

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 158****[Docket No. 27791; Notice No. 96-3]****RIN 2120-AF69****Passenger Facility Charges****AGENCY:** Federal Aviation Administration, DOT.**ACTION:** Advance notice of proposed rulemaking (ANPRM).

SUMMARY: This document seeks public comment on changes to several sections of Title 14, Code of Federal Regulations, Part 158, Passenger Facility Charges (PFC's), that deal with the collection, handling, and remittance of PFC's. The notice specifies the quantity and quality of airline cost data necessary for the Federal Aviation Administration (FAA) to determine an adequate rate of airline compensation. In addition, the notice includes several proposed modifications to part 158 that would allow air carriers to be compensated based on PFC's collected; implement the statutory prohibition (FAA Authorization Act of 1994) on collection of PFC's from passengers traveling on frequent flyer awards; and clarify various terms. Finally, the notice requests comments on several proposals dealing with ways to safeguard PFC revenue in the event of carrier bankruptcy.

DATES: Comments must be received on or before May 16, 1996.

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-200), Docket No. 27791, 800 Independence Avenue, SW., Washington, DC 20591. Comments delivered must be marked Docket No. 27791. Comments may be examined in Room 915G on weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Sheryl Scarborough, Passenger Facility Charge Branch (APP-530), Airports Financial Assistance Division, Office of Airports Planning and Programming, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone (202) 267-8825.

SUPPLEMENTARY INFORMATION:**Comments Invited**

Interested persons are invited to participate in this advance notice of proposed rulemaking by submitting

such written data, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from considering the options in this advance notice are also invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the closing date for comments specified will be considered by the Administrator before taking action on this proposed rulemaking. The proposals contained in this notice may be changed in light of comments received. All comments received will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with Federal Aviation Administration (FAA) personnel concerning this rulemaking will be filed in the docket. Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must include a preaddressed, stamped postcard on which the following statement is made: "Comments to Docket No. 27791." The postcard will be date stamped and mailed to the commenter.

Availability of ANPRM

An electronic copy of this document may be downloaded using a modem and suitable communications software from the FAA regulations section of the Fedworld electronic bulletin board service (telephone: 703-321-3339) the Federal Register's electronic bulletin board service (telephone: 202-512-1661), or the FAA's Aviation Rulemaking Advisory Committee Bulletin Board service (telephone: 202-267-5948).

Internet users may reach the FAA's web page at <http://www.faa.gov> or the Federal Register's webpage at http://www.access.gpo.gov/su_docs for access to recently published rulemaking documents.

Any person may obtain a copy of this ANPRM by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-9680. Communications must identify the notice number or docket number of this ANPRM.

Persons interested in being placed on the mailing list for future NPRM's should request from the above office a copy of Advisory Circular No. 11-2A,

Notice of Proposed Rulemaking Distribution System, that describes the application procedure.

Background**Current Regulation**

In the late 1980's, the traditional sources of airport revenue for capital improvements began to appear inadequate to meet these demands.

Congress responded to these needs by enacting 49 U.S.C., The Aviation Safety and Capacity Expansion Act of 1990, which allows public agencies controlling commercial service airports (those with regularly scheduled service and enplaning 2,500 or more passengers per year) to charge enplaning passengers using the airport a \$1, \$2, or \$3 facility charge. Public agencies wishing to impose these PFC's must apply to the FAA for such authority and meet certain requirements spelled out in the legislation and the implementing regulation (14 CFR part 158) issued by the FAA in May 1991.

Upon receiving FAA approval to impose PFC's, the public agency gives written notification to all carriers who are required to collect PFC's. On the charge effective date, carriers and their agents begin collecting the PFC's when the ticket is issued. PFC's are collected until the charge expiration date, or upon further notification from the public agency or the FAA. PFC's are collected based on the original ticket issued. Carriers remit PFC revenue monthly to airports.

Section 158.53(a) provides, as compensation for collecting, handling, and remitting the PFC revenue, that the collecting air carrier was entitled to retain \$0.12 of each PFC remitted on, or before, June 28, 1994. Thereafter, air carriers are entitled to \$0.08 of each PFC remitted.

