

Proposed Rules

Federal Register

Vol. 81, No. 210

Monday, October 31, 2016

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Part 259

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

RIN 2105-AE53

Refunding Baggage Fees for Delayed Checked Bags

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

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The Department of Transportation (DOT or Department) is soliciting public comment and feedback on various issues related to the requirement for airlines to refund checked baggage fees when they fail to deliver the bags in a timely manner, as provided by the FAA Extension, Safety, and Security Act of 2016.

DATES: Comments should be filed by November 30, 2016. Late-filed comments will be considered to the extent practicable.

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

- *Federal eRulemaking Portal:* go to <http://www.regulations.gov> and follow the online instructions for submitting comments.

- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., West Building Ground Floor, Room W12-140, Washington, DC 20590-0001.

- *Hand Delivery or Courier:* West Building Ground Floor, Room W12-140, 1200 New Jersey Ave. SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

- *Fax:* (202) 493-2251.

Instructions: You must include the agency name and docket number DOT-OST-2016-0208 or the Regulatory Identification Number (RIN) for the rulemaking at the beginning of your

comment. All comments received will be posted without change to <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, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78), or you may visit <http://DocketsInfo.dot.gov>.

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

FOR FURTHER INFORMATION CONTACT: Clereece Kroha, Senior Trial Attorney, 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), clereece.kroha@dot.gov (email).

SUPPLEMENTARY INFORMATION: The Department of Transportation (DOT or Department) is seeking comment on the appropriate means to implement a requirement in recent legislation for airlines to refund checked baggage fees when they fail to deliver the bags in a timely manner. Specifically, the Department seeks comment on how to define a baggage delay, and the appropriate method for providing the refund for delayed baggage.

Background

On April 25, 2011, the Department of Transportation published its second Enhancing Airline Passenger Protections final rule that requires, among other things, that U.S. and foreign air carriers adopt and adhere to a customer service plan that addresses various consumer issues. See 76 FR 23110 (April 25, 2011). In the proposal preceding that final rule, the Department solicited comments on whether we should include as standards: (1) That carriers reimburse passengers the fee charged to transport a bag if that bag is lost or not timely delivered, and (2) the time when a bag should be considered not to have been timely delivered (*e.g.*, delivered on

same or earlier flight than the passenger, delivered within 2 hours of the passenger's arrival). After reviewing the comments received, we adopted in the final rule a customer service standard that requires carriers to reimburse passengers for any fee charged to transport a bag if the bag is lost. We decided to not require carriers to reimburse passengers for any fee charged to transport a bag that is not timely delivered. In making this determination, we stated that, as is the case with transporting passengers, while delay in receiving baggage may be inconvenient, once the carrier delivers a bag, the service has been performed. We clarified that although not required to refund baggage fees in the case of delayed delivery of a checked bag, carriers must comply with the Department's baggage liability rule, 14 CFR part 254, and applicable international agreements, to compensate passengers for direct or consequential damages resulting from the delay in delivering of luggage, up to the limits set by the rule and the agreements.

Baggage fees, along with other ancillary fees, have become an increasingly important component of the airline industry's revenue structure. According to data from the Department's Bureau of Transportation Statistics (BTS), the top 13 U.S. carriers collectively generated over \$3.8 billion in revenue in 2015 from baggage fees.¹ While we have no doubt that airlines continue to invest in baggage handling infrastructure and technology to improve the efficiency and quality of their services, we also realize that baggage delays do occur and affect many consumers on a daily basis. Data from the Department's *Air Travel Consumer Report* demonstrate that, in 2015, the 13 largest U.S. carriers received close to 2 million mishandled baggage reports from passengers for their domestic scheduled flights.² Although these mishandled baggage reports also include reports of lost, damaged, and pilfered

¹ Source: Baggage Fees by Airline 2015, Bureau of Transportation Statistics, Office of the Assistant Secretary for Research and Technology, updated on May 2, 2016. https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/subject_areas/airline_information/baggage_fees/html/2015.html.

² Source: Air Travel Consumer Report, February 2016 Edition, Page 31. https://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/subject_areas/airline_information/baggage_fees/html/2015.html. The Department does not collect information on mishandled baggage for international flights.

baggage in addition to delayed baggage, this figure suggests that the number of delayed baggage incidents is likely significant.³ Since the issuance of the 2011 final rule in which the Department decided not to require airlines to refund baggage fees for delayed bags, many consumers and consumer rights advocacy groups have voiced their opinion that airlines should be required to refund checked baggage fees if they fail to deliver bags on time.

