DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 234, 259, and 399

[Docket No. DOT–OST–2007–0022]

RIN No. 2105–AD72

Enhancing Airline Passenger Protections

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Department of Transportation seeks comment on rules it is proposing to enhance airline passenger protections in the following ways: by requiring air carriers to adopt contingency plans for lengthy tarmac delays and incorporate them in their contracts of carriage, by requiring air carriers to respond to consumer problems, by deeming the continued operation of a flight that is chronically late to be unfair and deceptive in violation of 49 U.S.C. 41712, by requiring air carriers to publish information on flight delays on their Web sites, and by requiring air carriers to adopt customer service plans, incorporate these into their contracts of carriage, and audit their own compliance with their plans. The Department takes this action on its own initiative in response to the many recent instances when passengers have been subject to waits on airport tarmacs for very long periods and also in response to the ongoing high incidence of flight delays.

DATES: Comments should be filed by February 6, 2009. Late-filed comments will be considered to the extent practicable.

ADDRESSES: You may file comments identified by the docket number DOT–OST–2007–0022 by any of the following methods:

- *Federal eRulemaking Portal:* go to *http://www.regulations.gov* and follow the online instructions for submitting written comments. A standard form has been created for those who wish to use it in submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave., SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.

Instructions: We strongly encourage you to use the standard form to submit comments. To access the form, go to *http://www.regulations.gov* and use the SEARCH DOCUMENTS field provided to input the docket number for this rulemaking. Then, you can search the index for ''Public comment standard form.'' This form may then be moved to your computer desktop, where you can type in your comments. You may then attach the form when you submit your comments to the docket.

Using the standard form will eliminate the need for you to type a title, headings and questions since the form identifies the rulemaking on which you are commenting, sets out the headings identified in the **SUPPLEMENTARY INFORMATION** section of this document and lists the questions that we have asked in the NPRM. It will also make it easier for you, other commenters and the Department to easily search or sort the comments submitted on the various issues in the rulemaking.

If you do not use the standard form, you must include the agency name and docket number DOT–OST–2007–0022 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your comment. All comments received will be posted without change to *http://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, a business, a 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 or comments received, go to *http://www.regulations.gov* or to the street address listed above. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Daeleen Chesley or Blane A. Workie, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590, 202–366–9342 (phone), 202–366–7152 (fax), *betsy.wolf@dot.gov* or *blane.workie@dot.gov* (e-mail).

SUPPLEMENTARY INFORMATION:

Background

On November 15, 2007, the Department of Transportation (DOT or Department) issued an Advance Notice of Proposed Rulemaking (ANPRM) in Docket DOT–OST–2007–22 entitled ''Enhancing Airline Passenger Protections.'' This ANPRM was published in the **Federal Register** five days later. *See* ''Department of Transportation, Office of the Secretary, 14 CFR Parts 234, 253, 259, and 399 [Docket No. DOT–OST–2007–0022], RIN No. 2105–AD72, 72 FR 65233 *et seq.* (November 20, 2007).'' We announced in the ANPRM that we were considering adopting or amending rules to address several concerns, including, among others, the problems consumers face when aircraft sit for hours on airport tarmacs and the growing incidence of flight delays. We observed that beginning in December of 2006 and continuing through the early spring of 2007, weather problems had kept more than a few aircraft sitting for long hours on airport tarmacs, causing the stranded passengers undue discomfort and inconvenience. We observed further that passengers were also being harmed by the high incidence of less extreme flight delays: In the first seven months of 2007, only 72.23 percent of flights arrived on time, a lower percentage than for the same period in any of the previous 12 years. (On-time arrival performance remains problematic: It has improved only slightly since the issuance of the ANPRM. For the first five months of 2008, it was the second worst for these months in 14 years.) We acknowledged that the industry and interested observers have attributed both the marathon tarmac waits and the epidemic of flight delays to a number of factors besides weather, such as capacity and operational constraints, for example. Some of these are being addressed by the Federal Aviation Administration (FAA) and certain airports in other contexts, but in the meantime, we decided to explore the adoption of regulatory measures to address passengers' concerns.

Thus, citing our authority and responsibility under 49 U.S.C. 41712, in concert with 49 U.S.C. 40101(a)(4) and 40101(a)(9) and 49 U.S.C. 41702, to protect consumers from unfair or deceptive practices and to ensure safe and adequate service in air transportation, we called for comment on seven potential measures. We intended these measures to ameliorate difficulties that passengers experience without creating undue burdens for the carriers. We also posed questions for commenters to answer and invited them

to suggest other measures to address the problems at issue.

The measures proposed in the ANPRM covered the following subjects: Contingency plans for lengthy tarmac delays, carriers' responses to consumer problems, chronically delayed flights, delay data on Web sites, complaint data on Web sites, reporting of on-time performance of international flights, and customer service plans. The specifics of the ANPRM's proposals are set forth below in the context of the measures we are proposing—or not proposing—in this notice.

We received approximately 200 comments in response to the ANPRM. Of these, 13 came from members of the industry—*i.e.*, air carriers, air carrier associations, and other industry trade associations—and the rest came from consumers, consumer associations, and two U.S. Senators. On the consumer side, some 131 individual members of the Coalition for an Airline Passengers Bill of Rights (CAPBOR) filed identical or nearly identical comments. CAPBOR's founder and spokesperson, Kate Hanni, also filed comments with additional material on behalf of both CAPBOR and the Aviation Consumer Action Project (ACAP). Another 34 unaffiliated individuals filed comments, as did five other consumer associations: ACAP, the National Business Travel Association (NBTA), the Federation of State Public Interest Research Groups (US PIRG), Public Citizen, and the National Consumers League.

On the industry side, four carriers filed comments: Jet Airways (India), Ltd., Delta Air Lines, Inc., China Eastern Airlines, and Virgin Atlantic Airways, Ltd. Five carrier associations filed comments: The Association of Asia Pacific Airlines (AAPA), the National Air Carrier Association (NACA), the International Air Transport Association (IATA), the Air Transport Association of America (ATA), and the Air Carrier Association of America (ACAA). Two travel agency associations, the American Society of Travel Agents (ASTA) and the Interactive Travel Services Association (ITSA) also filed comments, as did the Airport Council International, North America (ACI–NA).

In general, the consumers and consumer associations maintained that the Department's proposals do not go far enough, while the carriers and carrier associations attributed the current problems mostly to factors beyond their control such as weather and the air traffic control system and tended to characterize the proposals as unnecessary and unduly burdensome. The travel agency associations expressed support for consumer protections but not at their members' expense. The commenters' positions that are germane to the issues raised in the ANPRM are set forth below in the context of the measures we are proposing—or not proposing—here.

Notice of Proposed Rulemaking

Having considered the comments, we have decided to propose rules to do the following: (1) Require air carriers to adopt contingency plans for lengthy tarmac delays and to incorporate these plans in their contracts of carriage, (2) require air carriers to respond to consumer problems, (3) declare the operation of flights that remain chronically delayed to be an unfair and deceptive practice and an unfair method of competition, (4) require air carriers to publish delay data on their Web sites, and (5) require air carriers to adopt customer service plans, incorporate these in their contracts of carriage, and audit their adherence to their plans. We have decided not to propose rules to require air carriers to publish complaint data on their Web sites or to report on-time performance of international flights. We are proposing that the rules take effect 180 days after their publication.

We invite all interested persons to comment on the proposals set forth in this notice. Our final action will be based on the comments and supporting evidence filed in this docket, on our own analysis and regulatory evaluation, and on the ongoing work of our National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays (Tarmac Delay Task Force).

Proposals

1. Contingency Plans

The ANPRM: We stated in the ANPRM that we were considering requiring every certificated or commuter air carrier[1] that operates domestic scheduled passenger service using any aircraft with more than 30 passenger seats to develop and implement a contingency plan for lengthy tarmac delays. (This plan would apply to all of the carrier's flights, including those involving aircraft with 30 or fewer seats.) Each covered carrier would be required to incorporate its plan in its contract of carriage. This would enable passengers to sue for breach of contract in the event that a carrier fails to adhere to its plan. Each plan would have to include at least the following: The maximum tarmac delay that the carrier will permit, the amount of time on the tarmac that triggers the plan's terms, assurance of adequate food, water, lavatory facilities, and medical attention, if needed, while the aircraft remains on the tarmac, assurance of sufficient resources to implement the plan, and assurance that the plan has been coordinated with airport authorities at medium and large hub airports. Carriers would also be required to make their complete contracts of carriage, including contingency plans, available on their Web sites and to retain for two years the following information for any ground delay that either triggers their contingency plans or lasts at least four hours: The length of the delay, the cause of the delay, and the actions taken to minimize hardships for passengers. Our proposal did not contemplate that the Department would review or approve the plans, but we stated that the Department would consider failure to comply with any of the above requirements—including implementing the plan as written—to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 and therefore subject to enforcement action.

The Comments: CAPBOR and its members believe that this proposal does not go far enough. They maintain that the Department should establish minimum standards for contingency plans via regulation and should also review and approve the plans rather than allow each carrier the leeway to set what might well be overly lax standards. They also maintain that the Department should monitor carriers' performance under their plans. In their view, requiring carriers to incorporate their contingency plans into their contracts of carriage will not protect passengers, because as a practical matter these contracts cannot be enforced. They do support publication of contingency plans in contracts of carriage, however, and they argue that these plans should be airport-specific to account for differences among airports. CAPBOR and its members contend that because an airport's concessions are often closed by the time that a flight is cancelled and passengers allowed to deplane, we

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

should require airports to contract with their vendors to require that concessions remain open during lengthy tarmac delays. They request that in any rule proposed or adopted, we refer to ''potable water'' and ''operable lavatories'' rather than simply ''water'' and ''lavatory facilities,'' respectively, and that we include a requirement for adequate ventilation.

Individual commenters make similar points. For example, they, too, tend to oppose allowing the carriers to set their own standards, particularly those involving the amount of time that triggers the provisions of the contingency plans or the maximum amount of time on the tarmac before the carrier must return to a gate and allow passengers to deplane.

Of the other consumer associations, ACAP concurs with CAPBOR, as does U.S. PIRG. The latter suggests three hours as the maximum interval before passengers are allowed to deplane. Also concurring with CAPBOR are Public Citizen and the National Consumers League. NBTA has a different point of view: It contends that customer service is by nature market driven and that airlines are better situated than the government to gauge both their customers' expectations and whether putative protective measures afford benefits that outweigh their costs—costs that will inevitably be passed on to the traveling public. NBTA does not support requiring the carriers to develop and publish contingency plans, but it believes that carriers that do not do so will provide poorer service and thus lose business. What NBTA does support is a requirement that carriers provide what it calls ''baseline passenger's rights'' in whatever way they find most effective and cost efficient. NBTA's list of these rights includes access to lavatory facilities, access to water or other liquids, access to food for tarmac delays lasting more than six hours, ways for passengers with medical emergencies to request and receive medical attention, and cabin temperature suitable for normal travel attire. NBTA also supports requiring carriers to maintain records on lengthy tarmac delays as a tool for the Department and others to use for analyzing airline performance.

Senators Barbara Boxer and Olympia Snowe take the position that the Department should set minimum standards for protecting passengers during lengthy tarmac delays. They believe that passengers should be permitted to deplane after three hours on the tarmac.

