

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 259 and 260

[Docket No. DOT-OST-2016-0208]

RIN 2105-AE53

Refunding Fees for Delayed Checked Bags and Ancillary Services that Are Not Provided

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The U.S. Department of Transportation (Department or DOT) is proposing to mandate refunds for delayed checked baggage and ancillary fees for services related to air travel that passengers did not receive. DOT is required by law to issue regulations mandating both refunds.

DATES: Comments should be filed by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by the docket number DOT-OST-2016-0208 by any of the following methods:

- Federal eRulemaking Portal: go to <https://www.regulations.gov> and follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. S.E., West Building Ground Floor, Room W12-140, Washington, D.C., 20590-0001.
- Hand Delivery or Courier: West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. S.E., Washington, D.C., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: (202) 493-2251

Instructions: You must include the agency name and docket number DOT-OST-2016-0208 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to <https://www.regulations.gov>, including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the *Federal Register* published on April 11, 2000 (65 FR 19477-78), or you may visit <http://DocketsInfo.dot.gov>.

Docket: For access to the docket to read background documents and comments received, go to <https://www.regulations.gov> or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Clereece Kroha, Kimberly Graber, or Blane Workie, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave. S.E., Washington, D.C., 20590, 202-366-9342 (phone), 202-366-7152 (fax), clereece.kroha@dot.gov, kimberly.graber@dot.gov, or blane.workie@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

A. Purpose

The purpose of this NPRM is to ensure that travelers are treated fairly when requesting refunds for ancillary service fees by implementing two statutory aviation consumer protection provisions. The first statutory provision is 49 U.S.C. 41704, note, which requires the Department to promulgate a regulation that mandates that airlines refund checked baggage fees to passengers when they fail to deliver checked bags in a timely manner. Currently the Department's regulations at 14 CFR part 259 require that airlines refund baggage fees for lost bags. The Department proposes to add a requirement that airlines must also refund passengers for any fee

charged to transport a checked bag that is not timely delivered. The NPRM sets forth the standards to be used to determine the length of delay that would trigger the requirement to refund baggage fees. It also addresses the statutory requirement that a baggage fee refund should be provided “promptly” and “automatically” when it is due.

The second statutory provision is 49 U.S.C. 42301, note prec., which requires the Department to promulgate a rule that mandates that airlines promptly provide a refund to a passenger of any ancillary fees paid for services related to air travel that the passenger does not receive. Currently the Department’s regulations at 14 CFR part 259 require that airlines refund fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation. In addition, the Department’s Office of Aviation Consumer Protection (formerly known as the Office of Aviation Enforcement and Proceedings), a unit within the Office of the General Counsel which enforces aviation consumer protection requirements, considers any airline practice of not refunding fees for ancillary services that passengers paid for but are not provided to be an unfair or deceptive practice in violation of 49 U.S.C. 41712.¹ The Department proposes to retain the existing requirement regarding ancillary fee refunds arising from flight oversales or cancellations. The Department also proposes to clarify that the refund requirement applies to any situation in which an airline fails to provide passengers the ancillary services that passengers have paid for (e.g., passengers paid for using the in-flight entertainment (IFE) system but the IFE system was broken and could not be used by the passengers). The inclusion of regulatory text requiring that airlines must refund ancillary fees for services related to air travel that passengers did not receive, as provided in 49 U.S.C. 42301, note prec., would not impose additional requirements on airlines as airlines are already

¹ The Department’s Office of Aviation Consumer Protection uses its general authority to prohibit unfair or deceptive practices of air carriers, foreign air carriers, and ticket agents to conduct oversight in the area of refunds. A practice is “unfair” to consumers if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition. A practice is “deceptive” to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. These definitions are consistent with the Department’s past practice and are based on case precedent and policy of the Federal Trade Commission.

providing refunds of ancillary fees when they fail to provide services that passengers paid for, consistent with the Department's interpretation of section 41712.

B. Unfair or Deceptive Practice

The provision at 49 U.S.C. 41712 authorizes the Department to investigate and, if necessary, take action to address unfair or deceptive practices or unfair methods of competition by air carriers, foreign air carriers, or ticket agents. On December 7, 2020, the Department issued a final rule that, among other things, adopted definitions for the terms "unfair" and "deceptive" when used in discretionary aviation consumer protection rulemaking actions brought pursuant to section 41712.² That rule also requires that when the Department issues a new discretionary aviation consumer protection rulemaking declaring that a specific practice in air transportation or the sale of air transportation is unfair or deceptive within the meaning of section 41712, the Department shall employ the definitions of "unfair" and "deceptive" set forth in 14 CFR 399.79. This rulemaking, which would implement statutory mandates, is not a discretionary aviation consumer protection rulemaking. As a result, the procedures set forth in the Department's rule on Defining Unfair or Deceptive Practices would not apply.

II. REFUNDING BAGGAGE FEES FOR DELAYED BAGS

A. Background

The Department's aviation consumer protection regulation, in 14 CFR 259.5(b)(3), requires carriers to provide refunds of baggage fees to passengers when their checked bags are lost. The provision at 49 U.S.C. 41704, note requires that the Department issue a final rule requiring an air carrier or foreign air carrier to promptly provide to a passenger an automated refund for any fees paid by the passenger for checked baggage if (1) the carrier fails to deliver the checked baggage to the passenger not later than 12 hours after the arrival of a domestic flight, or not later than 15 hours after the arrival of an international flight; and (2) the passenger has

² See *Final Rule, Defining Unfair or Deceptive Practices*, 85 FR 78707, Dec. 7, 2020.

notified the air carrier or foreign air carrier of the lost or delayed checked baggage. In addition, the Department can extend one or both of the deadlines, up to 18 hours for domestic flights, and up to 30 hours for international flights, if the Department determines during the rulemaking process that one or both of the shorter deadlines is not feasible and would adversely affect consumers in certain cases. In addition, 49 U.S.C. 41704, note does not define what constitutes “promptly” when providing an “automated” refund. Accordingly, the Department published an advance notice of proposed rulemaking (ANPRM) to seek public comment on the terms and implementation of the statutory provision (81 FR 75347, October 31, 2016).

As noted in the ANPRM, many consumers and consumer rights advocacy groups have emphasized to the Department that delayed delivery of checked bags greatly inconveniences passengers and urged that airlines be required to reimburse passengers for baggage fees when bags are delayed. Some have asserted that lengthy delays may render the bag transportation service useless to consumers. The Department shares consumers’ concern about the inconvenience and frustration associated with delayed bags. According to data collected by the Department’s Bureau of Transportation Statistics (BTS), in calendar year 2019, the largest 10 U.S. carriers and their branded codeshare partners collectively mishandled nearly 3 million bags from passengers they transported on domestic scheduled flights.³ Although the mishandled baggage data collected by the Department does not distinguish among lost, delayed, damaged, and pilfered bags, data published by an aviation analytics firm show that delayed bags are by far the most common type of mishandlings. Specifically, according to the 2019 *SITA Baggage IT Insights Report*,⁴ globally, delayed bags represented 77% of all mishandled bags in 2018, while damaged or pilfered bags account for 18%, and lost or stolen bags account for 5%. Assuming delayed bags are 77% of mishandlings in 2019 for domestic flights by U.S. reporting carriers,

³ Source: *Air Travel Consumer Report*, February 2020, page 36, <https://www.transportation.gov/sites/dot.gov/files/2020-02/February%202020%20ATCR.pdf>.

⁴ <https://www.sita.aero/resources/type/surveys-reports/baggage-it-insights-2019>.

similar to 2018, we estimate that at least 2.3 million checked bags transported domestically were delayed in 2019.

To better address the concerns regarding fees for delayed checked bags and implement the requirements of 49 U.S.C. 41704, note, the ANPRM specifically sought comment on (1) how to determine the appropriate length of the delay within the statutory parameters that would trigger the refund requirement for delayed checked bags; (2) how to determine when a bag has been delivered for the purpose of measuring the length of delay, and (3) how to determine the appropriate method for providing “automated” refunds as provided in the statute. Approximately 60 individuals, ten representatives of airlines and airline associations (Airlines for American, Allegiant Air, American Airlines, Delta Air Lines, International Air Transportation Association, Sun Country Airlines, National Air Carrier Association, Spirit Airlines, the Association of Asia Pacific Airlines, and Virgin Atlantic), one consumer group (Consumer Union), and one trade association for travel agencies (American Society for Travel Advisors) submitted comments. The Department has carefully reviewed and considered the comments received on the ANPRM and is proposing a rulemaking designed to ensure that airlines provide prompt refunds for ancillary fees paid by passengers for delayed checked baggage as provided in 49 U.S.C. 41704, note. The summary of the ANPRM comments, the Department’s responses to the ANPRM comments, and the Department’s proposal is set forth below.

