BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

In the Matter of:	)	
Tarmac Delay Rule	)	**Docket OST-2019-0144**

COMMENTS OF AIRLINES FOR AMERICA
AND THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

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Airlines for America ("A4A") and the International Air Transport Association ("IATA") appreciate the opportunity to submit these Comments on behalf of their members[1] in response to the Department of Transportation's ("DOT") notice of proposed rulemaking, Tarmac Delay Rule ("TDR NRPM").[2] We applaud DOT for its efforts to align the tarmac delay regulations ("TDR") with the tarmac delay statute, 49 U.S.C. § 42301 ("Section 42301"), as well as the deregulatory changes to improve the TDR and reduce the adverse impacts for passengers and airlines.

As an initial point, carriers make operational decisions that they determine are in the best interests of their passengers. In fact, carriers' and passengers' interests are aligned—*i.e.*, safe and efficient transportation of passengers between their origin and destination. To that end, carriers work diligently with airports, government agencies, and each other to prevent tarmac delays, which usually occur during irregular operations. However, passengers and carriers still bear the significant burdens and costs of the TDR, including three minutes of passenger delays

[1] A4A's members are: Alaska Airlines, Inc.; American Airlines Group, Inc.; Atlas Air, Inc.; Federal Express Corp.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member. IATA represents over 290 airlines in 120 countries.
[2] DOT, Tarmac Delay Rule, Notice of Proposed Rulemaking, 84 Fed. Reg. 57,370 (Oct. 25, 2019) (hereinafter "TDR NPRM").

for every one minute of tarmac time savings,[3] and DOT should continue to improve the TDR to reduce such costs.

We offer the recommendations herein to further improve the tarmac delay framework and proposed rules. Our suggested improvements seek to significantly reduce the unintended consequences and significant costs that the TDR have imposed on consumers and the airlines.

Specifically, we strongly recommend that DOT:

1. Adopt a single performance-based standard for the time that a carrier begins to return an aircraft to a suitable disembarkation point for the departure delay exception;

2. Adopt a performance-based standard for the time that a tarmac delay starts for departing flights;

3. Further improve tarmac delay reporting, including application of the departure delay exception to carriers' reporting obligations; and

4. Defer to a pilot-in-command's decision-making for the application of the safety and security exception and recognize unavoidable circumstances that are beyond the carrier's control.

I. DOT should align the departure delay exception with the tarmac delay statute without distinguishing control of the tarmac area. 14 C.F.R. § 259.4(c)(3)(i)

Under Section 42301, carriers must give passengers the option to deplane and return to the airport terminal when there is an excessive tarmac delay, in three hours for domestic flights and in four hours for international flights.[4] As DOT correctly acknowledges in the TDR NPRM,[5] Congress amended the tarmac delay statute to specify that a tarmac delay is considered

[3] *See infra* notes 19-20 and accompanying text.
[4] *See* 49 U.S.C. § 42301(b)(3).
[5] *See supra* note 2, TDR NPRM, 84 Fed. Reg. at 57,371.

to have ended for a departing flight when "*the carrier . . . begin*[*s*] to return the aircraft to a suitable disembarkation point."[6]

To implement the new statutory standard, DOT proposes to impose a dichotomy for determining when the carrier begins to return an aircraft to a suitable disembarkation location: (i) if the aircraft is located in an area not under the carrier's control, the aircraft begins to return when a request is made to the FAA control tower, airport authority, or other relevant authority directing the aircraft's operation; and (ii) if the aircraft is located in an area under the carrier's control, the aircraft begins to return when the pilot begins maneuvering the aircraft to the disembarkation point. Although this distinction is a slight improvement to a near-identical approach in DOT's current enforcement policy,[7] the proposed rule does not follow the plain language of the statute and creates unnecessary uncertainty for carriers and passengers. It will be cumbersome to put into practice for both the carriers and for DOT enforcement, raising the costs for both passengers and carriers.

