

# AVIATION ADVISOR

December 30, 2009

## DOT ISSUES “ENHANCED PASSENGER PROTECTION” REGULATIONS TO ADDRESS TARMAC DELAYS AND OTHER AIR CARRIER CONSUMER ISSUES

On December 30, 2009, the U.S. Department of Transportation (“DOT”) released a final rule entitled “Enhancing Airline Passenger Protections” (74 Fed Reg. 68983; Docket DOT-OST-2007-0022). The rule’s provisions will take effect 120 days after the publication date (i.e., April 29, 2010). Most of the new requirements will be codified at 14 C.F.R. Part 259.

Generally, the requirements apply to U.S.-flag carriers that operate scheduled or charter service using aircraft with 30 or more passenger seats. The requirements apply to all flights operated by such a carrier (e.g., if a carrier operates any aircraft with 30 or more passenger seats, they apply to all of the carrier’s flights, even if some are operated by aircraft with less than 30 seats). The rule does not apply to foreign-flag carriers, but does apply to international flights operated by U.S.-flag carriers.

The rule’s major provisions are as follows:

**(A) Tarmac Delay Contingency Plans.** Carriers are required to develop and implement contingency plans for lengthy tarmac delays. The plan must include:

(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., 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.

Carriers also are required to retain for two years certain records about tarmac delays that last at least three hours, even if the delays do not trigger a carrier’s contingency plan. Although the rule does not require that the contingency plans be

filed with DOT, it does state that within a year DOT will review “larger” carriers’ contingency plans and randomly review other carriers’ plans. Additionally, the rule does not require that a carrier’s contingency plan be incorporated into its contract of carriage, as had been proposed by DOT previously. However, each carrier will be required to post its contract of carriage on its website, and to separately post its contingency plan if not incorporated. DOT also will publish a list of which carriers have and have not incorporated their contingency plans.

**(B) Response to Consumer Problems.** Carriers are required to: (1) designate an employee to monitor the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers, and to have input into decisions on flight cancellations and delays; (2) make available the email and postal contact information about the department at the carrier with which complaints can be filed, including on the carrier’s website, on e-ticket confirmations, and upon request at ticket counters and boarding gates staffed by the carrier; and (3) acknowledge receipt of complaints within 30 days of receipt and send a substantive response within 60 days of receipt.<sup>1</sup>

**(C) Chronically Delayed Flights.** This section applies only to carriers that report data pursuant to 14 C.F.R. Part 234 (e.g., that account for at least 1% of domestic scheduled passenger revenue). DOT considers the operation of a chronically delayed flight for more than four consecutive one-month periods to be an unfair and deceptive practice. The rule defines a flight to be “chronically delayed” if it is operated at least 10 times per month and arrives more than 30 minutes late (including cancelled flights) more than 50% of the time.<sup>2</sup>

**(D) Delay Data on Carrier Websites.** Carriers that report data pursuant to 14 C.F.R. Part 234 (e.g., that account for at least 1% of domestic scheduled passenger revenue) already are required to, in the course of reservation/ticketing discussions or inquires about flights, disclose upon request the on-time performance code for domestic flights. Those carriers will now also be required to include the on-time performance code

for domestic flights on their websites, including flights operated by a code-share partner. Upon the initial listing of flights, either on the same page or via a hyperlink, carriers must provide certain on-time performance data for the most recent calendar month reported to DOT, including special highlighting of chronically delayed flights.<sup>3</sup>

**(E) Customer Service Plans.** Carriers are required to develop and implement customer service plans. The plans must address:

- (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.

Carriers that do not offer their own reservations and ticketing services may, for certain service plan elements, explain that they do not provide such services and identify the carrier that provides the

<sup>1</sup> The consumer problems requirements described in this section do not apply to charter services.

<sup>2</sup> Unlike most of the rule, this requirement will be codified at 14 C.F.R. § 399.81.

<sup>3</sup> Unlike most of the rule, these requirements will be codified at 14 C.F.R. § 234.11.

services. Carriers are required to annually audit their adherence to their customer service plans, and to retain records of the audits for two years. The rule does not require that a carrier's customer service plan be incorporated into its contract of carriage, as had been proposed by DOT previously. However, each carrier will be required to post its contract of carriage on its website, and to separately post its customer service plan if not incorporated. The rule does not include any specific requirements for the content of customer service plans, but DOT will address the matter in a future proceeding.<sup>4</sup>

**(F) Retroactive Amendments to Contract of Carriage.** Carriers are prohibited from retroactively applying any material amendments to their contracts of carriage with significant negative implications to consumers who have already purchased tickets.<sup>5</sup>

DOT also states that in a future proceeding it will seek comments on eleven additional issues: (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.

If you have any questions concerning these matters, please do not hesitate to contact any of the members of our Aviation Group.

The **AVIATION ADVISOR** is published by [Zuckert, Scoutt & Rasenberger, L.L.P.](#), a law firm in Washington, D.C.

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<sup>4</sup> The customer service plan requirements described in this section do not apply to charter services.

<sup>5</sup> Unlike most of the rule, this requirement will be codified at 14 C.F.R. § 253.9.