B. Proposals

1. Length of Delay Triggering Refund Requirement

The ANPRM

In the ANPRM, the Department sought comment on how to determine the appropriate length of delay that would trigger the refund requirement for checked baggage. The provision at 49 U.S.C. 41704, note prescribes the minimum lengths of delay that would trigger the refund requirement as not later than 12 hours for domestic flights and not later than 15 hours for international flights. It also provides the Department the flexibility to modify these timeframes

to up to 18 hours for domestic flights and up to 30 hours for international flights if the Department determines that the 12-hour or 15-hour standards are infeasible and would “adversely affect consumers in certain cases.” The Department asked why a particular length of time within this timeframe would be more appropriate than other times. The Department also asked if there is a reason to establish a secondary set of criteria, such as the flight duration or the frequency of service to determine the appropriate timeframe.

Comments Received

According to comments submitted in response to the ANPRM, airlines generally support adopting the maximum lengths of delay allowed by the statute (18 hours for domestic flights and 30 hours for international flights). The airlines believe that any DOT requirement should provide carriers maximum flexibility to take into account the multiple variables that could impact their operations. Some airline commenters express concerns about the difficulties they encounter in delivering delayed bags for international long-haul flights they operate in low frequencies, which they state would take 24-48 hours. The National Air Carrier Association (NACA), Allegiant Air, and Spirit Airlines specifically expressed concerns about the difficulties Ultra Low-Cost Carriers (ULCC) face in transporting delayed bags due to their low frequency of scheduled flights and the lack of interline agreements with other carriers. The American Society of Travel Advisors (ASTA) and Consumers Union are in favor of adopting the minimum lengths of delay prescribed in the statute because they believe the default timeframes set by the statute are necessary to mitigate consumer harms resulting from delayed baggage and any extension of the default timeframes would “adversely affect consumers.” Some individual commenters suggested that the Department should adopt a tiered standard based on not only domestic versus international flights, but also on the length or frequency of the flights.

DOT Response

The Department proposes to require an airline to refund an ancillary fee paid by a passenger for a checked bag if the airline fails to deliver the bag to the passenger within 12 hours

of arrival for domestic flights. The note in 49 U.S.C. 41704 provides that the Department shall issue a rule that requires carriers to promptly provide a refund for any ancillary fees paid by a passenger for checked baggage if a carrier fails to deliver the bag to passengers within 12 hours of arrival for domestic flights. There is an exception if the Department determines that the 12-hour standard is not feasible and would adversely affect consumers in certain cases. The Department believes it is feasible for airlines to return a bag within 12 hours for domestic flights because airlines have tracking systems in place to identify the location of bags and airlines should be able to place delayed bags on the next available flight, often resulting in bags being delivered within 12 hours for domestic flights.

With respect to international flights, the Department proposes to allow carriers up to 25 hours to deliver checked bags without having to issue a refund because the Department considers it not feasible, in many cases, for airlines to return a bag in less time and believes a timeframe that is shorter than 25 hours would adversely affect consumers. The statute provides the Department discretion to extend the timeframe for when carriers must refund fees paid by passengers for delayed checked baggage from 15 hours to up to 30 hours of the arrival of international flights if the Department makes a determination that 15 hours is not feasible and would adversely affect consumers in certain cases. The Department considered and was persuaded by the comments stating that many international long-haul flights are scheduled once a day which makes recovery and delivery of a delayed checked bag within the minimum length delay of 15 hours prescribed in the statute extremely challenging for carriers. Also, consumers may be negatively impacted by a 15-hour deadline because carriers may have less incentive to deliver the delayed bag on the next flight when flights are scheduled once a day. This is because even if the bag arrives on the carrier's next flight, the 15-hour deadline would have already passed. Setting the timeframe for returning bags to 25 hours exceeds the minimum length of delay in the statute but increases the likelihood that carriers can meet the deadline even if their flights are scheduled 24 hours apart. The Department believes that the 12-hour deadline for

domestic flights and 25-hour deadline for international flights provides carriers sufficient time to recover and return the bags to consumers. It also incentivizes carriers to return bags as soon as possible, limiting the inconvenience to consumers.

The Department solicits comment on whether it has adequately considered the impact on consumers and airlines of the proposed 25-hour deadline for international flights. Commenters should identify any factors that they believe the Department may not have considered fully. The Department also seeks comment on whether the proposed 12-hour deadline for domestic flights is reasonable, particularly for ULCC that may have a lower frequency of scheduled flights and a lack of interline agreements with other carriers. The Department notes that, according to the aforementioned SITA baggage report, transfer mishandling is by far the leading cause of bag delays, which accounted for 46% of total bag delays in 2019. Most ULCCs operate point to point itineraries that do not involve transfer of bags from one flight to another and therefore do not incur the delays caused by transfer mishandling in nearly the numbers that network carriers are likely to experience. The Department requests comment on whether the proposed deadlines are feasible and whether they would negatively impact consumers. Commenters should articulate specific concerns and provide reasons for any alternative deadlines that they would endorse.

The Department has tentatively determined not to propose a tiered standard based on flights' frequency, length, or other variables. To avoid having to provide a refund under such a standard, carriers would have to implement a costly system of sorting and prioritizing delivery of delayed bags based on the length or frequency of each individual flight. The cost and complexity of such a system would likely outweigh the benefits to carriers and consumers. Consumers may be negatively impacted because carriers may have less incentive to deliver the delayed bag as soon as possible. Conversely, a simplified standard based on domestic and

international flights is expected to be easier for carriers to implement, for consumers to understand, and for the Department to enforce.

Also, there is a proposed editorial change to the rule text in 14 CFR 259.5(b)(3). The existing rule requires carriers to make every reasonable effort to return mishandled baggage within twenty-four hours. In light of the proposed delay thresholds that would trigger the baggage fee refund requirement for delayed bags, the Department is proposing to remove the reference to “twenty-four hours” and, instead, require carriers to return mishandled baggage “within 12 hours for domestic flights and within 25 hours for international flights.”

2. Domestic Segments of International Itineraries

The ANPRM

The ANPRM requested comment on whether the international or the domestic deadline should apply to a delayed bag transported on domestic segments of international itineraries.

Comments Received

In response, most airlines supported applying the international deadline for bags transported on domestic segments of international itineraries. They explain that the duration and frequencies of international itineraries should be taken into consideration when establishing such a deadline. ASTA states that consumers will benefit from one standard being applied by avoiding confusion and uncertainty regarding when a refund is due.

DOT Response

This NPRM proposes to apply the 25-hour international deadline to delayed checked bags on international itineraries that include a domestic segment or segments. Based on information provided by the airline industry on mishandled baggage reporting, for bags traveling on itineraries that include both domestic and international segments, mishandlings occur more frequently on the international segment(s). The Department believes that applying the international deadline to such itineraries appropriately takes into account that many delayed bags traveling on an international itinerary were likely delayed on the international portion of the trip.

Also, as pointed out by ASTA, applying one standard prevents confusion as to when a refund is due. The Department solicits comment on whether the 25-hour international standard is the appropriate standard to apply for domestic segments of international flights. Are there any instances in which the 12-hour domestic standard is more appropriate for an international itinerary that includes a domestic segment? For example, assuming an international itinerary on one ticket starts with a domestic segment from Seattle to New York followed by an international segment departing from New York many hours later, should the 12-hour deadline apply when the bag did not arrive in New York on time for the passenger to recheck the bag for the international portion of the journey?