As for members of the industry, Delta, the sole carrier that commented individually on this proposal, both supports the principle of contingency plans for lengthy tarmac delays and states that it has one already. Its plan does not have a time limit for tarmac delays, however, because in Delta's judgment passengers fare better overall if Delta retains the flexibility to respond to each situation as it deems appropriate at the time. It contends, for example, that categorically requiring the return of planes to the gate after a specified interval would probably result in more flight cancellations than occur now. Delta opposes mandating coordination with airport authorities in the preparation of a contingency plan as ''unnecessary and potentially unmanageable.'' Delta does not object to a record-retention requirement, but it believes that two years' retention is too long and that six months would suffice. It maintains that any such requirement should be triggered by a uniform delay interval, set by the Department, rather than be permitted to vary from carrier to carrier according to disparate contingency plans; Delta itself believes four hours to be a reasonable standard. Delta does not address whether the contingency plans should be incorporated into the contracts of carriage.

Of the carrier associations that commented on this proposal, NACA agrees in principle that carriers should meet their passengers' needs for food, water, lavatories, and, if necessary, medical attention during extraordinary ground delays and that they should formulate contingency plans for achieving this goal. NACA thinks that the Department should work with the carriers to develop guidance on the following questions: What kinds of food should passengers reasonably expect during a long delay; what should be required on flights whose aircraft have limited or no kitchen resources because no food service is provided in normal circumstances; what should be expected of carriers whose aircraft lack storage capability for additional ''emergency'' food and that have no catering facilities and no contract for catering services at the airport at which they are delayed; and what sort of medical attention and supplies can passengers reasonably expect? NACA opposes inclusion of carriers' contingency plans in their contracts of carriage, because the contracts are legally binding, so passengers would have a private right of action against any carrier that did not adhere to the provisions of its plan. ''Given the vagaries of what would constitute appropriate emergency services,'' NACA states, ''and in the absence of a specific statutory mandate, we believe that the inclusion of such provisions within the contract of carriage exposes carriers to a myriad of unfounded lawsuits.'' In lieu of incorporation of the contingency plans in the contracts of carriage, NACA supports requiring that each carrier provide public notice of its plan—for example, by including a notice on its Web site, by posting notices at check-in counters, or by including a notice in its in-flight magazine or in other materials available to passengers on the plane. It suggests that the Department could require all carriers to provide it with copies of their plans and then itself make the plans available to the public. NACA's comments are endorsed by ACAA.

ATA commented extensively on this proposal, and IATA supports ATA's comments. ATA prefaced its comments by asserting that the Department should focus on addressing the root causes of delays, which it characterizes as ''insufficient airspace capacity and an operating environment handcuffed by outdated radar technology,'' in addition to calling for passenger protections. ATA agrees in principle that carriers should have contingency plans for lengthy tarmac delays, provided that each air carrier is permitted to decide on the details of its own plan based on its own unique facilities, equipment, operating procedures, and network. ATA not only supports the Department's proposal not to prescribe the terms of carriers' contingency plans, but it particularly opposes a set interval of time after which an aircraft must be returned to the gate, claiming that such a requirement would do passengers more harm than good. Among the potential negative consequences ATA lists are the required return to the gate when the aircraft is next in line for takeoff, potential conflicts with governmental orders during a pandemic that passengers be kept on aircraft, and conservative decisions that result in wasting passenger, aircraft, and crew time and affect downstream connecting passengers adversely. ATA also argues that a strict requirement that aircraft return to the gate after a set interval would stifle competition: It reasons that carriers might otherwise choose alternate ways to address the competing passenger interests and needs that arise during a lengthy tarmac delay.

ATA reports that carriers already have both general contingency plans and airport-specific contingency plans. It states that carriers do not intend to publish the latter, and it recommends that the Department allow them flexibility in how they notify consumers

of the former. Most carriers, it assumes, would post their contingency plans on their Web sites. ATA opposes requiring carriers to include their contingency plans in their contracts of carriage and in fact doubts that the Department has the authority to do this in the aftermath of deregulation. As a practical matter, ATA claims, inclusion of carriers' general contingency plans in their contracts of carriage would require the deletion of technical and operational terms that do not belong in a contract and the addition of qualifying statements so that carriers would retain the flexibility to make different operational decisions depending on the facts of the situation, including extraordinary circumstances. ATA also opposes requiring incorporation of contingency plans in carriers' contracts of carriage because this would expose them to litigation under inconsistent standards among the states and among foreign countries. It predicts that standards would fluctuate as carriers took steps to minimize their exposure. ATA opposes the proposed recordkeeping requirement as redundant of other existing and proposed regulations.

RAA prefaced its comments by asking the Department to keep in mind, when proposing rules, what it characterizes as ''the unique relationship between most regional airlines subject to the proposals * * * and their passengers.'' RAA states that over 90 percent of its members' passengers fly under ticketing, marketing, scheduling, and passenger processing and handling arrangements that are controlled by the major-carrier partners of RAA's members—in fact, these passengers' contracts of carriage are with the major carrier, not the regional airlines. RAA states further that while its members are responsible for operating their flights safely and can cancel or divert them for reasons of safety, most delays, diversions, and cancellations are determined by the FAA or the regional airlines' major-carrier partners. RAA opposes regulations that would burden its members *vis-à-vis* the railroads and bus companies with which they compete for passengers.

Regarding contingency plans, RAA asks the Department to let airlines adopt plans that reflect their own circumstances, capabilities, and passenger service standards. It asks the Department to apply requirements for contingency plans and recordkeeping only to the airline that has a contract of carriage with the passenger and also to require contingency plans of ''other critical parties such as the FAA and the airports.'' In RAA's view, requiring enforceable contingency plans would be contrary to deregulation and as a practical matter would prevent carriers from responding flexibly to the many kinds of delays that occur. It states that because contingency planning varies from airport to airport, requiring a contingency plan for each airport to be published and enforced through the contract of carriage would be both impracticable and burdensome. RAA opposes requiring carriers to retain records on delayed flights, both as redundant of existing requirements of the Department's Bureau of Transportation Statistics and as a burden that would yield little if any public benefit. RAA contends that its members are constrained not only by their major-carrier partners' control over delay decisions and their differing standards for passenger service but also by the capacity constraints of their own aircraft—aircraft with limited capacity for food, water, and lavatory facilities. If contingency plans are to be required, RAA takes the position that they should only be required of major carriers, with implementation to be arranged by the major carrier and its regional airline partners on flights operated with aircraft with more than 30 passenger seats. RAA opposes coverage of flights operated with smaller aircraft.

ACI–NA supports this proposal and states that it recently convened a meeting of more than 100 officials from airports, airlines, passenger organizations, and the federal government to develop an outline for a contingency plan. Along with ''best practices'' in place at North American airports, this plan will be provided to the Department's Tarmac Delay Task Force.

Of the travel agency associations, ASTA strongly favors requiring carriers to adopt contingency plans and requiring the incorporation of these plans in air carriers' contracts of carriage, but it believes that the proposal in the ANPRM does not go far enough. ASTA implies, without explanation, that even with the plans incorporated in the contracts of carriage, they will not be enforceable unless the Department reviews them. ASTA suggests that any rule that we adopt ''require very specific plans in the general mode of 'if this happens, we will take the following specific steps to assure proper care of passengers.' '' ASTA also supports the recordkeeping requirement and suggests that it be triggered by a delay of three hours. Also, ASTA believes that carriers should be required to coordinate not only with airport authorities at medium and large hub airports but with the authorities at ''all primary airports.'' ITSA did not address this proposal.

Proposed Rule: We have decided to propose a rule along the lines set forth in the ANPRM, and we invite comment from all interested persons. Specifically, we propose to adopt a new rule, 14 CFR part 259, which, among other things, would require any certificated or commuter air carrier that operates domestic passenger service using any aircraft with a design capacity of more than 30 passenger seats to develop a contingency plan for long tarmac delays of scheduled and public charter flights and to adhere to this plan's terms. This plan would apply to all of the carrier's scheduled and public charter flights, including those with aircraft having a design capacity of 30 or fewer seats. We are not proposing that the rule cover single-entity charters and other charters in which consumers have some bargaining leverage. The rule would require each carrier to incorporate its contingency plan in its contract of carriage. At a minimum, each plan must include the following: The maximum tarmac delay that the carrier will permit, the amount of time on the tarmac that will trigger the plan's terms, the assurance of adequate food, water, and lavatory facilities, as well as medical attention if needed, while the aircraft remains on the ground, assurance of sufficient resources to implement the plan, and assurance that the plan has been coordinated with airport authorities at medium and large hub airports. The rule would require carriers to retain for two years the following information on any on-ground delay that either triggers their contingency plans or lasts at least four hours: The length of the delay, the cause of the delay, and the steps taken to minimize hardships for passengers (including providing food and water, maintaining lavatories, and providing medical assistance). Failure to do any of the above would be considered an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 and subject to enforcement action, which could result in an order to cease and desist as well as the imposition of civil penalties.

In adopting this approach, we are tentatively rejecting the suggestions of those consumers and groups who believe that the Department should set minimum standards for the contingency plans rather than allow each carrier to set its own standards based on its particular circumstances. We continue to be of the tentative view based on the information available to us that the Department should not substitute its judgment in this area for that of the air carriers. Nevertheless, we ask interested

persons to comment on whether any final rule that we may adopt should include either or both of the following: A uniform standard for the time interval that would trigger the terms of carriers' contingency plans and a uniform standard for the time interval after which carriers would be required to allow passengers to deplane. Commenters who support the adoption of either or both requirements by rulemaking should propose specific amounts of time and state why they believe these intervals to be appropriate.

As for incorporation of the contingency plans in carriers' contracts of carriage, at this stage we are tentatively rejecting consumers' arguments that this requirement would be ineffectual, because no commenter has provided any support for its assertion that as a practical matter the contracts of carriage cannot be enforced, particularly where class-action litigation is available. We are also tentatively rejecting carriers' arguments that we should not require incorporation because this would subject them to the risk of inconsistent standards among the various jurisdictions. This risk exists already, since the carriers' contracts of carriage are enforceable in state courts, and it is not increased with the addition of new enforceable terms to these contracts. ATA has failed to establish that we lack the authority to require that contingency plans be incorporated in carriers' contracts of carriage. Our broad authority under 49 U.S.C. 41712 to prohibit unfair and deceptive practices encompasses this power. Indeed, 14 CFR part 253 shows that we have the authority not only to require that contracts of carriage include specified terms but also to regulate the means by which contract terms are disclosed to consumers. We tentatively believe that in providing for private enforcement of the plans as well as enforcement action by the Department, we are creating a stronger incentive for carriers to adhere to their plans. We invite interested persons to comment on the implications of our creating a private right of action based on a carrier's failure to follow the terms of its contingency plan. Commenters should address the potential for multiple lawsuits by classes as well as individual plaintiffs and the potential for inconsistent judicial decisions among the various jurisdictions. Commenters should also address whether and to what extent requiring the incorporation of contingency plans in carriers' contracts of carriage might weaken existing plans: That is, would the requirement encourage carriers to exclude certain key terms from their plans in order to avoid compromising their flexibility to deal with circumstances that are both multifarious and unpredictable?

