligations. ACAP and U.S. PIRG agree with the views of Flyersrights.org. ASTA also supports incorporating the customer service plans into the contract of carriage, but has concerns about its effectiveness because DOT does not plan to review the plans to ensure sufficient specificity and enforceability. ATA opposes a requirement that these plans be incorporated in carriers' contracts of carriage. ATA challenges the Department's legal authority to do this in the aftermath of deregulation and argues that the Department cannot substitute Congress's chosen enforcement mechanism which precludes private judicial enforcement with one of its own creation. ATA also expresses concern that litigation costs would increase dramatically over current levels if each customer service commitment were incorporated into airlines' contracts of carriage.

DOT Response: Although we agree with the commenters about the benefits of customer service plans being incorporated into a carrier's contract of carriage, we will not in this final rule make such incorporation a mandatory requirement of covered carriers, for the same reasons as stated in our discussion of contingency plans. The Department has determined that for now it should strongly encourage carriers to voluntarily incorporate the terms of their customer service plans in their contracts of carriage. At the same time, the Department will undertake a series of related measures to ensure the dissemination of information regarding each airline's customer service plans. The Department believes that incorporation of the customer service plans into carriers' contracts of carriage provides individuals notice of their rights and carrier responsibilities in a readily available source and will help improve compliance with the matters so incorporated. However, as stated in our discussion of contingency plans, we believe that incentives exist for carriers to include their customer service plans in their contracts of carriage and, as pointed out by the Department's Inspector General in his 2006 report, most major airlines already do so.

As discussed above, the Department will require each air carrier that has a Web site to post its entire contract of carriage on its Web site in easily accessible form, including all updates to its contract of carriage. The Department will also require each air carrier with a Web site that chooses not to include their customer service plan in its contract of carriage to post the plan itself on its Web site in easily accessible form.

Many airlines already post their contract of carriage, including their customer service plan, on their Web site. An airline's contract of carriage is also available for public inspection at airports and ticket offices. The purpose of this requirement is to ensure that interested consumers can easily review an airline's contract of carriage, which as of the effective date of the rule may include the customer service plan of airlines that choose to incorporate such a plan. By reviewing an airline's contract of carriage, consumers can find out an airline's stated legal obligations to passengers and be better informed about their rights and a carrier's responsibilities when problems occur (for example, the passenger's rights and carrier's responsibilities if an airline delays or cancels a flight or loses a bag).

This rule also requires each covered carrier that has a Web site to post its entire contract of carriage on its site in easily accessible form. Many airlines already post their contract of carriage on their Web site. An airline's contract of carriage is also available for public inspection at airports and ticket offices. The purpose of this requirement is to ensure that interested consumers can easily review an airline's contract of carriage, which as of the effective date of rule may include the customer service plan of airlines that are required to have such a plan. By reviewing an airline's contract of carriage, consumers can find out an airline's stated legal obligations to passengers and be better informed about their rights and a carrier's responsibilities when problems occur (for example, the passenger's rights and carrier's responsibilities if an

airline delays or cancels a flight or loses a bag).

4. Audit of Customer Service Plans

The NPRM: The NPRM proposed that each covered carrier audit its own adherence to its plan annually and make the results of its audits available for the Department's review for two years. We rejected carriers' arguments in comments to the ANPRM against requiring audits and invited carriers that oppose self-auditing as unduly burdensome to provide evidence of the costs that they anticipate. We also rejected consumers' arguments that the Department should set standards for the audits, review all audits, or have them done by our IG.

Comments: NBTA favors giving the Department's IG the resources to conduct audits of carriers' customer service plans, and suggests that these audits be conducted not more frequently than once every three years and at similar times in the year to provide accurate comparative information. ATA agrees with the self-auditing proposal because internal auditors are more familiar with the industry, and it saves time and training costs associated with outside auditors. ASTA notes that self-auditing is unlikely to improve the situation because the ''promises'' carriers make in their customer service plans are likely to be aspirational, lacking in substance and unenforceable.