A. The departure delay exception should be a performance-based standard that follows the language of the statute.

To be clear, carriers support the departure delay exception, but oppose the dichotomy that DOT proposes to arbitrarily impose upon that exception. Given the issues and concerns discussed below, we strongly urge DOT to adopt a single and simple standard that wholly adopts the statutory standard: the exception simply applies when the carrier begins to return the aircraft to the disembarkation point. Proposed section 14 C.F.R. § 259.4(c)(3)(i) should follow the

[6] *See* 49 U.S.C. § 42301 (emphasis added).
[7] DOT's enforcement policy provides that an aircraft, when located in an area not under the carrier's control, is considered to be returning to a suitable disembarkation point when the FAA control tower, airport authority, or other relevant authority gives permission to return to the suitable disembarkation point. DOT, Enforcement Policy on Extended Tarmac Delays (Nov. 22, 2016).

language of the statute and simply read: "For departing flights, the carrier begins to return the aircraft to a suitable disembarkation point no later than three hours (for domestic flights) or four hours (for international flights) in order to deplane passengers."

This performance-based approach best aligns the departure delay exception to DOT's updated Administrative Rulemaking, Guidance, and Enforcement Procedures, published on December 3, 2019, that state that regulations "should specify performance objectives, rather than prescribing specific conduct that regulated entities must adopt."[8] It will allow for carriers' diverse methods that begin to return an aircraft to a suitable disembarkation point, which can depend upon the carrier-specific processes, control of the tarmac, and the totality of circumstances. Accordingly, DOT should accept any evidence of when the carrier begins the process of returning the aircraft, effectively stopping the clock at the first demonstrable indicia. The carrier's evidence should be sufficient whether derived from internal sources (*i.e.*, carrier documents) or external sources (*e.g.*, airport logs). This standard will also alleviate DOT's burden to enforce the TDR; otherwise, DOT will need evidence of where the aircraft was located, control of the tarmac area in which the aircraft is located, and the time the request was made to return to a disembarkation point or evidence of maneuvering the aircraft to a disembarkation point. In fact, it is difficult, if not impossible, to get specific records from FAA local air traffic control (ATC) at an individual airport regarding the exact time that an individual flight sought permission to return, and this poses an additional burden on carriers and the DOT enforcement office to obtain.

[8] 49 C.F.R. § 5.5(e) (signed December 3, 2019, pending publication in the Federal Register).

DOT also appears to presume that carriers already have the technology to capture the time an aircraft actually moves when the aircraft is located in a carrier-controlled area. In fact, few carriers have actual proof of when an aircraft starts to maneuver to a disembarkation point, often relying on alternative indicia (*e.g.*, automated record of the release of aircraft brakes or request to maneuver the aircraft).

Alternatively, if DOT proceeds with an arbitrary definition of when a carrier begins to return the aircraft to a disembarkation point, which it should not, DOT should adopt a single and simple standard: the carrier begins to return to a disembarkation point when the crew or carrier's operations center requests, regardless to whom the request is made: (i) to return the aircraft to a disembarkation point or (ii) to start the carrier's return process (*e.g.,* to start a return checklist).

B. <u>The proposed dichotomy does not follow the language of the statutory standard.</u>

The statutory text does not distinguish, for purposes of determining when a carrier begins the return process, which entity has control over the tarmac area in which the aircraft is located. No other part of the statute nor any debate in the Congressional record demonstrates an intent to differentiate between aircraft that carriers have begun to return to a suitable disembarkation point.[9] The statute's focus is clear and without condition: the carrier's first action that begins to return the aircraft to a disembarkation point stops the tarmac delay. In fact, requiring a carrier to maneuver the aircraft to stop the tarmac delay clock is contrary to the statute because the return process actually begins when the carrier makes the decision to return the aircraft to the disembarkation point, which always occurs before the aircraft is maneuvered. Moreover, carriers

[9] *See e.g.,* H. Rep. 114-899 at 47 (2016) (reporting on the purpose of the statutory amendment, but without a discussion of control of the tarmac area where an aircraft is located).

can begin the return process in many ways. The method may differ by carrier, airport, and circumstance, but it always begins before the crew begins to maneuver the aircraft.

