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14 CFR Parts 121 and 135
Smoking Aboard Aircraft; Summary and
Disposition of Comments; Rule

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DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Parts 121 and 135**

[Docket No. 25596; Amdt. Nos. 121-196 and 135-25]

Smoking Aboard Aircraft; Summary and Disposition of Comments**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Disposition of comments.

SUMMARY: This document summarizes and responds to comments received by the FAA concerning the Smoking Aboard Aircraft Final Rule. Due to a congressional mandate, the rule went into effect on April 23, 1988. Because of the early effective date, the FAA did not have sufficient time to issue a notice of proposed rulemaking and receive comments from the public. Therefore, post-effective date comments were invited from the public. The comment period closed on May 31, 1988; however, this document addresses comments received through December 31, 1988.

DATE: Effective Date of Final Rule: April 23, 1988.

ADDRESS: The Smoking Aboard Aircraft Final Rule docket may be examined at the Federal Aviation Administration, Office of the Chief Counsel, Rules Docket, Room 718-G, 800 Independence Avenue SW, Washington, DC 20591. The Rules Docket is open weekdays, except Federal holidays, between 8:30 a.m. and 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Gary E. Davis, Project Development Branch (AFS-240), Air Transportation Division, Office of Flight Standards, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591, Telephone (303) 327-3094.

SUPPLEMENTARY INFORMATION:**Background**

In 1984 Congress directed the Secretary of Transportation to commission an independent study by the National Academy of Sciences (NAS) on the cabin air quality in airliners. NAS formed the Committee on Airliner Cabin Air Quality (Committee), and the study was published in August 1986. The Committee presented 21 recommendations, the most controversial of which was to ban smoking on all commercial domestic flights.

In December 1987, Congress enacted an amendment to section 404(d)(2) of the

Federal Aviation Act of 1958 (Act). The amendment (section 404(d)(1)(A)) (smoking ban or ban) banned smoking in the passenger cabin or lavatory aboard domestic flights scheduled for 2 hours or less. Congress required that the ban go into effect on April 23, 1988, and last for a period of 2 years.

Congress also added section 404(d)(3) to the Act which provides for a civil penalty of up to \$2,000 for any passenger who tampers with, disables, or destroys a smoke detector in the lavatory of an aircraft. The civil penalty provision took effect immediately and has no expiration date. Congress directed the Secretary of Transportation (Secretary) to issue the implementing regulations. The Secretary has delegated this responsibility to the FAA (Amendment 1-323, 53 FR 10260, March 30, 1988).

The FAA issued the Smoking Aboard Aircraft Final Rule on April 12, 1988 and published it in the Federal Register on April 12, 1988 (53 FR 12384). Because Congress required that the smoking ban go into effect on April 23, 1988, the FAA rule became effective on the same date. Post-effective date comments were invited from the public.

The Department of Transportation (DOT) compiled the public comments in response to both the NAS Committee on Airliner Cabin Air Quality recommendations and the FAA rule. With respect to the former—from the date of publication of the Committee's recommendations through December 31, 1988—DOT's Consumer Affairs Office received 3,187 unsolicited letters concerning the Committee's recommendation to ban smoking aboard aircraft, of which 2,871 supported the NAS recommendation. The FAA has been advised by the Office of the Secretary of Transportation that one of the letters supporting the Committee's recommendation to ban smoking aboard aircraft was signed by more than 6,400 people. The remaining 316 letters received opposed the Committee's recommendation to ban smoking and smoking regulations in general.

With respect to the FAA rule—from the date of publication of the rule through December 31, 1988—DOT's Consumer Affairs Office received 6,058 letters and postcards. Seventy-seven comments were in favor of the ban; the balance, most of which were form letters and postcards, opposed the smoking ban. The letters and cards received by DOT since June 8, 1988, are available for review in the Rules Docket.

Discussion of the Comments

Comments on the final rule were invited to be submitted between April 23, 1988, and 11, 1988. The FAA has

reviewed all of the comments received up to December 31, 1988. The comments and the FAA's disposition of the comments are discussed below.

The FAA received 122 comments: 79 supporting the rule, 36 opposing the rule, and 7 neutral. Ninety-three comments received were from private citizens. Twenty-one comments were received from medical and health organizations. The remaining 8 comments received were from airline industry and union organizations, a consumer action group, one air carrier, and a representative of the tobacco industry.

