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## DOT Moves Forward with Controversial Airline Passenger Protection Rules

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*In the face of significant airline opposition, the U.S. Department of Transportation ("DOT") has introduced a series of new rules designed to enhance passenger rights and "to improve the air travel environment for consumers." The new rules could have profound effects well beyond the immediate need for airlines, airports, and travel agents to make fundamental systems and programming changes, and to train appropriate employees. Consumers are likely to witness sea changes in comparison shopping, with greater transparency in fare, ancillary fee, and other costs. Whether consumers will react with even greater confusion, or simply not fly when faced upfront with larger fees in a price-sensitive market, remains to be seen. The rules are being challenged in court, but most likely will go into effect before the court rules. Prospects for increased DOT enforcement actions loom large on the horizon. Without question, the DOT's actions represent the largest expansion of airline consumer protection rules in decades.*

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The first rule on air passengers' rights came into effect, in part, on August 23, 2011, and after a DOT extension, will be in full effect on January 24, 2012 for rules pertaining to full-fare advertising, baggage fee disclosures, certain itinerary requirements, notifications of flight status changes, and the holding of reservations without payment. The new rule significantly impacts the regulatory environment in which air carriers and travel agents operate and expands applicability to domestic and foreign airlines, smaller carriers, U.S. airports, and travel agencies.

Airlines and other travel organizations had requested a more comprehensive delay and continue to challenge the new rules in the U.S. Court of Appeals for the D.C. Circuit. The International Air Transport

<sup>1</sup> The authors wish to acknowledge the superb assistance of Alison Agnew, Practice Assistant, and Philippine Dumoulin, Foreign Legal Intern, in preparation of this alert.

Association ("IATA") claims that the rules represent an illegal extraterritorial application of U.S. law. Yet, it is likely that the new rule will become fully effective before the court decides the case. Absent an injunction, all affected entities must now implement and comply with DOT's new requirements.

In addition, DOT recently signaled it is moving forward with new rules directed at (1) enhancing disclosure requirements on code share operations; (2) targeting travel agents to adopt minimum customer service standards and disclose airlines they sell and do not sell, along with any incentive payments they receive from airlines or preferential displays of individual fares; and (3) adding further disclosures of fees for overweight baggage, booking fees, and other ancillary fees.

## Background

Since 2009, DOT has promulgated several rules intended to protect consumers and prohibit certain "unfair and deceptive" practices in the commercial aviation industry. This latest rule, known as Enhancing Airline Passenger Protections II (the "Consumer Protection Rule" or "New Rule"), expands on earlier rules by increasing transparency and expanding applicability, and it purports to remove sources of confusion for consumers.<sup>2</sup> Many have argued, however, that the costs of implementation and compliance for air carriers and ticket agents, particularly the costs of updating websites and upgrading technologies, may outweigh the benefits of increased clarity for passengers.

The new rule covers several subjects, including:

- tarmac delay contingency plans and delay data
- customer service plans and responses
- oversales and denied boarding compensation
- full fare advertising
- baggage and other fees and related code-share issues
- post-purchase price increases
- flight status changes
- choice-of-forum provisions

Nearly every sector of the industry has expressed opposition to all or portions of the proposed rule, and nearly every sector requested extensions. In addition to IATA, the Association of Asia Pacific Airlines ("AAPA"), the Latin American and Caribbean Air Transport Association ("ALTA"), the Association of European Airlines ("AEA"), and the Arab Air Carriers Organization ("AACO") sought a six-month delay of the rule from DOT, arguing that additional time was needed to adequately train employees, coordinate with airlines, and upgrade technology. The American Society of Travel Agents ("ASTA") also requested that DOT indefinitely defer the implementation of the baggage fee disclosure requirement because it views the rule as "an act of commercial suicide."<sup>3</sup> In response to these extension requests, DOT delayed the effective date of the rule's most controversial provisions until January 24, 2012, to allow airlines adequate time to comply with the new requirements.<sup>4</sup>



<sup>2</sup> Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-23167 (April 25, 2011).

<sup>3</sup> Enhancing Airline Passenger Protections: Limited Delay of Effective Date for Certain Provisions, 76 Fed. Reg. 45182 (July 28, 2011).

