

ZUCKERT SCOUTT & RASENBERGER, L.L.P.

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FAA Reauthorization Statute Establishes New Consumer Protection Requirements for Airline Passengers (February 2012)

On February 14, 2012, President Obama signed H.R. 658, the “FAA Reauthorization and Reform Act of 2012,” which became Public Law 112-95 (the “Act”), allocating funds for federal aviation programs over the course of four fiscal years (through September 30, 2015). While most federal agencies are funded on an annual basis, aviation historically has been funded on a multi-year cycle, which among other benefits can promote long-term investment in projects such as the “NextGen” air traffic control system and airport capital improvements.

Because the last long-term aviation funding bill was passed in 2003 (with allocations since 2007 having been provided by a series of short-term measures), the Act provided the first opportunity in many years for Congress to revise its specific requirements for and to provide additional guidance to the Federal Aviation Administration (which generally oversees aviation “safety” matters) and the Department of Transportation (which generally oversees aviation “economic” matters).

One area of particular concern to Congress in the reauthorization process was consumer protection. Although DOT in 2009 and 2011 issued new regulations governing the relationship between air carriers and their passengers,¹ the Act includes various further consumer protection requirements, which either enhance DOT’s requirements, or address issues that were not on the agenda in the prior DOT rulemaking process.

This article provides a brief overview of the consumer protection requirements included in the Act. The firm of Zuckert, Scoutt & Rasenberger, L.L.P. is available to assist air carriers and other sellers of air transportation that may have specific concerns about these requirements or other provisions of P.L. 112-95.



The firm’s practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with the DOT regulations and federal statutes that govern the relationships between air carriers and their passengers.

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Certain provisions of the Act directly create new rights for passengers and/or new obligations for air carriers, ticket agents and/or airports, including:

- **Tarmac Delay Plans** (section 415; codified as 49 U.S.C. § 42301). Air carriers and U.S. airports are required to submit tarmac delay contingency plans to DOT for review and approval. The plans also must be made available online, and revised periodically. Carrier plans must address the provision of food, water, and other necessities during delays; how facilities and gates will be made available during delays; and how passengers will be allowed to deplane following an excessive delay. Airports also must address how sterile areas will be provided for international arrivals. The carrier requirements are similar – but not identical – to regulations already adopted by DOT. The new statute also is unclear as to whether its requirements apply only to U.S.-flag carriers, or also to foreign carriers.²
- **Complaints Hotline** (section 415; codified as 49 U.S.C. § 42302). DOT is required to establish and publicize a telephone hotline for air passenger complaints. Additionally, most U.S.-flag and foreign carriers are required to: (i) post online DOT's telephone number, website, and mailing address for complaints, (ii) post online their own telephone numbers, websites, and mailing addresses for complaints, and (iii) post DOT's telephone number for complaints at ticket counters and on e-ticket confirmations.³
- **Insecticides Disclosure** (section 415; codified as 49 U.S.C. § 42303). DOT is required to list on its website the countries that may require a U.S.-flag or foreign carrier to treat the passenger cabin of an aircraft with insecticides. U.S.-flag and foreign carriers as well as ticket agents that offer tickets to any of those countries must refer purchasers to the DOT website.⁴
- **Smoking** (section 401; codified at 49 U.S.C. § 41706). Smoking previously was prohibited on virtually all passenger flights to, from, and within the U.S. However, there was a limited exemption for single-entity charter flights. Smoking is now also prohibited on such charter flights if they are operated with aircraft that require a flight attendant (generally, aircraft with more than 19 seats).⁵
- **Child Safety Seats** (section 412). U.S. carriers are required to post on their websites the maximum dimensions of child safety seats that can be used on each of their aircraft. However, this requirement will become effective only once FAA adopts implementing regulations.⁶
- **Musical Instruments** (section 403; codified as 49 U.S.C. § 41724). Air carriers are required to allow passengers to carry a small musical instrument as carry-on baggage, and certain large musical instruments in the cabin with the purchase of an extra ticket or as checked baggage. However, this requirement will only become effective only once DOT adopts implementing regulations. Additionally, the new statute also is unclear as to whether its requirements apply only to U.S.-flag carriers, or also to foreign carriers.
- **Noise Complaints** (section 510): Each U.S. airport that qualifies as a "large hub" (which currently includes the 29 largest airports, based on passenger enplanements) is required to post online a telephone number for receiving noise complaints related to the airport.