The private citizen commenters opposing to the rule recommended that the FAA repeal the ban. Because the smoking ban was congressionally mandated, only Congress can repeal the smoking ban.

The private citizen commenters supporting the rule and the comments received from the medical and health organizations recommended that the FAA extend the smoking ban to include flights longer than 2 hours and to extend the ban beyond the April 1990 expiration date.

At this time, scientific evidence has not sufficiently established that there is a significant health risk to nonsmoking passengers and crewmembers, while on board an aircraft, when other passengers are smoking and the existing smoking regulations are enforced. DOT is conducting a study to identify the type and level of contaminants created by smoking aboard aircraft and the health risks such contaminants may pose to nonsmoking passengers. With the information provided from the DOT study, and upon consideration of reports and studies from other governmental agencies and scientific and medical groups, options for mitigating the exposure to smoking contaminants aboard aircraft will be evaluated. Further rulemaking at this time is premature.

The scope and duration of the present smoking ban regulations promulgated by the FAA were intended solely to implement the congressional mandate to ban smoking aboard aircraft. Therefore, recommendations to extend the smoking ban in duration or to expand the scope of the ban to flights longer than 2 hours are beyond the scope of this rulemaking. Recommendations for changes to the congressional mandate that bans smoking should be directed to the Congress. Legislation was introduced in the last Congress and at least one bill has been introduced already in the 101st Congress to permanently prohibit smoking on all domestic airline flights.

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The remaining 8 comments are discussed below. These commenters addressed the FAA's decision to apply the smoking ban to each flight segment of 2 hours or less during a multistop flight, use of the North American Edition of the Official Airline Guide (OAG) to determine which flights will be covered by the smoking ban, realistic scheduling, compliance and enforcement issues, tampering with smoke detectors, and the requirement to keep the passenger information signs lit during flights of 2 hours or less.

Flights Covered by the Smoking Ban

Flight Segments

One commenter stated that the FAA's determination to apply the smoking ban to each flight segment of 2 hours or less during a multistop flight ignores what the commenter believes is the intent of Congress to strike a balance between the needs of smokers and nonsmokers aboard aircraft. By applying the smoking ban to each flight segment of 2 hours or less, a passenger who is on board an aircraft that makes several stops before arriving at its final destination will be prevented from smoking for the entire length of the trip if each flight segment of the trip is 2 hours or less. The commenter recommended, for the purpose of applying the smoking ban, that a multistop flight be considered one flight, rather than considering each flight segment of a multistop flight as a separate flight.

Congress made no apparent distinction between flights of 2 hours or less and flights that are segments of multiple-flight itineraries (flight segments). Such flight segments are listed individually in schedules as nonstop flights and, for many passengers, a nonstop flight segment is an entire flight. The FAA determined that Congress intended to provide passengers on nonstop flights of 2 hours or less a smoke-free flight, even if that flight may continue after landing to another destination.

Use of the Official Airline Guide

Another commenter stated that the FAA's determination to apply the smoking ban to each flight of 2 hours or less listed in the OAG is too narrow. The commenter recommends that the smoking ban apply to all flights of 2 hours or less, including charter flights which are not listed in the OAG. The commenter raised two concerns: (1) many flights, although not scheduled, are 2 hours or less and passengers aboard such flights should benefit from the smoking ban; and (2) air carriers may stop publishing their flights in the

OAG and thereby avoid compliance with the smoking ban.

Charter flights are not scheduled flights. Because the congressional mandate requires that the smoking ban be applied to scheduled flights, nonscheduled flights of 2 hours or less are unaffected. Therefore, applying the ban to charter flights is beyond the scope of this rulemaking.

While, hypothetically, an air carrier might remove a flight listing from the OAG to avoid complying with the smoking ban, the FAA concluded, as noted in the preamble to the rule, that competitive and marketing pressures would discourage this action. The FAA invited comments on its conclusion (55 FR 12262, April 12, 1989). No comment or complaint has been received regarding the removal of a flight listed in the OAG.