As for the other points made by consumers, we are not proposing to require the plans to be airport-specific, although carriers may choose to adopt different standards for each airport in their plans. We are not proposing here to require airports to provide for concessions to remain open during lengthy tarmac delays, in part because we doubt that we have the authority to do so. Our proposed rule does not refer to ''potable water'' or ''operable lavatories,'' because water and lavatory facilities that are ''adequate'' are necessarily potable and operable, respectively. Furthermore, the quality of drinking water on aircraft is regulated by the Environmental Protection Agency (EPA). Our proposed rule does not address ventilation, because we have no basis at this stage to assess the adequacy of ventilation or to require potentially significant modifications to aircraft.

As for the other points made by carriers, those that rank operational flexibility as their highest priority are free to adopt a relatively long interval as their standard for returning a plane to the gate and allowing passengers to deplane. Were a carrier to follow this strategy only to see its market shares declining *vis-á-vis* its competitors with shorter intervals in their contingency plans, the carrier could amend its plan accordingly. Conversely, were a carrier to decide that it wanted to amend its plan to allow itself more time before returning the aircraft to the gate, the proposed rule provides that the amended plan would only apply to flights that the carrier has not yet offered for sale. This condition would protect consumers who have booked flights under the impression that they will not be kept on the tarmac more than, say, three hours from the unpleasant discovery that by the time they actually fly the carrier has amended its contingency plan to make that interval six hours.

As for RAA's requests that we treat regional carriers and their larger-carrier code-share partners differently, we have decided not to do so at this stage in the rulemaking process. The rule that we are proposing would apply to both partners in a code-share arrangement, because even if the determination to cancel a flight or keep it on the tarmac is made by the major carrier or results from action by the FAA, it is the carrier operating the flight that remains directly responsible for the passengers for the duration of the delay. We expect that the major carriers and their regional code-share partners would collaborate on their contingency plans to come up with standards that suit both parties. We recognize that the regional carriers' plans would reflect the limited size and capacity of their aircraft, and nothing in the rule would bar a regional carrier from providing differently for aircraft of different sizes.

Nevertheless, while we are proposing here not to treat regional carriers and larger carriers differently in the rule, we invite interested persons to comment on whether, in the event that we adopt a rule requiring contingency plans, we should limit its applicability to carriers that operate large aircraft—*i.e.*, aircraft originally designed to have a maximum passenger capacity of more than 60 seats. Proponents of this alternative approach should provide arguments and evidence in support of their position, as should opponents.

2. Response to Consumer Problems

The ANPRM: This proposal would require every certificated and commuter air carrier that operates domestic scheduled passenger service using any aircraft with a design capacity of more than 30 passenger seats to address mounting consumer problems in the following ways: At its system operations center and at each airport dispatch center, designate an employee to be responsible for monitoring the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers and have input into decisions such as which flights are cancelled and which are subject to the longest delays; on its Web site, on all e-ticket confirmations, and, on request, at each ticket counter and gate, inform consumers how to file a complaint with the carrier (name of person or office, address, and telephone number); and send a response to each consumer complaint received within 30 days of receipt.

The Comments: CAPBOR and its members support the proposal and take the position that carriers should be required to provide postal addresses, telephone numbers, and e-mail addresses for customer service, to acknowledge receipt of a complaint within 24 hours, to resolve the complaint within 30 days of receiving it, and to notify the Department if the passenger disagrees with the resolution. In addition, CAPBOR calls for a requirement that consumers' complaints to the carriers and complaints that the Department refers to the carriers be combined and tabulated by category, with the results made available to the public every month.

Of the individual commenters, one agrees in principle with the proposal

but voices concern over the cost of creating a position at each airport for responding to complaints, reasoning that this would not affect delays. Another voices concern that not all consumers have access to the Internet and favors requiring travel agents to provide the information on where to complain as well.

Of the other consumer associations, ACAP and U.S. PIRG concur with CAPBOR, Public Citizen concurs with CAPBOR and U.S. PIRG, and the National Consumer League concurs with U.S. PIRG. NBTA, in contrast, characterizes the proposal as micromanagement of airline customer service. NBTA maintains that most if not all carriers have customer service departments to address problems that arise and that poor responses will affect consumers' business decisions.

Delta is again the only carrier that commented individually on this issue. Delta deems a regulation requiring the designation of carrier employees responsible for what it characterizes as responding to and managing extended ground delays and flight cancellations, and prescribing such employees' locations, to be unnecessary, because such a requirement is implicit if the Department mandates contingency plans. Delta is concerned, moreover, that the proposal could work to undermine carriers' ability to establish processes and management hierarchies that ensure compliance with their contingency plans. Delta states that it is committed to providing multiple customer-friendly channels for complaints, and given the rapid development of communication technologies, the carrier opposes making the use of particular channels mandatory. Delta opposes a 30-day requirement for responding to consumer complaints and posits 60 days as the current industry standard. It cautions that in cases involving international travel, particularly under code-sharing arrangements, ''coordinating the best solution for the customer may require more than 30 days, especially if a detailed investigation is needed.'' In addition, Delta is concerned that seasonal surges in complaint volume or unexpected events could mean financial hardship for a carrier that was required to increase staffing temporarily to respond to all complaints within 30 days.

Of the carrier associations, NACA states that its members already monitor their flight operations at each airport and maintains that it should be up to each carrier to decide if it wants to have this be one employee's sole responsibility or include it with an employee's other responsibilities. As for responding to complaints, NACA contends that the Department should specify how complaints are to be lodged with the carriers if it is going to require a response to each complaint. Whether the complaint is handed to an airline agent at the airport, submitted via e-mail, or sent by U.S. mail, the complainant should be required to have proof that the carrier received the complaint. NACA believes 30 days to be insufficient for responding to complaints but would accept a 45-day requirement even though it prefers 60 days. NACA's comments are endorsed by ACAA.

ATA, with IATA's endorsement, supports requiring carriers to respond to consumer problems and cites the voluntary commitments to do so that a number of carriers have long had in place. ATA states that its members agree that consumers should receive responses to their complaints within 30 days when practicable, provided that by ''response'' the Department means notification that a complaint has been received and is being reviewed and that by ''complaint'' the Department means a passenger's complaint that raises customer service concerns and that is submitted to the carrier's customer relations department. It contends, however, that resolving complaints in only 30 days is difficult if not impossible. ATA supports the idea of designating an employee at a carrier's systems operations center to monitor the effects of flight delays and cancellations, provided that the designee is a current employee who carries out other responsibilities as well. It does not support requiring such an employee at each airport dispatch center, claiming that this would duplicate existing procedures and would strain carriers' resources without lessening the problems that consumers face. ATA supports allowing each carrier to choose the means by which it receives complaints and responds to them, and it supports requiring carriers to post information on contacts for complaints on their Web sites. It opposes requiring this information on e-tickets as redundant, if the information is on the carriers' Web sites, and burdensome, as carriers would have to change the printing format for e-tickets to accommodate the new information. Thus, ATA argues, the benefit of including complaint information on e-tickets would outweigh the cost, particularly in the absence of any evidence that users of e-tickets are experiencing any difficulty in finding this information at present.

RAA urges the Department to let carriers monitor the effects on passengers of flight delays, flight cancellations, and lengthy tarmac delays by whatever means they choose, given the wide variety of circumstances among all carriers and between major and regional carriers. It asserts that for its members, designating a single person rather than making all employees responsible for taking passengers' interests into account might be wasteful if not counterproductive given how they may well have little if any control over decisions on delays, diversions, and cancellations. As far as consumer complaints are concerned, RAA asserts that the best means for giving contact information may similarly vary among carriers and between major and regional carriers. Tickets for RAA's members' code-share services are typically sold and issued by their major-carrier partners, which often staff the ticket counters and gates that consumers use as well. Under these circumstances, RAA contends, its member carriers should not be held responsible for telling consumers how to file complaints. RAA states that when a major carrier receives a complaint that involves its regional carrier partner, it coordinates with the latter to gather facts so that it can respond to the consumer. Like ATA, RAA maintains that 30 days is sufficient for acknowledging receipt of a complaint but too little time for resolving one. Finally, RAA takes the position that any requirements adopted should only apply to flights operated with aircraft seating at least 30 passengers and not to flights operated with smaller aircraft.

ACI–NA supports this proposal but did not specifically address it.

Of the travel agency associations, ASTA agrees in principle with carriers' having an employee responsible for monitoring the effects of schedule disruptions on passengers and having input in the decisions made but doubts that this requires as many individuals as the proposal contemplates given current communications technology. ASTA supports a period of 30 days for responding substantively to consumer complaints. It opposes allowing individual carriers to choose how complaints may be filed, supporting instead a uniform requirement that complaints be accepted by telephone, by U.S. mail, and by e-mail. ITSA did not address this issue.

Proposed Rule: We have decided to propose a rule along the lines set forth in the ANPRM, and again we invite comment from all interested persons. Specifically, our proposed new rule, 14 CFR part 259, includes a requirement

that every certificated and commuter air carrier that operates scheduled domestic passenger service using any aircraft with a design capacity of more than 30 passenger seats respond to consumer problems concerning its scheduled flights in three ways. First, at its systems operations center and at each airport dispatch center, the carrier would have to designate an employee who monitors the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers and has input into decisions on which flights to cancel and which to delay the longest. We anticipate that these responsibilities would be borne by current employees in addition to their other responsibilities; we do not intend for any carrier to have to hire new employees to comply with this regulation. Second, on its Web site, on all e-ticket confirmations, and, upon request, at each ticket counter and gate, the carrier would have to inform consumers how to file a complaint by providing the name, address, telephone number, and e-mail or Web-form address of the appropriate person or office. Carriers would be given 180 days to modify their Web sites and reformat their e-tickets before this requirement would take effect. Third, for each complaint filed, the carrier would have to acknowledge receipt to the consumer within 30 days and provide a substantive response within 60 days of receiving it. By ''substantive response,'' we mean a response that addresses the specific problems about which the consumer has complained. We are not proposing that this provision cover public charter operations. Complaints about public charter flights are filed not with the carrier but with the Public Charter Operator; also, the carriers operating these flights may not have employees at each airport that they serve.

In adopting this approach, we are tentatively rejecting as unrealistic CAPBOR's contention that we should require acknowledgement of a complaint's receipt within 24 hours and a resolution of the complaint within 30 days. The deadlines that we are proposing represent standard practice in the industry and should allow carriers adequate time to investigate and respond appropriately. We are addressing carriers' opposition to hiring new employees to do work that is redundant by clarifying that this is not our intent. We are tentatively rejecting carriers' arguments that we should not make any particular complaint channel mandatory, because we recognize that not all consumers have access to the Internet. Some consumers traveling on e-tickets purchased by a third party or by telephone may not have access to the Internet themselves. We are tentatively rejecting ATA's contention that requiring carriers to provide information on e-tickets regarding how to complain is redundant and burdensome, because ATA has not supported this contention. Under the proposed rule, an electronic e-ticket confirmation or itinerary may include a link to the complaint information in lieu of displaying the entire text. We invite ATA to provide evidence on the costs to carriers of changing the format for e-tickets to accommodate the new information in its comments on this proposal. We are tentatively rejecting RAA's contention that its members should not be required to tell consumers how to file complaints. The rule by its terms would not require those regional carriers that do not have Web sites or ticket counters or issue e-tickets to provide information on filing complaints via these channels. Passengers of these carriers who wish to complain should be able to find out at the gate how to do so. RAA provides no basis for its assertion that flights operated with aircraft seating fewer than 30 passengers should be exempt from this requirement.