<sup>4</sup> In its decision to delay the effective date, DOT explained that it wanted to balance the "benefit of having these protections in place for consumers as soon as practical with the capability of airlines to comply with the additional requirements being

Allegiant Air LLC and Spirit Airlines are currently petitioning for review of the rule before the DC Circuit. Southwest has intervened in the case, and IATA and the Air Transport Association of America ("ATA") have filed to participate as *amici curiae*. In their briefs, the petitioners assert that the rule is a violation of air carriers' right to free speech as protected by the First Amendment, contrary to the purpose and spirit of the Airline Deregulation Act, and unlawful, arbitrary, and capricious.<sup>5</sup> The petitioners also maintain that they face "irreparable harm" if the rules are implemented on January 24, 2012. Southwest and other low cost carriers are particularly concerned that if all taxes are included in the advertised fare, sales will decrease because of the perceived price increase.<sup>6</sup> The petitioners sought a stay of the rule on July 22, 2011.<sup>7</sup>

On the other side, ASTA has intervened and the Interactive Travel Services Association ("ITSA") has filed a notice of intention to participate as *amicus curiae* on behalf of DOT. Though ASTA objected to some of the rule's baggage fee disclosure provisions, it supports the implementation of the full fare advertising rule to allow consumers to compare full fare prices.

On September 19, 2011, the D.C. Circuit denied the petitioners' request for a stay. It now appears that DOT will begin implementation of the rules before the legal challenge is resolved. This means that carriers and ticket agents must also begin implementing the rules' provisions, even if the court ultimately decides to review or strike down the rule. The petitioners' briefs are due November 14, 2011 and final briefs are due February 17, 2012.

## Key Areas of Customer Protection Rule

### Full Fare Advertising (Effective Date: Jan. 24, 2012)

Prior to the new rule, air carriers and ticket agents were permitted to separate government taxes and fees that are not *ad valorem* in nature, clearly advertised, and collected on a per-passenger basis from the advertised price of a fare. Now, U.S. and foreign air carriers and ticket agents must include all government-imposed taxes and fees in the price the first time the airfare is presented to a customer.

Though the price presented to the customer must include all taxes and fees, carriers and ticket agents may inform consumers of the government taxes and fees included in the full fare price. For example, air carriers and ticket agents may have pop-ups or fine print that lists the government taxes and fees. However, DOT cautions carriers and agents to ensure that consumers understand the total price of the airfare and are not confused by such notifications.

The rule also prohibits the use of "opt-out" provisions by carriers and ticket agents in the selection of additional services or products. In other words, an optional service can be added to the total fare price to be paid by the consumer only if the customer affirmatively agrees to pay for such a service (i.e., by checking a box for that service or by taking other concrete action). This provision is similar to consumer protection laws in other jurisdictions, such as the European Commission's ("EC") regulation 1008/2008.

This provision may place heavy burdens on air carriers and ticket agents, including the high cost of new advertisements and updated websites. Though DOT justifies the provision as a measure to keep consumers from being duped, this portion of the New Rule may do little to ease customer confusion.

imposed upon them..." DOT believes "the January 24, 2012 date will provide the airlines with adequate time to comply with the requirements." *Id.* at 45184.

<sup>5</sup> Petition for Review of Order of Department of Transportation, *Allegiant Air, LLC v. Department of Transportation*, No. 11-1222 (D.C. Cir. June 16, 2011).

<sup>6</sup> "Courts Decision on Rights Rules Could Hobble Carriers' Next Steps," *Aviation Daily*, Sept. 27, 2011.

<sup>7</sup> Motion for Stay, *Allegiant Air, LLC v. Department of Transportation*, No. 11-1222 (D.C. Cir. July 22, 2011).

**Baggage and Ancillary Fees (Effective Dates: Aug. 23, 2011 and Jan. 24, 2012)**

The Consumer Protection Rule establishes new requirements for the disclosure of baggage fees and allowances for carry-on and checked baggage applicable to both carriers and travel agents. The rule requires all U.S. and foreign carriers that advertise or sell air transportation in the U.S. to provide notice to consumers of baggage fees and allowances. Carriers must disclose any change in fees or allowances directly on their homepage or by providing a link from the homepage to another webpage. Notices of any changes must remain on the homepage for at least three months. The portion of the rule applicable to carriers went into effect on August 23, 2011.

Due to the continually changing nature of baggage fees and the burdensome cost to ticket agents to constantly update notices, the New Rule requires only that ticket agents provide details on where passengers may obtain information regarding a carrier's baggage fees and allowances. For example, ticket agents may display carriers' fees and allowances directly on their own website or they may provide a link to the airline's webpage. All ticket agents and air carriers must inform passengers that additional baggage fees may apply on the first screen in which the ticket agent or carrier offers a fare for a specific itinerary. Ticket agents and carriers must also include itinerary-specific information about baggage fees and allowances on e-ticket confirmations, though ticket agents may do so through a hyperlink. This requirement, applicable to both air carriers and travel agents, will go into effect on January 24, 2012.

