



U.S. House of Representatives
Committee on Transportation and Infrastructure

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SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Aviation

FROM: Subcommittee on Aviation Staff

SUBJECT: Hearing on “Aviation Consumer Issues: Emergency Contingency Planning and Outlook for Summer Travel”

PURPOSE OF HEARING

The Subcommittee on Aviation will meet on Wednesday, May 20, 2009, at 2:00 p.m., in room 2167 of the Rayburn House Office Building to receive testimony regarding aviation consumer issues, focusing on emergency contingency planning and outlook for summer travel.

BACKGROUND

In Fiscal Year (FY) 2007, U.S. airlines set an annual record by carrying 765.3 million scheduled domestic and international passengers. In FY 2008, this declined to 757.4 million.¹ The Department of Transportation’s Inspector General (DOT IG) reported that unprecedented fuel prices in the first three quarters of 2008, coupled with the recession, impacted the airline industry with \$5.8 billion in operating losses and bankruptcies. In response, airlines began to cut capacity, and “by November 2008, airlines had implemented capacity cutbacks that eliminated roughly 13 percent of domestic scheduled flights” as compared to November 2007.² Capacity cutbacks have meant reduced flight frequencies, elimination of smaller aircraft, and ceasing some flight operations.³ It is predicted that system capacity, as measured in available seat miles (the number of seats

¹ Federal Aviation Administration (FAA), Aerospace Forecast Fiscal Years 2009-2025 64 (The 2008 number is an estimate. Numbers are measured in revenue passenger enplanements in millions for U.S. commercial air carriers for scheduled U.S. passenger traffic.)

² DOT IG, Aviation Industry Performance: A Review of the Aviation Industry in 2008 4 (2009).

³ *Id.* at 4.

multiplied by the distance traveled), for domestic and international aviation will decline by 6.7 percent in 2009, after a 1.2 percent increase in 2008.⁴ FAA forecasts that domestic capacity will be reduced by 9 percent in FY 2009.

The DOT IG reported, “Airlines responded to the dramatic shift in their operating environment by cutting flights, raising airfares, and tapping into ancillary sources of revenues.”⁵ Airports have also been affected—small community, or non-hub, airports were impacted the most by capacity cuts, with a 16 percent decrease in available seat miles from November 2007 to November 2008.⁶ The FAA forecasts that declines in activity in the near term will give way to returned growth in the long term.⁷

Another issue that is affecting the airline industry in the short term is the outbreak of the novel influenza A (H1N1). The influenza started in Mexico in April 2009 and spread via human-to-human contact throughout Mexico, the United States, and other foreign countries. Many worried that a large part of the population would be susceptible to contracting novel H1N1 flu and that it would spread rapidly. On April 28, the Centers for Disease Control and Prevention (CDC) recommended that U.S. travelers delay nonessential travel to Mexico, and the World Health Organization (WHO) soon thereafter recommended that ill individuals should delay air travel.⁸ In response to fears about contracting the flu from the confined area of an airplane, and the travel advisory for Mexico, many airlines cut flights to Mexico and waived change ticket fees. Continental Airlines and US Airways cut departures to Mexico by as much as 40 percent and Delta, United, and JetBlue also some cut service.⁹

I. Consumer Issues and Airline Delays

With the decline in air traffic from capacity cuts, airline delays similarly declined. According to the DOT IG, “[f]or the second half of 2008, the number of delays was 24 percent lower than the same period in 2007.”¹⁰ Despite the system-wide decline in delays, large hub airports that are notorious for being system “chokepoints” continued to be problematic. In the summer of 2008, delays at San Francisco International (SFO) increased by 6 percent and Newark Liberty International (EWR) by 0.4 percent as compared with the summer of 2007. Delays only decreased by 5 percent each at John F. Kennedy International (JFK), LaGuardia Airport (LGA) and Chicago O’Hare (ORD), as compared to the previous summer; as opposed to 11 percent nationwide.¹¹ Recent decreases in capacity corresponding traffic will likely continue through the summer, meaning that overall, delays are projected to remain low system-wide. However, major “chokepoints” of the New York area, Chicago, and Atlanta, will continue to experience high rates of delays.

⁴ *Id.*

⁵ DOT IG, *supra* note 2. Many carriers have unbundled their passenger fares by adopting an “a la carte” pricing plan, which includes fees for checked baggage, beverages and specific seats. According to BTS, airlines collected \$1.1 billion in excess baggage fees (any passenger baggage that is not transported free-of-charge) in FY 2008.

⁶ DOT IG, *supra* note 2, at iii.

⁷ FAA, *supra* note 1, at 5.