Congress could have created this dichotomy or stopped the tarmac delay clock when the aircraft started to maneuver to the disembarkation point. It did not. In accordance with its own rulemaking requirements, DOT should not deviate from the Congressional standard or implement more regulations than necessary, and implement only those regulations that are supported by the statutory authority.[10] Accordingly, DOT should remove the departure delay exception dichotomy from the proposed TDR and strictly follow the statutory standard.

C. The proposed dichotomy is arbitrary.

DOT does not explain why there should be a distinction between aircraft in different tarmac areas under control by different entities. Most notably, the TDR NPRM itself gives no explanation for the dichotomy or any alternatives that were considered.[11] Stakeholders are simply left guessing as to DOT's reasons for the dichotomy and have no opportunity to rebut those reasons. DOT must remove this distinction for these deficiencies alone.[12]

At most, DOT explains the benefits of the general departure delay exception framework—*i.e.*, stopping the tarmac delay clock when the carrier begins to return the aircraft to

[10] *See* 49 C.F.R. § 5.5. *See also* DOT, Policies and Procedures for Rulemakings, DOT Order 2100.6, § 6.a-b (Dec. 20, 2018).
[11] *See* 49 C.F.R. § 5.5 ("In considering whether to propose a new regulation, policy makers should consider . . . whether any other reasonable alternatives exist that obviate the need for a new regulation.").
[12] *See* 49 C.F.R. § 5.11 (requiring a specific statement or description of the need for the regulation, including a description of the market failure or statutory mandate necessitating the rulemaking); *id.* § 5.13 (requiring notices of proposed rulemakings to include a reasoned preliminary analysis of the need for the proposed rule based on the information described in the preamble to the NPRM, an additional statement of whether a rule is required by statute, and a reasoned preliminary analysis indicating that the expected economic benefits will meet the statutory objective and outweigh the estimated costs); Executive Order 12866 (requiring agencies to propose or adopt a regulation only upon a "reasoned determination" that the benefits of the intended regulation justify its costs).

a suitable disembarkation point. None of the asserted benefits support the proposed dichotomy and some intended effects run contrary to it.

First, DOT states that the departure delay exception will give carriers relief in situations when the carriers may be unable to reduce the length of a tarmac delay for circumstances beyond their control. Regardless of which entity controls the tarmac area in which the aircraft is located, circumstances beyond the control of the carrier may prevent reductions in the length of the tarmac delay. For example, an aircraft may be in a carrier-controlled area, but at the boundary of that area, having to next taxi through an airport or FAA ATC-controlled area. The carrier would need permission to taxi through the airport or FAA ATC-controlled tarmac area before it can begin maneuvering beyond the boundary of carrier-controlled area. While a first step may be a crew's request to its operations center to return the aircraft to a suitable disembarkation point, the carrier may also need to coordinate with other carriers for a suitable disembarkation location. These steps usually occur well prior to the crew reaching out to the entity in control of the tarmac to get permission to maneuver the aircraft and are the appropriate point at which to stop the tarmac delay clock.

Second, DOT states that the framework it proposes "offers carriers more flexibility." To the contrary, under this prescriptive regime, carriers will have less flexibility to use the most efficient process to begin to return an aircraft to a disembarkation point, which can depend upon their internal operations and the airport. Also, flights could be prevented from taking off within the tarmac delay time because the carrier is required to use a less efficient return process. Simply put, carriers will be required to create and use two different methodologies to begin to return aircraft to a disembarkation point, without the flexibility to choose the methodology that is both compliant and best for the passengers.

Third, DOT states, without further explanation, that its framework will "maintain important consumer protections." However, DOT offers no evidence that carriers have treated or would treat an aircraft that is in a carrier-controlled tarmac area with less urgency than an aircraft in a non-carrier controlled tarmac area. Carriers treat all aircraft that are experiencing tarmac delays with an equal sense of urgency, and it is in their best interest to do so from both operational and passenger-relations perspectives.