Petition for Rulemaking and Public Comments

On May 27, 1994, Air Transport Association of America (ATA), on behalf of its members, petitioned for a rule change to § 158.53(a) to extend the \$0.12 handling fee for an additional 3 years, at which time the petitioner would file comments as to whether or not the airline industry, as a whole, had fully recovered the costs of implementing, operating, and maintaining the PFC collection system. Further, the petitioner requested that § 158.53 be amended to allow air carriers to retain a handling fee for a refunded PFC. As justification for such changes, the petitioner asserted that the economic health of the airline industry depends, in part, upon the full cost

recovery of programs which the carriers implement. This includes the PFC program, which the carriers are required, by law, to carry out on behalf of airport operators. Further, the petitioner asserted that service to passengers may ultimately be harmed if airlines are required to cut costs elsewhere to compensate for unrecovered costs associated with the PFC program.

Since the petition was submitted, the carrier compensation rate has been decreased to \$0.08 per PFC remitted in accordance with § 158.53(a). The FAA was unable to respond to the petitioner's request for an immediate decision because the timing of that request did not allow sufficient opportunity for public comment on a proposal that would affect both carriers and public agencies.

A summary of the ATA's petition for rulemaking was published in the Federal Register on June 24, 1994 (59 FR 32668). This summary included a request for specific data to be provided to the FAA by air carriers and public agencies. Twelve comments, from 11 commenters, were received on the ATA's proposals.

Ten comments from air carriers were in favor of the proposals and many of the comments included some of the types of data requested by the FAA. The air carriers commenting included five major domestic carriers, one of which submitted two separate comments, two international carriers, a charter carrier, and a regional carrier. The data provided by these carriers, in most cases, indicated that the carriers had incurred as yet unrecovered start-up costs, even though the start-up costs varied widely from carrier to carrier. Most of the carriers also indicated that they did not expect to fully recover their ongoing monthly costs if carrier compensation were lowered to \$0.08 per remitted PFC. Those carriers which addressed the issue of handling fees for refunded PFC's argued that under the current rule, for refunded tickets, the carrier is required to handle the PFC twice and yet is not entitled to compensation for either transaction.

One dissenting comment from the City of Chicago argued against FAA adoption of a modification to the rate of carrier compensation. The City argued that, in the data provided with the petition for rulemaking, the ATA had not made a persuasive case that air carriers would incur losses if the compensation level were \$0.08. The City also stated its belief that any shortfall, if it exists, would be quickly made up as PFC collections begin at more and more airports. The City also

stated that raising the compensation rate to \$0.12 would result in over \$1 million per year in lost PFC revenue and that the City would be required to defer implementation of PFC projects or tap into other revenue sources to make up for this lost revenue.

Insofar as the handling fees for refunded PFC's, the City stated that the ATA petition did not provide enough information to fully analyze the impact on airports of the proposal. The City further stated that it was willing to "keep an open mind" on this issue but that any change should be coupled with the ability of airports to audit airline collection and remittance practices, enabling the airports to ensure that PFC's are properly remitted and to "Safeguard against distortion in the ordinary practices of refunding/rewriting tickets versus honoring previously issued tickets."

The FAA agrees that a change to the airline compensation level could affect the length of time needed for a public agency to collect its approved amount of PFC revenue. Public agencies take into account a variety of factors when preparing PFC applications. However, these factors are forecasted estimates based on available data present at one time. Procedures are already in place, and have been utilized, to allow the public agency to make the necessary adjustments, either upward or downward, to the duration of PFC revenue collection in the event that actual collections differ from the amounts forecast in the PFC application. In addition, the PFC regulation (Part 158) provides procedures that have already been utilized for deleting projects from approved applications.

The remaining dissenting comment was a joint submission of the Airports Council International—North America (ACI-NA) and the American Association of Airport Executives (AAAE). The ACI-NA and AAAE argued that the data provided in the ATA's petition is seriously flawed and that the airlines have not demonstrated, as is required by statute, that the expenses for which they seek compensation are "necessary and reasonable." Insofar as the handling fee for refunded PFC's, the ACI-NA and AAAE stated that they are not receptive to the proposed change unless "public agencies are provided with some mechanism to better reconcile anticipated PFC collections with actual amounts remitted."