The New Rule also requires U.S. and foreign carriers to have a webpage that lists all ancillary fees that may apply to a flight, with a link to such a page on the carrier's homepage. Carriers may provide a range of fees based on certain factors, but carriers may not use a range of fees for any baggage fees or allowances. These requirements went into effect on August 23, 2011.

**Tarmac Delay Contingency Plans (Effective Date: Aug. 23, 2011)**

As of April 2010, DOT has required U.S. air carriers to adopt tarmac delay contingency plans and give passengers the opportunity to deplane if the plane is grounded on the tarmac for more than three hours for domestic flights.<sup>8</sup> Under the New Rule, any foreign air carrier that operates flights to or from the U.S. must adopt and comply with a tarmac contingency delay plan. For international flights, the rule also prohibits foreign and domestic air carriers from permitting an aircraft to remain on the tarmac at a U.S. airport for more than four hours, and carriers must give passengers the opportunity to deplane if the delay is three hours on domestic flights or four hours on international flights.<sup>9</sup> Air carriers are also required to notify passengers of the flight's status every thirty minutes and provide the reason for the delay, if known.

The New Rule expands its application to foreign air carriers and to non-hub and small hub airports.<sup>10</sup> All carriers must coordinate their contingency plans with the relevant airport authorities, the office of Customs and Border Protection, and the Transportation Security Administration.

**Oversales and Denied Boarding Compensation (Effective Date: Aug. 23, 2011)**

Prior to the New Rule, passengers who were involuntarily denied boarding were entitled to the one-way value of their ticket up to \$400 if the carrier could get them to their destination within two hours for

<sup>8</sup> Enhancing Airline Passenger Protections, 74 Fed. Reg. 68983-69004 (Dec. 30, 2009).

<sup>9</sup> 76 Fed. Reg. 23114.

<sup>10</sup> If a carrier does not pick up any U.S.-originating passengers, the carrier will not be required to adopt a tarmac delay contingency plan.

domestic flights or four hours for international flights. Passengers could claim up to \$800 if the involuntarily denied boarding delayed them for more than two hours for domestic flights or four hours for international flights.

The new rule increases the minimum compensation for denied boarding to \$650 for short delays and to \$1,300 for long delays. Denied boarding compensation ("DBC") payments must also be given to "zero fare ticket" holders who are involuntarily bumped, i.e., passengers holding frequent flyer award tickets. Many air carriers are concerned that this increase will reduce the number of passengers who will volunteer to be denied boarding and instead encourage passengers to try to be involuntarily bumped. DOT defends the rule, arguing that it will give air carriers the incentive to increase the compensation they provide to volunteers to avoid higher DBC payments.

The rule is applicable to any denied boarding that occurs at U.S. airports on domestic and international flights. It does not apply to operators of aircraft with 29 seats or fewer. As stated in the final rule, these oversale provisions are intended to be compatible with oversale rules for the European Union (EU).

### Passenger Protections, Round 3

In the immediate wake of the Consumer Protection Rule, DOT has proposed two additional rules intended to further enhance the passenger protections established in the New Rule. First, DOT issued a Notice of Proposed Rulemaking ("NPRM") in July 2011 regarding the reporting of ancillary passenger revenues.<sup>11</sup> In an effort to make airline pricing more transparent for both industry analysts and consumers, DOT proposes to collect revenue information related to 19 ancillary fees, including booking fees, baggage fees, charges related to in-flight meals and drinks, seat assignment and cancellation charges, and others. This rule would only apply to carriers classified as "large certificated air carriers."<sup>12</sup>

The majority of U.S. carriers have expressed opposition to the rule, arguing that the expanded reporting would impose costly burdens on carriers and is too complex to be justified. Air carriers are also concerned that the additional reporting could be used to impose new taxes on the already heavily taxed airline industry.

More recently, DOT announced its third Enhancing Airline Passenger Protections Rule in a yet-to-be-published Supplemental NPRM ("SNPRM").<sup>13</sup> This rule was originally intended to focus on whether airlines should be required to provide ancillary fee data to global distribution systems ("GDS") so that GDS companies can provide customers with full comparisons of air fares that include all fees. As a compromise, some GDS companies have suggested that airlines disclose certain "core" fees, while other minor fees are left out of the reporting process.<sup>14</sup> In addition to the issue of ancillary fees, this latest SNPRM, which is loosely based on recommendations from the Future of Aviation Advisory Committee, will propose to expand the list of passenger protections. The rule would cover several issues, including:

- Requirements for carriers to provide assistance to code-share partners when the flight operated by the code-share partner experiences lengthy tarmac delays
- Enhancing disclosures on code-share operations, to include on-time performance data and website schedule disclosures of code-sharing operations

<sup>11</sup> Reporting Ancillary Airline Passenger Revenues, 76 Fed. Reg. 41726-41731 (July 15, 2011).

