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

**Comments of Consumers Union to
The U.S. Department of Transportation on
“Refunding Baggage Fees for Delayed Checked Bags”
Docket No. DOT-OST-2016-0208, Document No. 2016-26199**

Introduction

Consumers Union¹ submits these comments to the U.S. Department of Transportation (“Department”) in the above-referenced Advance Notice of Proposed Rulemaking. We support the Department’s proposal to require airlines to refund checked baggage fees when bags are not delivered in a timely manner. This is consistent with our strong support for the Department’s passenger protection measures in recent years, in our public statements, in comments to the Department, and through our representation on the Department’s Future of Aviation Advisory Committee.

Background

This Notice addresses 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 2016.² Consumers Union believes this is a necessary

¹ Consumers Union is the policy and mobilization arm of Consumer Reports. Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts this work in the areas of telecommunications reform, health reform, food and product safety, financial reform, and other areas, including air travel. Consumer Reports is the world’s largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

² www.federalregister.gov/documents/2016/10/31/2016-26199/refunding-baggage-fees-for-delayed-checked-bags.

addendum to the Department's earlier passenger protections, and in particular to the requirement that checked baggage fees be refunded when airlines lose checked bags.

This Notice is pursuant to an October 18, 2016, announcement that the Department was taking a number of additional steps to protect air travelers,³ following the passenger protections established in its April 20, 2011 rule.⁴ The 2011 rule had required airlines to refund baggage fees when the bag is lost, and noted that consumers might have legal rights to recover damages incurred as a consequence of a bag being delayed. It also reiterated that airlines must comply with applicable international agreements, as well as with the Department's own applicable baggage liability rules, as set forth in 14 CFR part 254.⁵

But the 2011 rule had declined to require a refund when the bag is delayed. The Department saw a similarity with flight delays—short of cancellation—which are not generally grounds for a refund: “while delay in receiving baggage may be inconvenient, once the carrier delivers a bag the service has been performed.”

Consumers Union respectfully disagrees with that judgment. In our view, a separate, additional fee for checked baggage carries with it an implicit promise to deliver a separate, additional service—timely delivery of that bag, for the convenience of the passenger who is paying that fee. The passenger has brought what is needed for a successful and satisfactory trip away from home, a trip which may be only for a limited number of days, typically with a full schedule of activities or leisure planned. Those plans are disrupted, and the passenger is inconvenienced, whenever the bag does not arrive at the destination at the same time as the passenger. So we are pleased that the Department, prompted by Congress, has now proposed to require refunds for delayed bags as well as for lost ones.

Indeed, the fee may be small in relation to the cost of the inconvenience to the passenger; but it is important that the passenger not suffer a fee on top of the inconvenience.

Support for the Department's Proposal

According to the Department's monthly Air Travel Consumer Reports, in 2015 there were 3.24 reports of mishandled baggage filed for every 1,000 domestic passengers enplaned.⁶ This translates into more than 2 million mishandled baggage reports among the 13 largest U.S. carriers for domestic scheduled flights.⁷ The Department defines “mishandled” as including bags that are lost, damaged, delayed, or pilfered, and does not publish separate figures for these four categories, but recognizes that “the number of delayed baggage incidents is likely significant.”⁸

³ “U.S. Department of Transportation Announces Enhanced Protections for Air Travelers, Actions to Promote Airline Competition,” www.transportation.gov/briefing-room/us-department-transportation-announces-enhanced-protections-air-travelers-actions.

⁴ <https://www.gpo.gov/fdsys/pkg/FR-2011-04-25/pdf/2011-9736.pdf>; www.transportation.gov/briefing-room/us-department-transportation-expands-airline-passenger-protections.

⁵ www.gpo.gov/fdsys/pkg/CFR-2016-title14-vol4/xml/CFR-2016-title14-vol4-part254.xml.

⁶ www.transportation.gov/sites/dot.gov/files/docs/2016FebruaryATCR_1_0.pdf.

⁷ www.federalregister.gov/documents/2016/10/31/2016-26199/refunding-baggage-fees-for-delayed-checked-bags.

⁸ ANPRM, 83 Fed. Reg. at 75347-75348.