This matter has also caught the attention of the Congress. In 2016, both the Senate and the House of Representatives included in their Federal Aviation Administration reauthorization bills a provision to require the Department to issue a rule that mandates refunds of baggage fees for delayed bags.⁴ On July 15, 2016, the President signed into law the FAA Extension, Safety, and Security Act of 2016 (“FAA Extension Act” or “Act”) which includes a requirement for the Department to issue a rule mandating that airlines provide automated refunds to passengers for any fee charged to transport a bag if the bag is delayed.⁵

Defining a Baggage Delay

Section 2305 of the FAA Extension Act provides that the Department shall issue a final rule within one year of the enactment of the Act that requires U.S. and foreign carriers to promptly provide an automated refund for any ancillary fees paid by the passenger for checked baggage if the carriers fail to deliver the bag to passengers within 12 hours of arrival for domestic flights and within 15 hours of arrival for international flights, if the passenger notifies the carrier about the delayed or lost baggage. The Act also allows the Department to extend these timeframes to up to 18 hours for domestic flights and up to 30 hours for international flights, if the Department determines that the 12-hour or 15-hour standards are not feasible and would adversely affect consumers in certain cases.

Each delayed bag affects an individual passenger’s travel experience, resulting in inconvenience and other harms. The Department is seeking comments from all stakeholders in order to determine how to implement section 2305 of the

Act so the mandated regulation would best achieve Congress’ and the Department’s goal of mitigating the inconvenience and harm to consumers caused by delayed baggage.

DOT is seeking comment to help it determine the appropriate length of delay within the statutory parameters that would trigger the refund requirement. As stated above, the Act provides that a refund should be issued to passengers if the carrier fails to deliver the checked baggage to the passenger not later than 12 hours after the arrival of a domestic flight, or not later than 15 hours after the arrival of an international flight. The Act also authorizes the Department to extend these timeframes to up to 18 hours for domestic flights and 30 hours for international flights if the Secretary determines that the 12-hour or 15-hour standards are infeasible and would “adversely affect consumers in certain cases.” The Department invites public input on the 12 and 15 hour standards prescribed in the Act as well as any other standards within the statutory parameters, which are for domestic flights between 12 and 18 hours after the flight’s arrival and for international flights between 15 and 30 hours after the flight’s arrival. The Department seeks comment on why a particular length of time within this timeframe would be more appropriate than other times.

The Department also seeks comment on how the rule should deal with a passenger itinerary that consists of an international flight connecting to a domestic flight. Is there a reason that this itinerary should be considered an international flight within the meaning of the statute, or does the final domestic flight cause the passenger to be treated as domestic for purposes of the statute and rule? Is there a reason to distinguish between a standard interline (*i.e.*, multiple-carrier) connection on a single ticket and a connection constructed by the passenger using two tickets (*e.g.*, where the carriers do not interline with each other)?

We solicit comments on the ways in which standard industry practice for baggage interlining and mishandled baggage may affect the mandated rule. For example, the last carrier on an interline itinerary is generally responsible for handling a mishandled-baggage report to conclusion, but on a baggage delay on an interline trip this will generally not be the carrier to whom the passenger paid the baggage fee.

In addition to situations, such as interline, in which there are multiple entities involved in the transportation of

bags, there are also situations in which there are multiple entities involved in the transactions of bag fees. Specifically, although not a common practice among most carriers, there are instances in which a carrier authorizes a ticket agent, by contractual agreement, to collect baggage fees from the ticket agent’s customers on behalf of the carrier. To the extent an entity other than the carrier is involved in collecting baggage fees, we seek comments on who should be held responsible to refund the bag fees for delayed bags. Should we hold both entities responsible? Based on the structure of the agreement between the two entities, and common business practice, what is the best way to ensure that bag fees are refunded in a timely manner and to avoid passengers being sent back and forth between two entities to determine which entity is responsible?

As the statute gives the Department some flexibility to modify the length of delay taking into consideration feasibility and any negative impact on consumers, we construe the statute’s use of the phrase “in certain cases” to mean that Congress intends to provide the Department the flexibility to differentiate the length of delay that triggers a refund based on certain circumstances, if appropriate, instead of applying one standard to all domestic flights, and another standard to all international flights, if the Department determines this is appropriate. In that regard, in addition to domestic versus international flights, is there a reason that the rule should establish a secondary set of criteria, such as the flight duration and/or the frequency of service in question? Is the frequency of the operation by the transporting carrier or all carriers that operate on the same route relevant to defining the delay? Since some international flights are short haul flights (*e.g.*, trans-border flights), and some domestic flights can last for over 10 hours (*e.g.*, New York to Honolulu), should we instead tier the delay standard based on the length of the passenger’s flight(s)?

DOT is also seeking comment on how to determine when the clock stops running for purposes of measuring the delay. The Act provides that the 12 hour and 15 hour clock stops when the carrier “delivers the checked baggage to the passenger.” Sometimes, a passenger may stay at the arrival airport and wait for the delayed baggage if the delay is likely to be within a few hours. However, when the delay goes beyond a certain point, the industry’s common practice is to deliver the bags to the passenger’s residence or a designated location requested by the passenger. In

³ The mishandled baggage data as reported to the Department is based on the number of mishandled baggage reports received from passengers by the reporting carriers. Each report may involve more than one piece of mishandled baggage.

⁴ Sec. 3109, Federal Aviation Administration Reauthorization Act of 2016, S. 2658, 114th Cong. (2015–2016); Sec. 507, Aviation Innovation, Reform, and Reauthorization Act of 2016, H.R. 4441, 114th Cong. (2015–2016).