DOT Response: The rule requires each carrier to audit its own adherence to its plan annually and to make the results of each audit available for the Department's review for two years afterwards. The Department believes that a system for verifying compliance with customer service plans is essential. We believe that requiring covered carriers to audit their plans annually will further influence carriers to live up to their commitments. We agree with ATA that self-auditing is preferable as internal auditors are familiar with the industry and the cost of external audits can be avoided. The Department's IG, in several reports, also recommended that airlines conduct internal audits to measure their compliance with their customer service plans. Some airlines are already doing so, but most are not. We disagree with the suggestion that the IG, rather then the airlines, conduct routine audits. In the past, in response to Congressional requests, the IG has conducted audits of the customer service commitments that ATA member carriers voluntarily adopted; however, these audits, which were costly, lengthy and resource intensive, were not routine annual audits. Instead, the audits focused on the effectiveness of the plans and the extent to which each airline met the provisions under its plan for the purpose of making recommendations for improving accountability, enforcement and consumer protections afforded to air travelers.

The Department believes that audits of customer service plans should be conducted at least once a year to enable an airline to quickly take action if it learns that it is not in compliance with its customer service plans or if it is not effectively implementing its plan. If audits are conducted once every three years as suggested by one commenter, an airline may not be properly implementing its customer service plans for quite some time before it becomes aware of the problem. We are also not requiring that the audits be conducted ''at similar times in the year'' or even that there be a single unified audit of all the subjects covered in the customer service plans, in order to allow each airline the flexibility to design an audit program that fits its particular operational environment.

Retroactive Applicability of Amendments to Contracts of Carriage

The NPRM: In the NPRM, we proposed to adopt a rule to prohibit carriers from retroactively applying any material amendment to their contracts of carriage with significant negative implications for consumers to people who have already bought tickets. We asked for commenters to address the implications of a carrier's being held to different contract terms vis-à-vis different passengers on the same flight if some bought their tickets before the contract of carriage was amended and some afterwards.

Comments: NBTA states that customers on the same flight should be governed under the same contract of carriage, and last minute business travelers should not be subject to different contracts than other passengers. ATA also opposes this measure, and notes that carriers need flexibility and such a requirement will discourage carriers from making improvements in customer service due to the difficulty of dealing with differing customer service standards as applied to passengers depending on the time of purchase. ASTA thinks the Department should prohibit retroactive changes to the contract of carriage, as the contract is formed at the moment of purchase. ASTA states that it would be unfair to the airlines to allow consumers to take retroactive advantage of improvements that were not in effect when they bought their tickets and equally unfair to consumers to permit an airline to change the bargain that existed when the ticket was purchased.

DOT Response: As we believe that consumers have the right to receive accurate information at the time of purchase about the terms in the contract of carriage that are applicable to them and to which they will be held, this final rule prohibits carriers from retroactively applying any material amendment to their contracts of carriage that has any significant negative implications for consumers who have already bought tickets. We believe that it would be unfair, for example, for a passenger to purchase a non-refundable ticket in March for a flight in May and to learn later that the carrier added a significant fee in April that the passenger would be subject to and that may have affected his/her purchase decision had he/she been aware of it. This provision is included in the rule as a new section 253.9 in Part 253.

Effective Date of Rule

The NPRM: In the NPRM, we proposed that the final rule take effect 180 days after its publication in the **Federal Register** in order to afford carriers sufficient time to adopt their plans, modify their computer systems, and take other necessary steps to be able to comply with the new requirements before we begin enforcing them. We invited comments on whether 180 days is an appropriate interval for completing these changes.

Comments: We received few comments on this issue. Flyersrights.org suggested that the rules should become effective after 120 days. NBTA thinks a ''reasonable date should be established after determining the impact the final rule will have on carriers.'' ACI–NA supports the DOT proposal to make the final rule effective 180 days after publication in the **Federal Register** but suggests a tiered implementation schedule providing an extra 120 days to small and non-hub airports if the Department adopts its suggestion that airlines be required to coordinate their plans with all airports at which they provide service. ATA recommends a ''significant implementation period'' as the rule would require substantial software and operational changes.

DOT Response: We agree with ATA and NBTA that carriers should have sufficient time to implement these changes. We also agree with Flyerrights.org that four months is adequate time for carriers to implement the necessary changes. Consequently, for the reasons stated above the rule will go into effect 120 days after it is published in the **Federal Register**.