For domestic segments of international itineraries, the Department also solicits comment on whether any mandate for refunds for delayed checked baggage should exclude instances in which a bag was available in the appropriate location at the first point of entry into the United States, to be picked up by the passenger for rechecking for a subsequent domestic flight segment on that itinerary, but the passenger failed to pick up the bag. Most bags arriving to the United States from an international flight would require their owners to claim them at the first point of entry and recheck them with the connecting carriers after they pass through U.S. Customs and Border Protection. The Department requests comment regarding not requiring carriers to issue a refund for a lengthy delay in delivering the bag if carriers determine that a bag delay was caused by a passenger's failure to pick up and recheck the bag at the first point of entry into the United States.⁵

Similarly, the Department requests comment regarding not requiring carriers to issue a refund in instances in which a passenger is traveling with two separate tickets and the passenger fails to collect the checked bag at the end of the first itinerary and check it with the carrier on the

⁵ The Department permits reporting carriers not to report as a mishandled bag when undisputed evidence shows that delay was caused by a passenger's negligence at the first point of entry. See, *Number 30A Technical Directive: Mishandled Baggage (Amended)*, effective Jan. 1, 2019. <https://www.bts.gov/topics/airlines-and-airports/number-30a-technical-directive-mishandled-baggage-amended-effective-jan>.

second itinerary. Are there other circumstances in which not requiring carriers to issue a refund of bag fees if the bag did not arrive at the final destination by the applicable deadline would be appropriate? Instead of specifying particular circumstances in which airlines are not required to issue a refund for a lengthy delay in delivering the bag, would a general exception for checked baggage delays that were a result of a passenger's negligence be preferable? The Department seeks comment on whether such exceptions are reasonable and, if so, what level of proof, if any, carriers should be required to provide to show that a bag delay was caused by the passenger's negligent action or inaction.

3. Methodology for Measuring Length of Delay

The ANPRM

While the Department did not specifically ask for comment on when the clock starts for purposes of measuring the length of the delay for delivering checked baggage, the Department did seek comment on how to determine when the clock stops running, i.e., bags have been delivered to the passenger.

Comments Received

Comments received in response to the ANPRM indicate that many airlines prefer an interpretation that considers the bag to be delivered to the passenger (i.e., stops the clock) when the bag is physically present at the intended destination airport and the passenger has been notified that the bag is available for pick up. Several airlines oppose stopping the clock when the bag is transported to an offsite location and handed over to the passenger, citing difficulties arising when the offsite location is far away from the airport, when the passengers are in control of the delivery time and may choose to receive the bag at a later time (e.g., postponing the handover of the bag until the next morning when the bag could have been delivered during the night before), or when carriers have less control over delivery services provided by vendors in international operations. A few airlines supported stopping the clock when the bag is transported to an offsite location even if the passenger does not have physical possession of the bag and has

not yet been notified. ASTA commented that the clock should stop when passengers have physical possession of delayed bags because the disruption caused by the delay continues until passengers are reunited with their bags. Consumers Union stated that the clock should stop when the bag is physically handed over to the passengers or when the bag has arrived at the place where the passenger has asked the bag to be delivered. Consumers Union specifically opposed making the destination airport the designated delivery place because it believes that requiring the passengers to make another trip to the airport would further inconvenience passengers.

With regard to how to measure the start of the delay for delivering checked baggage, airline commenters stated that the Department should not use the published scheduled arrival time of the flight. Instead, airlines support an approach of starting the clock at the aircraft's "block-in time," meaning the time when a flight has parked at the arrival gate or another disembarkation location and blocks were placed in front of its wheels.

DOT Response

To calculate the length of delay that a passenger experiences in receiving a checked bag, it is necessary to specify the start and end of the delay. The provision at 49 U.S.C. 41704, note states that the clock starts at the "arrival" of a flight. The statute does not, however, specify what constitutes the "arrival" of a flight. The Department generally agrees with airlines that using the actual arrival time of the last flight segment on which a passenger traveled as opposed to the scheduled arrival time of that flight is a reasonable approach. However, rather than using the aircraft's block-in time, the Department proposes that the start of the delay be based on the time that the passenger reached his or her destination and was given the opportunity to deplane from the last flight segment. Airlines already track this information for the purpose of ensuring compliance with the Department's tarmac delay rule in 14 CFR part 259.

As to when the Department would consider bags to be delivered to the passenger, the Department is not persuaded by comments advocating for the clock to stop when a passenger is reunited with the delayed bag. This approach would not be workable as passengers have

significant control over when they would reunite with the bags. For example, a passenger may be notified that a bag is ready for pick-up at the airport in the morning but choose to not pick up the bag until that evening or the next day; or a passenger may request hotel delivery but be away from the hotel during the day and only receive the bag in the evening. Carriers facing the hurdles of deferred baggage handover time are less likely to make the mandated deadlines and would be required to provide refunds despite the bags being available to passengers for pickup at an earlier time.

Pursuant to the proposal in this NPRM, at the carriers' discretion, a delayed bag would be considered delivered (1) when the bag is transported to a location agreed to by the passenger and the carrier, regardless of whether the passenger is present to take possession of the bag; (2) when the bag has arrived at the destination airport, is available for pickup, and the carrier has provided notice to the passenger of the location and availability of the bag for pick-up; or (3) if the carrier offers delivery service and the passenger accepts such service, when the bag has arrived at the destination airport, and the carrier has provided notice to the passenger that the bag has arrived and will be delivered to the passenger. Given the three options, carriers would be able to coordinate with each passenger regarding whether the passenger prefers to retrieve the bag at the airport or, if the carrier offers the service, to have the bag delivered to the passenger at a desired location. This approach provides airlines the ability, with less financial risk, to work with the passengers to transfer the bags to the most convenient location in the most efficient manner to the passenger. At the same time, these options would eliminate handover time being postponed by the passenger while the clock is running. If a carrier opts to stop the clock at the time the carrier provides notice that the delayed bag is available at the destination airport for pick-up by the passenger or delivery if the carrier offers this service and passenger chooses it, the carrier would have the burden of proving that it provided notice to the passenger prior to the applicable

deadline. This approach would also benefit passengers by increasing the likelihood carriers would provide passengers the option of having the delayed bag delivered to them.

A carrier that already has a system in place to notify passengers of the status of their baggage may choose to have the clock stop when a delayed bag arrives at the airport and the notification has been provided to the passenger. Alternatively, a carrier that does not have a notification system in place and is reluctant to invest in such a system may choose to have the clock stop at the time the bag was transported to an agreed-upon location. Allowing carriers to choose among these options minimizes carriers' cost, which otherwise may be passed on to the passengers through the increase of ticket prices or baggage fees. The Department seeks comment on whether this analysis accurately captures carriers' incentives to work with passengers and provide baggage delivery or if there are other factors that were not considered that could cause carriers to engage in different behaviors in response to the proposed options. In addition, the Department seeks comment on whether allowing carriers to choose among these three options is reasonable and effective to achieve the goal of providing carriers and passengers the maximum level of flexibility, promoting efficiency in delayed baggage recovery, and ensuring passengers are treated fairly when their bags are delayed in air transportation.

In addition to comments requested on the previously discussed elements of the proposal, the Department seeks comment on the following issues:

a. Form and Evidence of Notification to Passengers.

For carriers that choose to have the clock stopped when a delayed bag has arrived at the intended airport and the carrier has notified the passenger that the bag may be picked up or, if the carrier offers and passenger accepts, that the bag may be delivered, what should constitute a sufficient form of notification to ensure that passengers receive adequate and timely information about the whereabouts of their bags before carriers are relieved from the obligation of refunding baggage fee? Currently, most airlines provide ticket confirmations and other air travel information to passengers via email. Many carriers also use mobile applications to provide

various notifications and alerts to passengers, including reminders of check-in time, boarding time, gate information, and changes to flight status and baggage status. Some of these carriers allow passengers to opt-in to receiving notifications through email or text messages. Would push notices through mobile applications, email, and text message be sufficient constructive notice for the purpose of stopping the delayed baggage clock? Would contact via a voice call or message be sufficient? If a voice call or message is a permissible form of notification, what evidence should a carrier be required to provide when there is a dispute between a carrier and a passenger about whether such a notification was provided? The proposed rule text does not specify what type(s) of notification method are considered adequate. In that regard, should the Department adopt a notification standard that is performance based instead of specifying a particular notification method to be necessary for the purpose of stopping the delayed baggage clock? If any of these methods are acceptable, should the Department's focus be on the timeliness of the notification rather than the methods of notification?

