

**DEPARTMENT OF TRANSPORTATION****Office of the Secretary****14 CFR Parts 234, 253, 259, and 399**

[Docket No. DOT-OST-2007-0022]

RIN No. 2105-AD72

**Enhancing Airline Passenger Protections****AGENCY:** Office of the Secretary (OST), Department of Transportation (DOT).**ACTION:** Clarification Concerning Advance Notice of Proposed Rulemaking (ANPRM).

**SUMMARY:** On November 20, 2007, the Department of Transportation (DOT or Department) published an Advance Notice of Proposed Rulemaking (ANPRM), 72 FR 65233 seeking comments on whether the Department should adopt a rule to enhance airline passenger protections in the following ways: Require carriers to adopt contingency plans for lengthy tarmac delays and incorporate them in their contracts of carriage, require carriers to respond to consumer problems, deem operating a chronically delayed flight to be unfair and deceptive, require carriers to publish delay data, require carriers to publish complaint data, require on-time performance reporting for international flights, and require carriers to audit their compliance with their customer service plans.

In a section of the ANPRM entitled "Regulatory Notices" the Department addressed a number of general regulatory issues as they relate to the ANPRM, including DOT Regulatory Policies and Procedures, Federalism, the Regulatory Flexibility Act and the Paperwork Reduction Act. In its discussion of Executive Order 13132 ("Federalism"), which sets forth certain requirements for Federal agencies when they are "taking action that preempts State law," the ANPRM concluded that it "does not propose any regulation that \* \* \* preempts State law." Based upon comments DOT has received, and upon its own further review, the Department has determined that this statement has been misconstrued in the overall context of the proposed DOT regulation and its impact upon State law. This notice clarifies the Department's prior statement concerning preemption in this area.

**DATES:** Comments on the ANPRM were due to be filed on or before January 22, 2008. The Department is currently reviewing comments that it has received. The Department will further address this issue in any Notice of

Proposed Rulemaking subsequently issued by the Department in this docket.

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

**FOR FURTHER INFORMATION CONTACT:**

Betsy L. Wolf or Blane A. Workie, Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, U.S. Department of Transportation, 1200 New Jersey Ave., SE., Washington, DC 20590, 202-366-9342, 202-366-7152 (fax), [betsy.wolf@dot.gov](mailto:betsy.wolf@dot.gov) or [blane.workie@dot.gov](mailto:blane.workie@dot.gov) (e-mail).

**SUPPLEMENTARY INFORMATION:** The Department's ANPRM sought comment on a variety of DOT proposals, including:

(1) Amending 14 CFR part 253 to require any certificated or commuter air carrier that operates domestic scheduled passenger service using any aircraft with more than 30 passenger seats to develop a contingency plan for long ground delays on the tarmac for all of its flights (including those that use aircraft with 30 or fewer seats) and to incorporate this plan in its contract of carriage;

(2) Adopting a new regulation, 14 CFR Part 259, that among other things would require every certificated and commuter carrier that operates domestic scheduled passenger service using any aircraft with more than 30 passenger seats to respond to mounting consumer problems in a number of specific ways;

(3) Amending 14 CFR 399.81 so that it sets forth the Department's enforcement posture on chronically delayed flights;

(4) Amending 14 CFR 234.11 to require airlines that report on-time performance to the Department pursuant to 14 CFR part 234 (*i.e.*, certificated U.S. carriers that account for at least 1% of the domestic scheduled passenger revenue) and online reservation services to include on their Web sites, at a point before the passenger selects a flight for purchase, specific information for each listed flight about its performance during the previous month;

(5) Adopting a new regulation, 14 CFR Part 259, that would also require certificated and commuter carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats to publish complaint data on their Web sites;

(6) Amending 14 CFR 234.4 and 234.11 to require carriers that report on-time performance to the Department pursuant to 14 CFR Part 234 (*i.e.*, certificated U.S. carriers that account for

at least 1% of the domestic scheduled passenger revenue) and the largest foreign carriers to report on-time performance for international flights to and from the United States; and

(7) Adopting a new regulation that would require certificated and commuter carriers that operate domestic scheduled passenger service using any aircraft with more than 30 passenger seats to audit their adherence to their own customer service plans.

Detailed discussions concerning each of these proposals are set forth in the November 20, 2007 ANPRM.

In the "Regulatory Notices" section of the ANPRM the Department addressed a number of regulatory issues. Matters relating to Executive Order 13132 were addressed as follows:

This Advance Notice of Proposed Rulemaking has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). *This notice does not propose any regulation that* (1) has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government, (2) imposes substantial direct compliance costs on State and local governments, or (3) *preempts State law.* Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

72 FR 65236 (emphasis supplied). After further review, including initial review of comments submitted to the Department in response to the ANPRM, the Department has concluded that our prior statement addressing preemption of State regulations concerning air carrier operations has been misconstrued.