Regulatory Analyses and Notices

A. Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

This action has been determined to be significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. It has been reviewed by the Office of Management and Budget. The final Regulatory Evaluation has concluded that the benefits of the final rule exceed its costs, even without considering non-quantifiable benefits. The total present value of benefits over a 20 year period at a 7% discount rate is $169.7 million and the total present value of costs over a 20 year period at a 7% discount rate is $100.6 million. The net present value of the rule for 20 years at a 7% discount rate is $69.1 million. A copy of the final Regulatory Evaluation has been placed in the docket.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. An 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 CFR 399.73. Our analysis identified 19 small businesses potentially affected by the requirements of the final rule. However, although certain elements of this rule impose new requirements on these small air carriers, the Department believes that the economic impact will not be significant based on its examination because for those carriers identified as small businesses (and for which data on receipts was readily available) annualized total costs of the rule are estimated to be one tenth of one percent or less of annual receipts per firm. More specifically, annualized total costs as a percent of annual receipts ranged from 0.09% to 0.0006%. On the basis of this examination, the Department certifies that this rule will not have a significant economic impact on a substantial number of small entities. A copy of the Regulatory Flexibility Analysis has been placed in docket.

C. Executive Order 13132 (Federalism)

This Final Rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule does not include any provision that: (1) Has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13084

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (''Consultation and Coordination with Indian Tribal Governments''). Because this final rule does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

E. Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995, DOT has submitted the Information Collection Requests (ICRs) abstracted below to the Office of Management and Budget (OMB). Before OMB decides whether to approve these proposed collections of information and issue a control number, the public must be provided 30 days to comment. Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to: Department of Transportation, Office of Aviation Enforcement and Proceedings, Office of the General Counsel, 1200 New Jersey Avenue, SE., Washington, DC 20590. OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

We will respond to any OMB or public comments on the information collection requirements contained in this rule. OST may not impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. OST intends to obtain current OMB control numbers for the three new information collection requirements resulting from this rulemaking action. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

The ICRs were previously published in the **Federal Register** as part of NPRM (73 FR 74587) and the Department invited interested persons to submit comments on any aspect of each of these three information collections, including the following: (1) The necessity and utility of the information collection, (2) the accuracy of the estimate of the burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) ways to minimize the burden of collection without reducing the quality of the collected information.

The final rule contains three new information collection requirements. The first is a requirement that certificated and commuter air carriers that operate passenger service using any aircraft with 30 or more passenger seats retain for two years the following information about any ground delay that lasts at least three hours: the length of the delay, the precise cause of the delay, the actions taken to minimize hardships for passengers, whether the flight ultimately took off (in the case of a departure delay or diversion) or returned to the gate; and an explanation for any tarmac delay that exceeded 3 hours. The Department plans to use the information to investigate instances of long delays on the ground and to identify any trends and patterns that may develop. The assumptions upon which the calculations for this requirement are based have not changed; however, we have modified the information collection burden hours to take into account the fact that the final rule requires covered carriers to retain information about any ground delay that last at least three hours as opposed to ground delays that last at least four hours as proposed in the NPRM. Also, rather than using data about the total number of tarmac delays in 2007 as we did in the NPRM, we use the total number of tarmac delays averaged in 2007–2008. The second is a requirement that any certificated and commuter air carrier that operates scheduled passenger service using any aircraft with 30 or more passenger seats adopt a customer service plan, audit its adherence to the plan annually, and retain the results for two years. The Department plans to review the audits to monitor carriers' compliance with their plans and take enforcement action when appropriate. We have revised the information collection burden hours for this requirement because it applies not

only to the reporting carriers as proposed in the NPRM but to all U.S. airlines that operate domestic scheduled passenger service using any aircraft with 30 or more passenger seats. The third is a requirement that each reporting carrier display on its Web site information on each listed flight's on-time performance for the previous month for both its flights and those of its non-reporting code-share carriers. This information will help consumers to select their flights. The assumptions upon which the calculations for this requirement are based have changed significantly. Initially, we had estimated that the one-time programming cost for displaying flight delay data on each covered carrier's Web sites would be $20,000. Based on industry comments received, we have revised the on-time programming cost from $20,000 to $400,000 for each covered carrier. The median hourly wage for computer programmers has decreased from $33.47 to $32.73.

For each of these information collections, the title, a description of the respondents, and an estimate of the annual recordkeeping and periodic reporting burden are set forth below:

1. Requirement To Retain for Two Years Information About Any Ground Delay That Lasts at Least Three Hours

Respondents: Certificated and commuter air carriers that operate domestic passenger service using any aircraft with 30 or more passenger seats.