In addition, carriers may not have contact information for some passengers, particularly passengers who purchased their tickets through ticket agents. The Department seeks comment on how carriers may notify passengers when they do not have valid contact information for a passenger. Could this problem be resolved by carriers obtaining contact information for all passengers when they file a mishandled baggage report for a delayed bag?

b. Timing of Notification to Passengers

For carriers choosing option 2, which would have the clock stopped when the delayed bag has arrived at the intended airport and notification that the bag is available for pick-up was provided to the passenger, the Department proposes to add a third element to stop the clock, i.e., the bag is actually available for pickup. For example, assuming that a carrier's baggage office at the intended airport closes at 10 p.m. and opens at 6 a.m.; when a delayed bag arrives at the intended airport at 1 a.m., and a notification was sent to the passenger at the same time through an automated push alert on the mobile application, the clock would stop at 6 a.m. the next

morning when the bag becomes available for pickup, instead of at 1 a.m. The Department is also proposing that the clock would still stop at 1 a.m. in circumstances when the passenger is contacted and expresses a preference that the bag be delivered and the carrier agrees to do so (option 3) as that is the time that the bag arrived at the destination airport. The Department seeks comment on this additional element for option 2 for determining when a bag has been delivered.

4. Multiple Carrier/Ticket Agent Involvement and Responsibility

The ANPRM

In the ANPRM, the Department sought comment regarding who should be responsible for issuing refunds when there are multiple parties involved in the collection of baggage fees and/or the transportation of the bags. These situations arise, for example, when there is a codeshare or interline itinerary in which the carrier collecting the bag fee (usually the first carrier) and the carrier responsible for bag delivery and receiving the delayed bag report (usually the last carrier) are different carriers, or when an itinerary is marketed by a third party such as a ticket agent, and the third party collected not only the airfare but also the baggage fees.

Comments Received

Airlines point out the difficulty they face in situations when the entity collecting the fee does not have information that the bag was delayed beyond the applicable timeframe and that a refund is due, while the carrier with the information about the delay may not have the payment information necessary for issuing the refund. With regard to ticket agents collecting baggage fees, most commenters, including airlines, consumer representatives, and ticket agent representatives, agree that when a ticket agent was authorized by a carrier to collect the baggage fee on the carrier's behalf, the carrier should be responsible for issuing the refund. ASTA further suggests that these agents may facilitate the refund by using the Electronic Miscellaneous Document (EMD) process, an IATA process that facilitates transactions involving non-flight ancillary services.

With respect to multiple-carrier itineraries, some commenters have suggested an approach that requires the carrier “at fault” for the delay of the bag to issue the refund; some commenters want the carrier that collected the fee to make the refund regardless of “fault;” and others prefer that the refund amount be shared among the carriers on a prorated basis. Consumers Union commented that consumers should not be burdened with tracking down which airlines caused the delay.

DOT Response

The Department agrees with the commenters that when a ticket agent’s role is to act as the agent of a carrier, collecting the baggage fee on the carrier’s behalf and passing on the fee to the carrier, the carrier should be responsible for issuing the refund when it is due. It should be noted that the functionality of EMD is controlled by individual airlines and that not all airlines use the EMD process. While the Department does not endorse EMD or any other products available to settle baggage fee transactions among carriers and ticket agents, the EMD process is an example of a system that could facilitate the smooth handling of baggage fee transactions and refunds. The Department expects carriers to work with ticket agents collecting baggage fees on the carriers’ behalf to ensure that refunds are issued in a timely manner. In instances in which a ticket agent collected the baggage fee, the Department will hold the carriers responsible if passengers entitled to refunds are not provided prompt refunds, because 49 U.S.C. 41704, note applies to airlines.

The Department has tentatively decided to not apply the new proposed baggage refund requirements in 14 CFR part 260 to ticket agents. The proposed part 260 makes cross references to certain minimum standards of the airline customer service plan required by 14 CFR 259.5, which currently applies to carriers but not to ticket agents. The Department is required by 49 U.S.C. 42301, note prec., to issue a rule requiring ticket agents with an annual revenue of at least \$100 million to adopt minimum customer service standards, and intends to address this

requirement through a separate rulemaking.⁶ The Department seeks information on ticket agents' involvement in collecting baggage fees from passengers, either as a carrier's agent or as a principal. The Department also notes that, pursuant to 14 CFR 399.80(l), a ticket agent's failure or refusal to make proper refunds promptly when service cannot be performed as contracted, or a ticket agent's representation that such refunds are obtainable only at some other point, constitutes an unfair or deceptive practice.

Regarding multiple-carrier itineraries, the Department agrees with Consumer Union that expecting consumers to track down which airline caused the delay would be an unreasonable burden to place on consumers. It would also be costly for carriers to determine which carrier is at fault for causing each bag delay. Accordingly, this NPRM proposes that the carrier that collected the baggage fee must issue the refund. With respect to multiple-carrier itineraries for which a ticket agent collected the bag fee, the Department is proposing that the carrier that operated the last flight segment must issue the refund if there are multiple airlines involved. The Department notes that the operating carrier of the last flight segment may be a fee-for-service carrier that normally does not handle baggage fee refunds since these types of entities generally do not sell tickets or ancillary services. As such, the Department solicits comment on whether, rather than requiring the carrier that operated the last flight segment to provide the refund, it should require the carrier that marketed the last flight segment to issue the refund when a ticket agent collects the bag fee. Carriers would be free to prorate the cost of refunds among themselves through contractual agreements, if so desired, but consumers should be afforded a simplified process in pursuing a refund from one carrier that already has the payment information for issuing refunds. The Department seeks comment on whether this proposal regarding refund obligations adequately addresses the issues raised when multiple parties are involved in the sale and provision of air transportation or whether there are additional issues that need to be addressed.

⁶ See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202010&RIN=2105-AE57>.

5. Refund Mechanism and Passengers Notifying Carriers about Delayed Bags to Receive Baggage Fee Refunds

The ANPRM

In the ANPRM, the Department sought comment regarding the appropriate method for providing a refund for delayed baggage. It noted that when refunds are due on purchases with a credit card, the Department already requires a carrier to transmit a credit statement to the credit card issuer within seven business days of receipt of full documentation for the refund requested. In addition, the Department requires that, with respect to purchases with forms of payment other than credit cards, an airline must provide a refund within 20 days of receipt of full documentation of such a request. Because 49 U.S.C. 41704, note states that carriers should “promptly provide an automated refund” to an eligible passenger when the carriers fail to meet the applicable time limit in delivering the checked bag and the passenger has notified the carrier of the lost or delayed checked baggage, the Department asked whether prescribing a specific mechanism for the carriers to use to provide the statutorily required automated refund would negatively or positively impact carriers and consumers.

Comments Received

To determine how to “promptly provide an automated refund” for delayed bags, most commenters state that the Department should apply its existing requirement on providing prompt ticket refunds. Specifically, when a refund is due, 14 CFR part 374, which implements Regulation Z of the Board of Governors of the Federal Reserve Board (12 CFR part 226), requires a carrier to issue a refund of ticket purchase price paid by a credit card within seven days after receiving a complete refund request. The regulation in 14 CFR 259.5(b)(5) further requires a carrier to issue a refund of ticket purchase price paid by cash or a check within 20 days after receiving a complete refund request. However, airline commenters expressed concern that this type of “automated” refund may not be feasible for interline itineraries because refunds can only be made after a consumer informs the airline that charged the baggage fee that the bag is

delayed. Some airlines are also concerned about the difficulty in issuing “automated” refunds when passengers purchase tickets from travel agents or as a part of a tour package.