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

The ANPRM: This proposal would codify the Department's 2007 enforcement policy on chronically delayed flights. The proposed new text would define a chronically delayed flight as a flight by a covered carrier that is operated at least 45 times in a calendar quarter and arrives more than 15 minutes late more than 70 percent of the time. It would define a covered carrier as one that reports on-time performance data to the Department under 14 CFR part 234—*i.e.*, a certificated U.S. carrier that accounts for at least one percent of domestic scheduled passenger revenue. The text would state that the Department considers a chronically delayed flight to be an unfair and deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712 if it is not corrected before the end of the second calendar quarter following the one in which it is first chronically delayed.

The Comments: CAPBOR supports this proposal but believes that carriers should not be allowed a full six months to correct chronically delayed flights and that the Department should automatically impose civil penalties whenever a flight becomes chronically delayed in any given quarter. CAPBOR also favors stricter standards than the ones that we proposed: Specifically, that the rule should apply to flights operated at least 24 times in a calendar quarter and that flights should be deemed chronically late if they arrive at least 15 minutes late more than 50 percent of the time. Ms. Hanni goes further and calls for an even lower threshold of 40 percent. CAPBOR wants the Department to make certain that carriers cannot evade the rule by changing the number of a flight or changing its departure time by a few minutes. Ms. Hanni adds that the Department should also address the problem of chronically cancelled flights by regulation.

None of the individual commenters addressed this proposal. Of the other consumer associations, ACAP concurs with CAPBOR, as do U.S. PIRG, Public Citizen, and the National Consumers League. NBTA alone supports the proposal as drafted.

Delta, the only carrier that commented individually on this issue, takes the position that the Department should use the standard proposed as a rebuttable presumption that a flight violates 49 U.S.C. 41712 rather than as a rule. In Delta's view, the Department must also consider in each case whether the carrier has intended to deceive the public or compete unfairly, because flights may fail to operate on time for an extended period for many reasons that are beyond the carrier's control. For example, if a flight performs erratically due to unpredictable delays attributable to problems in the national air traffic control system, the carrier cannot solve the problem by extending the block time to make the flight operate on time more consistently: This would make the flight arrive early when the system functions properly, which in turn could cause disruptions and tarmac delays at the destination airport. Another example would be a period of harsh and unexpected weather arriving just when a carrier thought that it had solved the problems that had made a flight late. Delta warns that adopting a rigid standard for enforcement could result in carriers' cancelling flights or arbitrarily retiming them significantly, thus creating ''new'' flights, solely to avoid enforcement action and even though they might otherwise have eventually solved the scheduling problems. Delta warns that this approach is in turn likely to cause passengers more inconvenience than would continuing to try to address the real issues affecting a flight's performance. In cases where the actual individual delays of a given flight are relatively small—say 16 minutes, for example—passengers fare better if the flight is maintained than if it is cancelled altogether.

Delta opposes expanding the definition of a chronically delayed flight to include international flights to and from the United States. It claims that any carrier's ability to adjust the timing of such flights is limited by time zone issues and consumers' preference to arrive at foreign destinations at particular times. Additionally, foreign laws and airport authorities may limit a carrier's ability to adjust schedules or address other operational factors that affect on-time performance.

In Delta's opinion, adopting the proposal as a rule would not result in improvement of on-time performance, because carriers already deem customer satisfaction to be critical to their success and are therefore already doing whatever they can to meet their schedules. Rather, Delta suggests, the government should use its resources to improve the air traffic control system. The carrier concludes that in any enforcement action, if a carrier can show that it has done all it reasonably can to resolve the problem but that the underlying primary cause is outside of its control, no sanction should be imposed.

Of the carrier associations that commented, ATA, with IATA's endorsement, agrees with Delta that the proposed standard should only be a rebuttable presumption and not a rule, because in some circumstances a carrier may have legitimate reasons for not being able to comply. ATA supports the proposed definition of a chronically delayed flight and prefers it to the standard proposed by the Department's Inspector General (IG), *i.e.*, flights arriving 30 minutes late 40 percent of the time. ATA opposes expanding the definition to include international flights.

RAA does not oppose defining chronically delayed flights, but it does oppose treating them as an unfair and deceptive practice subject to enforcement action. RAA believes that the market will punish carriers that fail to satisfy consumers and that the Department should rely on market forces rather than enforcement. If the Department persists nevertheless, RAA takes the position that the rule should apply only to the carrier that sets the schedules and enters into contracts of carriage with passengers when that carrier is not the carrier operating the flights. In a similar vein, ACAA contends that any rule on chronically delayed flights should apply only to the largest carriers.

ACI–NA states that chronically delayed flights can harm both airports and their local communities economically by causing passengers to lose confidence in an airport's operations. A smaller airport can sustain greater harm, according to ACI–NA, because even though larger airports may have more delayed flights, delayed flights at a smaller airport may constitute a larger percentage of that airport's flights. Also, delays at small airports whose flights feed a large carrier's hub are more disruptive to passengers, because they cause more missed connections. Regarding the proposal, ACI–NA maintains that a threshold of 45 flight operations per calendar quarter, or approximately four flights per week, will improperly exclude operations at many small airports and thus fail to protect their passengers. Instead, ACI–NA proposes a threshold of 12 flight operations per calendar quarter, or one flight per week. ACI–NA also maintains that a late-arrival threshold of more than 70 percent is too lenient to carriers and unfair to consumers, and it proposes a threshold of 50 percent. Finally, ACI–NA maintains that any rule should apply not only to the major and national carriers that account for at least one percent of domestic scheduled passenger revenue but also to the operations of regional or feeder carriers that are affiliated with the larger carriers. ACI–NA reasons that delays harm passengers just as much regardless of which certificate holder operates the aircraft. Furthermore, with regional carriers now transporting one of every four domestic passengers, operating half of daily domestic flights, and providing the only scheduled service to about 70 percent of U.S. airports, ACI–NA deems it critical that their operations be covered by the rule.

Of the travel agency associations, ASTA supports defining chronically delayed flights as an unfair and deceptive practice but suggests that the proposal can be improved in a number of ways. First, the threshold should be set at 50 percent rather than 70 percent, which will be a stronger incentive for airlines to adjust their schedules or operations. Second, rather than permitting a carrier two calendar quarters to correct a chronically delayed flight, correction should be required within the first calendar quarter following the one in which the flight became chronically delayed: ASTA maintains that three months should usually suffice, and in cases where a carrier can show why it should be granted additional time, the Department would have the discretion to accommodate it. Third, ASTA supports applying this rule to international scheduled passenger service by both U.S. and foreign carriers. ITSA did not address this issue.

Proposed Rule: With some modification to the details, we have decided to propose a rule along the lines set forth in the ANPRM, and we invite comments from all interested persons. Specifically, we propose to amend 14 CFR 399.81 to define chronically delayed flights and to specify that the Department considers flights that continue to be chronically delayed for three consecutive calendar quarters to be an unfair and deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. 41712 and subject to enforcement action. This proposal defines a flight as chronically delayed if it is operated at least 30 times in a calendar quarter and arrives more than 15 minutes late more than 70 percent of the time. As far as substitute flights are concerned, all flights in a given city-pair market whose scheduled departure times are within 30 minutes of the most frequently occurring scheduled departure time would be considered to be one single flight for purposes of assessing chronic delays. The revised proposal reflects the Department's 2008 enforcement policy, and we tentatively believe that it strikes the appropriate balance between consumers' need to have reliable information about the real arrival time of a flight and the carriers' inability to control or predict the weather and certain other factors that can contribute to delays. In addition, for the reasons set forth below in support of our decision not to propose a rule requiring on-time reporting of international flights, we have also decided against proposing to include foreign air transportation—*i.e.*, international flights—in the definition of a chronically delayed flight.

We further invite interested persons to comment on an alternate definition of a chronically late flight as one that is operated at least 30 times in a calendar quarter and that arrives at least 30 minutes late at least 60 percent of the time. While this latter approach could theoretically yield more benefits for consumers, we are concerned that adopting this more stringent standard could lead to a large number of flight cancellations and possibly even the elimination of service to some communities. Also, we invite comment on whether we should adopt an even stricter definition favored by the Department's Inspector General: A flight that is cancelled or delayed 30 minutes or more at least 40 percent of the time. The Inspector General calculated in 2006 that using this definition would yield 5,369 chronically delayed flights, a very high number (*Follow-Up Review:*

Performance of U.S. Airlines in Implementing Selected Provisions of the Airline Customer Service Commitment, Report Number AV–2007–012, Issued November 21, 2006, at page 5, footnote 8, and Attachment, page 17). Because we are concerned that any consequential increase in enforcement responsibilities might require the diversion of resources from other aviation compliance activities, commenters should assess both the benefits that this definition would engender and the costs that it would entail. Of course, regardless of which definition we adopt, we always have the authority to take enforcement action against flights that do not meet the definition but that appear to involve unrealistic scheduling and thus to constitute unfair and deceptive practices and unfair methods of competition within the meaning of 49 U.S.C. 41712.

For enforcement purposes, we are considering the option of not treating a flight that remains chronically delayed for three consecutive quarters as an unfair and deceptive practice and an unfair method of competition if every prospective passenger using any available channel of purchase is informed before buying a seat on that flight that the flight is chronically delayed. There is no deception or unfairness if a consumer who knows that a flight is chronically delayed chooses it for travel nonetheless. We invite comment on this approach.

We are tentatively rejecting as too draconian the consumers' contentions that we should not allow a full six months for the correction of a chronically delayed flight, that we should automatically impose civil penalties in the calendar quarter when a flight becomes chronically delayed, and that we should define chronically delayed flights more broadly. As we have stated above, our aim in proposing rules is to strike a balance between a passenger's need to have the best possible information about the real arrival time of a flight and the carriers' inability to control—or foresee—the weather and various other factors that can cause delays. As for chronically cancelled flights, the proposed rule would treat each flight that is cancelled within seven days of departure as a delayed flight for purposes of our analysis, but we decline at this time to consider regulating chronically cancelled flights in other respects. We are addressing consumers' concerns that carriers could evade the rule by changing a flight's number or departure time by providing for the treatment of substitute flights as the same flight.

We are also tentatively rejecting the carriers' contention that we should use the standard we adopt as a rebuttable presumption and not a rule. Chronic delays are a serious problem that must be addressed, and we consider the standard we are proposing here to be a reasonable and feasible approach. We invite carriers to provide evidence to the contrary in their comments on this proposal. Furthermore, as the carriers know, the Department's enforcement procedures afford a potential respondent ample opportunity to show extenuating or mitigating circumstances and thus perhaps avoid penalty. For example, our enforcement procedures are sufficiently flexible for us to take account of the contract terms between a major carrier and its regional code-share partner in any investigation of the latter's delayed flights. As for ACAA's contention that any rule should apply only to the largest carriers, while ACI–NA's comments attest to the importance of addressing unrealistic scheduling by small and regional carriers, by its terms the proposed rule would not apply to any carrier that does not account for at least one percent of domestic scheduled passenger revenue. These carriers already collect and report on-time performance data. Their operations account for nearly 90 percent of all domestic passenger enplanements. In our view, the substantial cost burden that compliance with this proposal would impose on the smaller carriers, which are not required to collect or report on-time performance data, would outweigh any corresponding public benefits.

