IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PARALYZED VETERANS OF AMERICA, *et al.*, *Plaintiffs*, vs. U.S. DEPARTMENT OF TRANSPORTATION, *et al*., *Defendants*.	Case No. 17-01539 (JDB)

JOINT APPENDIX

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UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

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REPORTING OF ANCILLARY

AIRLINE PASSENGER REVENUES

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PUBLIC MEETING

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THURSDAY,

MAY 17, 2012

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The public meeting convened in the Oklahoma City Room of the US Department of Transportation offices at 1200 New Jersey Avenue, Southeast, at 9:30 a.m., Robert Monniere, Moderator, presiding.

DOT STAFF PRESENT:

ROBERT MONNIERE, Moderator

YUH WEN LING

CHARLES SMITH

JACK WELLS

BLANE WORKIE

PUBLIC COMMENTORS:

LESLIE ABBOTT

MELODY ANDERSON

MARY BARNICLE

MICHAEL CARBONE

JIM CASEY

DANNY COX

CATHERINE GANTT

LORRY HALLOWAY

HEATHER HARVEY

DAVE HOSFORD

CHARLIE LEOCHA

PAUL PEMBERTON

BILL RACE

PAUL RUDEN

BILL SHOWALTER

ADRIAN van den ENDEN

ALEXANDER van der BELLEN

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our vendor to print new tags, and scanners would probably be the most accurate way for us to be able to determine moving away from the manual process.

We don't fly as many customers, but I definitely can appreciate the point made by Delta that moving to a manual process is really not the direction you want to take for accuracy purposes, so the tags would then need bar codes and bar codes would then come with scanners.

So, I don't know what the lead time is on that, but I would say it's relatively substantial, especially for a low-cost carrier.

MS. WORKIE: So if others can also comment on the lead time. I mean, if the Department makes a determination that they would require -- sorry. If a determination is made that there would be a final rule requiring mishandled baggage to be calculated differently so that it's based on check bags

enplaned as well as checked wheelchairs, how much time would the airlines need to comply with that sort of a requirement?

The related question is we've been talking a lot about the cost and most of the cost being in terms of automation. Would the cost be reduced if the Department provided additional time or would it not make any difference at all?

MS. ANDERSON: Melody Anderson from US Airways. So, additional time wouldn't reduce cost. The cost would be the same because, like Spirit said, we have a vendor -- vendors that we have to work with to make the changes, so to get specific as far as time, we would have to give them very specific requirements.

A high level estimate from our side would be well over a year to make those changes because you're talking about multiple systems, and then after that, the vendors make a change. We have to make a change

internally.

We have to do training. We have to do testing, all of those pieces, so it's not a quick flip of the switch given our network size and the number of employees we have, so --

MS. GANTT: Catherine Gantt with Southwest Airlines. Again, for the mishandled baggage in general, 90 to 120 days. If we go with the assistive devices, I'd have to separate out wheelchairs and scooters. That's going to take some programming, and I can't speak to exactly how long that would take, but it would be longer than that.

MR. HOSFORD: Dave Hosford with Delta. There would be no significant cost reductions depending on the time line. I think the costs are really associated with the automation and the cost to automate those processes.

On a timing standpoint, we're looking at probably 12 to 18 months, and I

think the important caveat there would be is we wouldn't want to start the metric until the first of the year on a calendar year so that all the internal reporting could be adjusted, as well.

Obviously, we wouldn't want to have a disconnect between our internal reporting and our external reporting, so we would prefer that if a change is made that it's made effective the first of the year so that we can cascade our goals internally.

MR. PEMBERTON: Paul Pemberton with American Airlines. For us personally, our host system is old and reaching the end of shelf life, so a current example is we didn't change the functionality of anything within our weight and balance system, yet we just needed to increase the size with a new aircraft that we are receiving. That will take a year just to do that and was very significant in cost.

So, for something like this, I

think I would go with Dave in that it would be at least probably 18 months for us and the cost wouldn't -- based on the time, cost wouldn't be modified.

MS. BARNICLE: Mary Barnicle with United Air Lines. I'd echo the other comments that similarly for United Air Lines, costs don't go down because time is enhanced. What the benefit of additional time is would only be the fact that this potential change, along with all the other regulatory changes that we're assimilating right now, would, perhaps, displace fewer of our other profit-generating projects that benefit our customers.

In terms of a floor on time, for us it would be we believe at least four months until we could even get a bid back from our contractor once we actually really had specs about what was needed, so that gives you an idea of the need for specifications and a four-month lag period before we could even begin to estimate costs never mind

implementation and testing as discussed by others.

MR. RACE: Bill Race, JetBlue Airways. We just recently had a cut-over to a new reservation system. We still have a backlog of IT resources and projects, and with the finite amount of IT resources, we estimate at least 12 months, most likely 12 to 24 months, before we could make any changes such as this.

In answering the earlier question as far as a percentage of wheelchair versus checked bags, since we're not tracking that now, it would be hard to estimate what that percentage would be. If it was larger than we expect, there would also be an additional amount of resources required to make that change, as well, to any prior change we made as far as the total number of bags checked reported.

MS. LING: This question may be a little bit into the weeds, but multiple people

mentioned having to coordinate with your vendors to change tags. How many vendors are there that make different tags, or is it just a few, many?

MS. ANDERSON: Melody from US Airways. Ours is tied into our reservation system, so that's -- the vendor that we're referring to in our host system.

MR. HOSFORD: Dave Hosford with Delta. At the actual tag, there's really only one vendor. I think the piece of that question that's challenging is that with the proposed changes, we're really not just talking about changes within our DCS system.

We're really talking about process changes, which is going to include every single vendor and ground handler that we have, so I think that's where the complexity is, but there definitely are multiple, multiple vendors and multiple parties that would all need to be aligned to make the appropriate changes.

Before the
U.S. Department of Transportation
Bureau of Transportation Statistics
Research and Innovative Technology Administration
Washington, D.C.

In the matter of:	)	
	)	
Notice of Proposed Rulemaking:	)	DOT-RITA-2011-0001
Reporting Ancillary Airline Passenger Revenues	)	
	)	

SUPPLEMENTAL COMMENTS OF US AIRWAYS, INC.

Communications with respect to this document should be sent to:

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October 2, 2012

Before the
U.S. Department of Transportation
Bureau of Transportation Statistics
Research and Innovative Technology Administration
Washington, D.C.

In the matter of:	)	
	)	
Notice of Proposed Rulemaking:	)	DOT-RITA-2011-0001
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SUPPLEMENTAL COMMENTS OF US AIRWAYS, INC.

US Airways, Inc. ("US Airways") hereby provides additional comments on the Department of Transportation's ("Department" or "DOT") July 15, 2011, Notice of Proposed Rulemaking ("NPRM")[1] following the publication of the transcript from the May 17, 2012, meeting regarding changes to ancillary fee, and mishandled bag and assistive device reporting ("Public Meeting"). The NPRM proposed i) drastic increases in the level of detail carriers must provide the Department when reporting ancillary fees; ii) a new formula for calculating mishandled baggage; and iii) specific reports concerning mishandled wheelchairs and scooters transported in aircraft cargo bins.

US Airways submits the proposed rule would impose significant equipment and computer programming costs, create on-going operational inefficiencies, and lead to customer inconvenience, all of which outweighs the benefit DOT believes might be gained from finalizing the rule. Moreover, the assumptions made by DOT in initiating this rulemaking are incorrect. In

[1] 76 Fed. Reg. 41726, July 15, 2011.

the Public Meeting Notice[2], the Department stated:

1) "The Department assumes that… airlines already collect the ancillary fee revenue identified in the proposed reporting requirement."

2) "The Department assumes that… airlines already collect and maintain information on the total number of counter-checked bags, gate-checked bags, and valet bags transported in the aircraft compartment."

3) "The Department assumes that… airlines already gather and maintain information on damage, delay and loss of wheelchairs and scooters transported in the aircraft cargo compartment.

Notice, at 25106.

In actuality, much of the information the Department proposes carriers to report is not currently collected and maintained by US Airways because there is no identified business need for it. Thus, the idea that the proposed rule will be simple to implement and impose minimal costs is inaccurate. US Airways would require major investment in new equipment and system reprogramming – at a cost exceeding $5 million – to capture and report the information the Department proposes to collect.

Accordingly, US Airways urges the Department to withdraw the proposed rule.

I. The Benefits to Consumers are Lower, and the Costs to Carriers are Higher, than Stated in the Proposed Rule.

Carriers already disclose the ancillary revenues they receive in their Form 41 reports. The issue in the proposed rule is the level of detail that is required, with DOT proposing that carriers break data they already report into 23 categories[3] purportedly for the benefit of consumers.[4] However, several of the 23 data categories proposed are outdated and unnecessary

[2] *See* 77 Fed. Reg. 25105 (April 27, 2012) ("Notice").
[3] The text of the NPRM refers to 19 categories, apparently by treating some of the most granular detail in the checked baggage area as one item with several sub categories. In total, 23 new items of data would be required.
[4] The NPRM also suggests governmental needs will be met, with the FAA, GAO, DOJ and DOT benefiting from this information. But, the NPRM does not explain how the FAA and GAO would use the information, and ignores the more precise tools already available to DOJ and DOT for gaining information from carriers. These tools include the use of civil investigation demands, investigation letters, and in many cases, just asking the carriers.

information. Furthermore, the Department cost-benefit analysis under-estimates the burden carriers will have to collect and report the data.