DOT Response

The Department tentatively interprets the requirement in 49 U.S.C. 41704, note to mean that a prompt and “automated” baggage fee refund is due when the baggage delivery delay has exceeded the applicable delivery deadline *and* the passenger has notified the air carrier or foreign air carrier of the lost or delayed checked baggage. The clock for determining whether the refund is “prompt” starts at the expiration of the delivery deadline or when the passenger provides notification of the lost or delayed baggage, whichever is later. DOT proposes to require airlines to provide refunds for delayed bags within seven business days of a refund being due for credit cards and within 20 days of a refund being due for payments using cash, check, vouchers, frequent flyer miles, or other form of payment. For the refund process to start, passengers would need to notify *the airline that collected the bag fee* about the delay in receiving the bag. If a ticket agent collected the bag fee, passengers would need to notify the carrier that operated the flight about the delay in receiving the bag. With respect to multiple-carrier itineraries for which a ticket agent collected the bag fee, passengers would need to notify the carrier that operated the last flight segment about the delay in receiving the bag. The Department acknowledges that this notification requirement on passengers would encompass two different scenarios, each of which would impose a different level of burden on passengers. First, in situations in which the carrier accepting and handling a mishandled baggage report (MBR) from the passenger is the same carrier that collected the baggage fee, the filing of an MBR would constitute notification from the passenger to the carrier that the baggage was delayed for the purpose of receiving a checked baggage fee refund. It is the Department’s understanding that the vast majority of itineraries marketed to consumers in the United States are either itineraries involving only one carrier or itineraries involving fee-for-service codeshare operations (itineraries involving a marketing carrier and its regional codeshare partners in which the marketing carriers collect the baggage

fees and also accept MBRs). The Department believes that this notification requirement would not be burdensome to passengers in most delayed bag incidents, as passengers normally file MBRs with carriers about delayed bags shortly after they find out that their checked bags did not arrive on time. In addition, the burden of notifying carriers about a delayed bag is further reduced by baggage tracking systems implemented by a growing number of carriers that alert passengers when their bags will arrive late and offer passengers the option to file an MBR via mobile device or app without needing to visit the baggage claim areas or the baggage service offices. When using these technologies, passengers are often advised to click on a link provided in the late bag alert to either wait for the bag or set up free delivery. Such technology developments allow passengers to conveniently notify carriers about mishandled baggage for the purpose of receiving compensation for direct and consequential damages from mishandled baggage under the existing rule, as well as receiving a refund of baggage fees under the proposed rule.

In contrast to the first scenario discussed above, the second scenario involves situations in which the carrier that received an MBR about a delayed bag and the carrier or ticket agent that charged the baggage fee are two different entities. Examples of this scenario include interline itineraries and itineraries that involves codeshare flights operated by more than one marketing carrier. The proposed rule would require the passenger to notify the carrier that processed the baggage fee charge about a delayed bag to receive a refund for the baggage fee. In situations in which a ticket agent collected the bag fee, passengers would need to notify the carrier that operated the flight about a delayed bag. With respect to multiple-carrier itineraries for which a ticket agent collected the bag fee, passengers would need to notify the carrier that operated the last flight segment about the delay in receiving the bag. Similar to filing an MBR the Department expects that most passengers in this situation would contact the carrier that operated the flight (or the carrier that operated the last flight segment in a multiple carrier itinerary) immediately following their arrival at the destination and finding out about the delayed bag. In any event, the

carrier that has collected the baggage fee (or if a ticket agent collected the bag fee, the carrier that last operated the flight), would have seven days (for credit card transactions) or 20 days (for transactions other than credit cards) to issue a refund from the time a baggage delay exceeded the applicable deadline, or from the time it receives a notification from the passenger, whichever is later. The Department solicits comments on whether, instead of requiring passengers to notify the carrier that operated the last flight segment about the bag delays, we should require passengers to notify the carrier that marketed the last flight segment. We ask that commenters supporting that passenger notify and obtain refund from the last operating carrier address the issue of obtaining a refund from the last operating carrier when the carrier is a fee-for-service carrier that does not sell tickets.

To illustrate this proposal with an example: A passenger traveled from Chicago to Los Angeles on a flight that arrived at Los Angeles on June 19 at 6 P.M., and according to the carrier's record, the passenger was given the opportunity to deplane at 6:15 P.M. At 6:45 P.M., the passenger did not receive the checked bag and filed a mishandled baggage report with carrier X (which is also the carrier that collected the baggage fee). Carrier X chooses to apply the standard that stops the delayed bag clock at the time the bag arrives at the Los Angeles Airport and the carrier has notified the passenger that the bag is available for pick up. Accordingly, the clock for calculating bag delay started at 6:15 P.M., and Carrier X has 12 hours, or until 6:15 A.M. on June 20 to stop the clock and avoid refunding the bag fee. The bag did not arrive in Los Angeles until 10:00 A.M. on June 20. Therefore, Carrier X would be required to refund the bag fee and has seven days from June 20 to issue the refund for the baggage fee that was paid by a credit card. In a different scenario, if Carrier X accepted the MBR and Carrier Y is the carrier that collected the baggage fee, assuming the passenger did not notify Carrier Y about the bag delay until June 25, Carrier Y will have seven days from June 25 to issue the refund.

The Department believes that applying the same seven or 20-day requirements to baggage fee refunds, as required by other DOT refund regulations, is consistent with the

statutory language that requires the refunds to be “prompt.” It also avoids confusion among passengers arising from trying to understand and apply different standards for ticket refunds and baggage fee refunds, and saves cost for infrastructure and training that carriers would have to invest in to establish a different refund timeliness standard.

Also, similar to ticket refunds, the Department expects that baggage fee refunds would be issued in the same form of payment as the original baggage fee payment. Under this proposal, in addition to credit card, cash, and check payments being refunded in their respective original forms of payment, baggage fees paid by airline credit/voucher or frequent flyer miles would be refunded in their original forms of payment as well. When a delay occurred to a bag for which a baggage fee was waived due to the passenger’s airline loyalty program status or as a benefit of using an airline-associated credit card, carriers would not be required to provide a refund as the passenger did not pay anything.

In circumstances in which a bag was delayed but a refund of the baggage fee is not required (either because the delay did not exceed the deadlines or the baggage fee was waived,) carriers are still responsible for compensating passengers for any direct or consequential damages resulting from the baggage delay, consistent with 14 CFR part 253 for domestic air transportation, and with applicable international treaties for international air transportation.

The Department is aware that at least one major U.S. carrier is offering a “baggage fee subscription” program, under which passengers may opt to prepay a fixed fee that allows the subscribers to travel with certain numbers of checked bags without paying individual baggage fees during the subscribed period. Although the subscribers are not paying baggage fees on a per bag basis, they are still paying a fee for the transportation of their bags. DOT’s proposal would require airlines to provide refunds to passengers who subscribed for the program if a checked bag experienced a refund-qualifying delay. The Department seeks comments on whether this is a reasonable determination, and if so, how to determine the amount of refund to which these passengers should be entitled, considering the passenger’s subscription type and usage of the

program, but not overly complicating the calculation of the refund and the administration of the program. The Department also seeks comment on whether there are other new and innovative baggage fee assessment schemes already implemented by carriers or on the horizon that should be considered in the context of promulgating a rule regarding refunding baggage fees for delayed bags.

In summary, the Department's proposed procedure requires that the airline collecting the baggage fee issue a refund, in the same form of payment, within seven or 20 days (depending on the form of payment) after the delay in the delivery of the bag has exceeded the applicable deadline and after the passenger has notified that airline of the delay. The Department seeks comment on whether this proposed procedure is a reasonable and workable way for carriers to meet the statutory requirement to promptly provide an automated refund to an eligible passenger when a carrier fails to meet the applicable time limit in delivering the checked bag and the passenger has notified the carrier of the lost or delayed checked baggage. The Department also seeks comment on whether requiring passengers to notify the entity that collected the bag fee about the bag delay when they already filed mishandled baggage report with another entity is overly burdensome to them. In particular, if commenters take the view that requiring passengers to provide notifications to the entities that collected baggage fees from them is overly burdensome, the Department seeks suggestions for alternative procedures.

6. Other Issues

In addition to providing comments to questions specifically raised in the ANPRM, commenters also raised other issues for consideration.

a. Oversized/Overweight Bag Fees

Carriers normally set a maximum allowance for the size and the weight of a standard checked bag, and charge a higher fee for an oversized and/or overweighed bag. Some commenters contend that fees for oversized and overweight bags should be exempt from the refund requirement because these bags are still delivered even if they were late. However, the

statutory language in 49 U.S.C. 41704, note requires a refund for delayed “checked baggage,” making no distinction or exception for special items that are transported as checked bags. The Department interprets the statute to cover oversized/overweight bags, and accordingly proposes to treat them the same as standard sized bags.

b. Escalated Fee Scale for Multiple Checked Bags

Many carriers have adopted an escalated fee scale for additional bags checked by one passenger, under which if more than one bag is checked, an escalated bag fee is charged for each additional bag. Problems may arise when carriers try to determine the amount of refund if only one or some of the multiple checked bags are delayed. Airlines for America (A4A) suggests that when carriers can identify which bag is delayed, only the fee paid for that bag should be refunded. The Department agrees generally with this approach but if a dispute were to arise between a consumer and an airline, the airline would have the burden of providing documentary evidence to identify the specific fee charged for a specific bag. For example, when a passenger checks multiple bags, if a carrier’s baggage handling system assigns a unique identification to each checked bag and correlates the specific baggage fee charged to the specific bag, the carrier would be permitted to provide a refund in that amount if that bag was delayed. On the other hand, if the carrier’s system was able to assign an identification to each bag but baggage fees were charged in a lump sum, then the Department proposes that the refund for one delayed bag would be in the amount equal to the highest baggage fee per bag charged in that transaction.