Fourth, in its regulatory evaluation of the proposed rules generally, DOT claims that "airlines will have more certainty and fewer stages of operation to complete before hitting the 3-hour limit." As explained below, the dichotomy does not inject certainty into the tarmac delay process; it injects uncertainty. DOT also fails to analyze whether the dichotomy would reduce stages of operation. In fact, having a split system would likely increase the stages of operation, requiring determinations of the aircraft location and whether the decision-making process to return has stopped the tarmac delay clock.

Fifth, DOT states that the framework will reduce the number of delays subject to enforcement. However, as discussed below, the lack of clarity and implementation difficulties will work against carriers' compliance with the new standard.

D. The proposed dichotomy is unclear and will be difficult to implement.

DOT's standard regarding control of a tarmac area, whether by a carrier or non-carrier (*i.e.*, FAA control tower, airport authority, or other relevant authority), is unclear in practice, and if not in theory, does not account for operational complexities at many airports. Carriers already struggle with this issue under DOT's current enforcement policy. For example, some carriers require permission to return to the gate from another carrier, because one carrier may control an area of the airport that other carriers must traverse to reach a gate, taxiway, or runway. In many

cases, an aircraft will taxi between carrier and non-carrier-controlled areas of the tarmac, especially at a large hub, requiring multiple permissions from different parties before an aircraft can begin maneuvering to the disembarkation point. It is often difficult to determine retrospectively the exact aircraft location at any pinpoint-specific moment in time to determine which entity controlled that tarmac location. Also, some deicing locations have shared control between carriers and the airport; it is not clear which return method under the dichotomy applies where resource areas are shared. DOT's dichotomy, therefore, does not consider the patchwork of control at airports, increasing the risk of carriers inadvertently violating the TDR. DOT should avoid this unnecessary complexity and eliminate the arbitrary dichotomy.

Given the significant variation in tarmac control both between and within airports, compliance with the TDR will become more difficult. As one example, a crew may incorrectly believe that it has additional time to try to takeoff because the crew incorrectly believes that it is in an airport-controlled area of the airport, which would give the crew more time to begin returning to the disembarkation point compared to the process in a carrier-controlled area, which requires permissions and maneuvering of the aircraft. Civil penalties from such simple mistakes by the crew will increase operating costs to the airlines, and, in turn, the passengers.

II. The start of a tarmac delay for departing flights should be a performance-based standard. 14 C.F.R. §§ 259.3 and 259.4(c)(3)(i)

Following the statutory language,[13] DOT proposes that a tarmac delay clock for a departing flight starts when the "main aircraft door" is closed, defining "main aircraft door" as "the door used for boarding" and "[i]n situations in which there are multiple doors that can be

[13] Section 42301 provides that the carrier must begin to return the aircraft to the suitable disembarkation point based no later than three or four hours after "the main aircraft door is closed in preparation for departure."

used for boarding, the last door closed is considered the main aircraft door." DOT's prescriptive proposed rules presume that the closing of the main aircraft door is when passengers are no longer able to deplane the aircraft. However, DOT also explains in the TDR NPRM preamble that this presumption can be overcome with a showing "that passengers on board the aircraft have the opportunity to deplane from an aircraft, even while the aircraft doors are closed." DOT explains that this opportunity to rebut the presumption "allows carriers some flexibility in determining when a tarmac delay begins, while adhering to the standard prescribed in the statute." We generally support the rebuttable nature of the rule and DOT's approach. We offer the following considerations and recommendations to improve the proposed TDR and reduce costs and burdens.

First, not all carriers have standardized fleet types that can capture the time when a main aircraft door closes, and some carriers do not have any aircraft that can capture this time. There are certain fleet types that do not have the capability to capture door close time. Equipping aircraft with the capability to automatically capture this time would require substantial investments from the industry with little benefit to the passengers and could not be accomplished in the time between the final rule and a likely effective date. Moreover, DOT has not considered the costs or performed a cost-benefit analysis to require equipage of systems that automatically capture the main door closing time.

