

Initial Regulatory Flexibility Analysis

Consumer Rulemaking NPRM: Enhancing Airline Passenger Protections II

**Contract No.:
GS-10F-0269K**

**Order No.:
DTOS59-09-F-10089**

**Project No.:
1029-000**

Submitted To:

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May 12, 2010

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Executive Summary

The Department of Transportation (DOT) is proposing a rule to provide airline passengers with additional protections in the areas of airline service provision and consumer information. Some of the provisions in this proposed rule build on regulatory requirements recently adopted as part of the Final Rule on Enhanced Airline Passenger Protections (EAPP1), which was published in the Federal Register on December 30, 2009. Econometrica and its subcontractor HDR Decision Economics were tasked with developing a regulatory evaluation and small entity impact analysis for the requirements that are included in the Notice of Proposed Rulemaking (NPRM).

The Regulatory Flexibility Act of 1980, as amended, requires Federal agencies to conduct a separate analysis of the economic impact of rules on small entities. The Regulatory Flexibility Act requires that Federal Agencies take small entity's particular concerns into account when developing, writing, publicizing, promulgating, and enforcing regulations. To this end, the Act requires that agencies detail how they have met these concerns, by including a Regulatory Flexibility Analysis (RFA). An initial RFA, which accompanies a NPRM, must include the following five elements:

1. A description of the reasons why action by the Agency is being considered;
2. A succinct statement of the objectives of, and legal basis for, the proposed rule;
3. A description of and, where feasible, an estimate of the number of small entities to which the proposed rule would apply;
4. A description of the proposed reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that would be subject to the requirements and the type of professional skills necessary for preparing the report or record; and
5. Identification, to the extent practicable, of all Federal rules which may duplicate, overlap, or conflict with the proposed rule.

A discussion of each of these requirements follows.

Introduction

The Department of Transportation (DOT) is proposing a rule to provide airline passengers with additional protections in the areas of airline service provision and consumer information. Some of the provisions in this proposed rule build on regulatory requirements recently adopted as part of the Final Rule on Enhanced Airline Passenger Protections (EAPP1), which was published in the Federal Register on December 30, 2009. Econometrica and its subcontractor HDR Decision Economics were tasked with developing a regulatory evaluation and small entity impact analysis for the requirements that are included in the Notice of Proposed Rulemaking (NPRM).

In the accompanying preliminary regulatory analysis, we provide estimates of the benefits and costs for specific proposals in the NPRM that would add regulatory requirements in the following areas:

Req. #	Requirement Description
1	Expansion of tarmac delay contingency plan requirements and extension of EAPP1 Final Rule requirements to cover foreign carriers
2	Expanded tarmac delay reporting and application to foreign carriers
3	Establishment of minimum standards for customer service plans (CSPs) and extension of EAPP1 Final Rule requirements to cover foreign carriers
4	Incorporation of tarmac delay contingency plans and CSPs into carrier contracts of carriage
5	Extension of EAPP1 Final Rule requirements for carriers to respond to consumer complaints to cover foreign carriers
6	Changes in denied boarding compensation (DBC) policy
7	Full-fare advertising and prohibition on opt-out provisions
8	Expanded requirements for disclosure of baggage and other optional fees
9	Prohibition on post-purchase price increases
10	Prompt passenger notification of flight status changes
11	Limitations on venue provisions in contracts of carriage.

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A discussion of each of these requirements follows.

1. Rationale for DOT Consideration of these Requirements

The Department of Transportation is proposing to improve the air travel environment for consumers by: requiring carriers to provide passengers timely notice of flight status changes, delays, or cancellations; increasing the number of carriers that are required to report tarmac delay information; enhancing protections afforded passengers in oversale situations, including increasing the maximum denied boarding compensation airlines must pay to passengers oversold from flights; prohibiting carriers from imposing unfair contract of carriage choice of forum provisions; increasing the number of carriers that are required to adopt tarmac delay contingency plans and the airports at which they must adhere to the plan's terms; expanding the carriers that are required to adopt, follow, and audit customer service plans and establishing minimum standards for the subjects all carriers must cover in such plans; requiring carriers to include their contingency plans and customer service plans in their contracts of carriage; increasing the number of carriers that must respond to consumer complaints; strengthening, codifying and clarifying the Department's enforcement policies concerning air transportation price advertising practices; requiring carriers to notify consumers of significant optional fees related to air transportation and of increases in baggage fees; and prohibiting post-purchase price increases. The Department is proposing to take this action to strengthen the rights of air passengers in the event of denied boarding, flight cancellation or long delays, and to ensure that passengers have accurate and adequate information to make informed decisions when selecting flights.