A. Collecting Data in the Manner Proposed by DOT Will Not Benefit Consumers.

The NPRM suggests that collecting specific data regarding ancillary revenues will benefit consumers by making "pricing more transparent" and making consumers "better informed about the existence of ancillary fees."[5] This statement is puzzling as the Department's second round of Enhancing Airline Passenger Protection rules[6] contained elaborate provisions designed to address this precise need, including a mandate that carriers develop a single webpage listing each specific ancillary fee charged by a carrier for optional services.

Quarterly reported aggregate revenue data will not better inform consumers, as it will not provide the price transparency DOT seeks. That US Airways took in X amount selling food, and Y amount selling sleep-sets, on board its aircraft in a three-month period, does not help a consumer make an informed decision about a specific trip.[7] As the Department has already promulgated rules intended to assist passengers by showing *specific* fees, it is counter-intuitive that public disclosure of *aggregated* revenues would further assist passengers.

B. DOT Under-Estimates the Amount of Time Carriers Will Need to Change their Reporting Systems and Develop New Processes to Collect Data.

The NPRM estimates it will take carriers 40 hours of programming time, plus an additional 10 hours per quarter, to accurately report ancillary revenues.[8] US Airways considers these estimates low, as it does not currently track revenues by all 23 of the ancillary revenue categories listed by the Department.

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[5] NPRM at 41726, col. 2, and 41728, col. 3.
[6] *See* 76 Fed. Reg. 23110, 23148 (April 25, 2011).
[7] Even if a consumer derived the "per passenger" amount collected, there is no correlation between the revenue US Airways has generated from passengers purchasing food and sleep-sets, and the price charged to the individual.
[8] *See* NPRM at 41729, col. 2.

US Airways estimates that it would take approximately 200 hours to complete the initial reprogramming of accounting software, create processes to collect ancillary revenue data, train employees, and test the overall data aggregation process necessary to track these ancillary revenues separately. Similarly, US Airways estimates it will take at least 20 additional hours each quarter to complete and submit the required report. US Airways' estimate is only for its accounting system software, and does not include reprogramming of other computer systems necessary to automate the tracking of these ancillary revenues. Thus, the cost is actually higher.

The Department could reduce the compliance burden on carriers by not collecting ancillary revenue data in the categories that are minor or non-sources of ancillary revenue for carriers, invoke commercial relationships between the carrier and third-parties, and which do not affect the consumer's price. These categories account for a significant portion of the reprogramming/remapping effort required for US Airways. A complete description of these categories is attached as Appendix A.

Given the burden on carriers to complete these reports and the lack of consumer benefit, as described above, US Airways urges the Department to abandon this new reporting requirement. Nevertheless, if DOT institutes such reporting, US Airways recommends the Department give carriers one year from the date of any Final Rule to be fully compliant with the new requirements.[9] This will ensure ample time for carriers to take all of the steps necessary to completely and accurately, collect and report ancillary revenues.

C. Any Ancillary Revenue Reporting Requirement Must Include Clarification in Several Areas to Ensure Consistent Reporting.

Any rule the Department promulgates regarding the reporting of ancillary revenues must provide clarification, including detailed descriptions, examples, and distinctions, of exactly

[9] US Airways also submits that any new reporting requirements should be made effective as of the start of a new calendar year (*i.e.* January 1). This ensures differently collected data is not mixed and avoids confusion.

which revenues should be reported in each category. Without this, it is unlikely carriers will interpret the categories in the same way, thereby defeating the goal of enabling consumers to make accurate comparisons among carriers.[10]

The Department should also clarify that carriers are only required to report ancillary revenues collected directly from customers and not codeshare and interline revenues. The clearinghouse process for codeshare and interline revenues takes longer than directly collected revenue (and much of the revenues wash out). This would avoid the possibility that a report includes different time periods for clearinghouse and directly collected revenues.[11]

II. The Department's Proposed Change to the Way Mishandled Baggage Ratios ("MBRs") Are Calculated Will Favor Some Business Models over Others.

The incentive for airlines to maximize their baggage performance already exists – lower costs, increased operational efficiency, and reduced customer complaints, all motivate airlines to continually improve their baggage performance. That the media publishes carrier MBR rankings, and consumers use them to compare carriers, only amplifies this motivation. Changing the MBR calculation will not affect these basic realities of air carrier operations, but risks confusing passengers who rely on this data.

A. MBR's are Not Lower Solely Because Fees Reduced the Number of Checked Bags.

US Airways questions the Department's determination that the decrease in carrier MBRs is exclusively the result of fees reducing the overall number of checked bags.[12] If MBRs only decreased because carriers implemented checked bag fees, then the MBR data for JetBlue and

[10] It is also important where, as here, certain categories of ancillary revenue are subject to taxation and other categories are not. (*See* NPRM at 41727, col. 1 and 2.)
[11] Different carriers also enjoy different percentages of ancillary revenues being passed through from their partners, as revenue distribution between codeshare and interline partners are unique contractual relationships.
[12] *See* 76 Fed. Reg. 41726, 41728-29 (July 15, 2011).

Southwest – carriers that do not charge for the first piece of checked luggage[13] – would have been expected to remain flat. Yet, from October 2007 to October 2009, JetBlue and Southwest experienced similar MBR decreases of 37% and 32%, respectively.[14]

US Airways submits that a significant part of its own improved baggage handling performance has been driven not by the imposition of checked baggage fees, but by the numerous projects US Airways has undertaken in the last six years to improve its handling of checked luggage. These projects include: equipment improvements to the baggage sorting system at Philadelphia; revamped baggage handling policies and improved employee training; closer coordination with airport authorities and TSA; and a system-wide bar code scanning system to track every piece of checked luggage in real time. The fruits of US Airways' efforts are evident in its numbers: in October 2006, US Airways' MBR was 7.89; in October 2010, US Airways' MBR was 2.15. Indeed, even between 2006 and 2008, when US Airways introduced checked bag fees, US Airways' MBR had already dropped to 3.08 – a reduction of over 60 percent.[15]

B. The Department's Current Metric Correctly Emphasizes Passenger Inconvenience.

At the bottom of the Department's proposal to change the way MBRs are calculated is a fundamental question: should the focus be on the individual checked bag that gets mishandled, as would be the case under the proposed rule? Or should the focus be on the number of passengers inconvenienced, as in the existing rule? US Airways submits that the emphasis already is properly placed on the passenger, as consumers are inconvenienced whether an airline

[13] *See* http://www.jetblue.com/about/legal/optional-services-and-fees/ *and* http://www.southwest.com/html/customer-service/travel-fees.html?int=GNAVTRAVELFEES.
[14] Source: Air Travel Consumer Reports.
[15] *See* Air Travel Consumer Report, December 2006, 2008, and 2010, containing data for the 12-month period ending October 2006, 2008, and 2010, respectively.

mishandles all of their checked luggage, or just a single piece. Other DOT metrics also emphasize the consumer by measuring "per enplanement", *e.g.*, disability complaints are not measured "per disabled passenger"; and frequent flyer complaints are not measured "per frequent flyer". Shifting the focus away from the passenger would represent a break from a long understood policy and practice, and be inconsistent with many of the collection and measuring functions the Department performs.

In its current form, a passenger sees the MBR number, and immediately knows their odds of being inconvenienced by mishandled luggage. Calculating mishandled baggage figures by pieces of checked luggage does not provide similar clarity. For example, if a carrier reported an MBR of 5.0 using the new calculation method, a passenger would not know if 5 passengers each had one bag mishandled – a one in 200 chance of being inconvenienced; or if one passenger had five checked bags mishandled – a one in 1,000 chance of being inconvenienced. This difference is significant to a traveler choosing a carrier or deciding whether to check a bag.

C. The Proposed New MBR Calculation Method Creates Bias in Favor of Certain Business Models, and Against Other Business Models.

An MBR calculation method that measures "per checked bag", instead of "per enplanement", inherently penalizes carriers with hub-and-spoke business models, and favors carriers operating point-to-point services. This is because network carriers using hub-and-spoke business models typically carry more passengers on connecting itineraries than point-to-point carriers. As connecting itineraries require a carrier to "handle" the bag more often than a non-stop itinerary, the connecting itineraries of hub-and-spoke carriers will inevitably have a greater number mishandled bags than those carriers offering point-to-point service.

It is notable that Southwest has been the only carrier that supported the Department's proposed change to the way mishandled luggage is calculated. This is not surprising given that

Southwest has a higher percentage of point-to-point itineraries than network carriers, and stands to gain from the misleading bias against network carriers that would be introduced.

The proposed new MBR calculation would also penalize carriers that partner with other carriers, and carriers that offer international flights – both services which benefit passengers. In the case of partnering carriers, the first carrier in the itinerary would receive credit for the checked bag, while the last carrier in the itinerary would be attributed the mishandled bag, even if they never touched it.[16] For international service, excluding bags carried on domestic segments of international itineraries reduces the overall sample size of checked bags that get measured. A reduced sample size makes the MBR number less accurate for consumers. Furthermore, it can artificially inflate a carrier's MBR number, where carriers end up reporting bags as mishandled (based on passenger claims), even though that same bag did not count towards a carrier's overall number of checked bags. As only carriers that offer international service would be affected by this, the MBR rankings would be distorted.