Estimated Annual Burden on Respondents: From 0 to 21 hours and 15 minutes (1275 minutes) per year for each respondent. The estimate was calculated by multiplying the estimated time to retain information about one ground delay (15 minutes) by the total number of ground delay incidents lasting at least three hours per respondent (from 0 to 85 incidents, averaged in 2007–2008).

Estimated Total Annual Burden: A maximum of 207 hours and 15 minutes (12,435 minutes) for all respondents. The estimate was calculated by multiplying the estimated time to retain information about one ground delay (15 minutes) by the total number of ground delay incidents lasting at least three hours in calendar years 2007–2008 (averaged) for the reporting carriers (748) and adding the product of the estimated time to retain information about one ground delay (15 minutes) multiplied by 11 percent of the total number of ground delay incidents lasting at least three hours in calendar years 2007–2008 (averaged) for the reporting carriers (82.28). (The reporting carriers accounted for 89 percent of domestic scheduled passenger service, so we have assumed that nearly all of the remaining 11 percent was provided by other certificated and commuter carriers using aircraft with more than 30 passenger seats.)

Frequency: From 0 to 85 ground delay information sets to retain per year for each respondent. (N.b. Some air carriers may not experience any ground delay incident of at least three hours in a given year, while some larger air carriers could experience as many as 85 in a given year according to data on ground delays in the average of calendar years 2007 and 2008.)

2. Requirement That Each Covered Carrier Retain for Two Years the Results of Its Annual Self-Audit of Its Compliance With Its Customer Service Plan

Respondents: Certificated and commuter air carriers that operate domestic scheduled passenger service using any aircraft with 30 or more passenger seats (42 carriers).

Estimated Annual Burden on Respondents: 15 minutes per year for each respondent. The estimate was calculated by multiplying the estimated time to retain a copy of the carrier's self-audit of its compliance with its Customer Service Plan by the number of audits per carrier in a given year (1).

Estimated Total Annual Burden: A maximum of 10 hours and 30 minutes (630 minutes) for all respondents. The estimate was calculated by multiplying the time in a given year for each carrier to retain a copy of its self-audit of its compliance with its Customer Service Plan (15 minutes) by the total number of covered carriers (42).

Frequency: One information set to retain per year for each respondent.

3. Requirement That Each Covered Carrier Display on Its Web Site, at a Point Before the Consumer Selects a Flight for Purchase, the Following Information for Each Listed Flight Regarding its On-Time Performance During the Last Reported Month: the Percentage of Arrivals That Were on Time, the Percentage of Arrivals That Were More Than 30 Minutes Late (With Special Highlighting if the Flight Was More Than 30 Minutes Late More Than 50 Percent of the Time), and the Percentage of Flight Cancellations if the Flight Is Cancelled More Than 5% of the Time. We Are Adding a Requirement That a Marketing/Reporting Carrier Display Delay Data for Its Non-Reporting Code-Share Carrier(s)

Respondents: Every U.S. carrier that accounts for at least one percent of scheduled passenger revenue, maintains a Web site, and is not already displaying the required information (9 carriers).

Estimated Annual Burden on Respondents: 11,964 hours (717,780 minutes) in the first year and no more than 12 hours (720 minutes) in subsequent years for each respondent. The estimate for the first year was calculated by adding the estimated number of hours per respondent for developing its Web site for data posting (11,951 hours [717,060 minutes], the quotient of a one-time programming cost of $400,000 divided by $33.47, the median hourly wage for computer programmers) to the estimated number of hours for management of data links (12 hours [720 minutes], estimated at one hour per month).

Estimated total annual burden: 107,667 hours (6,460,020 minutes) in the first year and no more than 108 hours (6,480 minutes) in subsequent years for all respondents. The estimate for the first year was calculated by multiplying the number of hours per respondent for developing its Web site for data posting (11,951 hours) by the number of covered carriers (9) and adding the product of the number of hours per year for management of data links (12) and the number of covered carriers (9). The estimate for subsequent years was calculated by multiplying the number of hours per year for management of data links (12) by the number of covered carriers requiring action to come into compliance (9).

Frequency: Development of Web site for data posting: 1 time for each respondent. Updating information for each flight listed on Web site: 12 times per year (1 time per month) for each respondent.

F. Unfunded Mandates Reform Act

The Department has determined that the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply to this rule.

