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STATE OF COLORADO
DEPARTMENT OF LAW

August 16, 2021

The Honorable Pete Buttigieg
Secretary
U.S. Department of Transportation
1200 New Jersey Ave., S.E.
Washington, D.C., 20590-0001

SUBMITTED VIA FEDERAL eRULEMAKING PORTAL

RE: Public Comment—Notice of Proposed Rulemaking, Refunding Fees for Delayed Checked Bags and Ancillary Services that are not Provided (Docket DOT-OST-2016-0208)

Dear Secretary Buttigieg:

The Colorado Department of Law (“Department”) offers the following comments regarding the notice of proposed rulemaking, “Refunding Fees for Delayed Checked Bags and Ancillary Services that are not Provided” (“NPRM”) published on July 21, 2021, by the U.S. Department of Transportation (“USDOT”).

As Colorado attorney general, I am deeply committed to the effective enforcement of consumer protections for airline industry customers. In a letter dated February 4, 2021, to the USDOT, for example, the Department raised specific concerns regarding the customer services practices of Frontier Airlines during the COVID-19 pandemic. This complaint resulted from the very large number of Colorado consumers who turned to the Department with complaints and concerns regarding Frontier Airlines—including failures to issue proper refunds, delaying responses in refund delivery, and not providing reliable measures to contact customer service representatives.

Given our strong interest in protecting the rights of airline consumers, we are very pleased with the thoughtfulness of NPRM. This effort is a strong demonstration of the USDOT’s commitment to protecting airline consumers and reflects an important stride forward in ensuring all airline consumers are treated fairly and equitably.

The proposals put forth in the NPRM appropriately balance the considerations of airline consumers with the practical realities of carriers. The

NPRM's clarification that refunds are required for failure to provide the ancillary services that passengers paid for is particularly welcomed. This clarification addresses the vulnerability of consumers in these contexts and is an example of the USDOT proactively addressing a nuanced issue.

While the proposed scope of the definition of “ancillary services” is appropriate, the Department recommends that the actual rule text be as clear as possible so that consumers can readily understand the scope of their rights. In other contexts, the Department has made efforts to assure that any add-on fees are clearly disclosed to consumers and that companies charge such fees only for actual additional goods and services that they provide. In the Department's recent action against DIRECTV, for example, we required refunds for consumers who paid for a sports channel they did not receive and high-definition services that were now part of its standard offering.¹ As for this rulemaking, we recommend that the final rule language ensure that consumers truly receive items of value for additional fees, prohibiting add-on fees that serve only to increase revenue without providing additional tangible benefits to airline consumers.

The Department supports USDOT's efforts to simplify the proposed refund structure and process. This improvement to the rules also will better inform consumers in understanding their rights. For example, we support the USDOT's tentative decision to not propose a tiered standard for the length of a delay triggering a refund based on flights' frequency, length, or other variables. A simplified system is certainly more accessible to all parties and is an example of the type of regulatory clarity that, in effect, protects consumers by enabling them to understand their own rights and advocate for themselves when regulations are defied or disregarded.

To build upon this proposed improvement, the Department encourages the USDOT to specify particular circumstances in which carriers are not required to issue a refund for lengthy delays in baggage delivery, rather than crafting a general exception for checked baggage delays that were a result of a passenger's “negligence.” A generalized exception, especially one turning on such a complex term of art is not only unclear, but also invites carriers to deny refunds more readily and place consumers in a challenging position. In particular, consumers in this situation would have to argue abstractly as to whether their specific situation was “negligent”—a vague concept likely to pose challenges not only to consumers and carriers, but for the ultimate enforcement process if any issue is litigated. More generally, we recommend that the structure of the rule place the burden on the airline to establish any exception and to create incentives against gaming by

¹ Colorado Attorney General's Office, *DIRECTV to pay more than \$1 million in refunds to Coloradans who were overcharged during Altitude Sports blackout* (June 3, 2021) (available at: <https://coag.gov/press-releases/6-3-21/>).

carriers to withhold such refunds—say, requiring additional refunds when the asserted exception is not claimed in good faith.

Finally, the Department recommends that the final rule require carriers to clearly communicate and inform airline consumers the scope of the NPRM's expanded refund rights, including a clear, readily accessible mechanism for consumers to easily request refunds. As reflected in our prior letters to USDOT regarding Frontier Airlines, carriers sometimes make seeking a refund of any kind so laborious, time consuming, and confusing that consumers opt to not seek a refund at all. Without such clarity, the USDOT risks allowing the expanded protections to become meaningless in practice.

Thank you for your consideration of these comments. Should your staff have questions, please feel free to contact Shalyn Kettering or Kurt Morrison with the Colorado Department of Law at (720) 508-6547.

Sincerely,

A handwritten signature in blue ink that reads "Phil J. Weiser". The signature is written in a cursive style with a large, stylized initial "P".

Phil Weiser
Attorney General