Second, carriers are not required to capture the main cabin door closure time for any current reporting requirements, including tarmac delay reporting. Specifically, on-time reporting and tarmac delay reporting uses "gate departure time," which the Bureau of Transportation Statistics (BTS) defines as "the instance when the pilot releases the aircraft parking brake after

passengers have loaded and aircraft doors have been closed."[14] Carriers using a Docking Guidance System may calculate the gate departure time based upon when the aircraft moves. Requiring the use of the main cabin door closure time without other available options adds unnecessary complexity to carriers' tarmac delay tracking and reporting processes. It is also burdensome for carriers, not transparent to the public, and confusing for DOT if there are separate rules for reporting the same information on the same flights.

To avoid the costs and complexities, we strongly urge DOT to allow carriers to adopt a standard that allows carriers to use the BTS-accepted gate departure time (commonly known as the "OUT" time), as a proxy to the main cabin door closing time, when starting the tarmac delay clock for departing aircraft. In line with DOT's acceptance of a rebuttable presumption that is discussed above, carriers would give passengers the opportunity to deplane when the door is closed until the gate departure time. This also aligns with DOT's proposed definition of tarmac delay in 14 C.F.R. § 244.1 for tarmac delay reporting—"the period of time when an aircraft is on the ground with passengers and the passengers have no opportunity to deplane."

Also, to facilitate carriers' tarmac delay tracking and compliance, DOT should apply these recommendations to the timing of the provision of food and water.

III. DOT should further improve the tarmac delay reporting requirements and revise its investigation process based upon the proposed carrier reporting requirements.

We support DOT's decisions to: (i) reduce the carriers' reporting burden by eliminating the reporting requirement under 14 C.F.R. part 244, provided that such flights are reported under 14 C.F.R. part 234; (ii) reduce the reporting for international flights to those that experience an

[14] Bureau of Transportation Statistics, Technical Reporting Directive #31 – On-Time Performance (Dec. 12, 2018).

"excessive tarmac delay" of more than four hours; and (iii) eliminate the record retention requirements in 14 C.F.R. § 259.4. These deregulatory actions will eliminate duplicative and costly administrative burdens for carriers under the TDR. We recommend that DOT further revise the reporting requirements and investigative process to further reduce the burdens and maximize the benefit to the travelling public and DOT.

A. DOT should apply the departure delay exception to carriers' reporting obligations. (14 C.F.R. parts 234 and 244; 14 C.F.R. § 259.4(g))

We urge DOT to further reduce the reporting burden for flights that do not violate the passengers' option to deplane and return to the airport terminal when there is an excessive tarmac delay. As currently proposed, carriers would continue to be obligated to report departing flights that experienced a tarmac delay, even when the carrier begins to return the aircraft to a suitable disembarkation point before the excessive tarmac delay time, qualifying for the proposed departure delay exception in proposed rule 14 C.F.R. § 259.4(c)(3)(i). The details for these flights will be publicly released in the Air Travel Consumer Report ("ATCR"), despite the fact that the flights are not, in fact, tarmac delays as defined in the statute. In other words, departing flights with tarmac delays are published in the ATCR, even when the exceedance of the three- or four-hour tarmac delay limit is not a TDR violation. When selecting a carrier for travel, the public gets little-to-no benefit from carriers reporting tarmac delays that have no bearing on the carrier's performance nor from DOT publishing tarmac delays that inaccurately reflect carriers' performance. Accordingly, we recommend that DOT: (i) exclude flights that qualify for the departure delay exception from the reporting requirement under 14 C.F.R. part 244; and (ii) revise the reporting requirements under 14 C.F.R. part 234 so that departure delay exception flights are not reflected in the ATCR.