The FAA acknowledges the airports' argument that additional measures may be needed to allow public agencies to monitor air carriers to ensure that PFC's are properly remitted. The FAA is

currently working with industry groups to prepare airline PFC auditing guidelines which should address many of these concerns. Because this auditing guidelines effort is ongoing, the FAA is not proposing changes to airline auditing requirements at this time.

Request for Additional Information

Airline Compensation Issues

The FAA did not receive sufficient information as a result of its request for data to permit a determination of adequate level of airline compensation. Therefore, the ANPRM provides additional guidance about the quantity and quality of data needed for the FAA to determine adequate compensation.

The FAA has reviewed the petition and comments received and finds that the carriers responding to the petition and request for comments accounted for approximately 50 percent of the enplanements at approved PFC locations, at the time of response. Some of the data provided by the carriers included cost centers that were not fully explained. The information received does not sufficiently justify a change to the rate at which carriers are compensated for collection and remittance of PFC's.

The data provided by the ATA and the carriers indicates the possibility of a need to adjust the compensation rate in order to reflect the average reasonable and necessary carrier costs associated with collecting, handling, and remitting the PFC.

The FAA will consider an increase in the carrier compensation rate above the current \$0.08 level, if data provided by carriers accounting for a sufficient portion of the enplanements at PFC approved locations indicates a clear need for the compensation level to be modified. The data provided by the carriers must be broken out by cost centers and certified by the carrier's accountant, an independent accounting firm, or by the officers of the company. Further, a description of each cost center and its relationship to the PFC program is needed. To proceed on the subject, the FAA must have detailed and persuasive data from carriers that, in total, represent at least 75 percent of the enplanements at PFC locations. In the FAA's judgment, the amount of 75 percent of the enplanements at PFC locations would give an adequate view of current industry costs and this information would also provide adequate cost data to determine if a change in the carrier compensation rate is appropriate and necessary.

In addition, the FAA requests that public agencies imposing PFC's provide

specific information on the effect a change in the current \$0.08 compensation rate would have on their PFC revenue stream; and their ability to implement projects within the PFC regulatory timeframe.

Passenger Facility Charge Collection and Remittance Issues

The FAA recently undertook a study of PFC collection and remittance issues at the request of Congress. One issue being studied is the problem of PFC revenues and airline bankruptcies.

Several comments by a number of parties have indicated that the provision in § 158.49(b), Handling of PFC's, may cause problems for the public agency in the event of an airline bankruptcy. The provision allows a collecting carrier to commingle PFC revenue with the carrier's other sources of revenue, before the carrier remits the PFC revenue to the public agency. A suggestion has been made that the FAA delete the provision allowing the carrier to commingle PFC revenue with other sources of revenue, and require that carriers place PFC revenues in escrow accounts for the period between collection and remittance. Therefore, the FAA is requesting comments on three possible modifications to § 158.49(b). The FAA specifically requests comments, including estimates of costs and benefits, on each of the following proposals relating to this issue.

1. Should the FAA prohibit commingling of PFC revenue with other sources of revenue, and require that carriers establish a separate trust account for PFC revenue collected?

2. Should the FAA require that carriers establish third-party escrow accounts to hold PFC revenue between collection of the revenue and remittance to the public agency?

3. Approximately 85 percent of domestic tickets issued in the United States are written by travel agents who remit ticket revenues to carriers through the Airline Reporting Corporation (ARC) clearinghouse. Should the FAA require that, for travel agency-issued tickets, the ARC remit PFC revenue directly to the public agency?

The FAA is concerned that costs to the carriers of any of these possible modifications may outweigh any benefits the public agencies may derive. The FAA is concerned that a cost-effective system of escrow accounts may not provide much protection to the public agency. Therefore, the FAA solicits comments on whether, for travel agent-issued tickets, direct remittance to the public agency by the ARC might provide as much, or more, protection to public agencies as an escrow account.

In addition, the FAA requests that carriers collecting PFC's provide information on an estimate of any interest revenue that might be lost if the commingling provision is eliminated, and the estimated cost of each suggested modification.

The FAA also requests that airports indicate their assessment of whether the benefits of this proposal outweigh expected increases to the PFC compensation rate resulting from implementation of this proposal.

Lastly, the FAA requests that public agencies, carriers, and the public provide any opinions to any of the possible modifications that will help safeguard PFC revenues in the event of an airline bankruptcy.