US Airways believes the Department should leave the MBR measurement as it currently exists, as it properly accounts for the number of touch-points a carrier has with a bag, and keeps the focus where it belongs – on the consumer. Both consumers and the media follow the MBR measurements with a keen interest, having a clear understanding of what MBR measures and how to make comparisons. Changing this calculation would confuse and disrupt what has become a reliable and longstanding way to look at carrier performance. By continuing to ensure all carriers are measured against each other for the same set of actions – accepting a bag, loading it in an aircraft, flying it, and off-loading it at the next airport – consumers can make meaningful comparisons during the decision making process.

[16] As it is usually impossible to determine which carrier actually mishandled a bag, such a metric also opens the door to game playing among baggage interlining carriers, as the first carrier in an interline itinerary could use less care with a bag without fear of being charged with a mishandled bag.

D. Carriers Should Have One Year to Implement the Changes Necessary to Accurately Measure Checked Bags.

Substantial equipment installation and programming efforts will be required by carriers in order to comply with a new MBR methodology. While US Airways can reasonably count the number bags checked at its ticket counters, other sources of checked bags are more challenging.

First, US Airways' gates are not equipped to print bag tags and automatically enter these gate-checked bags, which account for approximately 6% of all US Airways checked bags[17], into US Airways' baggage system. New computer equipment would have to be installed at each gate and on the ramp to print bag tags as luggage is taken from customers. US Airways estimates this equipment will cost at least one million dollars.[18] Furthermore, as manual entry of this data would be impossible due to time and volume constraints, expensive software upgrades would be required for US Airways to enter these bags into its baggage system.[19] US Airways estimates these software upgrades could cost upwards of another one million dollars. Both the gate equipment and software upgrades would also require significant investment of time.

Second, US Airways' software is not equipped to accommodate the entry of data from other airlines that accept bags for check in (i.e. codeshare or interline bags). To achieve this, all carriers that transfer baggage to each other would need to agree upon a common data format.[20]

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[17] The mishandling rate for gate checked luggage is in line with US Airways' overall baggage mishandling rate. Any report taken on gate checked bags is included under the current MBR metric.

[18] Such a process could also drive operational delays. Currently, when an aircraft is ready to depart but passengers have to check bags because there is no more overhead bin space, US Airways quickly affixes a paper tag at the end of the jet-bridge, and loads the bag in the cargo hold. Under the new process, passengers would go back up the jet-bridge to the gate, have new automated tags printed, then bring the bag back down the jet-bridge to be scanned and loaded onto the plane.

[19] A fully automated, industry-wide process is necessary to achieve the accuracy and auditable results that exist under the current MBR metric. Carrier DOT MBR rankings are often within 0.01 of one percent of each other. Thus, the manual process advocated for by Southwest at the Public Meeting, which is not readily validated and audited, is not a proper alternative when absolute precision is required.

[20] Any attempt at a manual process would be prohibitively time consuming in light of the volume of interline baggage. Moreover, it would simply be impossible to manually capture the required baggage information when receiving bags from other carriers and moving the bags through the system.

After that common format is agreed upon, carrier computer systems need to be re-programmed and mapped to each other, at significant time and expense.

For all of these reasons, US Airways submits that the Department should give carriers one year to implement any changes.[21]

III. US Airways Does Not Object to The Department's Collection of Data Regarding Mishandled Wheelchairs and Scooters under Certain Conditions and Provided Carriers Receive Sufficient Time to Implement Necessary Programming Changes.

US Airways takes seriously its obligations to passengers with disabilities, including its duty to carry a passenger's wheelchair, scooter, or other device without damaging it. As such, US Airways does not object to the Department's proposal to capture data on damaged wheelchairs or scooters transported by carriers, within three parameters.

First, carriers should be allowed to determine for themselves whether transporting wheelchairs and scooters in the cargo compartment or the passenger cabin will least likely result in damage to the assistive device. US Airways has previously advocated allowing carriers to seat-strap wheelchairs within the passenger cabin, citing the lack of a single passenger complaint about wheelchair damage as a result of seat-strapping.[22]

Second, US Airways does not object to the expansion of this reporting requirement beyond wheelchairs and scooters to include other mobility devices for passengers with disabilities, provided the reporting requirement does not extend to include non-mobility assistive devices and devices not used by passengers with disabilities, such as car seats, strollers, CPAP

[21] Again, US Airways believes it is appropriate for any new rule to begin at the start of the calendar year.
[22] *See* Comments of US Airways, Inc., August 2, 2011, Docket DOT-OST-2011-0098, p.11, and Appendix A, Section IV, p. 11-13.

machines, and seat cushions;[23] and that the Department explicitly lists which mobility devices it intends to be included under this reporting requirement (*e.g.* walkers).

Finally, US Airways requests the Department allow at least one year for carriers to implement the changes necessary to comply with this reporting requirement. Although US Airways informally tracks damaged medical assistive devices, its software is designed to ensure agents waive bag fees for passengers checking an assistive device. US Airways does not track the type of device damaged, as its software does not differentiate between mobility devices and other items.

In order to track this information accurately and efficiently, US Airways would be required to purchase and install new equipment and software to overcome all of these limitations, including specialized new tags and barcodes. Existing software would also need to be reprogrammed to ensure compatibility; new company procedures would need to be developed; and employees would need to be trained on both the new procedures, and new equipment. In light of all these steps necessary for compliance, US Airways submits the Department should allow carriers at least one year to comply with any new reporting requirements for mobility assistive devices.

* * *

The NPRM proposes changes in three separate areas – ancillary revenue data collection, a new MBR formula, and reporting on mobility device mishandling. While US Airways does not object to reporting on mobility device mishandling, subject to the parameters it described; US Airways is concerned about both the collection of ancillary revenue data and the Department's proposed new mishandled baggage metric. The collection of aggregated ancillary revenues asks

[23] US Airways is not disclaiming responsibility for damage to non-mobility medical devices under the appropriate regulations, but does not believe reporting damage to such devices is necessary.

for outdated or inapplicable data and does not help consumers make informed decisions. The proposed new MBR calculation method focuses on the bag instead of the consumer, and introduces bias that artificially alters the MBR rankings, based on a carrier's business model.

For the reasons stated in these comments, US Airways respectfully urges that the Department withdraw the pending NPRM.

Respectfully submitted,

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October 2, 2012

Proposed Ancillary Revenue Categories that Should Not be Collected by the Department

Many of the categories described in this section involve confidential commercial agreements between US Airways and third-party vendors. While US Airways anticipates that most carriers have similar arrangements, US Airways is not privy to those agreements, and can only comment on its own arrangements.

Category 12: Charges for Lost Tickets – This category is outdated as nearly all tickets issued to passengers today are electronic tickets, rendering the concept of a lost ticket obsolete. Paper tickets that still exist are predominantly issued by travel agents, and any lost ticket fees would be charged by the travel agent, not the carrier.

Category 15: Commissions on Travel Packages – This category does not apply to consumers and entirely misinterprets the position of carriers relative to the flow of money for travel package sales. Like ticket sales, carriers do not collect commissions from passengers; rather, carriers pay commissions to travel agents that sell their travel packages to clients.

Category 16: Travel Insurance – This category is inapplicable as travel insurance is provided by a third party vendor and consumer payments flow directly to the insurance company. Under a contract with the insurance company, US Airways earns a small referral fee for each policy sold. This is paid separately by the insurance company, and results in only a very minor amount of revenue to US Airways. Public disclosure of these back-end referral fees would do nothing to assist the consumer in making purchase decisions.

Category 17: Duty Free and Retail Sales – US Airways conducts retail sales on board international flights via Duty Free, and on domestic flights via the SkyMall catalog. While US Airways receives a commission on Duty Free items sold, passengers purchasing Duty Free items pay the third-party Duty Free supplier, not US Airways. Only after the Duty Free supplier collects the money, does the supplier separately pay any commissions owed to US Airways. For SkyMall, consumers pay the supplier directly and US Airways' revenue is based primarily on the number of passengers enplaned, plus an amount to cover the cost of additional fuel burn from the weight of the catalogs. US Airways receives a small commission once sales reach a certain annual threshold. Duty Free and SkyMall represent a very minor revenue stream to US Airways, and public disclosure of back-end revenue received from US Airways corporate partners would not aid the consumer's decision making process.

Category 18: One Time Access to Lounges – Carrier lounges and clubs are predominantly visited by the frequent travelers of a carrier, and its alliance partners. The amount of revenue collected by carriers for one-time access to clubs and lounges is very small, and this revenue is already included in the total revenues of carriers' club operations. Furthermore, lounges and clubs are commonly operated by third-party vendors, with which the carrier contracts to allow its frequent flyers access. In these situations, any one-time access revenues would go to the third-party operating the lounge/club, and not the carrier.

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 234 and 241

RIN 2105-AE41 (formerly 2139-AA13)

[Docket No. DOT-RITA-2011-0001]

Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments

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

ACTION: Final rule.