We also recommend that DOT recognize the departure delay exception for carriers' reporting obligations under the statutory reporting requirement and proposed 14 C.F.R. § 259.4(g). Congress defined a tarmac delay as "the period which passengers are on board an aircraft on the tarmac-(A) awaiting takeoff after the aircraft doors have been closed . . . ."[15] Congress, however, amended the statute to effectively recognize that an aircraft is no longer awaiting takeoff and the tarmac delay clock is no longer running after the carrier begins to return the aircraft to a suitable disembarkation point.[16] Accordingly, we recommend that DOT not require reporting for aircraft that qualify for the departure delay exception under Section 42301 or 14 C.F.R. § 259.4(g). In sum, carriers should not have to report tarmac delays that do not constitute violations of the statute or TDR.

B. DOT should further streamline excessive tarmac delay reporting. (14 C.F.R. § 259.4(g))

We recommend that DOT more closely align the reporting requirements in 14 C.F.R. § 259.4(g) with the statutory reporting requirements. Section 42301(h) simply requires "the air carrier responsible for such flight shall submit a written description of the incident and its resolution to the Aviation Consumer Protection Division of the Department of Transportation." Although DOT's proposed reporting requirement will be a substitute for the records retention requirement in 14 C.F.R. § 259.4(e), DOT substantially adds to the 30-day reporting requirement under Section 42301(h) and imposes an accelerated timeframe for reporting information that is required under the records retention requirements. DOT should not impose any reporting requirement that is unnecessary or exceeds the statutory standard.

[15] 49 U.S.C. § 42301(i)(3).
[16] *See* 49 U.S.C. § 42301(b)(3)(C).

Generally, we do not oppose reporting the information that carriers would typically provide under Section 42301 or most information that is required under the current record keeping requirements—*i.e.*, name of the operating carrier and marketing carrier; originally scheduled origin and destination airports; the airport at which the tarmac delay occurred; an explanation of the tarmac delay; resolution of the incident; and the actions taken to minimize hardships for passengers. However, depending upon the circumstances, number of actors involved in the delayed flight (*e.g.*, operating carrier, marketing carrier, airport, FAA, ramp service provider, *etc*.), time of year (busy travel season during holidays or irregular operations), crew and staff availability, and number of related delays, carriers may not have determined the "precise cause of the tarmac delay" within the proposed 30-day reporting period and may still be investigating the "precise cause" after 30 days from the event.

Accordingly, we urge DOT to revise the reporting requirement to require carriers to report the cause of the delay as determined by the carrier at the time of the report. While carriers will have determined the precise cause in many cases by the time of the report, this suggested change prevents carriers from rushing to conclusions when further investigation is required, while not subjecting carrier representatives to potential penalties for a certified statement that is inaccurate. Moreover, a carrier must certify the statement "to the best of [his/her] knowledge and belief," that the report is "true and correct," but may not have determined the precise cause by the time of the certification. If a different cause is determined after the report, the carrier representative is at risk of having certified a false statement to DOT. If DOT has concerns about the reported cause, it may always investigate the delay and request additional information.

Additionally, if DOT insists on carriers reporting flights that qualify for the departure delay exception, which it shouldn't, we recommend that DOT also collect the length of the

tarmac delay at the time the carrier begins to return the aircraft to a suitable disembarkation point. This will facilitate DOT's enforcement of the TDR by avoiding lengthy and costly investigations into tarmac delays that are not violations of the TDR.

C. DOT should amend its tarmac delay investigation process to incorporate the proposed carrier reporting requirements. (14 C.F.R. § 259.4(g))

Because DOT proposes that a carrier representative certifies the tarmac delay report, DOT should rely on the report for any investigation and enforcement purposes. For example, if DOT requires the report for a departure delay exception-qualified flight, which it should not, DOT should rely on the certified report that the carrier began to return a departing aircraft to a point of disembarkation before the three- or four-hour requirement.