In its August 2015 report, “Unfriendly Skies: Consumer Confusion Over Airline Fees,”⁹ the Minority staff of the Senate Committee on Commerce, Science, and Transportation called for a number of measures to improve consumer protections, including refunds fees charged for checked baggage that was delayed. Specifically, the report’s recommendations included:

- Ancillary fees should be disclosed as early as possible in the booking process, in a standardized format.
- Checked baggage and carry-on baggage fees should have a clear connection to the costs incurred by the airline.
- Airlines should promptly refund fees for any checked bags that are delayed more than 6 hours on a domestic flight.

On this last point, the report stated:

“Payment of checked baggage fees implies that the bags will actually be delivered in a timely fashion with passengers when they arrive at their final destination. Committee minority staff found, however, that most airlines do not have a standardized protocol for issuing refunds for checked baggage fees when baggage does not arrive within a reasonable period. Accordingly, Committee minority staff recommends that DOT set a presumptive requirement that airlines automatically refund any baggage fee paid by the passenger for baggage delayed more than 6 hours after time of arrival.”

As the report notes, charging additional fees for checked baggage, as for other services that were once intrinsic components of the price of an airline ticket, has become a major source of revenue for the airline industry. The annual revenue generated by U.S. airlines from baggage fees increased from \$464 million in 2007 to \$3.5 billion in 2014.¹⁰ And the Department reports that for 2015, the figure had risen further, to \$3.8 billion.¹¹

Senator Bill Nelson (D-Fla.), the Committee’s senior Minority member, summed up the “Unfriendly Skies” report’s findings: “The traveling public is being nickel-and-dimed to death.”

And topping the list of those doing the nickel-and-diming, as reflected in a July 2016 report by airline industry consulting firm IdeaWorks Company,¹² are the three major legacy U.S. airlines. United led all 135 of the world’s airlines on the list, with \$6.2 billion in ancillary fees in 2015; American was second, with \$4.7 billion; and Delta was third, with \$3.8 billion. (Southwest and Alaska Air were fifth and tenth.)

⁹ https://www.commerce.senate.gov/public/_cache/files/79d9b832-3d92-48a4-af4f-9a4cce28f5ae/8CB39475B79345233CAE7F94EB0129E1.8-6-15-final-airline-report.pdf.

¹⁰ *Id.* at 3.

¹¹ ANPRM, 83 Fed. Reg. at 75347.

¹² “2015 Top 10 Ancillary Revenue Rankings,” www.ideaworkscompany.com/wp-content/uploads/2016/07/2015-Top-10-Airline-Ancillary-Revenue-Rankings-Final.pdf.

Baggage fees are included in an IdeaWorks Company report released earlier this month, titled “Top Merchandising Innovations to Delight Air Travelers and Boost Profits.”¹³ Certainly, “boosting profits” is right on point.

As to the air traveler’s reaction, however, that is more accurately captured by the response of Consumer Reports’ own readers in our October 2015 “Airline Ratings Report,”¹⁴ culled from asking over 20,000 Consumer Reports subscribers about their experiences with U.S. airline service. We found the issue of “hidden fees”—particularly for checked baggage—to be a major factor in how passengers rated domestic airlines. Airlines perceived to have the most hidden fees were rated poorly, and airlines perceived to be most up front in disclosing fees received the best ratings.

Accordingly, Consumers Union has advocated consistently for complete and transparent disclosure of all airline pricing and fees, through all booking channels. We believe pricing transparency is a critical element in the fair and equitable levying of fees by airlines.

And that is why we have advocated consistently for refunding checked baggage fees when the bag is late. Even when carrying checked bags was included in the price of the ticket, consumers had a reasonable right to expect that their bags would be transported and delivered reliably and conveniently. With checked bag fees increasingly becoming a separately identified service, for which the passenger is charged a separately identified, additional fee, consumers have an even stronger right to expect that they will not have to wait around, or have to make a separate trip back to the airport, to get the bags they brought with them on the trip.

Response to Specific Questions in the ANPRM

The Advance Notice asks a number of questions regarding how best to craft the requirement. We offer the following suggestions to help ensure that consumers are protected as effectively as possible.