Section-by-Section Discussion of the Proposals

This ANPRM contains proposals to amend several sections of part 158.

One of these proposals is intended to address a change sought by the Air Transport Association in its petition for rulemaking which would allow air carriers to be compensated based on PFC's "collected," rather than "remitted."

Another proposal in this document is in response to a requirement, contained in the FAA Authorization Act of 1994, to implement the statutory prohibition on collection of PFC's from passengers traveling on frequent flyer awards.

An additional proposal clarifies that an air carrier has remitted the PFC's to the public agency when the public agency receives the PFC payment.

Further proposals codify current industry practice by providing for appropriate PFC adjustments when an itinerary change is initiated by the passenger.

Sections 158.3, 158.45, and 158.47

In response to a legislative requirement to prohibit collection of PFC's from holders of frequent flyer tickets, the FAA is proposing to modify §§ 158.3, 158.45(d), and 158.47.

Section 204 of the Federal Aviation Administration Authorization Act of 1994, Pub. L. 103-305 (August 23, 1994) (49 U.S.C. 40117(e)(2)(D)), precludes collection of a PFC from a passenger enplaning at an airport if the passenger did not pay for the air transportation which resulted in such enplanement, including any case in which the passenger obtained the ticket for air transportation with a frequent flyer award coupon without monetary payment.

This provision prohibits the collection of PFC's from passengers who obtained their ticket with an award

coupon issued under a frequent flyer or similar bonus award program.

The FAA is proposing to add a definition of "frequent flyer award coupon" to the definitions in § 158.3.

In addition, § 158.45(d) is being modified to include non-revenue passengers, as defined by existing Department of Transportation regulations, and frequent flyers to the list of passengers from whom issuing carriers and their agents shall not collect PFC's.

Finally, a paragraph prohibiting collection of PFC's from non-revenue passengers and frequent flyers is being proposed in § 158.47.

The FAA proposes a change to §§ 158.45(a)(3) and 158.47(c)(4) to delete a provision requested by air carriers in the original PFC rule that is no longer applicable under current industry ticketing practices.

The second sentence in each paragraph currently states—

Any changes in itinerary that are initiated by a passenger that require an adjustment to the amount paid by the passenger are subject to collection or refund of the PFC as appropriate.

However, current industry practice is to recalculate the applicable PFC's whenever a passenger initiates a change in itinerary, whether or not a fare change is applicable. Therefore, each sentence would be modified to delete the phrase "that require an adjustment to the amount paid by the passenger."

Section 158.51 Remittance of PFC's

The FAA proposes a change that would clarify § 158.51 that provides for PFC's collected by a carrier to be "remitted" to the public agency on a monthly basis, no later than the last day of each calendar month.

There has been some confusion as to whether this provision is satisfied by the act of mailing the payment to the public agency by that date, or whether receipt by the public agency is required. The second sentence in the paragraph currently states—

PFC revenue recorded in the accounting system of the carrier, as set forth in § 158.49 of this part, shall be remitted to the public agency no later than the last day of the following calendar month.

This sentence is being modified by replacing the words "remitted to" with the words "received by." This change would make it clear that the public agency must receive the payment to satisfy the regulation.

Section 158.53 Collection Compensation

The FAA proposes to amend § 158.53(a) to change the basis for which the air carrier is compensated for handling PFC's. This proposal is a change sought by the ATA in its petition for rulemaking.

At the time part 158 was enacted, it was felt that there would be a relatively small proportion of itinerary changes that would result in PFC refunds.

However, actual practice has shown larger than expected refund activity resulting in costs for which the carriers are not being reimbursed.

Currently, carriers are entitled to compensation only when they "remit" the PFC to the public agency. If refunds occur, carriers do not receive compensation for their handling of the PFC. Under the proposal, air carriers would be entitled to receive compensation for each PFC at the time the ticket is first issued, or "collected." Thus, the carriers would receive some compensation for all PFC collections. Air carriers would not, however, be entitled to additional compensation even though additional transactions, such as refunds, may take place.

Request for Comments

The FAA solicits comments and information from all segments of the public interested in the PFC program. The primary focus of this advance notice is carrier compensation for the collection, handling, and remittance of PFC's. All comments received by the FAA at the address and by the date listed above will be reviewed and utilized in any development of proposed regulations. Comments received pursuant to this ANPRM will be analyzed and discussed in the preamble to the Proposed Rule. Any proposed rulemaking will also be made available for public review and comment.