c. “Voluntary Separation” and Liability Waiver

A4A asserts in its comment that when a passenger voluntarily agrees to be separated from his or her checked bags, the refund requirement should not apply. One scenario presented by A4A involves a passenger who does not meet the minimum check-in time requirement but the carrier allows the passenger to check-in for the flight anyway with the caveat that there may not enough time to transport the checked bag to the same flight. Another scenario involves a standby passenger who is offered to board a flight at a time very close to departure with the

caveat that there may not be enough time to load his or her checked bag on that flight. If the passenger is informed, voluntarily agrees to travel without the checked bag on the same flight, and signs a waiver of liability associated with the delayed bag, A4A believes that the baggage fee refund requirement should not apply if the bag does not arrive by the deadline that triggers the refund requirement. The Department tentatively agrees with this approach and proposes such an exception. DOT reminds the industry that such an exception would only waive the passenger's entitlement to a baggage fee refund due to delayed bag delivery, and it would not waive any compensation due to the passenger if the checked bag is lost or damaged.

The Department seeks comment on the issues described above. The Department also notes that carriers are liable for incidental expenses associated with a delayed bag. Some airlines have suggested that when a late-boarding passenger is informed that his or her bag may not be transported on the same flight but chooses to take the flight anyway, the passenger is waiving the right to claim compensation for incidental expenses associated with a delayed bag. The Department solicits comment on whether, in such delayed bag scenarios, airlines should be permitted to require passengers to waive any rights to compensation for incidental expenses and if so, whether the Department should require that airlines retain such records for a specified time period.

d. Alternative Transportation

Commenters also brought up issues associated with baggage fee refunds when a passenger does not take a scheduled flight for various reasons. A4A suggests that when a passenger voluntarily chooses to take alternative ground transportation due to a lengthy flight delay or cancellation, the carrier should not be responsible for refunding bag fees. On the other hand, A4A states that when a carrier arranges for the passenger to travel on an alternative ground transportation, the baggage fee refund requirement should apply and the clock should start at the flight's actual arrival time. In addition, A4A argues that when a carrier arranges for a passenger

to travel on a flight by another carrier, the baggage fee refund requirement should not apply because otherwise it would discourage carriers from offering travel on other carriers' flights.

The Department tentatively agrees with the position that when passengers *voluntarily* choose to not travel on the scheduled flight or a substitute flight offered by the carrier, either by taking ground transportation that the passenger arranges on their own, or by purchasing tickets on flights of another carrier, the baggage fee refund requirement should not apply. The goal of the baggage fee refund requirement is to compensate passengers for bag delays caused by carriers. In the situations described above, a passenger's own decision to not travel on the scheduled or substitute flight arranged by the carrier is an intervening action that may contribute to a delay in being reunited with his or her bag. Conversely, when it is a carrier making the decision to arrange for alternative travel for passengers, either on ground transportation, on a later flight operated by that carrier, or on a flight by another carrier, the baggage fee refund requirement should apply. In those situations, under this proposal, the delayed bag calculation clock would start when the passenger's actual transportation arrived, whether a flight or other mode of transportation. The Department seeks comment on whether this position on alternate travel arrangements creates unreasonable burdens for consumers and airlines.

e. Type of baggage

Commenters also sought clarity on the meaning of checked baggage. A4A specifically states that fees collected for gate-checked bags should not be subject to the refund requirement as gate baggage handling charges are independent of bag fees and carriers assess gate handling fees to encourage passengers to check their bags at the ticket counter. With respect to what type of baggage is subject to the refund requirement, 49 U.S.C. 41704, note states that the refund requirement applies to "checked baggage." The Department interprets this to include not only bags checked with carriers at the ticket counters, but also gate-checked bags and valet bags if the passenger paid a fee to transport the bags. Generally, airlines do not charge for valet bags and valet bags are delivered on time. Both a "gate-checked bag" and a "valet bag" would be checked

in with carrier personnel at the departure gates for transportation in the aircraft cargo compartments, but a gate-checked bag would be claimed by the passenger at the final destination at the baggage claim area, while a valet bag would be returned to the passenger at the end of the flight segment when the passenger disembarks the aircraft. A4A in its comment argues that gate-checked bag fees should be treated differently because carriers often charge a gate-checked bag fee that is higher than the regular checked baggage fees to encourage passengers to check their bags at the ticket counter. Regardless of the reason for the fee, 49 U.S.C. 41704, note mandates that airlines must refund baggage fees if a bag is not delivered in a timely manner.

III. REFUNDING FEES FOR ANCILLARY SERVICES THAT WERE NOT PROVIDED

A. Background

The provision at 49 U.S.C. 42301, note prec. requires the Department to promulgate a rule that mandates that airlines promptly provide a refund to a passenger of any ancillary fees paid for services related to air travel that the passenger does not receive, including on the passenger's scheduled flight, on a subsequent replacement itinerary if there has been a rescheduling, or for a flight not taken by the passenger. The Department's regulation in 14 CFR 259.5(b)(5) requires that airlines refund fees charged to a passenger for optional services that the passenger was unable to use due to an oversale situation or flight cancellation. Although the existing rule only requires refunds of ancillary fees when a passenger does not take the original flight due to oversales or cancellation, the Department's Office of Aviation Consumer Protection would review any airline practice of refusing to refund fees for ancillary services that the passenger was unable to use due to an action of the airline to determine if the airline was engaging in an unfair or deceptive practice in violation of 49 U.S.C. 41712. It is the Department's understanding that airlines in general have been providing refunds to passengers, not only when passengers are unable to use the ancillary service due to an oversale situation or flight cancellation, but

also when passengers pay for ancillary services and do not receive those services from the carrier for other reasons.⁷

B. Proposals

This NPRM proposes to codify in the rule text a requirement that airlines must refund fees a passenger pays for an ancillary service that the passenger does not receive, including due to oversales and flights cancellations, which are already in the existing rule text, and other situations when the ancillary service is not available to the passenger. The Department seeks comments on the following issues:

1. Scope of Ancillary Services

The provision at 49 U.S.C. 42301, note prec. requires that airlines refund ancillary fees paid for services “related to air travel.” The Department has not defined “ancillary services” in its aviation economic regulations. However, the Department has defined “optional services” in 14 CFR 399.85(d), which requires U.S. and foreign air carriers to prominently disclose on their websites marketing air transportation to U.S. consumers information on fees for all *optional services* available to a passenger purchasing air transportation. Section 399.85(d) specifically provides that for purposes of that section, the term “optional services” is defined as any service the airline provides, for a fee, beyond passenger air transportation, including, but not limited to, charges for checked or carry-on baggage, advance seat selection, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades. This definition does not include fees charged for services to be provided by entities other than airlines, such as hotel accommodations or rental cars, which are commonly offered by some airlines as a package during the airfare reservation process. In this NPRM, the Department proposes to apply a definition for “ancillary services” in § 260.2 that is substantively identical to the definition of “optional services” provided in §

⁷ The Department notes that some carriers have published refund policies that state consumers will received a refund for fees paid for ancillary services that they did not receive. In addition, the Department’s Office of Aviation Consumer Protection has reviewed its consumer complaint database and found that when carriers receive consumer complaints filed with the Department alleging that they paid for ancillary services and did not receive the services, carriers usually have been issuing refunds after verifying that the ancillary services were indeed not provided.

399.85. This proposal defines ancillary service to mean any service related to air travel provided by a covered carrier, for a fee, beyond passenger air transportation. It specifies that such service includes, but is not limited to, checked or carry-on baggage, advance seat selection, access to in-flight entertainment system, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades. The Department seeks public comment on whether the proposed definition, which is similar to the definition for “optional service” in § 399.85, is appropriate to define ancillary services in the context of refunding ancillary service fees that are directly related to air travel.