SUMMARY: The Department of Transportation (DOT or Department) is issuing a final rule that changes the mishandled-baggage data that air carriers are required to report, from the number of Mishandled Baggage Reports (MBR) and the number of domestic passenger enplanements to the number of mishandled bags and the number of enplaned bags. Fees for checked baggage may have changed customer behavior regarding the number of bags checked, potentially affecting mishandled-baggage rates. Finally, this rule fills a data gap by collecting separate statistics for mishandled wheelchairs and scooters used by passengers with disabilities and transported in aircraft cargo compartments. An additional topic covered in the proposed rule, the reporting of airline fee revenues, remains open and is not addressed in this rulemaking.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Tim Kelly, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave., SE, Washington, DC 20590, 202–366–5952 (phone), 202–366–5944 (fax), *tim.kelly@dot.gov*. You may also contact Blane A. Workie, Assistant General Counsel for Aviation Enforcement and Proceedings, Department of Transportation, 1200 New Jersey Ave., SE, Washington, DC 20590, 202–366–9342 (phone), 202–366–7152 (fax), *blane.workie@dot.gov*. TTY users may reach these individuals via the Federal Relay Service toll-free at 800–877–8339. You may obtain copies of this notice in an accessible format by contacting the above named individuals.

SUPPLEMENTARY INFORMATION:

Background

On July 15, 2011, the Department published a notice of proposed rulemaking (NPRM) in the Federal Register, 76 FR 41726, which addressed the following areas: (1) reporting of ancillary fee revenue; (2) data for computation of mishandled-baggage rates; and (3) data for mishandled wheelchairs and scooters used by passengers with disabilities that are transported in the cargo compartment. With regard to the reporting of ancillary fee revenue, the Department proposed to collect detailed information about ancillary fees paid by airline consumers to determine the total amount of fees carriers collect through the *a la carte* pricing approach for optional services related to air transportation. The Department also proposed to alter its matrix for collecting and publishing data on mishandled baggage. For many years the Department has required the larger U.S. air carriers to report the number of Mishandled Baggage Reports (MBRs) filed by passengers and the total number of passenger enplaned. The Department then divides the number of MBRs (the numerator) by the total number of passengers enplaned (the

denominator) and multiplies the result by 1,000 in order to arrive at a rate of MBRs per 1,000 passengers which it publishes in its monthly Air Travel Consumer Report. For example, if an airline reports 800 MBRs and 600,000 passengers enplaned, that carrier will have a published rate of 1.3 MBRs per 1,000 passenger enplanements. In the NPRM, rather than compute the number of Mishandled Baggage Reports per unit of domestic enplanements the Department proposed using the number of mishandled bags per unit of total bags checked. As noted in the NPRM, passenger behavior was altered regarding the unit of bags checked when many air carriers began charging passengers for each bag that they check. We believe that airline passengers would have better information to compare airline services if the matrix for mishandled baggage were changed to the number of the actual mishandled bags per unit of checked bags rather than the number of Mishandled Baggage Reports filed by passengers per unit of domestic scheduled-service passenger enplanements. As explained below in greater detail, although the NPRM proposed to require carriers to report the total number of "checked bags," in this final rule we are clarifying this term to mean the total number of "checked bags enplaned." Consequently, a one-way connecting passenger would have his or her checked bag counted each time the bag was enplaned—i.e., at the origin point and at the connecting point. This is consistent with the manner in which the existing rule requires the total number of passengers enplaned to be reported. Finally, the Department proposed to collect information regarding damage, delay or loss of wheelchairs and scooters transported in the aircraft cargo compartment.

The Department received 278 comments in response to the NPRM, including several representing the views of multiple entities. Of these, eight comments were from members of the airline industry, representing the views of Allegiant Air, American Airlines, Delta Air Lines,

Southwest Airlines, Spirit Airlines, United Air Lines, US Airways, and Virgin America. Six comments were from industry associations, representing the views of Airports Council International, North America (ACI-NA), the Air Transport Association of America (ATA) [now known as Airlines For America (A4A)], the American Aviation Institute (AAI), the American Society of Travel Agents (ASTA), the Association of Retail Travel Agents (ARTA), and the Regional Airline Association (RAA). The Department received two comments from FlyersRights.org and 260 comments from individuals, including 219 from members of FlyersRights.org. Other consumer and disability associations, including Consumer Action, the Consumer Federation of America, Consumers Union, the Consumer Travel Alliance, the National Consumers League, the Open Doors Foundation, and the Paralyzed Veterans of America submitted comments.

On April 27, 2012, the Department published a notice of public meeting in the Federal Register, 77 FR 25105, listing a series of questions that the Department intended to pose to the public in order to receive input on the costs and benefits associated with the proposals outlined in the July 15, 2011, NPRM. This public meeting was held at the Department's headquarters on May 17, 2012. Attendees provided the Department with oral comments, a transcript of which is available in the public docket. Subsequent to the public meeting, American Airlines, Delta Air Lines, and US Airways submitted additional written comments.

In general, consumers, consumer associations, disability associations, and airports support the rule as proposed while many airlines and airline associations oppose it. The section-by-section analysis will describe each provision of the final rule.

On January 17, 2014, President Obama signed into law the Consolidated Appropriations Act, 2014 (P.L. 113-76), which included language transferring the powers and duties, functions,

authorities and personnel of the Department's Research and Innovative Technology Administration (RITA) to the Office of the Assistant Secretary for Research and Technology (OST-R) in the Department's Office of the Secretary. Thus, the Office of the Assistant Secretary for Research and Technology is now an office within the Office of the Secretary. Based on the Act, this rulemaking received a new regulation identifier number.

COMMENTS AND RESPONSES

1. *Reporting of Ancillary Fee Revenue*

The Department bifurcated its rulemaking on the reporting of ancillary fee revenue into two separate rules: this rule to address the reporting of data used in the computation of mishandled baggage and wheelchair/scooter rates (2104-AE41), and another rule to address the reporting of ancillary fee revenue (2105-AE31). These rulemakings were split as they address unrelated matters and their separation will make it easier for stakeholders to locate information about a particular topic embodied in each separate rule. The Department's rulemaking on the reporting of ancillary fee revenue, including an analysis of the public comments received in response to the 2011 NPRM and 2012 public meeting, remains open.

2. *Mishandled Baggage*

The NPRM: In the NPRM, the Department proposed changing the methodology for reporting mishandled baggage on a domestic system basis, excluding charter flights. The rule's proposed text would require reporting the number of mishandled bags rather than the number of Mishandled Baggage Reports filed by passengers, and the total number of domestic checked bags enplaned rather than the number of domestic passenger enplanements. As noted above, the Department stated in the NPRM that it believes that the current matrix for comparing airline mishandled baggage performance is outdated and the proposed changes would give airline

passengers better information to compare airline services. Passenger behavior was altered regarding the number of bags checked when many air carriers began charging passengers for each bag that they check. Although the Department did not specifically solicit comments on alternative methodologies for reporting mishandled baggage, comments received from air carriers and their associations led the Department to consider alternatives discussed below.

Comments: Consumers and consumer groups, as well as ACI-NA and one carrier, Southwest Airlines, stated that the proposed methodology would render more accurate and useful results. The current methodology, these comments asserted, compares unrelated numbers since fewer passengers currently check bags than when the methodology was devised. Consumer groups commented that the Department should capture data regarding the number of mishandled bags that were checked at the gate, in addition to the number of mishandled bags that were checked at check-in counters and self-service bag drop locations.

On the other hand, A4A (excluding JetBlue and Southwest Airlines), RAA, and the carriers that submitted comments, with the exception of Southwest Airlines, contend that the Department's long-standing methodology for calculating mishandled baggage is useful and valid. They commented that the proposed methodology would cost industry more than the current methodology. Increased costs would stem primarily from recording interlined baggage, gate-checked baggage, and "valet" bags. (Interlined baggage is checked baggage of a passenger whose itinerary does not involve a code-share but includes more than one airline. Gate-checked baggage is baggage that the passenger brought to the gate but which was taken by the carrier at that location and checked into the baggage compartment of the aircraft. Valet bags, sometimes called planeside bags, are bags that a passenger drops at the end of the loading bridge or on the tarmac near the aircraft and which carrier personnel load into the baggage compartment of the

aircraft, a process that is frequently used by regional airlines.) In addition, individual carriers commented that the proposed methodology would mislead the public, and would benefit Southwest Airlines to the detriment of all other carriers, regardless of each carrier's ability to properly handle bags. One carrier, US Airways, disagreed with a conclusion in a report issued by the Government Accountability Office (GAO; report GAO-10-785, July 2010) that bag fees had altered consumer behavior by leading them to check fewer bags, thus resulting in fewer MBRs. A4A (excluding JetBlue and Southwest Airlines) and RAA recommended that should the Department deem a change is necessary, the denominator of the rate calculation should be the total number of domestic enplaned bags rather than origin-and-destination bags. For example, for a passenger with a checked bag who is traveling one-way from Denver to Boston with a connection (change of planes) in Chicago, a "total enplaned bags" system would count the bag twice, i.e. when it was enplaned on the Denver-Chicago flight and again when it was enplaned on the Chicago-Boston flight. An "origin-and-destination" system would only count the bag once, as a bag moving from Denver to Boston regardless of the flight or flights that were used.) Southwest Airlines expressed concern with using total domestic enplaned bags as the denominator, claiming that to do so would benefit hub-and-spoke carriers at the expense of point-to-point carriers.