Regulatory Process Matters

Economic Impact

The FAA is unable to determine at this point the likely costs in imposing the proposals or the annual effect on the economy. Following a review of the comments submitted to this ANPRM, the FAA will determine what regulatory requirements will be proposed, if any, and will review the potential costs and benefits, as required by Executive Order 12866.

Significance

This anticipated rulemaking is "a significant regulatory action" as defined in Executive Order 12866 and the

Department of Transportation Regulatory Policies and Procedures.

Other Regulatory Matters

At this preliminary stage it is not yet possible to determine whether there will be a significant economic impact on a number of small entities or what the paperwork burden might be. These regulatory matters will be addressed at the time of publication of any NPRM on this subject.

List of Subjects in 14 CFR Part 158

Administrative practice and procedure, Air carriers, Airport, Air transportation, Passenger facility charge, Reporting and recordkeeping requirements.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend part 158 of the Federal Aviation Regulations (14 CFR part 158) as follows:

PART 158—PASSENGER FACILITY CHARGES (PFC'S)

1. The authority citation for part 158 continues to read as follows:

Authority: 49 U.S.C. §§ 40117, 47114, 47106, 47524e, and 47526.

2. Section 158.3 is amended by adding the following definition in alphabetical order:

§ 158.3 Definitions.

Frequent flyer award coupon means a zero-fare award of air transportation that an air carrier, or foreign air carrier, provides to a passenger in exchange for accumulated travel mileage or trip credits in a customer loyalty program. The definition of frequent flyer award coupon does not extend to redemption of accumulated credits for awards of additional or upgraded service on trips for which the passenger has paid a published fare. "Two-for-the-price-of-one" and similar marketing programs are not included in this definition.

3. Section 158.45 is amended by revising the second sentence of paragraph (a)(3), and revising paragraph (d) to read as follows:

§ 158.45 Collection of PFC's on tickets issued in the U.S.

(a) * * *

(3) * * * Any changes in itinerary that are initiated by a passenger are subject to collection or refund of the PFC as appropriate.

(d) Issuing carriers and their agents shall not collect PFC's from—

(1) A passenger on any flight to an eligible point on an air carrier that

receives essential air service compensation of that route under 49 U.S.C. § 41733, as amended by Pub. L. 103-305 (August 23, 1994);

(2) Non-revenue passengers, as defined by existing Department of Transportation regulations; and

(3) A passenger enplaning at an airport if the passenger did not pay for the air transportation which resulted in such enplanement, including any case in which the passenger obtained the ticket for the air transportation with a frequent flyer award coupon without monetary payment.

4. Section 158.47 is amended by revising the second sentence of paragraph (c)(4), and adding paragraph (i) to read as follows:

§ 158.47 Collection of PFC's on tickets issued outside the U.S.

(c) * * *

(4) * * * Any changes in itinerary that are initiated by a passenger are subject to collection or refund of the PFC as appropriate.

(i) Issuing carriers and their agents shall not collect PFC's from non-revenue passengers, as defined by existing Department of Transportation regulations, and passengers traveling under "frequent flyer award coupons."

5. Section 158.51 is amended by revising the second sentence to read as follows:

§ 158.51 Remittance of PFC's.

* * * PFC revenue reported in the accounting system of the carrier, as set forth in § 158.49 of this part, shall be received by the public agency no later than the last day of the following calendar month (or if that date falls on a weekend or holiday, the first business day thereafter).

6. Section 158.53 is amended by revising paragraph (a) to read as follows:

§ 158.53 Collection compensation.

(a) Retain \$0.12 of each PFC remitted on or before June 28, 1994. Retain \$0.08 of each PFC remitted from June 29, 1994, through [date of enactment of rulemaking]. Thereafter, air carriers shall be entitled to \$0.08 of each PFC collected; and

Issued in Washington, DC, on April 8, 1996.

W. Robert Billingsley,
Acting Director, Office of Airport Planning
and Programming, APP-1.

[FR Doc. 96-9253 Filed 4-15-96; 8:45 am]

BILLING CODE 4910-13-M