⁵ See, FAA Extension, Safety, and Security Act of 2016, Public Law 114–190, July 15, 2016.

some cases, the passengers may choose to receive notice when their bags arrive and pick up the bags at the carrier's baggage office at the destination airport. How should we determine that the bags have been "delivered" to the passenger and therefore stop the clock from running in each of these situations?

DOT seeks comment on the number of bags that are delayed annually based on the 12 and 18 hour and 15 and 30 hour statutory timeframes, and lost bags. The Department receives information on the number of mishandled-baggage reports filed by passengers, but we do not have data on how many of these are delayed bags, and how many are lost. Information on the number of delayed and lost bags that would be affected by this rulemaking would help the Department to better estimate the impact this rule would have on consumers and airlines.

Method for Refunding Delayed Baggage

The Department is also seeking comment on the appropriate method for providing a refund for delayed baggage. The Department's credit card refund regulation, 14 CFR part 374, implements the Consumer Credit Protection Act and Regulation Z of the Board of Governors of the Federal Reserve System, 15 U.S.C. 1601–1693r and 12 CFR part 226 (Regulation Z) with respect to air carriers and foreign air carriers. It states that when refunds are due on purchases with a credit card, a carrier must transmit a credit statement to the credit card issuer within seven business days of receipt of full documentation for the refund requested. In addition, the Department requires that, with respect to purchases with forms of payment other than credit cards, an airline must provide a refund within 20 days of receipt of full documentation of such a request. See 14 CFR 259.5(b)(5). The Department applies these refund standards to all refunds that are due to consumers, including airfare refunds and ancillary fee refunds. In order to receive a refund under Regulation Z, a consumer must request the refund from the carrier and provide all necessary supporting documents. In contrast, the Act states that carriers should "promptly provide an automated refund" to an eligible passenger when the carriers fail to meet the applicable time limit in delivering the checked bag, and the passenger has notified the carrier of the lost or delayed checked baggage. Under the Act, an "automated refund" should be issued to passengers as long as the delay has met the threshold timeframe and the passenger has notified the carrier about the delayed or lost bag. In that regard, we

view the delayed baggage fee refund provision in the FAA Extension Act differently from Regulation Z in that the Act only requires a passenger to notify the carrier that a bag is delayed or lost, and there is not a requirement for the passenger to request a refund for the baggage fee. We emphasize that since the Act's automated refund requirement covers all bags that are delayed for more than a set number of hours, it will also cover "lost bags," refunding fees charged for which is already required by 14 CFR 259.5(b)(3).⁶ As such, both bags delayed for more than the set number of hours and bags that are considered "lost" would be eligible for an automated refund.

The Department seeks comment on whether prescribing a specific mechanism for the carriers to use to provide the statutorily required automated refund would negatively or positively impact carriers and consumers. What procedures would be necessary on interline itineraries, for which the carrier to whom the passenger reports the delayed bag at his or her destination or stopover is not the carrier to whom the passenger had paid the baggage fee? In addition to soliciting comment on all of the issues and concerns identified above, we also welcome and any other information relevant to this issue. This specifically includes comments and data on the cost impact on new-entrant carriers (many of whom do not have interline agreements) of the time standard developed in this proceeding, and the cost impact on regional airlines.

Issued this 18th day of October, 2016, in Washington, DC.

Anthony R. Foxx,

Secretary of Transportation.

[FR Doc. 2016–26199 Filed 10–28–16; 8:45 am]

BILLING CODE 4910–9X–P

⁶ We have not defined "lost" for purposes of 14 CFR 259.5(b)(3) mandating a refund of the baggage fee for lost bags. Instead, in a Frequently Asked Questions document issued by the Department's Office of Aviation Enforcement and Proceedings, that office states that if a carrier unreasonably refuses to consider a bag to be lost after it has been missing for a considerable period of time, it could be subject to enforcement action for violating the statutory prohibition against unfair and deceptive practices. See, Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2), last updated May 8, 2015, https://www.transportation.gov/sites/dot.gov/files/docs/EAPP_2_FAQ_2_0.pdf.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 1, 112, 117, and 507

[Docket No. FDA–2016–D–2841]

Describing a Hazard That Needs Control in Documents Accompanying the Food, as Required by Four Rules Implementing the FDA Food Safety Modernization Act: Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notification of availability.

SUMMARY: The Food and Drug Administration (FDA, we, or Agency) is announcing the availability of a draft guidance for industry entitled "Describing a Hazard That Needs Control in Documents Accompanying the Food, as Required by Four Rules Implementing the FDA Food Safety Modernization Act: Guidance for Industry." This draft guidance explains our current thinking on disclosure statements made by an entity, in documents accompanying food, that certain hazards have not been controlled by that entity as required by certain provisions in four final rules. This document describes our current thinking on how to describe the hazard under each of the four rules and which documents we consider to be "documents of the trade" for the purpose of disclosure statements.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that we consider your comment on this draft guidance before we begin work on the final version of the guidance, submit either electronic or written comments on the draft guidance by May 1, 2017. Submit either electronic or written comments on the proposed collection of information by May 1, 2017.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <http://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a