⁸ WHO, http://www.who.int/csr/disease/swineflu/frequently_asked_questions/travel/en/index.html (last visited May 9, 2009). On April 29, the WHO raised the pandemic threat level of H1N1 to phase 5, meaning that a pandemic is imminent and the time to finalize the organization, communication, and implementation of mitigation measures is short.

⁹ Melanie Reffes, *More Carriers Trim Mexico Service In Response to Swine Flu Outbreak*, Aviation Daily, May 5, 2009, at 1-2.

¹⁰ DOT IG, *supra* note 2, at 16.

¹¹ DOT IG, *supra* note 2, at 9, 17.

According to the Bureau of Transportation Statistics (BTS), approximately 24 percent of flights were delayed or cancelled in 2008, slightly lower than 26 percent in 2007. Through March 2009, about 20 percent of flights were delayed or cancelled – the lowest level since 2003.¹² In 2008, there were 7,150 flights with taxi-out times (the time elapsed between departure from the origin airport gate and wheels off) of two hours or more and 1,232 of three hours or more out of approximately 7 million flights.¹³

In response to a 1999 extended on-board delay in Detroit, and subsequent calls for legislative action, members of the Air Transport Association (ATA), representing the major airlines, sought to improve customer service. ATA drafted an “Airline Customer Service Commitment, whereby signatory carriers agreed to develop individual Customer Service Plans to demonstrate ongoing dedication to improving air travel.”¹⁴ The Commitments included: notifying customers of known delays; cancellations and diversions; on-time baggage delivery and return of “lost” bags within 24 hours; properly accommodating disabled and special needs passengers; meeting customers’ essential needs during long on-aircraft delays; handling “bumped” passengers with fairness and consistency; disclosing travel itinerary, cancellation policies, frequent flyer rules, and aircraft configuration; ensuring good customer service from code-share partners; and being more responsive to customer complaints.

The DOT IG assessed airlines’ progress in implementing the Commitments in 2001 and found that most had incorporated them into their contracts of carriage.¹⁵ Airlines worked on more voluntary measures to improve customer service through a task force. In a follow-up report in 2006, the DOT IG noted that airlines had fallen behind in self-auditing their customer service plans.¹⁶

In December 2006, thunderstorms severely impacted American Airlines’ operations at the Dallas Fort Worth International Airport, diverting many flights and shutting down the airport for nine hours. On February 14, 2007, an ice storm crippled JetBlue’s operation at JFK and LGA and led to nine planes being stuck for more than five hours on the tarmac, with one of those planes delayed for ten hours.

Following these incidents, former Secretary of Transportation Mary Peters asked the DOT IG to review these two recent cases and examine the airlines’ customer service commitments, contracts of carriage, and policies regarding extended ground delays aboard aircraft and to provide an assessment on why the American and JetBlue delays occurred. The Secretary also requested

¹² BTS, <http://www.transtats.bts.gov/HomeDrillChart.asp> (follow “2008” and “2007” hyperlinks) (last visited May 12, 2009). Data represents the 20 major carriers.

¹³ BTS, http://www.bts.gov/programs/airline_information/taxi_out_and_other_tarmac_times/ (follow “2008” hyperlink next to “Taxi-Out by Carrier and Time-Blocks”) (last visited May 12, 2008).

¹⁴ JetBlue, which began service in February 2000 and became an ATA member in 2001, was not a signatory to the 1999 Commitment. However, in response to a February 14, 2007, incident, JetBlue instituted its own “Customer Bill of Rights” to address cancellations, delays and over bookings.

¹⁵ *See* DOT IG, Final Report on Airline Customer Service Commitment (2001) (concluded that while the airlines were making some progress on a few of the commitments, there were significant areas of deficiency); Status Report on Airline Customer Service (2001).

¹⁶ DOT IG, Follow-up Review: Performance of U.S. Airlines in Implementing Selected Provisions of the Airline Customer Service Commitment (2006).

recommendations for what airlines, airports, and the Federal Government can do to prevent such situations in the future.

In September 2007, the DOT IG recommended that the Department of Transportation (DOT) establish a national task force of airlines, airports, and FAA to develop and coordinate contingency plans to deal with lengthy delays; conduct incident investigations involving long, on-board ground delays; and to ensure that airlines comply with their public policies governing long, on-board delays. The DOT IG also recommended that airports establish a process for monitoring lengthy, on-board delays. For airlines, the DOT IG recommended they should define what constitutes an “extended period of time” for meeting passengers’ essential needs; establish specific targets for reducing chronically delayed or cancelled flights; disclose on-time flight performance on websites or orally during ticket purchase; and self-audit customer service plans.