American Airlines, Delta Air Lines, and US Airways commented that the Department severely underestimated the cost of complying with the proposed rule. They noted for gate-checked and "valet" bags, carriers would have to replace a manual bag tagging system with an automated one. Delta Air Lines stressed the importance of using an automated system because less than one hundredth of one percent often separates competitors in the Department's mishandled baggage rankings. That carrier estimated this would cost up to $10 million in new

equipment and $900,000 in programming, while requiring 18 to 24 months to fully implement. US Airways estimated that automation would cost $1 million in new equipment and $1 million in programming. In addition, Delta Air Lines commented that the rule would cause operational delays and passenger inconvenience because of the time involved in printing and then scanning automated bag tags.

On January 12, 2016, A4A filed supplemental comments. The organization objected to language in the Notice of Proposed Rulemaking on Transparency of Airline Ancillary Fees and Other Consumer Issues ("Consumer Rule 3")[1] that would amend the mishandled baggage reporting rule (14 CFR 234.6) to require reports "for all domestic scheduled passenger flight segments that are held out with the reporting carrier's code…," including flights operated for a carrier by its regional-carrier code-share partners. A4A stated that the data are not captured by flight segment today and that devising a system to do so would be costly and time-consuming. A4A also objected to language in that NPRM which the organization said could impede "valet" or "planeside" baggage service widely offered by regional carriers and would have to be coordinated with the Transportation Security Administration (TSA).

Finally, the Department received comments questioning which airline must report baggage in interline situations or when multiple airlines place their codes on a single flight.

DOT Response: The Department has decided to require that airlines report mishandled baggage in terms of the number of mishandled bags and the total number of domestic enplaned bags, excluding charter flights. A bag will be counted as "enplaned" on each flight of a passenger's journey. For example, if a passenger were traveling one-way from Denver to Boston with a connection in Chicago from one flight to another, the bag will be counted twice (once for each flight). Consistent with this approach, if that passenger were instead traveling on

[1] 79 Fed. Reg.29970, May 23, 2014, Docket DOT–OST–2014–0056

a direct flight from Denver to Boston with an intermediate stop in Chicago but no change of planes, the bag would be counted only once — when it was enplaned in Denver.

Passenger behavior was reportedly altered when many air carriers began charging passengers for each checked bag. Specifically, the GAO report cited above stated that the introduction of baggage fees resulted in a decline of 40 to 50 percent in the number of checked bags with a corresponding 40 percent decline in the number of MBRs per 1,000 passengers (GAO-10-785, July 2010, page 25). The ratio between checked bags and the number of passengers can vary greatly depending on the fees charged. Moreover, there is not a direct relationship between the number of MBRs and the number of mishandled (i.e., lost, stolen, delayed, damaged, and pilfered) bags because a single MBR could be submitted by a family — or even an individual — with multiple mishandled bags. In addition, the Department has decided to include in its revised mishandled baggage methodology all checked bags, including those checked at the gate and "valet" bags. As the GAO noted, as the amount of checked baggage has decreased, the amount of carry-on baggage has increased, resulting in airlines' having to check more bags at the gate. The Department believes that the new methodology in this rule will better inform passengers of their chances to retrieve their gate-checked baggage in an acceptable and timely manner.

The Department agrees with the suggestion from A4A (excluding JetBlue and Southwest Airlines) and RAA that the Department use the number of domestic bag enplanements rather than origin-and-destination bags in the denominator. We have revised the language of the relevant section accordingly. Using the enplaned-bag approach will avoid the costs that would be entailed for tracking a given bag from origin to destination for connecting passengers under an origin-and-destination approach. The use of "enplaned bag" language in the final rule also

results in a carrier receiving "credit" for a properly-handled bag on each flight of a passenger's journey. This ensures that when bags travel on multi-carrier itineraries or when interline agreements allow carriers to check bags through to the passenger's final destination, even when that passenger possesses more than one ticket, the operating carrier on each flight will receive "credit" for a properly-handled bag. For example, if a passenger travels on a flight operated by airline A from Washington, DC to Los Angeles, and a flight operated by airline B from Los Angeles to Honolulu, for the "denominator" figure airline A would include the passenger's checked baggage in its reporting for the Washington – Los Angeles flight while airline B would include the passenger's checked baggage in its reporting for the Los Angeles - Honolulu flight. The same piece of luggage would be reported by both airlines (on different flights), thus giving both airlines the chance to receive "credit" for handling the bag. Whether or not airlines A and B operate one or both of those flights as part of a code-share or as part of an interline agreement would have no impact on their reporting requirements. In the comments received from A4A (excluding JetBlue and Southwest) and RAA, the associations noted that the "enplanement" approach would resolve much of the complexity stemming from interlining, gate checking, and "valet" bag situations. Thus, the Department believes that adopting the suggested methodology of A4A (excluding JetBlue and Southwest) and RAA will result in lower compliance costs for air carriers.

Using the total number of domestic bag enplanements rather than bags checked for origin-destination trips further reduces the rule's cost because air carriers already count pieces of checked baggage in order to comply with the Federal Aviation Administration's (FAA) existing weight-and-balance requirements. The FAA requires that carriers maintain, for at least three months, the number of "standard," "heavy," and "non-luggage" bags carried in the cargo

compartment. Delta Air Lines confirmed at the May 17, 2012, public meeting that, because of the FAA requirements, the carrier already possesses a tally of bags transported in the cargo compartment on each of its domestic scheduled flights.

With respect to A4A's January 12, 2016, supplemental comments, the language in the "Consumer Rule 3" NPRM concerning reporting by flight segment referred to a separate proposal in that proceeding that would require carrier reports about on-time performance, oversales, and mishandled baggage to include data for flights operated by their domestic code-share partners. The phrase "for all domestic scheduled passenger flight segments that are held out with the reporting carrier's code" in that NPRM was simply intended to capture the code-share operations, not to require reporting by flight segment. If this Consumer Rule 3 proposal is finalized, we will modify the phrase in question to make this clear. This final rule simply requires carriers to count the number of checked bags that are enplaned on each flight; it does not require carriers to conduct segment-by-segment tracking of the number of bags on board each segment of a direct flight, nor does it require origin-destination ("O&D") tracking based on each passenger's itinerary.

A4A also contended in its January 12, 2016, comments that in order to comply with the instant rule as proposed, the only realistic solution for most carriers is to begin tracking "valet bags" in the same way that all other checked bags are tracked today—with an automated bag tag (ABT) that is linked to the passenger's Passenger Name Record, rather than the existing paper valet tags. A4A further asserted that once a bag is tagged with an ABT, TSA requires it to be treated like all other checked baggage and prohibits the traveler from having access to it in the sterile area of the airport. A4A stated that this means that carriers could no longer return these bags to passengers on the jet bridge at the conclusion of the flight. However, the rule does not

require the use of ABTs. In addition, TSA has advised the Department that TSA's interest is in ensuring that passengers do not have access in the secure area of an airport to a checked bag that has not passed through the passenger security screening checkpoint. Valet bags are screened at that checkpoint. TSA explained that attaching an ABT to a bag that the passenger has carried through the screening checkpoint, or referring to such a bag as a checked bag, would not trigger the prohibition on the passenger having access to that bag in the airport's secure area.

The Department is not prescribing a particular mechanism through which air carriers must capture the data required by this rule. Carriers may adopt whichever method they find best suited to their business model. In terms of "valet" bags, for example, this rule does not require air carriers to provide passengers with individual bag claims that must be matched to bags on arrival; instead, air carriers need only ensure that the "valet" bag is properly counted in the data reported to the Department.

Finally, the Department has made a ministerial change to its proposed rule. In its NPRM, the Department cited "49 U.S.C. 329 and chapters 41101 and 41701" as the authority for the mishandled baggage portion of the rule. The correct citation is: "49 U.S.C. §§ 329, 41101 and 41701."

3. Data for Wheelchairs and Scooters Transported in Aircraft Cargo Compartments

A. Reporting Mishandled Wheelchairs and Scooters Transported in the Cargo Compartment

The NPRM: The Department proposed requiring carriers to report the number of mishandled wheelchairs and scooters and the total number of wheelchairs/scooters transported in the aircraft cargo compartment. The Department sought public comment to better understand the scope of this issue and whether the prospect of loss, damage or delay of such devices or the lack of data made consumers with disabilities reluctant to travel by air.

Comments: In general, consumers voiced support for the proposal to require air carriers to break out data on the number of mishandled wheelchairs and scooters transported in the aircraft cargo compartment, maintaining that such reporting would reduce the number of incidents, while providing passengers with disabilities with a metric for making better-informed travel decisions. The Paralyzed Veterans of America and the Consumer Travel Alliance made similar supportive comments, noting that their members frequently request this currently-unavailable data, although the former group did request that the Department define "mishandled" in its regulation. ACI-NA commented that the proposed rule will increase accessibility of airports in general because passengers will know more about the air travel experience.