4. Delay Data on Carriers' and Other Sellers' Web Sites

The ANPRM: This proposal would require both carriers that report on-time performance data to the Department and online travel agencies to include on their Web sites, at a point before the passenger selects a flight for purchase, the following information on each listed flight's performance during the previous month: The percentage of arrivals that were on time, the percentage of arrivals that were more than 30 minutes late, special highlighting of any flight that was late more than 50 percent of the time, and the percentage of cancellations.

The Comments: CAPBOR and its members support requiring carriers to publish delay data on their Web sites for all flights but they assert that flights should be defined as ''late'' if they arrive more than 15 minutes late, not 30 minutes as proposed. CAPBOR believes that passengers will use this information to make better choices and that as a consequence, carriers with more delayed flights will have a greater incentive to correct their problems. CAPBOR takes the position that carriers should be required to provide the information not only on their Web sites before booking but also upon request to consumers who book by telephone. CAPBOR also takes the position that third-party reservations services should be required to provide this information as well and that carriers ''should be required to provide open interfaces for internet applications to access [these] data from their servers so as not to impose undue costs [on] third parties.'' CAPBOR favors applying this rule to the international flights of U.S. carriers and to all domestic scheduled passenger service using aircraft with more than 30 passenger seats. Ms. Hanni adds that special highlighting should be required for any flight that is late more than 40 percent of the time. In her view, however, it would not be enough to require disclosure of the performance information by telephone only upon request. Rather, she maintains, we should require disclosure of information about both chronically delayed and chronically cancelled flights whenever a consumer is booking flights, be it on line, by telephone, or even in person.

Those individual commenters who addressed this issue agree that disclosure of this information should be required for telephone sales as well as internet sales. They also agree that the disclosure requirement should apply to third-party reservations services.

Of the other consumer associations, ACAP agrees with CAPBOR, as does U.S. PIRG. Public Citizen concurs with U.S. PIRG and CAPBOR; the National Consumers League concurs with U.S. PIRG. NBTA supports requiring carriers to provide on-time performance information to consumers ''so long as these requirements are aligned with performance reports that carriers must file with DOT.''

Senators Boxer and Snowe support this proposal.

As for members of the industry, Delta, again the only carrier that commented individually on this issue, agrees that giving interested consumers information on historical on-time performance is good customer service, but the carrier strongly objects to detailed regulation of how this information is provided. In Delta's view, carriers should be free to decide what to tell consumers and how. On its Web site, Delta currently makes available the percentage of operations that were on time for any flight for which it is required to file on-time performance data with the Department. Once a consumer has selected dates and

routes, the screen for flight availability and pricing provides access to the following information via a click on the flight number: equipment type, flight duration and distance, and on-time performance for the previous month. In Delta's view, its practice meets consumers' reasonable wishes for information on a flight's historical performance, and the other categories of information that the Department proposes to require are unnecessary. Delta also contends that requiring carriers to change their Web sites to provide this additional information would impose substantial costs without yielding offsetting benefits for consumers. Unlike on-time performance data, Delta maintains, the data needed to deliver the additional information are not already collected, and Delta's existing software would not support collecting them or displaying and highlighting the results.

Delta also contends that the additional information that the proposal would require is of little relevance to consumers when purchasing air transportation. First, it reasons, a flight's performance over a month does not predict its performance today, tomorrow, or in three months, because reasons for delays can vary with seasons and from week to week or day to day according to weather, special events, or infrastructure problems (*e.g.*, ATC system failures, runway or taxiway closures). Delta states that it is constantly identifying and analyzing flights that perform poorly and taking measures to improve their performance by adjusting schedules and block times, crew rotations, maintenance schedules, and other operational factors. As a result, Delta states, a flight that performs poorly in one month rarely performs poorly the next month, and it is even less likely to perform poorly several months in the future. Second, Delta states that it has monitored customer calls at the rate of about 5,000 per month and that between March and September of 2007 it did not observe even one request for information on on-time performance.

Delta maintains that the percentages of its arrivals that are more than 30 minutes late and the percentage of its cancellations would be ''statistically insignificant'' (Delta estimates that just over ten percent of its flights system wide arrive more than 30 minutes late and states that in November of 2007 its completion rate was 99.3 percent), but it claims that collecting the underlying data to comply with the proposal would ''require substantial infrastructure modifications.'' Delta also maintains that about 40 percent of all cancellations result from mechanical problems, which are not specific to flight, route, or schedule, and therefore, providing this information during the booking process would not alert consumers to problematic flights.

Delta objects to requiring reservations agents to disclose on-time performance at the time of booking without being asked. It states that this would increase call times and call wait times and the costs associated with each. The delays, it states, would irritate callers who do not seek this information—*i.e.*, in Delta's experience, most callers. Consumers would not benefit, Delta contends, because historic performance is a poor predictor of performance when the passenger plans to fly.

Of the carrier associations that commented on this proposal, ATA, with IATA's support, favors the disclosure of delay information on carriers' Web sites or via a link to a third-party Web site only when consumers request this information. Stating that carriers already have commercial incentives to provide information that is of interest to consumers and that many already post on-time data on their Web sites, ATA contends that requiring the disclosure of data that consumers demand only occasionally would waste resources by increasing programming costs and consuming valuable screen space. Such a requirement would also waste the time of those consumers who do not find the information useful.

Like Delta, ATA strongly opposes requiring carriers' reservations agents to disclose on-time information without being asked, because the high cost of compliance would outweigh its speculative benefit. Furthermore, ATA maintains, requiring carriers' reservations agents to provide this information but not requiring the same of travel agents would prejudice competition between the two channels by imposing the added costs only on the carriers. ATA estimates the cost of compliance at $0.50 per call, which would translate into an additional $25 million per year for a carrier that receives over 50 million calls at its reservations center just for agents' time and not including training and programming costs. ATA also maintains that Computer Reservations Systems' (CRSs') displays currently have no space to show the extra on-time information covered by the proposal. The costs of modifying the displays would be high but the benefits few, ATA argues, because carriers' reservation centers account for only about 20 percent of all bookings. This requirement would also waste the time of those passengers who do not want the additional information. At the FAA's valuation of passenger time at about $30 per hour, the waste could run to tens of millions of dollars each year.

ATA also maintains that requiring ''special highlighting'' of flights would entail high costs for extensive reprogramming of internal carrier software and extensive changes to carriers' Web sites but would yield benefits that are dubious at best. ATA does not believe that the proposed disclosures would give consumers better information or help them make better choices, because historic performance data do not predict future performance.

RAA believes that this proposal would burden the reservation process and Web sites by giving passengers information that they may not want and by cluttering display screens so that they could not accommodate as many flights as they do now. RAA agrees with Delta and ATA that historic performance information may well have no predictive value for a consumer's flight, given variations in weather, for example. RAA argues that ''subjecting passengers to information overload could only further confuse them, lengthen the time required for booking a flight, substantially increase the workloads of reservation agents and webmasters and lengthen customer wait times, all to the detriment of the passenger.'' RAA maintains that passengers who want information on their flights' past performance can find it in the Department's reports and can also use this source to compare the performance of flights in the same city-pair offered by competing carriers. It states that most carriers' Web sites already offer performance information on the previous and current day's flights, and it opines that this is the information that consumers find most useful as their travel days draw near. In addition, some historic performance information is already available from reservations agents on request. RAA suggests that carriers could offer those passengers who want additional information a link to the Department's Web site, a solution it deems superior to ''imposing unwanted information on travelers who would rather expedite their bookings.'' Finally, RAA observes that regional airlines that operate services for major carrier code-share partners and that do not offer their own reservations and ticketing services would not be covered by this proposal.

ACI–NA supports the proposal but did not specifically address it.

Of the travel agency associations, ASTA opposes this proposal as unworkable and unhelpful to consumers. Noting that current

technology could not deliver on-time data for display by online travel agencies until the first week of the month following the deadline for reporting the data to the Department, which itself is 15 days after the applicable reporting month, ASTA maintains that ''[w]hat happened on a flight two months ago (on average) is not particularly instructive for what flights will do today, especially if the seasonality factor is considered.'' ASTA agrees with Delta and ATA that the costs of reprogramming to comply with the proposal would be significant and that the reprogramming could complicate the web displays of all online sellers of air transportation. If the Department does adopt a rule requiring disclosure of flights that are late more than a certain percentage of time, ASTA believes that the percentage should be the same as the percentage the Department uses to define flights that are chronically delayed. In addition, ASTA believes that if the Department uses enforcement aggressively against chronically late flights, carriers may be expected to take steps to avoid enforcement, which in turn would lower the incidence of late flights and make the proposed rule superfluous.

ITSA opposes this proposal, taking the position that the publication of flight-specific on-time performance data should be left to the marketplace. In ITSA's view, vendors should be allowed to exercise their business judgment to determine the extent to which consumers demand this information and whether and how to present it. ITSA contends that consumers who use its members' services would not hesitate to let these vendors know if they wanted to have the historic performance data covered by the proposal when they book flights, and it asserts that so far they have not done so, not even in surveys and focus groups conducted by vendors. ITSA agrees with the other industry parties who contend that historic flight data have little if any predictive value. ITSA points out that the proposal's requirements would affect not only online reservations services, including those of the carriers, but also the CRSs on which all vendors rely. If, over ITSA's objections, the Department does propose a rule requiring disclosure of historic on-time performance, ITSA seeks clarification of whether all, some, or none of the rule's provisions would apply to third-party vendors as well as to the carriers. ITSA also raises the issue of liability for performance data's accuracy and asks the Department to specify that online vendors and CRSs rely entirely on carriers for these data.

Proposed Rule: We have decided to propose a rule mostly along the lines set forth in the ANPRM, and we invite comment from all interested persons. Specifically, we propose to amend 14 CFR 234.11 to require air carriers that report on-time performance to publish the following information on their web sites for each listed flight regarding its performance during the latest reported month: the percentage of arrivals that were on time (*i.e.*, within 15 minutes of scheduled arrival time), the percentage of arrivals that were more than 30 minutes late, with special highlighting if the flight was late more than 50 percent of the time, and the percentage of cancellations. Carriers will be able to comply with the rule in one of the following ways: by showing the percentage of on-time arrivals on the initial listing of flights and disclosing the remaining information on a later page at some stage before the consumer buys a ticket, or by showing all of the required information via a hyperlink on the page with the initial listing of flights. To ensure that all carriers are posting information covering the same month, we are proposing to require that they load the information for the previous month into their internal reservations systems between the 20th and the 23rd days of the current month. (This latter requirement would also apply to § 234.11(a), the existing requirement that carriers disclose on-time performance information during reservation calls, ticketing discussions or transactions, or flight inquiries.) We invite comment from carriers on whether they would find it more convenient to load the information overnight on the third Saturday of the month than between the 20th and 23rd days as proposed.

In adopting this approach, we are tentatively rejecting consumers' request for disclosure of the percentage of arrivals that were more than 15 minutes late and special highlighting of flights that are late more than 40 percent of the time as excessive and unnecessary. We also tentatively reject the contention that the same disclosures should be required during telephone bookings. Section 234.11 already requires disclosure of on-time performance when requested during live discussions, transactions, or inquiries. We tentatively agree with the carriers that the costs of providing this and other information to all callers whether requested or not would be unduly burdensome and of dubious benefit, especially given that the rule will give consumers access to this information on the carriers' web sites. We are tentatively rejecting the arguments that flight performance data are irrelevant to consumers: the consumers' comments show otherwise. We invite those who file comments in opposition to this proposal to support their arguments with data on the costs of modifying their web sites to comply with the proposed disclosure requirements.