Additionally, when investigating a tarmac delay or (often unsubstantiated) customer complaint about a tarmac delay, DOT typically requests substantial information and documentation regarding the tarmac delay, including, but not limited to, crew statements and details regarding the opportunity to deplane (*e.g.*, time of announcement) that may not be clearly captured in carrier records. These requests, including for customer complaints regarding flights when there was no violation of the TDR, impose a significant burden on the carriers. A consumer complaint should not create a presumption of a TDR violation requiring carriers to engage in burdensome efforts to overcome the presumption, but in practice this is essentially how the Department approaches complaints that insinuate a tarmac delay today. Carriers should be permitted to rely on data and documents that are available in the carrier's normal course of business and not be required to generate new documents (*e.g.*, both crew and dispatch reports) to substantiate the response to an investigation. Because carriers will be required to provide a certified report that explains the tarmac delay, the cause of the delay, and relief provided to

passengers, submission of additional documentation regarding the tarmac delay is simply unnecessary. Accordingly, we strongly recommend that DOT rely solely on the carrier's certified report, which is based upon the carrier's investigation and the carrier's response to the customer complaint. Similarly, carriers should also be able to rely on on-time reporting and tarmac delay reporting (or lack thereof) to simply confirm that a TDR violation did not occur when responding to a customer complaint. If DOT requests additional information or specific employee statements, DOT should provide a rebuttable explanation of: (i) the information sought by DOT that is not in the carrier's on-time reporting or certified tarmac delay report; and (ii) the purpose of the information sought by DOT.

In sum, DOT should not conduct duplicative and burdensome investigations into tarmac delays for which the carriers have submitted a complete and certified report explaining that the carrier did not violate the TDR. Nor should DOT require substantial investigations into tarmac delays based on customer complaints when the carrier has proof or otherwise reported that a TDR violation did not occur.

IV. DOT should defer to the safety and security determinations of the pilot-in-command. 14 C.F.R. § 259.4(c)(3)(ii)

Generally, we support DOT's expansion of the safety and security exception. Specifically, the proposed TDR added that the pilot-in-command may determine that deplaning passengers at a suitable disembarkation point would jeopardize safety or security. The proposal better reflects the deference that Congress gives to the judgement of the pilot-in-command—"a passenger shall not have an option to deplane an aircraft and return to the airport terminal in the case of an excessive tarmac delay if- . . . (ii) the pilot in command determines that permitting a

passenger to deplane would jeopardize passenger safety or security."[17] DOT explains that the exception applies for "unavoidable safety-related reasons such as lightning," but continues explaining that a lack of buses or stairs would not qualify for the exception.[18]

We urge DOT to apply the exception in a manner that does not erode Congress' intent that DOT broadly defer to the pilot-in-command for matters of safety and security. For example, pilots often divert to another airport, while in the air, for safety-related reasons, including weather. Pilots need to retain full discretion to make diversion decisions for safety-related reasons, while not being overridden by an airport's preparedness to handle increased diversion volumes. In other words, the pilot's decision to divert to a particular airport should not be overridden based on tarmac delay criteria that are unrelated to flight safety. In fact, the decision to divert may occur long before tarmac delay issues arise at the diversion airport—second-guessing the pilot's diversion decision based on unknown future circumstances that do not factor into the flight's safe landing is simply illogical and contrary to the pilot's safety-based decision-making. Furthermore, circumstances occur where busses and stairs are unavailable due to the unsafe conditions on the field (*e.g.*, snow, ice, etc.) that would make getting busses to a remote location to facilitate deplaning impossible. To be clear, we do not suggest DOT defer to the pilot's choice of diversion station when enforcing and applying the TDR in cases involving non-safety related diversions. However, in instances where a legitimate safety-related concern requires landing at a diversion airport, DOT should not put carriers in a position where the carrier must override a pilot's decision where best to land a flight safely based on factors that don't come into play until after landing the aircraft, such as the availability of quick access to a

[17] 49 U.S.C. § 42301(b)(3)(D).
[18] *See supra* note 2, TDR NPRM, 84 Fed. Reg. at 57,373.

suitable disembarkation point. Additionally, DOT does not have the unique safety expertise to second-guess the determinations made by those located at the site of the delay, including pilots-in-command and operations managers.