Also in September 2007, the DOT: (1) created a New York Aviation Rulemaking Committee (ARC) to explore options for addressing airspace congestion and flight delays in the three major New York-area airports; (2) improved access to DOT’s complaint system, enhanced oversight of chronically delayed flights, initiated a rulemaking to increase compensation for passengers who are involuntarily bumped, and reviewed effectiveness of contingency plans for tarmac delays; (3) required the FAA to convene a schedule reduction meeting at JFK; and (4) worked to implement the New York, New Jersey, Philadelphia Metropolitan Area Airspace Redesign (“NY Area Airspace Redesign”).

The goal of the ARC was to identify ways to reduce congestion in the New York area airspace and efficiently allocate the scarce capacity of the New York area airports. On December 13, 2007, the ARC’s findings were submitted to the Secretary and a list of 77 operational initiatives that could potentially mitigate delays or increase efficiency in the New York area. Of these, FAA reports that 30 have been completed, 37 are “ongoing”— meaning they are either being implemented or reviewed, 7 have been folded into the Next Generation Air Transportation System (NextGen) initiatives, and 3 are dependent on NY Area Airspace Redesign. One example is the new take-off patterns at EWR and Philadelphia International Airports, which allow aircraft to fan out after taking off so that the next aircraft may take off sooner. While delays have recently declined due to decreases in traffic, the New York airspace remains a major chokepoint with significant delays that also cause a “ripple effect” system-wide. EWR has the worst on-time arrival rate in North America at 54.9 percent; and LGA’s rate is 63 percent and JFK’s rate is 64.3 percent.¹⁷ Many have called for solutions to be implemented now before capacity increases once again.

The FAA’s airspace redesign efforts will play a critical, near-term role in enhancing capacity, reducing delays, transitioning to more flexible routing and saving money for airlines and airspace users in fuel costs. Currently, FAA is pursuing several airspace redesign projects nationwide. Once implemented, FAA believes this effort could reduce delays by as much as 200,000 hours. An additional measure that is being implemented is flight caps, which are achieved through voluntary carrier schedule reductions. Flight caps were instituted at JFK in March 2008 and at EWR in May 2008. Under the terms of the hourly caps, airlines may shift their flights to times when airports have unused capacity rather than the overloaded peak hours. The caps are in place for two years, at which time their effectiveness will be reevaluated by the DOT.

¹⁷ Andrew Compart, *On-Time Streak Continues for U.S. Airlines in April*, Aviation Daily, May 5, 2009, at 3.

On December 8, 2008, the DOT issued a Notice of Proposed Rulemaking (NPRM) that would require air carriers to do the following: (1) adopt contingency plans for lengthy tarmac delays and incorporating them in their contracts of carriage; (2) respond to consumer problems; (3) publish delay data on their websites; and (4) adopt customer service plans, incorporate them into their contracts of carriage, and audit their adherence to the plans. It would also deem the operation of flights that remain chronically delayed to be unfair and deceptive. The comment period closed on March 9, 2009, and the DOT is proceeding towards issuing a final rule.¹⁸

On April 1, 2009, the DOT announced other consumer protection measures. Within 90 days, airlines must change their contracts of carriage to better inform passengers of what specific rules apply when they buy a ticket from an international code-share partner. This was done in response to a lack of clarity on issues (e.g., check-in time limits, carriage of animals, denied boarding compensation) when they buy a ticket with one airline, but the operating carrier is a code-share partner. The DOT's guidance also requires airlines to change their baggage liability policies to reflect the terms of the Montreal Convention.¹⁹

Contingency Planning for Lengthy Onboard Delays

As a recent reminder that lengthy tarmac delays are still problematic for passengers, on April 10, 2009, Delta Flight 510 was enroute to Atlanta, Georgia from Turks and Caicos, and was diverted to Columbia, South Carolina due to severe thunderstorms. After refueling and waiting to depart, another round of thunderstorms hit Atlanta, causing another delay. At that point, the crew had reached their maximum flight and duty time limits and the airline requested that Customs and Border Protection (CBP) allow them to deplane. CBP allowed passengers to deplane two hours after Delta's request, and took passengers to a waiting area. In sum, the plane was delayed on the tarmac for over five hours before passengers could deplane.

On January 3, 2008, in response to the DOT IG's 2007 recommendation, the DOT convened the National Task Force to Develop Model Contingency Plans to Deal with Lengthy Onboard Ground Delays (Task Force). The Task Force was comprised of airlines, airports, consumer groups, and Federal Government stakeholders. In November 2008, the Task Force issued its report on voluntary recommendations for the stakeholders to work together during lengthy delays and to develop contingency plans to ensure proper care of airline passengers.