Issued this 18th day of December 2009 in Washington, DC.

Ray LaHood,

Secretary of Transportation.

List of Subjects

14 CFR Parts 234 and 259

Air carriers, Consumer protection, Reporting and recordkeeping requirements.

14 CFR Part 253

Air carriers, Consumer protection, Contract of carriage.

14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and

fares, Air taxis, Consumer protection, Small businesses.

■ For the reasons set forth in the preamble, the Department amends 14 CFR Chapter II as follows:

PART 234—[AMENDED]

■ 1. The authority citation for 14 CFR Part 234 continues to read as follows:

Authority: 49 U.S.C. 329 and chapters 401 and 417.

■ 2. Section 234.11 is revised to read as follows:

§ 234.11 Disclosure to consumers.

(a) During the course of reservations or ticketing discussions or transactions, or inquiries about flights, between a carrier's employees or contractors and the public, the carrier shall disclose upon reasonable request the on-time performance code for any flight that has been assigned a code pursuant to this part.

(b) For each domestic flight for which schedule information is available on its Web site, including domestic code-share flights, a reporting carrier shall display the following information regarding the flight's performance during the most recent calendar month for which the carrier has reported on-time performance data to the Department: the percentage of arrivals that were on time—*i.e.*, within 15 minutes of scheduled arrival time, the percentage of arrivals that were more than 30 minutes late (including special highlighting if the flight was late more than 30 minutes of scheduled arrival time more than 50 percent of the time), and the percentage of flight cancellations if 5 percent or more of the flight's operations were canceled in the month covered. The information must be provided by showing all of the required information on the initial listing of flights or by showing all of the required information via a prominent hyperlink in close proximity to each flight on the page with the initial listing of flights.

(c) Each carrier shall load the information whose disclosure is required under paragraphs (a) and (b) of this section into its internal reservation system between the 20th and 23rd day of the month after the month for which the information is being provided.

PART 253—[AMENDED]

■ 3. The authority citation for 14 CFR Part 253 is revised to read as follows:

Authority: 49 U.S.C. 40113; 49 U.S.C. Chapters 401, 415 and 417.

■ 4. A new § 253.9 is added to read as follows:

§ 253.9 Retroactive Changes to Contracts of Carriage

An air carrier may not retroactively apply to persons who have already bought a ticket any material amendment to its contract of carriage that has significant negative implications for consumers.

■ 5. A new part 259 is added to read as follows:

PART 259—ENHANCED PROTECTIONS FOR AIRLINE PASSENGERS

Sec.
259.1 Purpose.
259.2 Applicability.
259.3 Definitions.
259.4 Contingency plan for lengthy tarmac delays.
259.5 Customer Service Plans
259.6 Notice and Contract of Carriage.
259.7 Response to consumer problems.

Authority: 49 U.S.C. 40101(a)(4), 40101(a)(9), 40113(a), 41702, and 41712.

§ 259.1 Purpose.

The purpose of this part is to mitigate hardships for airline passengers during lengthy tarmac delays and otherwise to bolster air carriers' accountability to consumers.

§ 259.2 Applicability.

This rule applies to all the flights of a certificated or commuter air carrier if the carrier operates scheduled passenger service or public charter service using any aircraft originally designed to have a passenger capacity of 30 or more seats, with the following exceptions: §§ 259.5 and 259.7 do not apply to charter service.

§ 259.3. Definitions.

Certificated air carrier means a U.S. air carrier that holds a certificate issued under 49 U.S.C. 41102 to operate passenger service or an exemption from 49 U.S.C. 41102.

Commuter air carrier means a U.S. air carrier as established by 14 CFR 298.3(b) that is authorized to carry passengers on at least five round trips per week on at least one route between two or more points according to a published flight schedule using small aircraft.

Large hub airport means an airport that accounts for at least 1.00 percent of the total enplanements in the United States.

Medium hub airport means an airport accounting for at least 0.25 percent but less than 1.00 percent of the total enplanements in the United States.

Small aircraft means any aircraft originally designed to have a maximum passenger capacity of 60 or fewer seats or a maximum payload capacity of 18,000 pounds or less.

Tarmac delay means the holding of an aircraft on the ground either before taking off or after landing with no opportunity for its passengers to deplane.

§ 259.4 Contingency plan for lengthy tarmac delays.