On the other hand, A4A (excluding Southwest Airlines) and RAA commented that the Department had no basis for concluding that passengers with disabilities are reluctant to travel by air due to wheelchair mishandling, and that the proposal lacked a public policy justification. Several air carriers asserted that the Air Carrier Access Act and its implementing regulation (14 CFR Part 382) already provide carriers with an incentive to handle these devices properly. The associations, individual airlines, and ARTA commented that the proposed rule was unduly burdensome on industry. In particular, these comments noted that wheelchairs and scooters are manually tagged and checked, and thus air carriers would need to implement a new mechanism to capture the required data. In written comments, American Airlines and Delta Air Lines commented that there would be high costs involved in programming systems to differentiate wheelchairs and scooters transported in the cargo compartment from the larger universe of all checked baggage. At the May 17, 2012, public meeting, US Airways stated that costs would be high, while others, including Delta Air Lines and Southwest Airlines, indicated the opposite. As

an alternative to the Department's proposal, several carriers proposed the establishment of a working group to devise a workable method of capturing the required data.

The Open Doors Foundation did not support the proposed rule. This organization commented that collecting this data would lead to competition among carriers in an area that should not be competitive, would cause airlines to reduce training and policies to the bare minimum needed to obtain "good" numbers, and would divert Department resources from other projects intended to make air travel more accessible.

Although A4A's comments opposing the Department's proposal represented the views of all of that association's members except Southwest Airlines, US Airways filed a supplemental comment after the May 17, 2012, public meeting in which it indicated that it did not object to the Department's proposal to require carriers to report the number of mishandled wheelchairs and scooters transported in the aircraft cargo compartment. US Airways commented that it would need one year to update software to distinguish wheelchairs and scooters from other checked baggage and that it should have the option of stowing some assistive devices in the passenger cabin.

DOT Response: The Department has decided to require carriers to report the number of mishandled wheelchairs and scooters and the number of wheelchairs/scooters accepted for transport in the aircraft cargo compartment. The Department's applicable definition of "mishandled" is found at 14 CFR 234.1, which defines "mishandled" as "loss, delay, damage, or pilferage." When issuing its NPRM, the Department intended for the same definition to apply to mishandled wheelchairs and scooters. The Department agrees with the many comments received from the public and disability rights groups that this rule will make air travel more accessible as it will provide the traveling public with the data necessary to make informed travel decisions.

The number of wheelchairs and scooters accepted for transport in the aircraft cargo compartment is to be included in the total number of checked bags enplaned. Similarly, the number of mishandled wheelchairs and scooters is to be included in the number of mishandled checked bags. We believe that the number of mishandled bags (and the rate of mishandled bags per 1,000 bags enplaned, which will be calculated by DOT and included in our Air Travel Consumer Report) should include all items of which the carrier took custody.

In response to comments from industry that there is no basis to conclude that passengers with disabilities are reluctant to travel by air due to wheelchair and scooter mishandling, the Department believes that the public comments received from air travelers with disabilities and disability rights organizations are representative of a widespread reluctance. It is public policy that air travel should be accessible to all members of the public, and the Department believes that this rule advances that policy goal. The Department appreciates that the Air Carrier Access Act and 14 CFR Part 382 have provided air carriers with an incentive to handle wheelchairs and scooters properly. The Department believes that this final rule will not only act as an additional incentive, but most importantly will provide passengers with disabilities with a metric that they may use to compare air carriers and to make informed travel decisions. The Department agrees with US Airways' comment that capturing data on the incidence of wheelchair and scooter mishandling is in line with a carrier's obligations and duties to passengers with disabilities.

The Department appreciates the concerns raised by Open Doors. While we believe that air carriers do strive to provide good service to passengers with disabilities, we continue to think that consumers with disabilities have the right to know which airlines provide the best service and have a right to select their air carriers based on that knowledge. In addition, the Department's existing disability regulations already require airlines to provide training to their

employees. The new rule provides further incentive to airlines to provide the training necessary to result in as little mishandling as possible to wheelchairs and scooters. Finally, this rulemaking does not divert the Department's attention from other objectives, e.g., issuing rules requiring accessible in-flight entertainment systems, but instead provides passengers with mobility impairments, who represent a large segment of the population of travelers with disabilities, with information they deserve and need to make informed travel decisions.

B. Extension of the Rule to Other Assistive Devices and/or Devices Transported in the Passenger Cabin

The NPRM: The Department solicited comments on whether the rule should be extended to all wheelchairs and scooters, regardless of whether they are transported in the passenger cabin or in the cargo compartment, and whether the rule should apply to other mobility devices, e.g., walkers.

Comments: Many consumers and disability rights organizations commented that the Department should extend the rule in this manner. These comments generally relied on the same rationale as for their support of the proposed reporting requirement for mishandled wheelchairs and scooters transported in the cargo compartment; namely, that the number of mishandled assistive devices will be reduced and consumers with disabilities will have data necessary to make better-informed travel decisions. The Paralyzed Veterans of America further recommended that this rule be applied to foreign air carriers and a member of the public recommended that this rule be applied to other modes of transportation. Many air carriers commented that capturing data on mishandled wheelchairs and scooters transported in the passenger cabin would prove unworkable since no data is kept about items transported in the cabin. US Airways commented that it would not oppose an extension of the rule to other

mobility devices so long as the Department explicitly listed which mobility devices were covered by the rule, and so long as the Department explicitly excluded mobility devices not used by passengers with disabilities.

Members of the public made numerous recommendations intended to improve the air travel experience for passengers with disabilities. These recommendations included the creation of a uniform damage form, a requirement that air carriers maintain a list of repair shops located near each airport served, a blanket exemption from all ancillary fees for passengers with disabilities, a mandated retrofitting of aircraft so that all mobility devices may be transported in the passenger cabin, and a prohibition on the gate-checking of assistive devices.

DOT Response: The Department believes that requiring the reporting of data on the mishandling of all assistive devices, particularly those transported in the passenger cabin, is impracticable. The Department understands that airlines do not have a mechanism for tracking items carried in the passenger cabin. Further, wheelchairs and scooters are generally checked as single items, while other assistive devices are generally stored inside baggage. Requiring the reporting of data on assistive devices stored inside checked baggage would require passengers and airlines to inventory such baggage. As a result, the Department will require that carriers report data only on scooters and wheelchairs.

The Department appreciates the additional recommendations received from the general public, including the application of this rule to cover other modes or to foreign air carriers, but concludes that these recommendations fall outside the scope of the current rulemaking.

4. Compliance Date

The NPRM: The Department did not propose a specific compliance date.

Comments: None of the public comments received prior to the May 17, 2012, public meeting related to the compliance date of this rule. During the public meeting and in subsequent public comments, most air carriers commented that they would need 12 to 24 months after the final rule is published in the Federal Register to comply because of time necessary for re-programming existing systems, installing new equipment, and training employees. In addition, Delta Air Lines and US Airways commented that a compliance date of January 1 would be preferable because it would provide the clearest demarcation between data sets.

DOT Response: The Department has determined that air carriers must comply with the new reporting requirements for air transportation taking place on or after January 1, 2018. The Department agrees with Delta Air Lines and US Airways that a January 1 compliance date provides a clear demarcation between data sets, corresponding with a change in the type of data reported by air carriers. In particular, given that this rule significantly changes the mishandled baggage metric, choosing the first day of the year as the compliance date will make future year-over-year comparisons more meaningful. In addition, the selection of this compliance date provides air carriers with adequate time to update their internal systems and reporting processes.

Based on this compliance date, data in this new format on mishandled baggage for the month of January 2018 will be due February 15, 2018. Data on mishandled wheelchairs and scooters transported in aircraft cargo compartments for the month of January 2018 will also be due February 15, 2018.

Regulatory Analyses and Notices

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

This action has been determined not to be significant under Executive Order 12866 and the Department of Transportation's Regulatory Policies and Procedures. It has not been

reviewed by the Office of Management and Budget. These changes make the measure of the published mishandled baggage rate more informative for ticket purchasers trying to assess risk. The new metric of number of bags reported as mishandled reveals more than the old figure of the number of reports of mishandled bags, since a single passenger report can cover multiple bags or even multiple passengers (e.g., several members of a family). Also, the number of enplaned checked bags is more helpful than the number of passengers, particularly given that the ratio of checked bags to passengers will tend to vary among carriers depending on their baggage allowances and fees. With purchasers better informed on the comparative performance of different carriers, competition among airlines should sharpen and performance in baggage handling can be expected to improve. As for reporting of wheelchairs and scooters, making information available to the public on each carrier's performance on handling wheelchairs and scooters would enable passengers with disabilities to make better decisions about which carrier to fly. Comments submitted in this rulemaking from air travelers with disabilities and disability rights organizations suggest that fear of the airlines damaging or losing wheelchairs and scooters creates a reluctance to fly among those dependent on these devices. The expected present value of costs incurred by carriers to comply with the final rule over a 10 year period using a 7% discount rate is estimated at $2,064,588 and using a 3% discount rate is estimated at $2,483,436. The final Regulatory Evaluation has concluded that the benefits of the final rule justify its costs. A copy of the final Regulatory Evaluation has been placed in the docket.