We have tentatively decided not to propose requiring on-line travel agencies to post the same information. For one thing, the costs of doing so would probably far outweigh the benefits for at least several years. Our preliminary economic analysis indicates that the costs to on-line travel agencies of complying with this proposed rule would run to $53.4 million in the first year and that benefits to passengers in this first year would amount to only $3.4 million. (Initial Regulatory Impact Analysis of Proposed Rulemaking on Enhanced Airline Passenger Protections at 56.) Applying the requirement only to carriers would cost the carriers $1.9 million in the first year while conferring benefits of $2.8 million on passengers. (*Id.* at 53.)

We would also like commenters to address one additional question: should we require covered carriers to provide the required information for domestic code-share flights, and if so, should this requirement apply to all domestic code-share flights or only to those operated by carriers that report on-time performance?

5. Complaint Data on Carriers' Web Sites

The ANPRM: This proposal would require certificated and commuter carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats to publish complaint data on their Web sites. Each carrier would have to disclose the number of consumer complaints it has received within a defined time frame concerning subjects such as tarmac delays, missed connections, and the failure to provide amenities to passengers affected by a flight that is delayed or canceled.

The Comments: CAPBOR and its members support the proposal and favor requiring carriers to publish complaint data on the following categories: involuntary bumping, baggage issues, frequent flyer miles, unaccompanied minors, delays, tarmac strandings, and disabilities. In Ms. Hanni's opinion, the complaints submitted only to the Department give an incomplete picture of the state of the industry.

Of the individual commenters, one does not think that consumers would use this information to make booking

decisions, because they base their decisions on price, availability, and schedule. This commenter also does not think that the proposal would lessen flight delays. Another individual agrees in general with the proposal but is concerned that the same information should be available to consumers who do not use the Internet.

Of the other consumer associations, ACAP concurs with CAPBOR, as do US PIRG, Public Citizen, and the National Consumers League. NBTA does not support this proposal. It argues that despite the desirability of transparency in general, the benefits to consumers of carriers' highlighting their complaints would be dubious. NBTA also cautions that many complaints are not sufficiently clear-cut to fall into simple categories and that the proposal makes no distinction between problems under carriers' control and problems resulting from uncontrollable factors such as the weather.

As for members of the industry, Delta, again the sole carrier to comment individually, strongly opposes this proposal. First, it maintains that carriers' communications on their Web sites are protected by the First Amendment and that there are constitutional restrictions on the government's ability to force carriers to communicate content on their Web sites with which they disagree and which does not show themselves in a positive light. Second, it asserts that consumers who would like to know other consumers' views of any carrier's customer service record can consult other sources, such as the Department's complaint data and a variety of third-party Web sites. Third, it contends, the proposal would be impossible to enforce, because carriers would inevitably adopt disparate standards. Fourth, it claims that the information would not be useful to consumers, because the carriers would not be able to indicate whether complaints were reasonable, how serious they were, or how they were handled.

Of the carrier associations that commented on this proposal, NACA, with ACAA's endorsement, opposes it. Like Delta, NACA believes that the subjective coding of complaint letters would render the cumulative numbers that would be published meaningless and devoid of context. Also like Delta, NACA contends that the proposal represents overreaching by the government. NACA states that the government does not force private businesses in any other industry to disclose their customer service results. NACA predicts, moreover, that the costs of collecting and disseminating the complaint data would be particularly onerous for the smaller carriers that do not file delay and baggage data with the Department and are not included in the Department's Air Travel Consumer Report.

ATA, with IATA's support, also opposes this proposal, because complaint data are already available from the Department and other online sources, because the information would not be useful to consumers, and because the Department provides no support for its implicit assumption that complaint data reflect a carrier's actual performance. ATA also maintains that compliance with the proposal would be costly, and, like NACA, it asserts that in no other industry are firms required to publish complaint data. In addition, ATA agrees with Delta that the proposal may well run afoul of the First Amendment.

RAA opposes this proposal as well, suggesting as an alternative that the Department encourage carriers to inform consumers on their Web sites of, and perhaps provide links to, the Department's Aviation Consumer Protection Division's Web site. This approach, it states, would give consumers standardized information that would be more helpful to them and would avoid burdening consumers with additional screen clutter and carriers with data storage and retrieval requirements.

ACI–NA supports this proposal but did not specifically address it.

Of the travel agency associations, ASTA opposes this proposal for the same reasons that it opposes requiring delay data on sellers' Web sites, and it questions the value of complaint data to consumers. ITSA opposes requiring online vendors to publish complaint data.

No Proposal: We have decided not to propose a rule requiring the publication of complaint data. Both the comments and our own further consideration have persuaded us that these data would be of little or no value to consumers. Specifically, consumers have access to a tabulation of complaints filed with the Department in the Air Travel Consumer Report, available on our Aviation Consumer Protection Division's Web site (*http://airconsumer.ost.dot.gov/*). In our experience with disability and discrimination complaints, consumers' complaints to the Department provide a reliable indication both of the types of complaints that individual carriers receive and, in relative terms, of which carriers receive the most complaints. Also, although carriers may receive 20 or 30 times as many complaints as the Department does, the Department's consumer complaint data are not subject to the disparate and subjective counting and coding that would inevitably occur under the original proposal.

6. International Flights' On-Time Performance

The ANPRM: This proposal would require U.S. carriers that report on-time performance to the Department and the largest foreign carriers to report on-time performance for international flights to and from the United States.

The Comments: CAPBOR and its members support a requirement that on-time performance be reported for all domestic and international scheduled passenger service using aircraft with more than 30 passenger seats. ACAP, U.S. PIRG, Public Citizen, and the National Consumers League concur. NBTA supports requiring U.S. and foreign carriers to report on-time performance for international flights as ''a reasonable mechanism to bring greater transparency to a growing market of [increasing] significance to NBTA and its international partners.'' It believes that the requirement should be comparable to that for domestic flights and that its implementation should be cost effective.

As for the industry commenters, of the carriers, Jet Airways generally supports initiatives to protect passengers without imposing unreasonable or unbalanced burdens on carriers, and it deems this proposal to be reasonable. Jet Airways suggests that to determine ''the largest foreign carriers'' the Department should consider the number of weekly flights a foreign carrier operates to U.S. airports and the concentration of international flights a single foreign carrier operates at each international gateway: for example, any foreign carrier that operates at least 70 flights a week to and from the United States could be included, as could any foreign carrier that accounts for at least 10 percent of scheduled international departures at a U.S. gateway.

Delta opposes the proposal. It believes on-time performance information to be of little use to consumers as a predictor of any given flight's performance on any given day, and it reports that consumers almost never request it. Delta doubts that on-time performance information for international flights will be useful to the Department for enforcement purposes, particularly flights to the United States, because factors that affect performance are often beyond a carrier's control, and because carriers often have little leeway to adjust schedules due to local airport restrictions, time zones, and other features of international aviation. In addition, Delta contends

that it would be unfair to impose the proposed requirement on U.S. carriers without holding foreign carriers to the same standards, which in turn would pose a risk that foreign authorities would retaliate by imposing burdensome requirements on U.S. carriers operating abroad, thus raising the costs of international flights.

China Eastern also opposes the proposal. It maintains that any benefits to consumers would be far outweighed by the costs to foreign carriers of devising the means to comply, especially those carriers that do not operate multiple daily flights to the United States. China Eastern also states that the information at issue is already available to consumers on Web sites such as *http://www.flightstats.com.* China Eastern cautions that if the Department adopts this proposal, other countries could impose similar requirements, resulting in ''a global patchwork of reporting requirements, imposing significant costs on foreign carriers and their customers.'' If the Department does adopt the proposal, China Eastern endorses Jet Airways' approach to defining ''the largest foreign carriers.'' China Eastern adds that if data are collected, the reasons for delays, such as the holding of flights for connecting passengers, weather, and airport congestion and traffic, should be clearly stated in conjunction with the delay statistics.

Virgin Atlantic opposes the proposal, stating that it is not required to supply on-time performance data to the UK or the EU and that producing such data and providing them to the Department would be a significant regulatory burden with questionable benefits for consumers. Virgin Atlantic contends that many factors affecting on-time performance are beyond any carrier's control. Virgin Atlantic also expresses concern over how to determine which foreign carriers are ''large,'' given that Virgin itself, like most foreign carriers, serves most of its international destinations only once or twice per day.

AAPA, a trade association of 17 major international carriers, states that it needs clarification from the Department on how it would use the on-time performance data, the level of detail the rule would require, and who would have access to the data before it can assess the costs involved with complying with this proposal. As for how to define ''large foreign airline,'' AAPA proposes that the definition be based on flight frequency to and from the U.S. rather than on carrier revenues.

IATA opposes the proposal. It states that sufficient on-time performance data are available through Web sites such as *http://www.flightstats.com* to give consumers all the information they might want or need. It maintains that any benefits the proposal might yield would be outweighed by its costs. In IATA's experience, consumers of international air transportation are swayed more by price and route convenience than by on-time performance. IATA's foreign-carrier members have not been required to report on-time performance data and would therefore incur significant costs in setting up the infrastructure to comply with the proposal. IATA contends that these costs would be especially onerous for the many foreign carriers that serve the United States infrequently. Like other industry commenters, IATA expresses concern that the proposal could prompt other governments to establish their own multifarious on-time performance reporting requirements, with each such requirement imposing another new set of costs, and with all of them together causing additional confusion for consumers. IATA notes that carriers sometimes delay long-haul international flights to accommodate delayed connecting passengers and cautions that the proposal could discourage this practice if carriers had to consider the consequences of poorer on-time performance results. This in turn would harm consumers, because frequently a carrier will only operate one such flight per day, so those passengers who missed it would have to stay overnight at their departure gateway.

ATA opposes the proposal for some of the same reasons as IATA. First, carriers frequently hold international flights for passengers who are delayed on inbound connecting flights, because an international flight may be a carrier's only operation to the foreign destination for that day or even for the week. These delays avoid stranding passengers, and ATA contends that carriers should not be penalized by having to report them. Second, ATA states that wind speeds tend to be stronger over the oceans, causing significant delays when carriers have to fly against prevailing winds. Third, ATA maintains that while equity and fairness would require the Department to impose the same requirements on foreign carriers as on U.S. carriers, the proposal would nonetheless place U.S. carriers at a competitive disadvantage, since they report all of their domestic flights as well as international flights, while most foreign airlines would report only a few flights per day, and ''[t]his severe disparity in the data would result in skewed and misleading information to consumers.'' Fourth, the proposal could subject U.S. carriers to new foreign regulations country by country. Fifth, the burden the proposal would impose on many foreign carriers would outweigh any theoretical benefit to consumers. ATA asserts that if the Department adopts the proposal over its objections, it should take care to ensure that domestic on-time performance data and international on-time performance data are kept separate in any source seen by consumers.

RAA opposes the proposal, fearing new reporting requirements on the part of foreign governments and the associated cost burdens. If the Department does adopt the proposal, however, RAA favors requiring reports only of the largest airlines in the largest markets.