2. Refund Eligibility

The provision at section 42301, note prec. requires covered carriers to refund ancillary services fees for services that “a passenger does not receive, including on the passenger's scheduled flight, on a subsequent replacement itinerary if there has been a rescheduling, or for a flight not taken by the passenger.” The Department’s existing rule, in 14 CFR 259.5(b)(5), already requires airlines to refund ancillary fees for services to be provided on a flight that a passenger was unable to use due to flight cancellation or oversales. In addition, the Department’s Office of Aviation Consumer Protection has authority to investigate unfair or deceptive practices in the provision of air transportation pursuant to 49 U.S.C. 41712, and considers an airline’s refusal to provide a refund to passengers for ancillary services that they purchased but did not receive to fall under that authority. As a result of this long-standing interpretation, the Department believes that members of the airline industry understand that failure to provide a refund of fees for ancillary services that an airline did not provide to a passenger could be viewed as an unfair or deceptive practice in violation of section 41712. Some airlines have adopted and published specific policies that provide refunds of fees for ancillary services that the passengers do not receive. Further, a review of some consumer complaint files regarding ancillary services that were not received show that airlines generally refund those fees.

In this NPRM, the Department proposes to codify in the rule text the requirement of 49 U.S.C. 42301, note prec. on ancillary fee refunds, as well as the Department's long-standing policy, which is consistent with that statutory provision. As such, the proposal would require covered carriers to promptly refund an ancillary service fee they charged a passenger, if the passenger did not receive the ancillary service he or she paid for because (1) the service was not made available to that passenger on the flight he or she took (either the original flights or an alternative flight due to schedule changes made by the airlines or due to an oversales situation); or (2) if the passenger did not take any flight due to the airline not operating the flight or making a significant change to the flight.

Under this proposal, a passenger would generally be entitled to a refund of the ancillary service fee if the passenger did not receive the ancillary service. The proposal is focused on whether a carrier failed to fulfill its obligation to provide the service, as opposed to whether the service was actually utilized by the passenger. If the service was available but a passenger did not use the service, the passenger would not be entitled to a refund. For example, when a passenger pays for wi-fi service on a flight, if the service is available to all passengers who purchased the wi-fi service, but a particular passenger is unable to use the service due to issues with a personal device, or the passenger simply decides to not use the service, there would be no requirement to refund the fee paid by that passenger. Also under this proposal, a flight schedule change affirmatively made by the passenger or due to passenger action would not result in eligibility for the ancillary fee refund. For instance, if a passenger is re-accommodated on an alternate flight due to late check-in and the ancillary service the passenger paid for such as wi-fi service is not available on the alternate flight, our proposal would not require the carrier to refund the ancillary service fee. The Department solicits comments on the reasonableness of this airline obligation-focused approach.

3. Prompt Refund

The Department is proposing to apply the same “promptness” standards to refunding ancillary services fees when refunds are due that is currently applicable to refunds for tickets, optional services that could not be used due to an oversale or flight cancellation, and lost bags. A prompt refund must be provided within seven days for credit card transactions and 20 days for transactions involving cash, checks, vouchers, or frequent flyer miles after the entity responsible for issuing a refund receives a request for a refund and the documentation necessary for processing the refund.

4. Entity Responsible for Refund

The Department recognizes that the entity that processed the ancillary fee charge may not necessarily be the entity that is responsible for providing the ancillary service. For example, in a codeshare or interline itinerary, the carrier that charges a fee for an ancillary service to be provided on a flight may not be the carrier that operates the flight. In these situations, the passenger who did not receive the ancillary service on the flight would need to contact the carrier that collected the fee to request a refund. Similar to the multi-carrier scenario for delayed baggage, the Department is proposing to hold the carrier that collects the fee for ancillary service (usually the marketing carrier of an itinerary) responsible for issuing a refund when the carrier or another carrier (usually under a codeshare or interline agreement with the marketing carrier) fails to provide the ancillary service.

For passengers who purchase airline tickets from ticket agents, the Department understands that on occasion ancillary services may be available for purchase at the time of ticket reservation from a ticket agent. For example, the Department is aware that some ticket agents’ websites offer the option for consumers to select seats for a fee during the booking process. It is the Department’s understanding that this fee charged by a ticket agent is passed on to the carrier whose ticket stock is used for issuing the ticket. DOT proposes that, if a passenger purchases an ancillary service from a ticket agent, the Department would hold the carrier responsible for issuing the refund because the ticket agent is collecting the ancillary service fee

on the carrier's behalf and passing on the fee to the carrier. The carrier presumably has a contractual relationship with the ticket agent, and 49 U.S.C. 42301, note prec. requires airlines to refund ancillary fees paid for services "related to air travel." With respect to multiple-carrier itineraries for which a ticket agent collects an ancillary service fee, the Department is proposing that the last carrier that operates the flight issue the refund if there are multiple airlines involved. The Department solicits comment on whether, rather than requiring the last carrier that operates the flight to issue the refund, it should require the carrier that marketed the last flight segment provide the refund. Through contractual agreements, carriers and ticket agents can determine how best to prorate the cost of refunds among themselves.

Similar to our proposal on refunding baggage fees, this NPRM does not propose to hold ticket agents that sell the ancillary services responsible for refunds. The Department is proposing a simple refund process to avoid passengers being sent back and forth among different entities in situations where one entity charged the passenger the fee for the ancillary service and another entity failed to provide the paid for service. Accordingly, the Department is seeking a general overview of ticket agents' role in the transaction and collection of ancillary service fees and the process of how fees collected by ticket agents are transferred to carriers. This information will assist the Department in determining how the Department's regulation requiring airlines to refund ancillary service fees should address the role of ticket agents and other non-carrier entities that may play a role in the sales of ancillary services.

REGULATORY ANALYSES AND NOTICES

A. Executive Order 12866 (Regulatory Planning and Review)

This action has been determined to be not significant under Executive Order 12866 ("Regulatory Planning and Review"), as supplemented by Executive Order 13563 ("Improving Regulation and Regulatory Review"). Accordingly, the Office of Management and Budget (OMB) has not reviewed it under that order.

The proposed rule would mandate refunds of baggage fees for significantly delayed checked baggage. It would set a threshold of 12 hours for domestic baggage and 25 hours for international baggage. The proposed rule would also mandate refunds of ancillary fees for services that passengers did not receive.

Refunds of baggage fees and ancillary service fees represent a transfer from airlines to passengers whose bags were mishandled by the airline. Accordingly, the impacts of this rule are predominantly distributional and not expected to generate significant net economic costs or benefits. For baggage fees, the estimated size of the transfer (or redistribution) is between \$10.71 million and \$11.43 million annually. This estimate, based on a Department analysis of baggage fee refunds available in this rulemaking docket, is an upper-bound estimate which assumes that passengers pay fees for all delayed bags. For ancillary fees, it is generally current practice for airlines to give refunds when passengers do not receive ancillary services on flights, as described in Section III.A. Some airlines have codified this practice in their published refund policies as well. Given current practice, the Department does not expect that the requirement to refund ancillary service fees would have significant distributional impacts.

The baggage fee refund requirement in the proposed rule could have some administrative costs, which are economic costs, because airlines may need to hire additional staff to process refunds. The requirement has an estimated annual cost between \$4.18 million and \$4.41 million, assuming that staff process refunds manually. (If refunds are processed electronically, as is expected in at least some cases, this cost could decrease.) Airlines should not incur significant administrative costs due to the ancillary service fee refund requirement, to the extent that the refunds are part of current practice. This conclusion could change if the proposed rule induces more passengers to seek refunds from carriers. In that case, the ancillary service fee refund requirement could add administrative costs and have distributional implications.

The Department seeks comment and additional data to quantify the effects of the proposed rule on baggage fee and ancillary service fee refunds, as well as information on potential impacts on passenger behavior.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA) (5 U.S.C. 601 et seq.) requires Federal agencies to consider the effects of their regulatory actions on small businesses and other small entities, and to minimize any significant economic impact. When an agency issues a rulemaking proposal, the RFA requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” which will “describe the impact of the proposed rule on small entities” (5 U.S.C. 603(a)). Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

The entities that would be directly regulated by this proposed rule are U.S. and foreign air carriers that charge baggage fees and other ancillary fees in scheduled air transportation. Under 14 CFR 399.73, for the purposes of the Department’s implementation of the RFA, a carrier is a small business if it provides air transportation exclusively with small aircraft, defined as any aircraft originally designed to have a maximum passenger capacity of 60 seats or less or a maximum payload capacity of 18,000 pounds or less.