B. 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. DOT

defines small carriers based on the standard published in 14 CFR 399.73 as carriers that provide air transportation exclusively with aircraft that seat no more than 60 passengers. No small U.S. air carriers are affected by these requirements, as they apply only to the "reporting carriers," i.e., U.S. carriers that account for at least 1 percent of domestic scheduled passenger revenue. No small carriers as defined in 14 CFR 399.73 are included in this group. On the basis of this examination, I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

C. Executive Order 13132 (Federalism)

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This final rule does not include any provision that: (1) has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibility among the various levels of government; (2) imposes substantial direct compliance costs on State and local governments; or (3) preempts State law. States are already preempted from regulating in this area by the Airline Deregulation Act, 49 U.S.C. § 41713. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13084

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments"). Because this final rule does not significantly or uniquely affect the communities of the Indian Tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of Executive Order 13084 do not apply.

E. Paperwork Reduction Act

This rule adopts new and revised information collection requirements subject to the Paperwork Reduction Act (PRA). The Department will publish a separate notice in the Federal Register inviting the Office of Management and Budget (OMB), the general public, and other Federal agencies to comment on the new and revised information collection requirements contained in this document. As prescribed by the PRA, the requirements will not go into effect until OMB has approved them and the Department has published a notice announcing the effective date of the information collection requirements.

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 rule.

G. *National Environmental Policy Act*

The Department has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). *See* 40 CFR 1508.4. In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. Id. Paragraph 3.c.6.i of DOT Order 5610.1C categorically excludes "[a]ctions relating to consumer protection, including regulations." The purpose of this rulemaking is to change the way in which air carriers report mishandled baggage to the Department and fill a data gap by collecting separate statistics

for mishandled wheelchairs and scooters used by passengers with disabilities and transported in aircraft cargo compartments. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

ISSUED THIS 18TH DAY OF OCTOBER, 2016, IN WASHINGTON, D.C.

-ORIGINAL SIGNED-

Anthony R. Foxx,
Secretary of Transportation

List of Subjects in 14 CFR Part 234

Air Carriers, Reporting, On-time statistics, Mishandled baggage, and Uniform system of accounts.

Accordingly, the Department of Transportation amends 14 CFR Chapter II as follows:

PART 234—[AMENDED]

1. The authority citation for Part 234 is revised to read as follows:

Authority: 49 U.S.C. §§ 329, 41101 and 41701.

2. A definition of "Mishandled checked bag" is added to section 234.2, to read "a checked bag that is lost, delayed, damaged or pilfered, as reported to a carrier by or on behalf of a passenger."

3. Section 234.6 is revised to read as follows:

§ 234.6 Baggage-handling statistics.

(a) For air transportation taking place before January 1, 2018, each reporting carrier shall report monthly to the Department on a domestic system basis, excluding charter flights, the total number of passengers enplaned systemwide and the total number of mishandled-baggage reports filed with the carrier.

(b) For air transportation taking place on or after January 1, 2018, each reporting carrier shall report monthly to the Department on a domestic system basis, excluding charter flights:

(1) the total number of checked bags enplaned, including gate checked baggage, "valet bags," interlined bags, and wheelchairs and scooters enplaned in the aircraft cargo compartment,

(2) the total number of wheelchairs and scooters that were enplaned in the aircraft cargo compartment,

(3) the number of mishandled checked bags, including gate-checked baggage, "valet bags," interlined bags and wheelchairs and scooters that were enplaned in the aircraft cargo compartment, and

(4) the number of mishandled wheelchairs and scooters that were enplaned in the aircraft cargo compartment.

(c) The information in paragraphs (a) and (b) shall be submitted to the Department within 15 days after the end of the month to which the information applies and must be submitted with the transmittal accompanying the data for on-time performance in the form and manner set forth in accounting and reporting directives issued by the Director, Office of Airline Information.

Airlines for America®

We Connect the World

David A. Berg
Senior Vice President, General Counsel & Secretary
O: (202) 626-4234
E: dberg@airlines.org

January 27, 2017

Judy Kaleta, Deputy General Counsel
Blane Workie, Assistant General Counsel
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Applicability of the January 20 Reince Priebus Memorandum – Regulatory Freeze Pending Review

Dear Judy and Blane,

I am writing to request that the Department announce by February 1 it is extending the effective dates, implementation dates or response dates of several regulatory actions that are covered by the January 20, 2017 memorandum to department heads directing a “Regulatory Freeze Pending Review” (the “Memorandum”). The purpose of the freeze is to ensure that new Department heads or their designees have an opportunity to review and approve any new or pending regulations.

Three items listed below have fast-approaching deadlines -- comments on the proposed rule for mobile phone use (February 13), the implementation of certain provisions of Passenger Protection Rule III (February 15), and responses to the Request for Information on distribution practices (March 31). I therefore would appreciate knowing by February 1 if the Department will extend the implementation and comment dates for these regulatory actions.

The regulatory freeze is not limited to final rules. For purposes of the directive, the term “regulation” is defined to mean “regulatory action” as used in EO 12866 and it is to be broadly construed to include "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking." It also covers “any agency statement of general applicability and future effect” setting forth agency policy on, or interpretation of, a statutory or regulatory issue.

Paragraph 3 of the Memorandum applies to regulations that have been published in the Federal Register but not yet taken effect. It requires that the effective date of such regulations be postponed 60 days from January 20, 2017.

Paragraph 3 must be construed liberally to give effect to the broad purpose and intent of the Memorandum. Clearly, in the case of final rules, the effective date, or implementation date if different than the effective date, should be delayed a minimum of 60 days. In the case of a notice requesting comment

on a proposed action, or requesting the submission of views or information, the Memorandum's directive to postpone the effective date should be applied to the due date for comments or submissions. Specifically, the Department should suspend the comment or response period until the Secretary or her designee has had an opportunity to review and approve (or disapprove) the regulatory action. This approach is consistent with the spirit of the Memorandum and will allow the Secretary time to review such regulatory actions and, importantly, not cause interested parties to waste resources by filing comments, views or information should the Secretary or her designee decide to terminate the regulatory action. If the Secretary or her designee approves the continuation of the regulatory action, a new 60 day comment or response period should be issued.

The DOT "regulatory actions" listed below are covered by the Memorandum. Consistent with Paragraph 3 of the Memorandum, the effective date or implementation date of final rules should be delayed at least 60 days, and for other regulatory actions the due date for comments or submissions should be delayed until 60 days after the Secretary has approved their continuation:

1. Final Rule: Enhancing Passenger Protections III, provisions concerning codeshare disclosure requirements and prohibition of undisclosed flight display bias (implementation date February 15, 2017). Docket No. DOT–OST–2014–0056

2. Final Rule: Reporting Data for Mishandled Baggage and Wheelchair Damage (effective date December 2, 2016; implementation date January 1, 2018). Docket No. DOT–RITA–2011–0001

3. Supplemental Notice of Proposed Rulemaking: Transparency of Airline Ancillary Service Fees (comment period closes March 20, 2017). Docket No. DOT-OST-2017-0007

4. Request for Information: Exploring Industry Practices on Distribution and Display of Airline Fare, Schedule, and Availability Information (comment period closes March 31, 2017). Docket No. DOT–OST–2016–0204

5. Notice of Proposed Rulemaking: Use of Mobile Wireless Devices for Voice Calls on Aircraft (comment period closes February 13, 2017). Docket No. DOT-OST-2014-0002

This list is not comprehensive and other pending regulatory actions may be covered by the Memorandum. The Advance Notice of Proposed Rulemaking on refunding baggage fees for delayed checked bags is not listed because paragraph 4 of the Memorandum excludes regulations subject to a statutory deadline. It also appears that the recently published Notice of Proposed Rulemaking to expand the list of drugs tested in transportation programs falls under the Memorandum's safety exception.

Thank you for considering our request. We look forward to your prompt response. Please contact me if you have any questions.

Very truly yours,

David A. Berg

Christopher Walker
Director
Regulatory and International Affairs

Delta Air Lines, Inc.
1212 New York Avenue NW
Suite 200
Washington, DC 20005
(202) 216-0700
chris.walker@delta.com

February 10, 2017

via email

Judy Kaleta
Acting General Counsel
Blane Workie
Assistant General Counsel
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

Re: Regulatory Review Timelines

Dear Ms. Kaleta and Ms. Workie:

Delta Air Lines, Inc. ("Delta") writes to express its support that the Department extend effective dates, implementation dates, and certain response dates on pending regulatory matters and requests for information. This action would be consistent with the January 20, 2017 memorandum to department heads directing a "Regulatory Freeze Pending Review" issued by the White House Chief of Staff Reince Priebus, as noted by Airlines for America in its letter dated January 27, 2017. We understand that the purpose of that memorandum is to ensure that new Department heads or their designees have an opportunity to review and approve any pending regulatory matters.

There are several ongoing rulemaking matters, requests for information, and final rule implementations – including Enhancing Passenger Protections III, Transparency of Airline Ancillary Fees, and Use of Mobile Wireless Devices for Voice Calls on Aircraft – with quickly approaching responsive dates. These are important, complex matters that merit thorough consideration by the Department. When the general regulatory processes is re-started, we look forward to participating in the policy discussions about them.