2. Objectives and Legal Basis for the Proposed Rule

On December 8, 2008, the Department issued a Notice of Proposed Rulemaking (NPRM) on enhancing airline passenger protections. See 73 FR 74586 (December 8, 2008). After reviewing and considering the comments on the NPRM, on December 30, 2009, the Department published a final rule in which the Department required certain U.S. air carriers to adopt contingency plans for lengthy tarmac delays; respond to consumer problems; post flight delay information on their websites; and adopt, follow, and audit customer service plans. The rule also defined chronically delayed flights and deemed them to be an "unfair and deceptive" practice. That rule took effect on April 29, 2010. See 74 FR 68983 (December 30, 2009).

In the preamble to the final rule, the Department noted that it planned to review additional ways to further enhance protections afforded airline passengers and listed a number of subject areas that it was considering addressing in a future rulemaking. The areas specifically mentioned as being under consideration were as follows: (1) DOT 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. The NPRM addresses most of those issues, as well as other matters that the Department believes necessary to ensure fair treatment of passengers.

3. Types and Numbers of Affected Small Entities

This section provides an overview of important features of the passenger air travel sector: U.S. and foreign carriers, airports, flights and passengers, regulatory authorities, and travel agencies and tour operators.

3.1. Small U.S. and Foreign Air Carriers

The proposed requirements for reporting tarmac delays (Requirement2), changes in the denied boarding compensation (DBC) policy, enhancements to EPP1 Final Rule requirements, full-fare advertising, and fee disclosure would apply to a number of small domestic carriers that provide passenger service using at least one aircraft with between 30 and 60 seats. In addition, the full-fare advertising and fee disclosure requirements would also apply to carriers providing passenger service exclusively with planes that have fewer than 30 seats. The regulatory evaluation accompanying the NPRM estimates the numbers of these carriers as follows:

Table 1 - Number of U.S. Carriers by Size Class, 2008

Group	Seat Criterion	Total	Out of Business	Active	Contract Carriers	Other
Large	> 60	41	2	39	17	22
Small	30 - 60	14	1	13	6	7
Very Small	< 30	43	8	35	2	33
Charter-only		19	2	17	0	17
Total		117	13	104	25	79

Source: BTS T-100 Segment database, 2008; BTS B-43 Aircraft database, 2007

DOT defines small carriers based on the standard published in 14 CFR 399.73:

For the purposes of the Department's implementation of chapter 6 of title 5, United State Code (Regulatory Flexibility Act), a direct air carrier or foreign air carrier is a small business if it provides air transportation only with small aircraft

as defined in §298.3 of this chapter (up to 60 seats/18,000 pound payload capacity).

A maximum of 47 independently-owned small U.S. carriers provide scheduled passenger service exclusively with aircraft that seat no more than 60 passengers. These small U.S. carriers would potentially have to comply with the proposed requirements pertaining to full fares advertising (requirement to display full fares on websites and in print advertising and prohibition on opt-out provisions), disclosure of baggage and other fees, and prohibition on post-purchase price increases. Of these 47 small U.S. carriers, 12 provide scheduled passenger service with least one aircraft with between 30 and 60 seats. These 12 carriers would also have to comply with the proposed requirements relating to denied boarding compensation (DBC) and lengthy tarmac delays.¹

Four of the 17 U.S. carriers that provide only non-scheduled (i.e., charter) passenger service do so exclusively with aircraft that have a maximum of 60 seats. Three of these 4 small U.S. charter airlines operate fleets comprised exclusively of aircraft with fewer than 30 seats.

Small foreign carriers would also need to comply with all of the proposed requirements applicable to small U.S. carriers operating aircraft of the same size. In addition, small foreign carriers that provide scheduled passenger service with least one aircraft with between 30 and 60 seats would have to comply with additional requirements relating to tarmac contingency plans, customer service plans, and responding to consumer complaints.²

Based on data from the BTS-100 air traffic database for 2008, only three foreign air carriers operate scheduled passenger service to and from the U.S. exclusively with aircraft that have fewer than 60 seats. One small foreign carrier operates service to and from the U.S. using aircraft with more than 29 but fewer than 61 seats. It would be required to comply with proposed requirements described above for U.S. carriers of this size-class, as well as the requirements relating to tarmac delay contingency plans, customer service plans, and customer problems/complaints that were instituted for covered U.S. carriers in a previous proceeding.

The other two small foreign carriers provide service to and from the U.S. exclusively with aircraft that have fewer than 19 seats. These two small foreign carriers would potentially have to comply with the proposed requirements pertaining to full fares advertising (requirement to display full fares on websites and in print advertising and prohibition on opt-out provisions), disclosure of baggage and other fees, and prohibition on post-purchase price increases.

3.2. Airports

Under one provision of Requirement 1 in the NPRM, covered carriers would be required to coordinate their tarmac contingency plans with small-hub and non-hub airports (EAPP1 already requires coordination of these plans with large and medium hubs). The Department has

¹ One additional small carrier, Piedmont Airlines, is not included in these counts because it is a wholly-owned subsidiary of a larger airline.