Similarly, DOT should recognize unavoidable circumstances that are wholly outside of the carrier's control. For example, DOT should recognize CBP staffing shortages that result in excessive tarmac delays. Similarly, CBP's untimely response or hesitation to provide support at a diversion airport can lead to significant delays that are beyond the carrier's control. DOT should also make exceptions when security circumstances at airports prevent carriers from timely deplaning, such as law enforcement availability and responses to threats at the airport. Carriers simply cannot predict, plan, or prepare for every possible circumstance that may lead to a delay. Requiring carriers to do so would result in excessive burdens and costs on the airlines and their passengers.

V. The TDR continues to impose significant costs and adverse impacts on consumers and the airlines.

We support DOT's other efforts to improve the TDR, including the reduced notification and announcement requirements. However, the airline industry has repeatedly warned DOT that the TDR have severe unintended consequences and impose significant costs on consumers and airlines in the form of increased flight cancellations and service disruptions. For example, studies have shown that for every minute a DOT-mandated return to the gate that saved passengers from having to endure a longer delay on the tarmac, the lost-time results of returning to the gate are triple those minutes in passengers' arrival delay time in reaching their destinations

"due primarily to increases in flight cancellations.[19]" DOT's own study estimated that cancellations occur *229 times more* than the regulatory impact assessment's estimate of 41 annual rule-driven cancelations.[20]

Accordingly, we strongly urge DOT to consider further amendments to the TDR that reduce the costs and negative impacts to the travelling public. As we have recommended before, DOT should: (i) comply with the statutory requirement that tarmac delay penalties be imposed on a per-flight, not a per-passenger basis; (ii) expand the TDR exceptions to include situations where flight crew members' duty limitations and rest requirements are a factor in causing a tarmac delay; and (iii) refrain from regulating cabin temperatures absent an enforceable lengthy tarmac delay.[21]

VI. Conclusion

DOT has proposed considerable improvements to the TDR that we support, but DOT should amend its proposal to establish a framework that is performance-based and less costly and burdensome for passengers and carriers. DOT should continuously reassess the efficacy of and need for the TDR framework and the scope of protections for a deregulated airline industry.

[NO FURTHER TEXT – SIGNATURE PAGE FOLLOWS]

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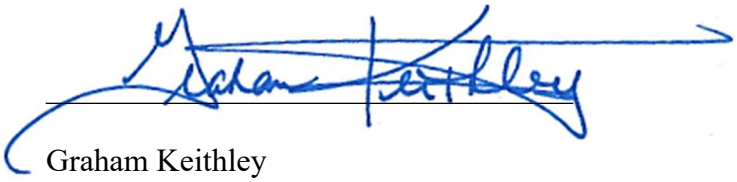
[19] Chiwei Yan et al., Massachusetts Institute of Technology and Dartmouth College, Tarmac Delay Policies: A Passenger-centric Analysis, Transportation Research Part A 83 (2016) *available at http://www.sciencedirect.com/science/article/pii/S0965856415002682?via%3Dihub* (although the tarmac delay rule "effectively decreases tarmac delays, especially extremely long tarmac delays, each passenger-minute of tarmac time saving is achieved at the cost of an increase of approximately three passenger minutes in total passenger delays. This is due primarily to increases in flight cancellations.")

[20] DOT, Final Regulatory Impact Analysis of Rulemaking on Enhanced Airline Passenger Protections 42 ("RIA") (Dec. 17, 2009) (Docket DOT-OST-2007-0022).

[21] A4A, Comments of Airlines for America, Part Two: Proposals for Repeal or Amendment of Specific DOT Economic Regulations 32-42 (Dec. 1, 2017) (Docket DOT-OST-2017-0069).

Respectfully submitted,



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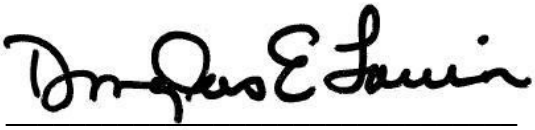

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