Respectfully submitted,

Christopher Walker

From: Mullen, Doug [mailto:DMullen@airlines.org]
Sent: Monday, February 27, 2017 5:19 PM
To: Workie, Blane (OST)
Cc: Dols, Jonathan (OST); Graber, Kimberly (OST); Berg, Dave
Subject: SNPRM Comment Period

Blane,

It was nice to see you on Friday at the ABA Forum. I'm writing to ask if DOT will extend the comment period for the SNPRM on Transparency of Airline Ancillary Service fees for 30 days while the Department takes additional time to analyze the Regulatory Freeze Pending Review Memorandum.

We noticed in a Travel Tech letter to you and Judy dated February 3rd that Travel Tech does not oppose a 30-day extension to the comment period for the DOT SNPRM on Transparency of Airline Ancillary Service Fees. Providing additional time will give all parties more time to develop comments, answer DOT questions, and provide material that will assist the Department in making a better-informed decision in this rulemaking, if it goes forward. Providing this additional time is not controversial and most likely welcomed by all parties given Travel Tech's statement.

We appreciate the Department addressing and extending the compliance date for certain Enhancing Passenger Protections III final rule provisions (codeshare disclosure and undisclosed flight display bias) and await your decision on application of the Memorandum for the following regulatory actions:

- Final Rule: Reporting Data for Mishandled Baggage and Wheelchair Damage (effective date December 2, 2016; implementation date January 1, 2018). Docket No. DOT–RITA–2011–0001
- Supplemental Notice of Proposed Rulemaking: Transparency of Airline Ancillary Service Fees (comment period closes March 20, 2017). Docket No. DOT-OST-2017-0007
- Request for Information: Exploring Industry Practices on Distribution and Display of Airline Fare, Schedule, and Availability Information (comment period closes March 31, 2017). Docket No. DOT–OST–2016–0204

Please let me know if you would like to discuss.

Best regards,
Doug

Doug Mullen
Associate General Counsel
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From: Mullen, Doug [mailto:DMullen@airlines.org]
Sent: Thursday, March 02, 2017 10:08 AM
To: Workie, Blane (OST)
Cc: Berg, Dave
Subject: Mishandled Baggage and Wheelchair Final Rule

Blane,

As a follow up to our January 27th letter regarding the status of several rulemakings in light of the January 20th Regulatory Freeze Memorandum, we would also like to know how the final rule on mishandled baggage and wheelchair reporting is impacted. If that rulemaking remains, we request, in the spirit of the regulatory freeze memorandum that the implementation period be delayed one year, until January 2019. Industry is facing some real challenges with both parts of this regulation and will need more time to implement it.

We will be in touch with more information in the near future.

Best regards,
Doug

BILLING CODE 4910-9X

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 234 and 241

[Docket No. DOT-RITA-2011-0001]

RIN 2105-AE65

Extension of Compliance Date for Final Rule: "Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments" (RIN 2105-AE41)

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

ACTION: Final rule. Extension of the compliance date.

SUMMARY: The Department of Transportation is extending the compliance date of its final rule on reporting of data for mishandled baggage and wheelchairs in aircraft cargo compartments from January 1, 2018 to January 1, 2019 (2105-AE41). Under that final rule, the mishandled-baggage data that air carriers are required to report changed, from the number of Mishandled Baggage Reports and the number of domestic passenger enplanements to the number of mishandled bags and the number of enplaned bags. The rule also requires separate statistics for mishandled wheelchairs and scooters used by passengers with disabilities and transported in aircraft cargo compartments. This extension is in response to a request by Airlines for America (A4A) and Delta.

DATES: The effective date of the final rule continues to be December 2, 2016. Based on the new compliance date, data in this new format on mishandled baggage for the month of January 2019 will be due to the Department on February 15, 2019. Data on mishandled wheelchairs and scooters transported

in aircraft cargo compartments for the month of January 2019 will also be due to the Department on February 15, 2019.

FOR FURTHER INFORMATION CONTACT: Blane A. Workie, Office of Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC, 20590, 202-366-9342, 202-366-7152 (fax), blane.workie@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

A copy of all materials related to the original rulemaking proceeding (2105-AE41) may be viewed online at http://www.regulations.gov using the docket numbers listed above. A copy of this notice will also be placed on the docket. Electronic retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's Web site at http://www.ofr.gov and the Government Publishing Office's Web site at http://www.gpo.gov.

Background

On November 2, 2016, the Department of Transportation published a final rule in the Federal Register (81 FR 76300), titled "Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments." This rule changes the methodology for the mishandled-baggage data that U.S. air carriers are required to report to the Department and requires U.S. air carriers to report separate statistics in their mishandled baggage reporting for mishandled wheelchairs and scooters used by disabled passengers and transported in aircraft cargo compartments.

On January 20, 2017, the White House Chief of Staff issued a memorandum entitled, "Regulatory Freeze Pending Review" ("Memo"). The Memo directed heads of executive departments and agencies to take certain steps to ensure that the President's appointees and designees have the

opportunity to review new and pending regulations. It instructed agencies to temporarily postpone the effective dates of regulations that had been published in the Federal Register, but were not yet effective, until 60 days after the date of the memorandum.

On January 27, 2017, the Department received a request from Airlines for America (A4A) to extend the compliance date of the final rule on reporting data for mishandled baggage and wheelchairs. In that request, the A4A cites the Memo as a reason to extend the compliance date. On February 10, 2017, Delta Air Lines also submitted a request to the Department expressing support for extending the compliance date which also referenced the Memo. On March 2, 2017, A4A sent a follow-up to its original request specifying that if the rulemaking remains that they are requesting that the implementation period of the final rule on mishandled baggage and wheelchairs be delayed one year until January 2019 in the spirit of the Memo. A4A states that industry is facing challenges with parts of this regulation and needs more time to implement it.

After carefully considering the requests, we have decided to grant an extension of the compliance date for the final rule on reporting of mishandled baggage and wheelchairs until January 1, 2019. As such, we also intend to extend the compliance date for the baggage handling statistics provision (14 CFR 234.6) in the final rule titled "Enhancing Airline Passenger Protections III," which was published contemporaneously with the final rule on reporting of data for mishandled baggage and wheelchairs, to January 1, 2019.

ISSUED THIS 2nd DAY OF MARCH 2017 IN WASHINGTON, DC, under authority delegated in 49 CFR 1.27(n)

-Original Signed-
Judith S. Kaleta
Deputy General Counsel

the WHITE HOUSE

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Office of the Press Secretary

For Immediate Release January 20, 2017

Memorandum for the Heads of Executive Departments and Agencies

FROM: Reince Priebus
Assistant to the President and Chief of Staff

SUBJECT: Regulatory Freeze Pending Review

The President has asked me to communicate to each of you his plan for managing the Federal regulatory process at the outset of his Administration. In order to ensure that the

President's appointees or designees have the opportunity to review any new or pending regulations, I ask on behalf of the President that you immediately take the following steps:

1. Subject to any exceptions the Director or Acting Director of the Office of Management and Budget (the "OMB Director") allows for emergency situations or other urgent circumstances relating to health, safety, financial, or national security matters, or otherwise, send no regulation to the Office of the Federal Register (the "OFR") until a department or agency head appointed or designated by the President after noon on January 20, 2017, reviews and approves the regulation. The department or agency head may delegate this power of review and approval to any other person so appointed or designated by the President, consistent with applicable law.

2. With respect to regulations that have been sent to the OFR but not published in the Federal Register, immediately withdraw them from the OFR for review and approval as described in paragraph 1, subject to the exceptions described in paragraph 1. This withdrawal must be conducted consistent with OFR procedures.

3. With respect to regulations that have been published in the OFR but have not taken effect, as permitted by applicable law, temporarily postpone their effective date for 60 days from the date of this memorandum, subject to the exceptions described in paragraph 1, for the purpose of reviewing questions of fact, law, and policy they raise. Where appropriate and as permitted by applicable law, you should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period. In cases where the effective date has been delayed in order to review questions of fact, law, or policy, you should consider potentially proposing further notice-and-comment rulemaking. Following the delay in effective date

    a. for those regulations that raise no substantial questions of law or policy, no further action needs to be taken; and

    b. for those regulations that raise substantial questions of law or policy, agencies should notify the OMB Director and take further appropriate action in consultation with the OMB Director.

4. Exclude from the actions requested in paragraphs 1 through 3 any regulations subject to statutory or judicial deadlines and identify such exclusions to the OMB Director as soon as possible.

5. Notify the OMB Director promptly of any regulations that, in your view, should be excluded from the directives in paragraphs 1 through 3 because those regulations affect

critical health, safety, financial, or national security matters, or for some other reason. The OMB Director will review any such notifications and determine whether such exclusion is appropriate under the circumstances.

6. Continue in all circumstances to comply with any applicable Executive Orders concerning regulatory management.

As used in this memorandum, "regulation" has the meaning given to "regulatory action" in section 3(e) of Executive Order 12866, and also includes any "guidance document" as defined in section 3(g) thereof as it existed when Executive Order 13422 was in effect. That is, the requirements of this memorandum apply to "any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking," and also covers any agency statement of general applicability and future effect "that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue."

This regulatory review will be implemented by the OMB Director. Communications regarding any matters pertaining to this review should be addressed to the OMB Director.

The OMB Director is authorized and directed to publish this memorandum in the Federal Register.

REINCE PRIEBUS