ACI–NA supports the proposal but did not specifically address it.

Of the travel agency associations, ITSA takes the position that any reporting requirement for international flights ''should be carefully harmonized with the home nations of any such carriers, or through any appropriate multinational body, in advance, in order to avoid [responsive] additional and potentially inconsistent requirements on U.S. carriers'' which ''could lead to additional and possibly inconsistent publishing requirements for [online vendors, CRSs,] and others from multiple nations.'' ASTA did not address this issue.

No proposal: We have decided for several reasons not to propose a rule requiring the reporting of on-time performance for international flights. First, as some carriers report, this information is already available on the internet. Second, many international flights involve slot-controlled airports, which means that the carriers operating them already have an incentive to meet their schedules. Third, we do not have sufficient evidence of a problem to justify the costs of reporting on-time performance of international flights, and on the many international routes that are only served by one carrier, access to on-time performance data would not affect consumers' choices. Fourth, as some carriers contend, a reporting requirement could make carriers less inclined to hold flights for incoming connections, which would create hardships for passengers in city-pairs served once a day or less. Fifth, the operating environment for international flights is much less homogeneous than that for domestic flights: For example, a variety of transoceanic weather patterns and long stage lengths can affect operating times. Finally, a reporting requirement, particularly one based on

carrier size, could raise issues regarding carriers' ''fair and equal opportunity to compete'' if the requirement differentiated between U.S. and foreign carriers or among foreign carriers.

7. Carriers' Adherence to Customer Service Plans

The ANPRM: This proposal would require certificated and commuter carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats to audit their own adherence to their customer service plans. We stated that in conjunction with this proposal we are considering requiring any covered carrier that does not already have a customer service plan in place to adopt one and, and we called for comments on what provisions should be mandatory in such plans.

The Comments: CAPBOR and its members support the proposal and take the position that carriers should be required to audit their customer service plans every three years and submit the results of the audits to the Department for approval.

Of the two individuals who commented on this issue, one supports the proposal and believes that carriers should all be required to have customer service plans and that audits should be standardized. The other also supports the proposal but believes that the Department should review a percentage of the audits every year.

Of the other consumer associations, ACAP endorses CAPBOR's comments but adds its view that customer service plans are at present ''largely illusory exercises in public relations rather than genuine, enforceable, and measurable standards for customer service'' and concludes that therefore self-auditing of these plans would be meaningless. ACAP maintains that any auditors should be independent, that they should use the standards required for financial audits, and that the audits themselves should be ''reviewed and audited by [the Department] on a statistically significant sample basis to determine their effectiveness and validity.'' US PIRG concurs with CAPBOR; Public Citizen concurs with US PIRG and CAPBOR, and the National Consumers League concurs with US PIRG.

NBTA doubts that self-audits of customer service plans would make these plans credible, so it favors giving the Department's IG the resources to conduct audits of carriers' customer service, whether or not they have adopted specific plans, and to make the results public. NBTA suggests that these audits be conducted every three years or more and ''at similar times in the year to provide accurate comparative information.''

As for members of the industry, Delta, again the only carrier to comment individually, opposes the proposal as unnecessary. It contends that compliance with public customer service plans represents good business, particularly given the highly competitive state of the aviation marketplace at present. It contends that conducting a single, unified audit of compliance may not make sense, and it states that it has audit processes and controls in place within each of the business units involved in meeting its own service commitments. Rather than performing one comprehensive audit of all twelve points of its plan, Delta runs continuous quality assurance and performance management programs and has done so for many years. The carrier adapts these programs as appropriate to achieve its customer service goals. Delta therefore believes that a unified audit would be redundant and unnecessary. Delta also contends that aside from compliance with customer service plans being good business, a carrier's failure to comply with its plan is subject to enforcement by the Department. Audits are thus not necessary to give carriers a strong incentive to comply.

Of the carrier associations that addressed this issue, NACA, with ACAA's endorsement, opposes independent auditing as an unnecessary added cost. ATA, with IATA's support, objects to external auditing but not to self-auditing. Also, ATA believes that the Department should require all carriers to adopt customer service plans, but it opposes a requirement that these plans be incorporated in carriers' contracts of carriage on the same grounds as those on which it opposes requiring incorporation in the contracts of carriage of contingency plans for lengthy tarmac delays.

RAA is opposed to requiring all carriers operating any aircraft with more than 30 seats to adopt customer service plans reviewed by the Department and to audit their own compliance with these plans. The audits, it maintains, would impose significant expenses on the smaller carriers that are least able to afford them. RAA contends that many of the commitments in existing customer service plans would be inappropriate if applied to carriers that neither market nor sell air transportation directly to passengers and that do not enter into contracts of carriage with them. Moreover, it states that the major carriers that belong to ATA have already undertaken in their ''Customers First 12-Point Customer Service Commitment'' to ensure good customer service by their code share partners.

ACI–NA supports the proposal but did not specifically address it.

Of the travel agency associations, ASTA asserts that carriers have a history of not living up to their customer service commitments and that therefore some form of auditing should be mandatory. It maintains, however, that auditing assumes specific standards by which performance can be empirically measured and tested, and ASTA does not see clearly how this could work in the context of customer service commitments. ASTA does not think that rulemaking is the appropriate means for devising auditing standards. ITSA did not address this issue.

Proposed Rule: We have decided to propose a rule along the lines set forth in the ANPRM but with one significant addition, and again we invite comment from all interested persons. Specifically, our proposed new rule, 14 CFR part 259, would require every U.S. air carrier that accounts for at least one percent of domestic scheduled passenger revenue to adopt a customer service plan for its scheduled service and any public charter flights that it sells directly to the public and to adhere to this plan's terms, but unlike the proposal in the ANPRM, this proposed rule would require carriers to incorporate their customer service plans in their contracts of carriage. This incorporation would enable passengers to sue for breach of contract in the event that a carrier failed to adhere to its plan. We are proposing that this rule include public charter flights because the operating carrier is the party responsible for ensuring that charter passengers receive necessary and promised services. The rule would require each carrier to audit its own adherence to its plan annually and to make the results of its audits available for the Department's review for two years. At a minimum, each plan would have to address the same subjects as ATA's Customers First Customer Service Commitment (*http://www.airlines.org/customerservice/passengers/Customers_First.htm*): Offering the lowest fare available, notifying consumers of known delays, cancellations, and diversions, delivering baggage on time, allowing reservations to be held or cancelled, providing prompt ticket refunds, properly accommodating disabled and special-needs passengers, meeting customers' essential needs during long on-aircraft delays, handling ''bumped'' passengers in cases of oversales with fairness and consistency, disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration,

ensuring good customer service from code-share partners, and improving response to customer complaints. The provision on meeting customers' essential needs during long on-aircraft delays would be required at least to refer to the carrier's contingency plan for lengthy tarmac delays. Failure to do any of the above would be considered an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 and subject to enforcement action.

In adopting this approach, we are tentatively rejecting consumers' arguments that the Department should set standards for the audits, review all audits, or even have them done by our IG. The comments do not persuade us that we are more qualified than the carriers to carry out audits. We are also tentatively rejecting carriers' arguments against requiring audits. We are concerned that some carriers may not be living up to their customer service commitments. By requiring the relevant carriers to adopt plans, incorporate them in their contracts of carriage, audit their own compliance, and make the results of their audits available for us to review, we intend to afford consumers better protection than they have experienced up to now. The plans would be enforceable not only by the Department under 49 U.S.C. 41712 but also by individual consumers or classes of consumers under state contract law. The auditing requirement should bring further pressure to bear on carriers to live up to their commitments. As in the case of the contingency plans for lengthy tarmac delays, we invite interested persons to comment on the implications of our creating a private right of action here, particularly potential benefits to passengers, potential negative consequences, and the costs to carriers. Would requiring incorporation lead to carriers' weakening their existing plans? We also invite those carriers that oppose self-auditing as unduly burdensome to provide evidence of the costs that they anticipate. We further invite comment on whether we should also require carriers to describe in their customer service plans the services they provide to mitigate passengers' inconvenience resulting from flight cancellations and missed connections and to specify whether they provide these services in all circumstances or only when the cancellations and missed connections have been within their control.

8. Retroactive Applicability of Amendments to Contracts of Carriage

Although we are not proposing specific regulatory language on amendments to contracts of carriage here, we are considering adopting a rule to prohibit carriers from retroactively applying any material amendment to their contracts of carriage with significant negative implications for consumers to people who have already bought tickets. We would like commenters to address the implications of a carrier's being held to different contract terms *vis-à-vis* different passengers on the same flight if some bought their tickets before the contract of carriage was amended and some afterwards.

9. Effective Date

We propose that any final rules that we adopt take effect 180 days after its publication in the **Federal Register**. We intend to afford carriers sufficient time to adopt their plans, modify their computer programs, and take other necessary steps to be able to comply with the new requirements before we begin enforcing them. We invite comments on whether 180 days is the appropriate interval for completing these changes.

Regulatory Notices

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

This action has been determined to be significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. It has been reviewed by the Office of Management and Budget under that Order. A preliminary discussion of the proposed solutions to enhance airline passenger protections without creating undue burdens for the carriers is presented above and in the accompanying Regulatory Evaluation. On the cost side, we recognize that many of the measures suggested in this NPRM would impose costs for both implementation and operation on the entities that its proposed requirements would cover. The benefits we seek to achieve entail relieving consumers of the burdens they now face due to lengthy ground delays, chronically delayed flights, and other problems discussed in the NPRM. The benefits would be achieved by affording consumers significantly more information than they have now about delayed and cancelled flights and about how carriers will respond to their needs in the event of lengthy ground delays. Making this information accessible should not only alleviate consumers' difficulties during long delays but also enable them to make better-informed choices when booking flights. The Regulatory Evaluation has concluded that the benefits of the proposal appear to exceed its costs. A copy of the Regulatory Evaluation has been placed in the docket.

B. Executive Order 13132 (Federalism)

This Notice of Proposed Rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This notice does not propose any regulation that 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. It does not propose any regulation that imposes substantial direct compliance costs on State and local governments. It does not propose any regulation that preempts state law, because states are already preempted from regulating in this area under the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

C. Executive Order 13084

This notice 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 we are 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.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The regulatory initiatives discussed in this NPRM would have some impact on some small entities, as is discussed in the Regulatory Evaluation, but I certify that it would not have a significant economic impact on a substantial number of small entities. We invite comment to facilitate our assessment of the potential impact of these initiatives on small entities.

E. Paperwork Reduction Act

This NPRM proposes three new collections 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.*)

Under the Paperwork Reduction Act, before an agency submits a proposed collection of information to OMB for approval, it must publish a document in the **Federal Register** providing notice of and a 60-day comment period on, and otherwise consult with members of the public and affected agencies concerning, each proposed collection of information.

This NPRM proposes three new collections of information. The first is a requirement that certificated and commuter air carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats retain for two years the following information about any ground delay that either triggers their contingency plans for lengthy tarmac delays or lasts at least four hours: the length of the delay, the cause of the delay, and the actions taken to minimize hardships for passengers. The Department plans to use the information to investigate instances of long delays on the ground and to identify any trends and patterns that may develop. The second is a requirement that each air carrier that accounts for at least one percent of scheduled domestic passenger revenue audit its own adherence to its Customer Service Plan annually and retain the results for two years. The Department plans to review the audits to monitor carriers' compliance with their plans and take enforcement action when appropriate. The third is a requirement that each air carrier that accounts for at least one percent of scheduled domestic passenger revenue and maintains a web site display information on each listed flight's on-time performance for the previous month. This information will help consumers to select their flights.