The Task Force identified basic passenger needs that should be met during lengthy delays, which broadly includes: (1) information, including deplaning options and the ability to communicate with friends and family; (2) food and hydration; and (3) a clean environment, lavatory and special services (e.g., access to medicine). Based on this, the Task Force laid out sample plans for airlines and airports, and the coordination between stakeholders, to effectively address passenger needs in these situations. For airlines, the Task Force recommended they establish "triggers" – "specific events or points in time during a lengthy onboard ground delay when communications with

¹⁸ Enhancing Airline Passenger Protections, 73 Fed. Reg. 74586 (proposed Dec. 8, 2008) (to be codified at 14 C.F.R. Parts 234, 259, and 399).

¹⁹ Providing Guidance on Airline Baggage Liability and Responsibilities of Code Share Partners Involving International Itineraries, 74 Fed. Reg. 14837 (April 1, 2009). Article 17 of the Montreal Convention states that carriers are liable for lost or damaged baggage if such action occurred while in the airline's custody, except if the destruction was as a result of a defect in the baggage.

involved stakeholders is initiated, a decision is made, or an action is taken.” An example is if a crew becomes aware that the flight will be delayed after passengers have boarded but before the aircraft leaves the gate, they should provide flight status announcements to passengers no less than every 30 minutes. The contingency plan should include actions to be taken by the airline following a triggering event, during an onboard delay, and to assist passengers with deplaning.

To deplane passengers, the airline may need to work with Government agencies, other aviation service providers, and local lodging and transportation services. Federal agencies that may need to be involved in deplaning, especially for an international arrival, are Transportation Security Administration (TSA) for passenger and baggage screening, CBP for international passenger processing, and the CDC.

The Task Force recommended that airports also establish triggers by which to determine appropriate action. Airports should work with other aviation service providers to deplane passengers from remote locations; and extend hours of operation for security workers, TSA, CBP, FAA, and concessionaires.

II. Planning for Health Emergencies

In the beginning stages of the outbreak of novel influenza A (H1N1)—commonly known as “swine flu”—in late April, constant media attention, school closures, and fears about travel contributed to the public’s alarm. Recently, fears have somewhat eased as the CDC recommended that schools remain open, the WHO has not increased the threat level to indicate that there is a pandemic outbreak,²⁰ and public officials have attempted to reassure the public that it is safe to be in public spaces. Other disease outbreaks of international concern in recent years have included the Severe Acute Respiratory Syndrome (SARS) epidemic between 2002 and 2003, and the avian A H5N1 influenza (“bird flu”) in 2003. SARS resulted in over 8,000 cases and 774 deaths worldwide²¹ and the avian flu resulted in 423 cases and 258 deaths worldwide.²² As of May 15, 2009, there were 4,714 confirmed U.S. cases of H1N1 with 4 deaths, affecting 47 states and territories. The WHO reports 7,520 cases in 34 countries.

Since H1N1 is spread by human-to-human contact, there was concern about contracting the disease while in a confined public space, such as an airplane. The WHO, CDC, DOT, and airlines have emphasized that it is still safe to fly and passengers should protect themselves by practicing good hygiene (e.g., wash hands frequently, use hand sanitizers, and avoid travel if sick).

The Secretary of Health and Human Services (HHS) is responsible for preventing the introduction, transmission, and spread of communicable diseases from foreign countries in the United States and from one state or U.S. possession into another.²³ HHS is the lead federal agency that is responsible for coordinating federal response and inter-agency coordination,²⁴ and issuing guidance to individuals and businesses that could be affected by a quarantinable disease. There are

²⁰ According to Reuters, “The [WHO] kept its global pandemic alert at 5 out of 6 because the new virus was not spreading rapidly outside North America.” Reuters, *Flu kills Canadian, first cases in Japan, Australia*, May 9, 2009.

²¹ CDC, Factsheet: Basic Information about [SARS] (Jan. 13, 2004).

²² WHO, Cumulative Number of Confirmed Human Cases of Avian Influenza A/(H5N1) Reported to WHO (May 6, 2009).

²³ 42 U.S.C. § 264 (2008).

²⁴ The Pandemic and All-Hazards Preparedness Act, 42 U.S.C. § 300hh (2007).

nine diseases that are quarantinable diseases.²⁵ Quarantine means “the separation and restriction of movement of persons who, while not yet ill, have been exposed to a communicable disease and, therefore, may become infectious and transmit the disease to others.” The CDC has the authority to isolate and quarantine individuals or groups ill with or exposed to such a disease, including at airports. CDC Quarantine Stations are located at 19 U.S. airports and are responsible for quarantining ill passengers and providing them with medical assistance.