² Small domestic carriers are already required to comply with these requirements under the EAPP1 Final Rule.

tentatively decided not to require carrier coordination of these plans with commercial airports that have fewer than 10,000 passenger enplanements annually.

The Federal Aviation Administration (FAA) categorizes airports based on the number of passengers departing annually (“enplanements”):

Table 2 - Passenger Enplanements by Size of Airport, 2008

Category	Minimum %/# of Passengers	# of Airports	Passengers (millions)	% of Total	Passengers / Airport (millions)
Large Hub	>1% of total	29	504.0	68.5%	17.38
Medium Hub	>0.25% of total	37	147.0	20.0%	3.97
Small Hub	>0.05% of total	72	60.8	8.3%	0.84
Non-Hub	>10,000/year	244	22.9	3.1%	0.09
Total		382	734.7		1.46

Source: Federal Aviation Administration, *Primary and Non-Primary Commercial Service Airports*, 2008

According to the FAA data, there were also 121 commercial service airports with between 2,500 and 10,000 passenger enplanements in 2008; 64 of these were located in Alaska. The 2008 BTS T-100 data indicate that at least one scheduled passenger service flight departed from 759 U.S. airports, indicating that there were 256 airports with fewer than 2,500 passengers departing in 2008. Of these, 184 were located in Alaska.

SBA size standards define privately-owned airports as small businesses if annual revenues do not exceed \$7 million and publicly-owned airports as small businesses if they are airports owned by small governmental jurisdictions with a population less than 50,000. However, the Department does not have information that would allow it to make a reliable determination of the numbers of the small-hub and non-hub airports that would be classified as small under these standards.

3.3. Travel Agencies and Tour Operators

While most regulation of the air transportation sector is concerned with carriers and airports, other sellers of air transportation must comply with OST advertising regulations and guidelines. Travel agencies and tour operators are the two largest industry sectors (in addition to carriers) that sell tickets to passengers for scheduled service flights. These sales sometimes are made on a stand-alone basis and sometimes as part of a package that may include accommodations, activities, and ground transportation. Small travel agents and tour operators would be affected by proposed Requirement 7, which would require display of full fares, including all government fees and taxes, in both online and print media advertising of air fares. Some of these firms may also be affected by proposed Requirement 9, which would prohibit ticket agents from unilaterally increasing the price charged for air travel after the purchase has been completed.

Four large online travel agencies (OTAs)—Expedia, Orbitz, Priceline, and Travelocity—reportedly account for 96 percent of all online sales by travel intermediaries in the leisure travel

market segment.³ However, the travel agent and tour operator sectors consist primarily of small businesses with fewer than 20 employees per firm. A significant number of these small entities offer online booking of air transportation and travel packages. Offline travel agencies and tour operators book these services through global distribution system (GDS) operators and/or directly with carriers.

The preliminary RIA assessed the costs of compliance for these firms based on the number of employees and whether or not they offered online booking capability. Compliance costs were estimated only for firms that were in business year-round. The numbers of large and small firms in these sectors were estimated from 2006 County Business Patterns data, as follows:

Table 3 - Travel Agencies and Tour Operators, 2006

	Total Firms	Large OTAs	Online Sales Capability	Offline Sales Only	20+ Employees	<20 Employees
Travel Agencies	12,248	4	2,078	10,166	669	11,579
Tour Operators	2,629	0	447	2,182	254	2,375

Sources: Bureau of the Census, *County Business Patterns*, 2006; PhoCusWright, *The Role and Value of the Global Distribution Systems in Travel Distribution*, 2009.

However, the applicable SBA size standards designate travel agencies with no more than \$3.5 million in annual revenues and tour operators with no more than \$7.0 million as small businesses. Data on the revenues of these firms are available from the Economic Census, which was last conducted in 2007. Detailed results from the 2007 survey for the travel agent and tour operator sectors are not yet available. Consequently, estimating the numbers of small firms requires use of data of the 2002 Economic Census.

The 2002 Economic Census estimates that there were 15,509 travel agencies operating for at least part of the year in 2002. Only 172 of these had revenues in excess of \$5,000,000. There were also 149 firms with estimated revenues in the \$2,500,000-4,999,999 range. Assuming that firm revenues are uniformly distributed within this size class, approximately 59 firms of these 149 firms could be expected to have had revenues that exceeded \$3,500,000. Accordingly, there may be as many as 15,278 small firms (15,509-172-59) in this sector that could be affected by the proposed requirement for full-fare advertising and prohibitions on opt-outs and unilateral post-purchase increases in the price of air travel.