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Certain provisions of P.L. 112-95 require air carriers to submit additional reports to DOT or direct government agencies to study specific issues related to air transportation. While these requirements do not directly create new rights for passengers, they may provide additional data intended to assist DOT in bringing enforcement actions against air carriers, or in developing new regulatory requirements intended to benefit passengers:

- **Diverted/Cancelled Flights** (section 402; codified as 49 U.S.C. § 41708). Carriers are required to submit monthly reports to DOT about flights that were diverted from their scheduled destinations, as well as about flights that were cancelled after departing the gate but before take-off. The requirements are similar – but not identical – to existing regulations. The new statute is unclear as to whether its requirements apply only to U.S-flag carriers, or also to foreign carriers.⁷
- **Flight Delays Report** (section 406). DOT's Inspector General has been instructed to study the causes of air carrier flight delays and cancellations, and to submit a report to Congress.
- **Delayed Baggage Report** (section 407). The Comptroller General has been instructed to study delays in the delivery of checked baggage to passengers and the feasibility of establishing minimum standards for compensating passengers for unreasonable delays, and to submit a report to Congress.
- **Cell Phones Report** (section 410). FAA has been instructed to study the impact of allowing the use of cell phones for voice communications during flight, and to submit a report to Congress.
- **Advisory Committee** (section 411). DOT has been instructed to establish an advisory committee for aviation consumer protection, with four members representing air carriers, airports, state and local governments, and nonprofit consumer protection groups.

Additionally, without expressly expanding DOT's statutory authority, Congress has indicated that DOT can investigate consumer complaints regarding the following matters (section 408):

- (1) Flight cancellations;
- (2) Compliance with Federal regulations concerning overbooking seats on flights;
- (3) Lost, damaged, or delayed baggage, and difficulties with related airline claims procedures;
- (4) Problems in obtaining refunds for unused or lost tickets or fare adjustments;
- (5) Incorrect or incomplete information about fares, discount fare conditions and availability, overcharges, and fare increases;
- (6) The rights of passengers who hold frequent flyer miles, or equivalent redeemable awards earned through customer-loyalty programs; and
- (7) Deceptive or misleading advertising.⁸

Finally, Congress has *encouraged* U.S. air carriers to adopt flexible policies for members of the U.S. Armed Forces who are traveling at their own expense (*i.e.*, by providing reduced airfares and waiving change fees and baggage fees), but this is only a "Sense of Congress" resolution; it does not actually impose any new *requirements* on U.S. air carriers (section 405).

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¹ See Enhancing Airline Passenger Protections, Final Rule, 74 Fed. Reg. 68983 (December 30, 2009); Enhancing Airline Passenger Protections, Final Rule, 76 Fed. Reg. 23110 (April 25, 2011).

² Most U.S.-flag and foreign air carriers already are required to adopt and publicize tarmac delay contingency plans, but are not required to submit the plans to DOT for review or approval. See 14 C.F.R. § 259.4.

³ DOT already requires U.S.-flag and foreign carriers to publicize its hotline for passengers with disabilities and other contact information on their websites. See 14 C.F.R. § 382.45. But DOT declined to require them to publicize its contact information for general complaints, describing such a proposal as “not wise since it might direct consumers away from contacting carriers that are in the best position to quickly resolve problems.” See 76 Fed. Reg. at 23142.

⁴ DOT previously proposed to require U.S.-flag and foreign carriers to make insecticide disclosures, but the proposal was withdrawn because few countries continued to treat aircraft occupied by passengers. See Aircraft Disinsection, 60 Fed. Reg. 3596 (Jan. 18, 1995) and 63 Fed. Reg. 5329 (Feb. 2, 1998).

⁵ DOT previously had been considering a similar proposal, as well as whether to explicitly prohibit the use of electronic cigarettes in-flight – although it has interpreted its regulations to already implicitly prohibit their use. See Smoking of Electronic Cigarettes on Aircraft, 76 Fed. Reg. 57008 (Sept. 15, 2011).

⁶ FAA previously has advised U.S. carriers that they have certain obligations to accommodate child safety seats, see Use of Child Restraint Systems on Aircraft, Advisory Circular 120-87B (Sept. 17, 2010), but has not required such carriers to publicize information about the seats that will fit on their aircraft.

⁷ Most U.S.-flag and foreign air carriers already are required to submit data about tarmac delays to DOT. See 14 C.F.R. § 244.3.

⁸ Historically, all of these matters except frequent flyer awards already have been enforcement priorities for DOT. But see In re Complaints of American Association of Discount Travel Brokers, DOT Order 89-9-25, at 4-5 (stating that frequent flyer programs are a “private contract between the carrier and each participant” and that oversight “would involve the Department in economic judgments outside of its regulatory expertise and certainly impinge upon the mandate and principles underlying the deregulation of domestic air transportation”).

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