(a) *Adoption of Plan.* Each covered carrier shall adopt a Contingency Plan for Lengthy Tarmac Delays for its scheduled and public charter flights at each large and medium hub U.S. airport at which it operates such air service and shall adhere to its plan's terms.

(b) *Contents of Plan.* Each Contingency Plan for Lengthy Tarmac Delays shall include, at a minimum, the following:

(1) For domestic flights, assurance that the air carrier will not permit an aircraft to remain on the tarmac for more than three hours unless:

(i) The pilot-in-command determines there is a safety-related or security-related reason (*e.g.* weather, a directive from an appropriate government agency) why the aircraft cannot leave its position on the tarmac to deplane passengers; or

(ii) Air traffic control advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations.

(2) For international flights that depart from or arrive at a U.S. airport, assurance that the air carrier will not permit an aircraft to remain on the tarmac at a large or medium hub U.S. airport for more than a set number of hours, as determined by the carrier and set out in its contingency plan, before allowing passengers to deplane, unless:

(i) The pilot-in-command determines there is a safety-related or security-related reason why the aircraft cannot leave its position on the tarmac to deplane passengers; or

(ii) Air traffic control advises the pilot-in-command that returning to the gate or another disembarkation point elsewhere in order to deplane passengers would significantly disrupt airport operations.

(3) For all flights, assurance that the air carrier will provide adequate food and potable water no later than two hours after the aircraft leaves the gate (in the case of departure) or touches down (in the case of an arrival) if the aircraft remains on the tarmac, unless the pilot-in-command determines that safety or security considerations preclude such service;

(4) For all flights, assurance of operable lavatory facilities, as well as

adequate medical attention if needed, while the aircraft remains on the tarmac;

(5) Assurance of sufficient resources to implement the plan; and

(6) Assurance that the plan has been coordinated with airport authorities at all medium and large hub airports that the carrier serves, including medium and large hub diversion airports.

(c) *Amendment of plan.* At any time, an air carrier may amend its Contingency Plan for Lengthy Tarmac Delays to decrease the time for aircraft to remain on the tarmac for domestic flights covered in paragraph (b)(1) of this section, for aircraft to remain on the tarmac for international flights covered in paragraph (b)(2) of this section, and for the trigger point for food and water covered in paragraph (b)(3) of this section. An air carrier may also amend its plan to increase these intervals (up to the limits in this rule), in which case the amended plan shall apply only to those flights that are first offered for sale after the plan's amendment.

(d) *Retention of records.* Each air carrier that is required to adopt a Contingency Plan for Lengthy Tarmac Delays shall retain for two years the following information about any tarmac delay that lasts at least three hours:

(1) The length of the delay;

(2) The precise cause of the delay;

(3) The actions taken to minimize hardships for passengers, including the provision of food and water, the maintenance and servicing of lavatories, and medical assistance;

(4) Whether the flight ultimately took off (in the case of a departure delay or diversion) or returned to the gate; and

(5) An explanation for any tarmac delay that exceeded 3 hours (*i.e.,* why the aircraft did not return to the gate by the 3-hour mark).

(e) *Unfair and Deceptive Practice.* An air carrier's failure to comply with the assurances required by this rule and as contained in its Contingency Plan for Lengthy Tarmac Delays will be considered an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 that is subject to enforcement action by the Department.

§ 259.5 Customer Service Plan.

(a) *Adoption of Plan.* Each covered carrier shall adopt a Customer Service Plan applicable to its scheduled flights and shall adhere to this plan's terms.

(b) *Contents of Plan.* Each Customer Service Plan shall, at a minimum, address the following subjects:

(1) Offering the lowest fare available;

(2) Notifying consumers of known delays, cancellations, and diversions;

(3) Delivering baggage on time;

(4) Allowing reservations to be held without payment or cancelled without penalty for a defined amount of time;

(5) Providing prompt ticket refunds;

(6) Properly accommodating passengers with disabilities and other special-needs, including during tarmac delays;

(7) Meeting customers' essential needs during lengthy tarmac delays;

(8) Handling ''bumped'' passengers with fairness and consistency in the case of oversales;

(9) Disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration;

(10) Ensuring good customer service from code-share partners;

(11) Ensuring responsiveness to customer complaints; and

(12) Identifying the services it provides to mitigate passenger inconveniences resulting from cancellations and misconnects.