One commenter suggested that the air carriers be allowed to use sources other than the OAG to determine scheduled flight times. The computer reservation system was recommended as one alternative to the OAG. The FAA determined that passengers, air carriers, and FAA inspectors should use the same resource to determine which flights are subject to the smoking ban. Thus, a comprehensive and accessible list of scheduled flights must be available. The OAG is such a list. It contains the operations of all major air carriers offering scheduled flights. Any such flights that are not listed in the OAG would almost certainly be utilizing aircraft with less than 30 seats where smoking is totally banned already. (14 CFR 252.5) In addition, the flight information in the OAG is readily available to passengers who want to determine whether smoking will be prohibited on a particular flight. Thus, because of its accessibility and widespread use and acceptance, the FAA continues to believe that the OAG is the best means for determining which scheduled flights are covered by the smoking ban.

Realistic Scheduling

Congress required that the smoking ban apply to flights scheduled for 2 hours or less, notwithstanding the actual duration of the flight. One commenter stated that many flights scheduled for 2 hours or less take longer and that passengers on such flights will be required to refrain from smoking for a longer period of time than intended by Congress. To prevent the ban from applying to scheduled flights that are likely to exceed 2 hours, the commenter suggested that the FAA require the airlines to adjust their schedules, as

reported in the OAG, by incorporating an average delay factor that would ensure accurate listings.

This comment should be addressed as a scheduling issue which is more appropriately within the regulatory jurisdiction of the Office of the Secretary of Transportation (OST). OST rules already regulate "unrealistic scheduling," which is defined as a prohibited unfair or deceptive practice (14 CFR 399.81(a)). Persons with evidence of unrealistic scheduling by a particular air carrier should provide it to OST. OST rules also require air carriers to report their on-time performance to OST and to include an on-time performance code for each flight in their computerized reservation systems (14 CFR 244.4). Thus, a regulatory deterrent to unrealistic scheduling is already in place.

Compliance and Enforcement

The preamble to the final rule states that the FAA expects air carriers to enforce the prohibition on smoking (55 FR 12260, April 12, 1989). One commenter requested that the FAA clarify the statement made in the preamble concerning this duty of the air carrier.

The FAA expects air carriers to make reasonable efforts to assist in the enforcement of the rule implementing the smoking ban. There is no indication that air carriers are not making such efforts or that air carriers do not understand how to do so.

Two commenters suggested that the FAA amend the rule to include provisions that the air carriers take such steps as are necessary to obtain a positive identification of the violator including, if necessary, the notification of police authorities at the airport who can meet the passenger and request identification. One of these commenters also suggested that the regulations require air carriers to report violations to the FAA within 48 hours of being informed that the violation occurred and that the FAA notify the alleged violator within 7 days of notification from the air carrier. The commenter is concerned that many violations may go unreported if such provisions are not included in the regulations.

The FAA expects smoking ban enforcement to be similar to enforcement of any other Federal Aviation Regulation (FAR). If a passenger violates the smoking ban, the air carrier should submit the appropriate information to the local FAA Flight Standards District Office (FSDO) so that the FAA can investigate the violation. The FAA does not believe that

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enforcement of the smoking ban requires the presence of a local enforcement officer or FAA representative at the gate to immediately initiate enforcement actions. However, if a passenger who is violating the smoking ban interferes with a crewmember while the crewmember is performing his or her duties, a pilot in command may request the presence of a law enforcement officer at the gate.

Limiting the time period for a person to report a violation may actually decrease the number of violations reported to the FAA. Air carriers would not report violations if they could not submit the information within the 48-hour time limitation. The FAA prefers to have as many violations reported as possible despite the amount of time the air carrier needs to submit the information. Similarly, after an air carrier reports a violation, FAA personnel must determine whether the violation can be pursued. To make this determination, FAA personnel must obtain the crewmembers' statements. Obtaining these statements often requires more than 7 days; however, it is not until these steps are taken, that the alleged violator is notified. Therefore, the FAA has determined that time limitations on the air carriers would decrease the number of violations reported and, a requirement that the FAA notify an alleged violator within 7 days would not provide the FAA with sufficient time to open an investigation.