The 2002 Economic Census estimates that there were 2,929 tour operators operating for at least part of the year in 2002. Only 47 of these had revenues in excess of \$10,000,000. There were also 81 firms with estimated revenues in the \$5,000,000-9,999,999 range. Assuming that firm revenues are uniformly distributed within this size class, approximately 49 firms of these 81 firms could be expected to have had revenues that exceeded \$3,500,000. Accordingly, there may be as many as 2,833 small firms (2,929-47-49) in this sector that could be affected by the proposed requirement for full-fare advertising and prohibitions on opt-outs and unilateral post-purchase increases in the price of air travel.

³ PhoCusWright, *The Role and Value of the Global Distribution Systems in Travel Distribution*, November 2009.

Relative to the size-class distinctions used in the preliminary RIA, applying the SBA size standards increases the estimated number of small businesses that would be affected by the proposed requirements. However, the estimated costs of compliance with these requirements are very low in relation to the average annual revenues of the relatively larger small travel agencies and tour operators with 20 or more employees that would be classified as small firms under the SBA size standards.

4. Nature and Impact of Proposed Rule on Affected Small Entities

This NPRM proposes two new collections of information:

- The first is a requirement that domestic and foreign air carriers that operate scheduled passenger service to or from the U.S. using any aircraft with more than 30 passenger seats report to the Bureau of Transportation Statistics (BTS) and 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 second is a requirement that any foreign air carrier that operates scheduled passenger service to and from the U.S. 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.

Small domestic carriers would have to comply with the requirement to report information about 3-hour or longer tarmac delays to the Bureau of Transportation Statistics (BTS). The regulatory evaluation that accompanies the NPRM estimates that non-reporting (i.e., all but the largest 19) U.S. carriers would have had 289 reportable tarmac delays in 2009. It would be reasonable to expect that small non-reporting carriers would have between 100 and 120 reportable tarmac delays annually under the proposed requirement, based on their approximate share of scheduled passenger service flights. Data collection and transmission costs are estimated at \$600 per report. Small carriers that opt to set up an automated system to handle reporting would incur estimated set-up expenses of approximately \$35,000 in 2011 and \$3,500 to maintain and update these systems. Each of the small carriers that is likely to set up this type of system had more than \$20 million in revenue in 2008.

Based on data from the BTS-100 air traffic database for 2008, there appears to be a maximum of 9 foreign air carriers that operate passenger service to and from the U.S. only with aircraft that have fewer than 60 seats. However, it is not possible to determine if these carriers do in fact operate passenger service using one or more aircraft with more than 60 seats, because foreign carriers do not have to report Form B-43 information on their fleets to the BTS. Moreover, 3 of these 9 carriers are subsidiaries of foreign airlines that operate international passenger service

with larger aircraft. It is unlikely that any of the other 6 small foreign carriers would have even a single reportable tarmac delay in a typical calendar year.

Small foreign carriers would need to develop, implement, and self-audit their compliance with customer service plans (CSPs) under the proposed Requirement 3 in the NPRM. The regulatory evaluation accompanying the NPRM estimates the first-year costs of setting up a compliant CSP at \$3,850 for a small carrier. Annual self-audit costs are estimated to be \$6,248 for a small carrier.

Small privately-owned and municipal airports would incur only minimal compliance costs associated with providing a point-of-contact for carriers to coordinate their tarmac delay contingency plans. Coordinating each plan would take no more than 1 or 2 hours annually. Non-hub airports serve an average of 2.5 carriers that would have to coordinate these plans with the airport authorities, for a total burden of between 2.5 and 5.0 hours of airport personnel time annually. The preliminary RIA does not attempt to assess the extent, if any, to which airports may incur additional costs associated with planes returning to the gate to comply with tarmac delay contingency plan requirements. However, the affected airports would receive additional gate fees in these situations that may exceed the costs of any services they are requested by carriers to provide.

Small travel agencies and tour operators would have to comply with the full-fare advertising and opt-out provisions of proposed Requirement 9. Small entities in these sectors would have to revise their print media advertising. Per-firm costs are estimated at \$3,000 that would have to revise all of its promotional materials. However, given the anticipated six-month lag between the rule publication date and the effective date for these provisions, it is likely that most materials that do not comply with the proposed requirement would no longer be in use. The preliminary regulatory evaluation estimates that this would be the case for 90 percent of the printed advertising currently in circulation.

Both domestic and foreign air carriers already have to comply with reporting, recordkeeping, and compliance requirements under existing regulatory provisions. Therefore carriers possess staff with the professional skills to meet these requirements.

5. Other Applicable Federal Regulations

The Department has sole authority to regulate air carriers and the advertising of air fares. It is not aware of any federal rules that would duplicate, overlap, or conflict with the proposed rule.

In some instances (e.g., Requirements 9 and 11), the proposed requirements would codify existing Department enforcement policy. In the case of the proposed denied boarding compensation (DBC) and full-fare advertising provisions, the proposed requirements would incorporate changes to existing enforcement policy.