For airlines and passengers, the CDC is the lead agency responsible for issuing travel advisories and information on recommended actions to prevent the spread of and contain diseases. CDC also coordinates with the Department of Homeland Security (DHS), CBP, and TSA. HHS and DHS signed a Memorandum of Understanding on October 2005 to address how the agencies will share travel information and screen and handle passengers suspected of being ill. Certificated Airports are required by FAA regulations to have emergency plans. However, the emergency plans are required to address such items as aircraft incidents, structural fires, and natural disasters. They are not required to address communicable diseases or pandemics. Although not required by regulation, many large airports do have pandemic plans.²⁶ According to Airports Council International-North America, because airports develop plans for medical emergencies and other disasters, and have had practice dealing with health emergencies (like SARS) in the past, they are well equipped to develop contingency plans.

In the event of a pandemic threat, the CBP and TSA are responsible for “passive surveillance” of passengers for signs of “flu-like symptoms.” If a passenger was suspected of being ill with novel H1N1, they would be pulled aside at airport screening to undergo “secondary” health screening by the CDC. Flight attendants also look for signs of flulike symptoms. If a passenger is suspected of flu-like symptoms while already enroute, the flight attendant notifies the pilot-in-command, who then notifies Air Traffic Control, which notifies the closest appropriate CDC Quarantine Stations for instructions. Airports and airlines have increased efforts to clean public spaces thoroughly and to provide advisory information to the travelling public. The DOT issued a National Aviation Resource Manual for Quarantinable Diseases in November 2005, in coordination with the CDC and HHS, to assist airports and aviation stakeholders in preventing the transmission of quarantinable diseases through the airline system.

During a pandemic health emergency, the WHO may recommend that countries screen at entry and exit points, including international airports. The WHO has not recommended entry/exit screenings for the novel H1N1 flu. According to the WHO, “Scientific research . . . shows that restricting travel would be of limited or no benefit in stopping the spread of disease. Historical records of previous influenza pandemics, as well as experience with SARS, validate this.”²⁷

²⁵ Cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers, SARS, and influenza are quarantinable diseases.

²⁶ 14 C.F.R. § 139.325 (2008).

²⁷ Statement by WHO Director-General, Dr. Margaret Chan, April 29, 2009.

III. H.R. 915, the “FAA Reauthorization Act of 2009”

H.R. 915, the “FAA Reauthorization Act of 2009”, contains several provisions to enhance consumer protection, decrease delays, and assist with contingency planning including:

- Mandating that air carriers and airports submit emergency contingency plans and detail in their plans how they will allow passengers to deplane following excessive delays. These plans must be approved by the DOT. The DOT can assess a civil penalty against an air carrier or airport that fails to adhere to an approved contingency plan.
- Requiring schedule reduction meetings to be held by the FAA if aircraft operations of air carriers exceed hourly maximum arrival and departure rates and are likely to have a significant adverse effect on the national or regional airspace system. If there is no agreement to reduce schedules, then the FAA shall use its administrative power in this area.
- Establishing an Advisory Committee for Aviation Consumer Protection in the DOT that is required to report annually on its recommendations.
- Reviewing air carrier flight delays, cancellations, and associated causes by the DOT IG.
- Requiring the DOT to issue denied boarding compensation final regulations within one year, with such rates appropriately adjusted.
- Directing the Comptroller General to study delays in the delivery of checked baggage to air carrier passengers and making recommendations for establishing minimum standards to compensate a passenger in the case of unreasonable delays, taking into consideration that many carriers are charging additional fees for checked baggage.
- Requiring air carriers to include on their websites and electronic tickets or boarding passes the DOT consumer complaint hotline number, and the email, phone number, and address for the DOT Aviation Consumer Protection Division and the air carrier.
- Requiring the Secretary of Transportation to establish and make available to the public a list of countries that require an air carrier to treat aircraft passenger cabins with insecticides prior to the flight or to apply an aerosol insecticide when the cabin is occupied with passengers.
- Requiring that an airport used by an air carrier or foreign air carrier for flights in foreign air transportation provide for the use of the airport’s terminal, to the maximum extent practicable, for the processing of passengers arriving at the airport on such a flight in the case of an excessive tarmac delay.

WITNESSES

PANEL I

The Honorable Christa Fornarotto
Acting Assistant Secretary for Aviation and International Affairs
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The Honorable Calvin L. Scovel, III
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PANEL II

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