- ***Threshold delay period triggering refund requirement***

It appears that the Department may be reading the statutory directive as setting a minimum threshold delay of 12 hours for a domestic flight and 15 hours for an international flight before a refund would be required, with flexibility to extend those thresholds to up to a maximum of 18 and 30 hours, respectively. Although the maximums are quite explicit and strict, we read the statute as less clear on the minimums. We would urge the Department to set the thresholds as low as possible consistent with its authority—mindful that a delay of *any* length is an inconvenience to the passenger, and that the delay is entirely out of the control of the passenger, and wholly within the control of the airline charging and profiting from the baggage fee, and the other businesses with whom it contracts. Those who charge and profit from the fee should bear the risk of the delay and resulting inconvenience. The incentive should be for the airline to have the checked bag on the same flight as the passenger it belongs to.

¹³ www.ideaworkscompany.com/wp-content/uploads/2016/11/Airline-Merchandising-Innovations.pdf.

¹⁴ www.consumerreports.org/content/dam/cro/magazine-articles/2016/October/Consumer%20Reports%20National%20Research%20Center%20Airlines%20Survey.pdf.

We believe the delay threshold proposed in the Senate Commerce Committee Minority staff report, six hours for domestic and international flights alike, is fairer, although even that threshold would leave many inconvenienced consumers still being charged for a service the airline did not satisfactorily provide. We do not see any justification for extending the thresholds beyond whatever the Department may determine the minimum to be. We do not see any potential negative impact on consumers from holding the airlines more strictly accountable that would warrant excusing longer delays—regardless of how long the route is, or how often the airline flies it.

- ***Allocating responsibility when multiple entities are involved***

We believe the accountability for the refund should rest with the airline who is charging the fee. If there is a code-share arrangement between two airlines, they should be responsible for allocating responsibility among themselves in the course of their dealings with each other. The consumer should not have the burden of identifying and proving which airline caused the delay, or tracking down the regional airline with whom the consumer has never dealt. Similarly, in the case where the airline authorizes a travel agent to collect the fee on its behalf, the airline charging the fee should be responsible for refunding it; the travel agent had no part in causing the delay. In cases where the consumer books two legs of a flight with different airlines, the first airline should be responsible if its delay causes the bag to miss the second leg of the flight.

- ***Determining when the clock stops on the delay***

Bearing in mind that the passenger is inconvenienced, and thus deprived of an important part of the service paid for, whenever the bag is not on the same flight, we believe the clock should stop only when the bag is physically handed over to the passenger, or when it arrives at the place where the passenger has asked the bag to be delivered. And that designated place should never be the airport. The passenger has already been inconvenienced once; requiring the passenger to make an extra trip back to the airport only compounds the inconvenience.

- ***Method for refunding the fee***

We support the Department’s proposal to require refunds within seven days on credit card purchases, and 20 days on purchases transacted by other means, consistent with the Department’s current regulations and guidelines as described. We believe this is a fair and reasonable timeframe.

The refund should be in the form of cash or an equivalent payment to the passenger’s credit card, debit card, or other form of automated payment. In the past, some airlines have reportedly offered reimbursement in the form of travel vouchers that can only be used on future flights.¹⁵ Such vouchers are an unacceptable substitute for an actual refund, because they can be

¹⁵ See, e.g., Airfarewatchdog.com, Guidance on Reimbursement of Passenger Expenses Incurred as a Result of Lost, Damaged, or Delayed Baggage, February 13, 2012, www.airfarewatchdog.com/blog/10505773/guidance-on-reimbursement-of-passenger-expenses-incurred-as-result-of-lost-damaged-or-delayed-baggage/.

too easily misplaced, and because they require the inconvenienced consumers to fly again with—and pay more money to—the same airline that inconvenienced them. The consumer paid the fee in cash, and should be reimbursed in cash.

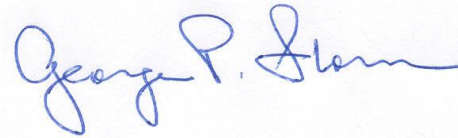
Conclusion

Consumers Union has been pleased to support the initiatives the Department has undertaken in recent years to better protect the rights of airline passengers. And in this case, we support requiring prompt refunds of checked bag fees when bags are not delivered to passengers on time. We urge the Department to finalize this rule consistent with our recommendations.

Respectfully submitted,



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