(c) *Self-auditing of Plan and Retention of Records.* Each air carrier that is required to adopt a Customer Service Plan shall audit its own adherence to its plan annually. Carriers shall make the results of their audits available for the Department's review upon request for two years following the date any audit is completed.

§ 259.6 Notice and Contract of Carriage.

(a) Each air carrier that is required to adopt a Contingency Plan for Lengthy Tarmac Delays or a Customer Service Plan may include such plans in their Contract of Carriage.

(b) Each air carrier that has a Web site shall post its Contract of Carriage on its Web site in easily accessible form, including all updates to its Contract of Carriage.

(c) Each air carrier that is required to adopt a Contingency Plan for Lengthy Tarmac Delays shall, if it has a Web site but does not include such Contingency Plan for Lengthy Tarmac Delays in its Contract of Carriage, post its Contingency Plan for Lengthy Tarmac Delays on its Web site in easily accessible form, including all updates to its Contingency Plan for Lengthy Tarmac Delays.

(d) Each air carrier that is required to adopt a Customer Service Plan shall, if it has a Web site but does not include such Customer Service Plan in its Contract of Carriage, post its Customer Service Plan on its Web site in easily accessible form, including all updates to its Customer Service Plan.

§ 259.7 Response to consumer problems.

(a) *Designated Advocates for Passengers' Interests.* Each covered carrier shall designate for its scheduled flights an employee who shall be responsible for monitoring the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers. This employee shall have input into decisions on which flights to cancel and which will be delayed the longest.

(b) *Informing consumers how to complain.* Each covered carrier shall make available the mailing address and e-mail or Web address of the designated department in the airline with which to file a complaint about its scheduled service. This information shall be provided on the carrier's Web site (if any), on all e-ticket confirmations and, upon request, at each ticket counter and boarding gate staffed by the carrier.

(c) *Response to complaints.* Each covered carrier shall acknowledge receipt of each complaint regarding its scheduled service to the complainant within 30 days of receiving it and shall send a substantive response to each complainant within 60 days of receiving the complaint. A complaint is a specific written expression of dissatisfaction concerning a difficulty or problem which the person experienced when using or attempting to use an airline's services.

PART 399—[AMENDED]

■ 6. The authority citation for 14 CFR Part 399 continues to read as follows:

Authority: 49 U.S.C. 40101 *et seq.*

■ 7. Section 399.81 is revised to read as follows:

§ 399.81 Unrealistic or deceptive scheduling.

(a) The unrealistic scheduling of flights by any air carrier providing scheduled passenger air transportation is an unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712.

(b) With respect to the advertising of schedule performance, it is an unfair or deceptive practice and an unfair method of competition to use any figures purporting to reflect schedule or on-time performance without indicating the basis of the calculation, the time period involved, and the pairs of points or the percentage of system-wide operations thereby represented and whether the figures include all scheduled flights or only scheduled flights actually performed.

(c) *Chronically delayed flights.* (1) This section applies to any air carrier that is a ''reporting carrier'' as defined in Part 234 of Department regulations (14 CFR Part 234).

(2) For the purposes of this section, a chronically delayed flight means any domestic flight that is operated at least

10 times a month, and arrives more than 30 minutes late (including cancelled flights) more than 50 percent of the time during that month.

(3) For purposes of this paragraph, the Department considers all of a carrier's flights that are operated in a given city-pair market whose scheduled departure times are within 30 minutes of the most frequently occurring scheduled departure time to be one single flight.

(4) The holding out of a chronically delayed flight for more than four consecutive one-month periods represents one form of unrealistic scheduling and is an unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712.

[FR Doc. E9–30615 Filed 12–29–09; 8:45 am]

BILLING CODE 4910–9X–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 1

RIN 3038–AB87

Electronic Filing of Financial Reports and Notices

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is amending certain of its regulations in connection with electronic filing of financial reports and related notices. The amendments broaden the language in the Commission's regulations applicable to electronic filings of financial reports to clarify that, to the extent a futures commission merchant (''FCM'') submits a Form 1–FR to the Commission electronically, it may do so using any user authentication procedures established or approved by the Commission. The amendments also permit registrants to electronically submit filings in addition to financial reports, including an election to use a non-calendar fiscal year, requests for extensions of time to file uncertified financial reports and ''early warning'' notices required under Commission regulations. In connection with the filing of financial reports, the amendments specify, consistent with other requirements and existing practice, that a statement of income and loss is included as a required part of the non-certified 1–FR filings for FCMs and introducing brokers (''IBs''). The amendments also require more immediate, but less prescriptive, documentation regarding a firm's capital condition when a firm falls below its required minimum adjusted net capital. Finally, the final regulations include several other minor amendments to correct certain outdated references and to make other clarifications to existing regulations.