Executive Order 13132 sets forth certain requirements for Federal agencies when they are "taking action that preempts State law." Promulgation of a Final Rule incorporating the Department's proposals on enhancing airline passenger protections as set forth in the ANPRM, or other proposals addressing the matters giving rise to the ANPRM, would not "tak[e] action that preempts State law" because such State or local laws are already preempted under the Airline Deregulation Act (ADA), which provides at 49 U.S.C. 41713(b)(4)(A), that "a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." The Supreme Court has consistently interpreted the ADA broadly so as to preclude any regulation of airline services other than by the Federal government. *See Morales*

*v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992); *American Airlines, Inc. v. Wolens*, 5113 U.S. 219 (1995). This broad view has most recently been reaffirmed in *Rowe v. New Hampshire Motor Transport Assoc.*, \_\_\_ S. Ct. \_\_\_, 2008 WL 440686, U.S., February 20, 2008 (No. 06–457).

For the foregoing reason, any State or local rules addressing, or related to, the services offered by air carriers are already preempted under the ADA. In addition, if the proposed rule addressed in the ANPRM is finalized, it is likely that the final rule would also separately preempt any such State or local regulations under other provisions of law. We need not further address any other grounds for preemption, particularly at the ANPRM stage, since, as explained above, States and localities are already precluded from regulating in this area.

Issued this 3rd day of March, 2008, at Washington, DC.

**Michael W. Reynolds,**

*Acting Assistant Secretary for Aviation and International Affairs.*

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**FEDERAL TRADE COMMISSION**

**16 CFR Ch. I**

**Notice of Intent to Request Public Comments**

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice of intent to request public comments.

**SUMMARY:** As part of its ongoing systematic review of all Federal Trade Commission rules and guides, the Commission gives notice that, during 2008, it intends to request public comments on the rules and guide listed below. The Commission will request comments on, among other things, the economic impact of, and the continuing need for, the rules and guide; possible conflict between the rules and guide and state, local, or other federal laws or regulations; and the effect on the rules and guide of any technological, economic, or other industry changes. No Commission determination on the need for, or the substance of, the rules and guide should be inferred from the notice of intent to publish requests for comments. In addition, the Commission announces a revised 10-year regulatory review schedule.

**FOR FURTHER INFORMATION CONTACT:** Further details may be obtained from the contact person listed for the particular rule or guide.

**SUPPLEMENTARY INFORMATION:** The Commission intends to initiate a review of and solicit public comments on the following rules and guide during 2008:

(1) *Guides for the Use of Environmental Marketing Claims*, 16 CFR 260. **Agency Contact:** Janice Podoll Frankle, (202) 326-3022, Federal Trade Commission, Bureau of Consumer Protection, Division of Enforcement, 600

Pennsylvania Ave., NW, Washington, DC 20580.

(2) *Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations*, 16 CFR 429. **Agency Contact:** Barbara Bolton, (404) 656-1362, Federal Trade Commission, Southeast Region, 225 Peachtree Street, NE, Suite 1500, Atlanta, GA 30303.

(3) *Power Output Claims for Amplifiers Utilized in Home Entertainment Products*, 16 CFR 432. **Agency Contact:** Jock Chung, (202) 326-2984, Federal Trade Commission, Bureau of Consumer Protection, Division of Enforcement, 600 Pennsylvania Ave., NW, Washington, DC 20580.

As part of its ongoing program to review all current Commission rules and guides, the Commission also has tentatively scheduled reviews of additional rules and guides for 2009 through 2018. A copy of this tentative schedule is appended. The Commission, in its discretion, may modify or reorder the schedule in the future to incorporate new rules, or to respond to external factors (such as changes in the law) or other considerations.

**Authority:** 15 U.S.C. 41-58.

By direction of the Commission.

**Donald S. Clark,**  
*Secretary.*

**APPENDIX  
REGULATORY REVIEW  
MODIFIED TEN-YEAR SCHEDULE**

16 CFR PART	TOPIC	YEAR TO REVIEW
254	Guides for Private Vocational and Distance Education Schools .....	2009
300	Rules and Regulations under the Wool Products Labeling Act .....	2009
301	Rules and Regulations under the Fur Products Labeling Act .....	2009
303	Rules and Regulations under the Textile Fiber Products Identification Act .....	2009
306	Automotive Fuel Ratings, Certification and Posting Rule .....	2009
425	Rule Concerning the Use of Negative Option Plans .....	2009
500	Regulations Under Section 4 of the Fair Packaging and Labeling Act (FPLA) .....	2010
501	Exemptions from Part 500 of the FPLA .....	2010
502	Regulations Under Section 5(C) of the FPLA .....	2010
503	Statements of General Policy or Interpretations Under the FPLA .....	2010
424	Retail Food Store Advertising and Marketing Practices Rule .....	2010
444	Credit Practices Rule .....	2010
239	Guides for the Advertising of Warranties and Guarantees .....	2010
433	Preservation of Consumers' Claims and Defenses Rule .....	2010
700	Interpretations of Magnuson-Moss Warranty Act .....	2010
701	Disclosure of Written Consumer Product Warranty Terms and Conditions .....	2010
702	Pre-sale Availability of Written Warranty Terms .....	2010
703	Informal Dispute Settlement Procedures .....	2010
14	Administrative Interpretations, General Policy Statements, and Enforcement Policy Statements .....	2011
23	Guides for the Jewelry, Precious Metals, and Pewter Industries .....	2011
423	Care Labeling Rule .....	2011
20	Guides for the Rebuilt, Reconditioned and Other Used Automobile Parts Industry .....	2012
233	Guides Against Deceptive Pricing .....	2012
238	Guides Against Bait Advertising .....	2012