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

1. *Requirement to retain for two years information about any ground delay that triggers the respondent's contingency plan for lengthy tarmac delays or lasts at least four hours.*

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

Estimated Annual Burden on Respondents: 0 to 9 hours and 50 minutes (570 minutes) per year for each respondent. The estimate was calculated by multiplying the estimated time to retain information about one ground delay (15 minutes) by the total number of ground delay incidents lasting at least four hours per respondent (0 to 38 incidents).

Estimated Total Annual Burden: A maximum of 73 hours and 35 minutes (4,401 minutes) for all respondents. The estimate was calculated by multiplying the estimated time to retain information about one ground delay (15 minutes) by the total number of ground delay incidents lasting at least four hours in calendar year 2007 for the reporting carriers (276) and adding the product of the estimated time to retain information about one ground delay (15 minutes) multiplied by 6.3 percent of the total number of ground delay incidents lasting at least four hours in calendar year 2007 for the reporting carriers (17.4). (The reporting carriers accounted for 93.7 percent of domestic scheduled passenger service, so we have assumed that nearly all of the remaining 6.3 percent was provided by other certificated and commuter carriers using aircraft with more than 30 passenger seats.)

Frequency: 0 to 38 ground delay information sets to retain per year for each respondent. (*N.b.* Some air carriers may not experience any ground delay incident of at least four hours in a given year, while some larger air carriers could experience as many as 38 in a given year according to data on ground delays in calendar year 2007.)

2. *Requirement that each covered carrier retain for two years the results of its annual self-audit of its compliance with its Customer Service Plan.*

Respondents: Every U.S. air carrier that accounts for at least one percent of scheduled domestic passenger revenue (18 carriers).

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

Estimated Total Annual Burden: A maximum of 4 hours and 30 minutes (270 minutes) for all respondents. The estimate was calculated by multiplying the time in a given year for each carrier to retain a copy of its self-audit of its compliance with its Customer Service Plan (15 minutes) by the total number of covered carriers (18).

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

3. *Requirement that each covered carrier display on its Web site, at a point before the consumer selects a flight for purchase, the following information for each listed flight regarding its on-time performance during the last reported month: the percentage of arrivals that were on time (with special highlighting if the flight was late more than 50 percent of the time), the percentage of arrivals that were more than 30 minutes late, and the percentage of flight cancellations.*

Respondents: Every U.S. carrier that accounts for at least one percent of scheduled passenger revenue, maintains a Web site, and is not already displaying the required information (15 carriers).

Estimated Annual Burden on Respondents: 623 hours (37,380 minutes) in the first year and no more than 12 hours (720 minutes) in subsequent years for each respondent. The estimate for the first year was calculated by adding the estimated number of hours per respondent for developing its Web site for data posting (611 hours [36,660 minutes], the quotient of a one-time programming cost of $20,000 divided by $32.73, the median hourly wage for computer programmers) to the estimated number of hours for management of data links (12 hours [720 minutes], estimated at one hour per month).

Estimated total annual burden: 9,345 hours (560,700 minutes) in the first year and no more than 180 hours (10,800 minutes) in subsequent years for all respondents. The estimate for the first year was calculated by multiplying the number of hours per respondent for developing its Web site for data posting (611 hours) by the number of covered carriers (15) and adding the product of the number of hours per year for management of data links (12) and the number of covered carriers (15). The estimate for subsequent years was calculated by multiplying the number of hours per year for management of data links (12) by the number of covered carriers (12).

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

The Department invites interested persons to submit comments on any aspect of each of these two information collections, including the following: (1) The necessity and utility of the information collection, (2) the accuracy of the estimate of the burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) ways to minimize the burden of collection without reducing the quality of the collected information. Comments submitted in response to this notice will be summarized or included, or both, in the request for OMB approval of these information collections.

F. Unfunded Mandates Reform Act

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

List of Subjects:

14 CFR Parts 234 and 259

Air carriers, Consumer protection, Reporting and recordkeeping requirements.

14 CFR Part 399

Administrative practice and procedure, Air carriers, Air rates and fares, Air taxis, Consumer protection, Small business.

For the reasons set forth in the preamble, the Department proposes to amend title 14, chapter II, subchapters A and F as follows:

PART 234—[AMENDED]

1. The authority citation for part 234 continues to read as follows:

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

2. Section 234.11 is revised to read as follows:

§ 234.11 Disclosure to consumers.

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

(b) For each flight for which schedule information is available on its Web site, a reporting carrier shall display the following information regarding the flight's performance during the most recent calendar month for which the carrier has reported on-time performance data to the Department: the percentage of arrivals that were on time—*i.e.*, within 15 minutes of scheduled arrival time (including special highlighting if the flight was late more than 50 percent of the time), the percentage of arrivals that were more than 30 minutes late, and the percentage of flight cancellations. The information may be provided in either of the following ways:

(1) By showing the percentage of on-time arrivals on the initial listing of flights and disclosing the remaining information on a later page at some stage before the consumer buys a ticket, or

(2) By showing all of the required information via a hyperlink on the page with the initial listing of flights.

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

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

PART 259—ENHANCED PROTECTIONS FOR AIRLINE PASSENGERS

Sec.

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

§ 259.1 Purpose.

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

§ 259.2 Applicability.

This rule applies to all certificated and commuter air carriers that operate domestic scheduled passenger service or public charter service using any aircraft with a design capacity of more than 30 passenger seats, with the following exceptions:

(a) Section 259.5 only applies to U.S. air carriers that account for at least one percent of domestic scheduled passenger revenue, and

(b) Section 295.7 does not apply to charter service.

§ 259.3. Definitions.

(a) *Certificated air carrier* means a U.S. direct air carrier that holds a certificate issued under 49 U.S.C. 41102 to operate passenger service and/or cargo and mail service or an exemption from 49 U.S.C. 41102.

(b) *Commuter air carrier* means an air carrier as established by 14 CFR 298.3(b) that carries passengers on at least five round trips per week on at least one route between two or more points according to published flight schedules and uses small aircraft.

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

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

(e) *Small aircraft* means any aircraft originally designed to have a maximum passenger capacity of up to 60 seats.

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

§ 259.4 Contingency plan for lengthy tarmac delays.

(a) *Adoption of plan.* Each certificated air carrier and each commuter air carrier that operates scheduled domestic passenger service using any aircraft with a design capacity of more than 30 seats shall adopt a contingency plan for lengthy tarmac delays for its scheduled and public charter flights and shall adhere to this plan's terms.

(b) *Contents of plan.* Each contingency plan for lengthy tarmac delays shall include, at a minimum, the following:

(1) Assurance of the maximum amount of time that the air carrier will permit the aircraft to remain on the tarmac before proceeding to a gate and allowing passengers to deplane,

(2) Assurance of adequate food, water, and lavatory facilities, as well as medical attention if needed, while the aircraft remains on the tarmac,

(3) The amount of time on the tarmac that triggers the provision of the services enumerated in paragraph (b)(2) of this section,

(4) Assurance of sufficient resources to implement the plan, and

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

(c) *Amendment of plan.* At any time, an air carrier may amend its contingency plan for lengthy tarmac delays to decrease the time intervals covered in paragraphs (b)(1) and (b)(3) of this section. An air carrier may also amend its plan to increase these intervals, in which case the amended plan shall apply only to those flights that are first offered for sale after the plan's amendment.

(d) *Retention of records.* Each air carrier that is required to adopt a contingency plan for lengthy tarmac delays shall retain for two years the following information about any on-ground delay that either triggers its contingency plan or lasts at least four hours:

(1) The length of the delay,

(2) The cause of the delay, and

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

§ 259.5 Customer service plan.

(a) *Adoption of plan.* Each U.S. air carrier that accounts for at least one percent of scheduled domestic passenger revenue shall adopt a customer service plan for its scheduled flights and any public charter flights that it sells directly to the public and shall adhere to this plan's terms.

(b) *Contents of plan.* Each customer service plan shall, at a minimum, address the following subjects:

(1) Offering the lowest fare available,

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

(3) Delivering baggage on time,

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

(5) Providing prompt ticket refunds,

(6) Properly accommodating disabled and special-needs passengers (At a minimum, this provision must refer to the air carrier's contingency plan for lengthy tarmac delays.),

(7) Meeting customers' essential needs during long on-aircraft delays,

(8) In the case of oversales, handling ''bumped'' passengers with fairness and consistency,

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

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

(11) Improving response to customer complaints.

(c) *Self-auditing of plan and retention of records.* Each air carrier that is required to adopt a customer service plan shall audit its own adherence to its plan annually and shall make the results of its audits available for the Department's review upon request for two years.

§ 259.6 Contract of Carriage.

(a) Each air carrier that is required to adopt a contingency plan for lengthy tarmac delays shall incorporate this plan into its contract of carriage.

(b) Each air carrier that is required to adopt a customer service plan shall incorporate this plan in its contract of carriage.

(c) Each air carrier that has a Web site shall post its entire contract of carriage on this site.

§ 259.7 Response to consumer problems.

(a) *Designated advocates for passengers' interests.* Each certificated air carrier and each commuter air carrier that operates scheduled domestic passenger service using any aircraft with a design capacity of more than 30 passenger seats shall designate an employee at its system operations center and at each airport dispatch center who shall be responsible for monitoring the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers. This employee shall have input into decisions on which flights to cancel and which to delay the longest.

(b) *Informing consumers how to complain.* Each certificated air carrier and each commuter air carrier that operates scheduled domestic passenger service using any aircraft with more than 30 passenger seats shall provide the name, address, telephone number, and e-mail or web-mail address of the person with whom or the office with which to file a complaint on its Web site, on all e-ticket confirmations, and, upon request, at each ticket counter and gate.

(c) *Response to complaints.* Each certificated air carrier and each commuter carrier that operates scheduled domestic passenger service using any aircraft with a design capacity of more than 30 passenger seats shall acknowledge receipt of each complaint to the complainant within 30 days of receiving it and shall send a substantive response within 60 days of receiving it.

PART 399—[AMENDED]

4. The authority citation for part 399 continues to read as follows:

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

5. Section 399.81 is revised to read as follows:

§ 399.81 Unrealistic or deceptive scheduling.

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

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

(c) *Chronically delayed flights.*

(1) This paragraph applies to each U.S. direct air carrier that holds a certificate issued under 49 U.S.C. 41102 to operate passenger service and/or cargo and mail service and that accounts for at least one percent of domestic scheduled passenger revenue.

(2) It is the policy of the Department to consider any domestic flight that is operated at least 30 times in a calendar quarter and arrives more than 15 minutes late or is cancelled more than 70 percent of the time during that quarter to be chronically delayed.

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

(4) It is the policy of the Department to consider any flight that is chronically delayed for three consecutive calendar quarters to be unrealistic or deceptive scheduling within the meaning of paragraph (a) of this section.

Issued this 17th, day of November 2008, at Washington, DC.

Michael W. Reynolds,

Acting Assistant Secretary for Aviation and International Affairs.

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