DATES: Effective Date: January 4, 2010.

FOR FURTHER INFORMATION CONTACT: Thelma Diaz, Associate Director, Division of Clearing and Intermediary Oversight, 1155 21st Street, NW., Washington, DC 20581. Telephone number: 202–418–5137; facsimile number: 202–418–5547; and electronic mail: *tdiaz@cftc.gov*, or Lawrence T. Eckert, Special Counsel, Division of Clearing and Intermediary Oversight, 140 Broadway, New York, New York 10005. Telephone number (646) 746–9704; and electronic mail: *leckert@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On October 13, 2009, the Commission published for comment in the **Federal Register** proposed amendments to Regulations 1.10 and 1.12 (the ''Proposals'').[1] Commission Regulation 1.10 sets forth the financial reporting requirements for FCMs and IBs [2] and Regulation 1.12 requires FCMs, IBs and applicants for registration thereof to provide notice of a variety of predefined events as or before they occur.[3]

The Proposals consisted of several amendments regarding electronic filing of financial reports and notices by FCMs and IBs as well as amendments to certain other financial reporting requirements. Specifically, the Commission proposed amendments to: (1) Broaden language in the Commission's regulations concerning authentication procedures applicable to electronic filing of financial reports in order to enable internet-based filing of such reports in anticipation of expected changes to ''WinJammer™,'' an application used by FCMs that file their non-certified financial reports electronically with the Commission; (2) expand the types of filings that FCMs and IBs may submit electronically to include required ''early warning'' notices and certain other notices and filings under Regulations 1.10 and 1.12; (3) provide for less prescriptive, but more immediate, documentation to be filed regarding a firm's undercapitalized condition; (4) expressly include an income statement in the required periodic unaudited financial reports of FCMs and IBs; and (5) make several other minor amendments to correct certain outdated references and to make other clarifications to existing regulations.

The 30-day public comment period on the Proposals expired on November 12, 2009. The Commission received one written comment on the Proposals, submitted by the National Futures Association (''NFA''). NFA noted its agreement and support of the Commission's Proposals and commended the Commission for its review of its electronic filing requirements and proposal of changes to reflect technological advances and current practices. As discussed below, NFA also encouraged the Commission to consider certain additional amendments to further expand the use of electronic filing in certain circumstances. NFA did not suggest delaying the implementation of the Proposals while these additional suggestions made by NFA are under consideration by the Commission. The Commission further notes that certain provisions included in the additional amendments offered by NFA for consideration may require publication in the **Federal Register** for prior notice and comment before they may be adopted. For the reasons set forth below, the Commission has therefore determined to adopt the amendments as proposed.

II. Rule Amendments

A. Electronic Filing Issues

1. Amendments to Regulation 1.10

Commission Regulation 1.10(c) generally sets forth the provisions governing where and how financial reports required to be filed by FCMs and IBs under Regulation 1.10 must be filed. Regulation 1.10(c)(1) indicates with whom reports should be filed and Regulation 1.10(c)(2) addresses the method for submitting such reports. Electronic submission of certified financial reports currently is addressed separately in Regulation 1.10(b)(2)(iii).

[1] 74 FR 52434 (Oct 13, 2009). The Commission's regulations cited in this rulemaking may be found at 17 CFR Ch. 1 (2009).

[2] For simplicity, references in this **Federal Register** release to IBs in connection with financial reporting and notice requirements are intended to refer to IBs that are not operating pursuant to a guarantee agreement.

[3] For example, Regulation 1.12(a) requires immediate telephonic notice, to be confirmed in writing by facsimile, when a registrant's (or applicant's) adjusted net capital falls below that required by Regulation 1.17. Other provisions of Regulation 1.12 require notification to the Commission for certain ''early warning'' events. Regulation 1.12(b), for example, requires notification by a registrant or applicant if such entity's adjusted net capital drops below a specified threshold.