The Department does not expect that this rule would have a significant economic impact on a substantial number of small entities. Some small carriers that qualify as small businesses operate flights as part of a code-share arrangement with a larger carrier. In these cases, the larger carrier collects the baggage fees and other ancillary service fees and would be responsible for the refunds under the proposal. At least five small carriers operating in 2018 had code-share arrangements with larger carriers covering some portion of their flights. For other flights, the estimated economic effects for carriers are small. As described in the baggage fee refund analysis, the estimated annual refund payments (\$10.71 million to \$11.43 million) and

administrative costs for carriers (\$4.18 million to \$4.41 million) would account for less than 0.5 percent of their annual baggage fee revenues (\$3.8 billion in 2015, the year used in the analysis due to data availability). As baggage handling and tracking technologies improve, we expect that the percentage of delayed bags affected by the rule and resulting economic effects would decrease further.

Accordingly, the Department certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The Department invites comment on this certification and on the analysis presented in support of it.

C. Executive Order 13132 (Federalism)

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (“Federalism”). This document does not propose 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. States are already preempted from regulating in this area by the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13084

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 (“Consultation and Coordination with Indian Tribal Governments”). Because none of the options on which the Department is seeking comment would 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

This NPRM does not propose a new collection of information that would require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (Pub. L. 104-13, 49 U.S.C. 3501 et seq.).

F. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA) requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. As described elsewhere in the preamble, this proposed rule would have no such effect on State, local, and tribal governments or on the private sector. Therefore, the Department has determined that no assessment is required pursuant to UMRA.

G. National Environmental Policy Act

The Department has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1D, Procedures for Considering Environmental Impacts (81 FR 92966, Dec. 15, 2016). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 10.c.16.h of DOT Order 5610.1D categorically excludes “[a]ctions relating to consumer protection, including regulations.” This proposal relates consumer protection. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Signed on June 23, 2021, in Washington, D.C.

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Peter Paul Montgomery Buttigieg,
Secretary of Transportation.

List of Subjects

14 CFR Part 259

Air carriers, Consumer protection, Reporting and recordkeeping requirements.

14 CFR Part 260

Air carriers, Consumer protection.

For the reasons set forth in the preamble, the Department proposes to amend 14 CFR chapter II as follows:

PART 259 – ENHANCED PROTECTIONS FOR AIRLINE PASSENGERS

1. The authority citation for 14 CFR part 259 continues to read as follows:

Authority: 49 U.S.C. 40101(a)(4), 40101(a)(9), 40113(a), 41702, 41708, 41712, and 42301.

2. Amend § 259.5 by revising paragraphs (b)(3) and (5) to read as follows:

§ 259.5 Customer Service Plan.

* * * * *

(b) * * *

(3) Delivering baggage on time, including making every reasonable effort to return mishandled baggage within 12 hours for domestic flights and within 25 hours for international flights, compensating passengers for reasonable expenses that result due to delay in delivery, as required by 14 CFR part 254 for domestic flights and as required by applicable international agreements

for international flights, and refunding passengers for any fees charged to transport a checked bag that is delayed or lost, as required by 14 CFR part 260;

* * * * *

(5) Where ticket or ancillary service fee refunds are due, providing prompt refunds within 7 days, as required by 14 CFR 374.3 and 12 CFR part 226 for credit card purchases, and within 20 days after receiving a complete refund request for cash and check purchases, and other means of payment. Refunds must be in the original form of payment (such as credit card, debit card, cash or check, airline miles);

* * * * *

3. Add part 260 to read as follows:

PART 260—REFUNDS FOR AIRLINE ANCILIARY SERVICE FEES

Sec.

260.1 Purpose.

260.2 Definitions.

260.3 Applicability.

260.4 Refunding fees for ancillary services that passengers paid for but that were not provided.

260.5 Refunding fees for significantly delayed or lost bags.

260.6 Providing prompt refunds.

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

§ 260.1 Purpose.

The purpose of this part is to ensure that carriers refund passengers for ancillary services related to air travel that passengers paid for but were not provided. This part is also intended to ensure that carriers refund passengers for fees to transport checked bags that are lost or significantly delayed.

§ 260.2 Definitions.

As used in this part:

Air carrier means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.

Ancillary service means any service related to air travel provided by a covered carrier, for a fee, beyond passenger air transportation. Such service includes, but is not limited to, checked or carry-on baggage, advance seat selection, access to in-flight entertainment program, in-flight beverages, snacks and meals, pillows and blankets, and seat upgrades.

Checked bag means a bag or an item other than a bag that was provided to a carrier by or on behalf of a passenger, for transportation in the cargo compartment of a scheduled passenger flight. A checked bag includes a gate-checked bag and a valet bag.

Covered carrier means an air carrier or a foreign air carrier operating to, from or within the United States, conducting scheduled passenger service.

Covered flight means a scheduled flight operated or marketed by a covered carrier to, from, or within the United States.

Foreign air carrier means a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation.

Significantly delayed checked bag means a checked bag that is not delivered to the passenger or the passenger's agent within 12 hours of the last flight segment's arrival for domestic itineraries and within 25 hours of the last flight segment's arrival for international itineraries, including itineraries that include both international flight segment(s) and domestic flight segment(s).

§ 260.3 Applicability.

This part applies to all covered carriers that collect fees, including checked baggage fees, for ancillary services to be provided on or in relation to a covered flight.

§ 260.4 Refunding fees for ancillary services that passengers paid for but that were not provided.

A covered carrier shall promptly provide a refund to a passenger for any fees it collected from the passenger for ancillary services related to air travel if the service was not provided,

including fees for services on the passenger's scheduled flight, on a subsequent replacement flight if there has been a rescheduling by the carrier, or on a flight not taken by the passenger due to oversales or a flight that is not operated by the carrier. If a ticket agent collected the ancillary fee, the carrier that is scheduled to operate the flight or if multiple-carrier itineraries, the carrier that is scheduled to operate the last segment of the passenger's itinerary is responsible for providing a refund.

§ 260.5 Refunding fees for significantly delayed or lost bags.

Upon receiving a notification pursuant to paragraph (b) of this section from a passenger, a covered carrier that collected a checked baggage fee from the passenger or, if a ticket agent collected the checked baggage fee from the passenger, the covered carrier that is scheduled to operate the flight or the covered carrier that is scheduled to operate the last segment of the passenger's itinerary if multiple-carrier itineraries, shall promptly provide a refund to the passenger of any fee charged for transporting a significantly delayed checked bag.

(a) *Determining the length of delay.* (1) For the purpose of determining whether a refund of the baggage fee is due, the 12-hour deadline for domestic itineraries and the 25-hour deadline for international itineraries is calculated from the time when a passenger was given the opportunity to deplane from the aircraft at the passenger's final destination; or, if the final travel segment was on alternate ground transportation, a comparable time when the passenger disembarks from the ground transportation.

(2) For the purpose of determining whether a refund of the baggage fee is due, a delayed bag is considered to have been delivered to a passenger or a passenger's agent if:

(i) The bag has been transported to a location, other than the destination airport, based on agreement by the passenger and the carrier, whether or not the passenger is present to take possession of the bag;

(ii) The bag has arrived at its intended final destination airport and is available for pick up, and the carrier has provided notice to the passenger or the passenger's agent (e.g., via push

notice through a mobile application, email, or text message) that the bag has arrived at that airport and is ready for pick up; or

(iii) The bag has arrived at the intended final destination airport and the carrier has provided notice to the passenger or the passenger's agent (e.g. via push notice through a mobile application, email, or text message) that the bag has arrived at that airport and will be delivered to a location that the passenger and carrier have agreed on.

(b) Notification of carrier by passenger about lost or significantly delayed bag. A covered carrier's obligation to provide a prompt refund for a lost bag or a significantly delayed bag does not begin until passengers provide notification of the lost or significantly delayed bag. If the entity that collected the baggage fee is the same entity that received a mishandled baggage report from the passenger, the filing of the mishandled baggage report constitutes a notification from the passenger for the purpose of receiving a refund, if due, for the baggage fee. In all other situations, passengers must inform the carrier that collected the baggage fee of the lost or delayed bag; or, if a ticket agent collected the bag fee, passengers must inform the carrier that operated the last flight segment about the lost or delayed bag for the purpose of receiving a refund for the baggage fee for a significantly delayed bag.

§ 260.6 Providing prompt refunds.

When a refund of a fee for an ancillary service, including a fee for lost or significantly delayed checked baggage, is due pursuant to this part, the refund must be issued promptly consistent with the requirement of 14 CFR 259.5(b)(5).