Tampering and Disabling Smoke Detectors

Several comments addressed the rule's provisions governing smoke detectors in aircraft lavatories. One commenter suggested that, as of January 1, 1988, the statement that tampering with smoke detectors is prohibited should be eliminated from the pre-flight briefing because, on January 1, 1988, § 121.517(e) of the FAR will require a placard in all aircraft lavatories stating this same information. Although the placards will be legible to most passengers using the lavatory, there may be some passengers who cannot or may not see or read the sign. In the interest of safety and because a violation may subject a passenger to a civil penalty of up to \$2,000, the FAA has determined that an audible, as well as a visual warning is appropriate. By including the statement in the briefing, all passengers will receive notice of the potential penalty for tampering with smoke detectors.

Considering the possibility that the 2-hour smoking ban might increase surreptitious smoking aboard aircraft,

the FAA sought comments on the need for tamper-resistant smoke detectors (22 FR 12349; April 18, 1986). Several commenters stated that passengers who insist on smoking can easily disable the smoke detectors. Some commenters suggested that the FAA require "tamper-resistant" smoke detectors and others suggested "tamper-proof" detectors. The commenters recommended a variety of approaches, such as installing the smoke detectors behind the ceiling panel, development of a technical standard order which would require that an audible and/or visual signal be provided to the flight or cabin crewmembers when tampering occurs, and requirements that smoke detectors be upgraded so that they are as sensitive as the existing technology will permit. In addition to soliciting comments, the FAA contacted local FAA inspectors to determine whether passengers are tampering with smoke detectors. The information received from our requests for comments and from the local FAA maintenance inspectors indicates that there has been some tampering with smoke detectors.

During a House Appropriations Committee hearing on February 24, 1988, Representative Richard Durbin recommended that the FAA require air carriers to install placards stating "Federal law provides for a penalty of up to \$2,000 for tampering with the smoke detector installed in this lavatory" in every lavatory equipped with a smoke detector. The recommendation was accepted, and the FAA requires that all smoke detectors installed before January 1, 1988. The FAA believes that these placards will help deter passengers from tampering with the smoke detectors. In addition, the FAA will issue an Action Notice to all Principal Maintenance Inspectors requiring the inspectors to conduct a survey and to report the results of the survey to the Flight Standards division within 90 days. The action notice will help obtain the information necessary to determine whether or not further rulemaking is necessary and if so, what action should be taken to prevent tampering with smoke detectors.

Passenger Information Signs

In addition to the passenger briefings, the FAA chose to inform passengers of the no smoking requirement on flights of 2 hours or less by keeping the passenger information signs lit during the flight. This method was chosen for the following reasons: (1) all airplanes used in operations under Part 121 of the FAR and all airplanes with more than 19 passenger seats used in operations

under Part 125 of the FAR must be equipped with these signs; (2) such signs have always been used to inform passengers when smoking is not allowed; and (3) passengers are accustomed to such signs. However, in the preamble to the final rule, the FAA solicited comments on whether the use of these signs is the best means of notification and whether any alternative means would be better (22 FR 12349; April 18, 1986). The FAA received one comment on this issue.

The commenter stated that the passenger information signs were not designed for continuous operation. The commenter recommended that the rule allow air carriers to choose between keeping the passenger information signs lit or posting "no smoking" signs in designated areas of the passenger cabin. The FAA finds that the alternative presented by the commenter would not be an effective way to carry out the ban. Passenger information signs are positioned so that every passenger can see a sign while seated. A passenger's field of vision is limited while seated in an aircraft and posted signs may not always be visible. Therefore, posted no smoking signs might not provide sufficient notice of the smoking ban to all passengers. Furthermore, it is important that the air carriers notify passengers of the smoking ban in a consistent manner. Uniformity of notification will reduce confusion concerning whether the ban applies to a particular flight.

Continuous use of the passenger information signs will not deteriorate the signs. Although the air carrier may need to replace the light bulbs used in the signs more frequently, this should not cause a substantial inconvenience. The bulbs used in the passenger information signs have a useful life of approximately 7,000 hours. In addition, the signs are installed with two bulbs so that the signs dim somewhat before both bulbs burn out. This gives the air carrier sufficient time to change the bulbs before the sign is inoperable. Because no effective alternative to the passenger information signs has been presented, and because use of the passenger information signs create no appreciable additional burden on the air carrier, the FAA will continue to require that the passenger information signs be used to inform passengers that a flight is a nonsmoking flight.

Issued in Washington, DC, on May 18, 1989.
Donald C. Beaudette,
Acting Director, Flight Standards Service.
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