Id. at 41726.

<sup>12</sup> Id. at 41726.

<sup>13</sup> Enhancing Airline Passenger Protections III, RIN 2105-AE11, Report on DOT Significant Rulemakings October 2011.

<sup>14</sup> "DOT Expands Scope of Third Round of Passenger Rights Rules," *Aviation Daily*, November 4, 2011.

- Expansion of on-time performance reporting to smaller carriers
- Adoption of minimum customer service standards for ticket agents
- Requirements for ticket agents to disclose the carriers whose tickets they sell and any incentive payments they receive and requirements for ticket agents to disclose any preferential display from individual fares or carriers
- Requirements regarding additional disclosures of substantial fees, such as oversize baggage fees
- The display of ancillary fees through all sale channels

This SNPRM will likely not be published in the Federal Register until the summer of 2012, and therefore will likely be delayed further by presidential-year politics. As with the previous rules, this rule will likely be contested by U.S. air carriers and ticket agents.

## Comparison with European Union Requirements

### Full Fare Advertising

The new requirements regarding full fare advertising are similar to regulations in Europe. Though EC 1008/2008 is focused on carriers within Europe, the regulation does encourage European carriers to indicate the final price to be paid on flights originating outside the European Union. However, it does not apply these requirements to non-EU carriers.

EC 1008/2008 provides that the final price to be paid by the customer should be indicated at all times, including taxes, charges, and fees. At a minimum, carriers must include the air fare rate, taxes, airport charges, and other charges, such as those related to security or fuel. Optional services or charges must be clearly displayed at the start of the booking process, and all additional services must be provided on an "opt-in" basis only.<sup>15</sup>

### Denied Boarding Compensation

DOT's oversale rule applies to foreign carriers who operate flights departing from U.S. airports. Similarly, EC 261/2004 applies to all passengers departing from an airport in an EU member state and to passengers departing from airports outside the EU on flights operated by EU carriers. It does not, however, apply to non-EU carriers' flights coming into the EU. As with DOT's oversale rule, EC 261/2004 also requires carriers to reimburse passengers who are denied boarding. EC 261/2004 sets the right to compensation as:

- 250 Euros (\$359) for flights of 1,500 kilometers or less;
- 400 Euros (\$575) for intra-community flights of more than 1,500 kilometers and for all other flights between 1,500 and 3,500 kilometers;
- 600 Euros (\$863) for all other flights.

The denied boarding compensation applies to delays of two hours on flights up to 1,500 kilometers, three hours on all intra-Community flights from 1,500 kilometers and other flights between 1,500 and 3,500 kilometers, or four hours on all the other flights.<sup>16</sup>

<sup>15</sup> Commission Regulation 1008/2008.

<sup>16</sup> Commission Regulation 261/2004.

## Thoughts on Final Approach

The emerging strength of low cost carriers in Europe, the U.S., and now Asia are redefining the economics of airline yield management and cost recovery. In an industry that historically has never earned adequate returns on its capital investments, with largely elastic demand, the airlines are now turning aggressively to boosting ancillary revenues.

Carriers like Ryanair, easyJet, Spirit, Tiger Airways, and Air Asia have earned an increasingly significant percentage of their revenues from ancillary fees. Established carriers and other low-cost carriers have now begun unbundling their costs of travel by charging separate fees for checked baggage, premium seats, telephone booking, WiFi, food and beverages. One GDS estimates airlines' ancillary revenues of over \$22 billion in 2010.

The unbundling of airline travel services has caused a tremendous consumer backlash, with clarion calls for more regulation and greater transparency. To date, many airline responses have been to add more fees and attempt to fight off new regulations in agency and judicial dockets. Early results appear to indicate strong consumer support and even judicial support for aggressive agency action. Consumers are likely to continue paying ever-increasing and diverse amounts for airline services, with governments around the world determined to make online shopping easier and more transparent. It remains unclear whether the underlying customer experience will get any better any time soon, and whether new regulations will help, and not inadvertently hurt, airline financial health, competition, and customer service.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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