

**BEFORE THE
OFFICE OF FOREIGN ASSETS CONTROL
DEPARTMENT OF THE TREASURY
WASHINGTON, DC**

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In the matter of

PROPOSED COLLECTION OF INFORMATION UNDER
THE CUBAN ASSETS CONTROL REGULATIONS
FROM PROVIDERS OF TRAVEL AND CARRIER SERVICES
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**COMMENTS OF AIRLINES FOR AMERICA
AND REQUEST FOR EXEMPTION**

Airlines for America¹ ("A4A") submits these comments in response to the Office of Foreign Assets Control's ("OFAC") February 29th Paperwork Reduction Act ("the Act") notice² soliciting views about OFAC's Provider of Travel and Carrier Services information collection requirements under the Cuban Assets Control Regulations ("the Regulations").³

We appreciate the statutory framework within which the Regulations exist and the care with which OFAC has revised them. Nevertheless, we believe that air carriers operating to Cuba should be exempt from them. The document collection and retention requirements for such air transportation are unnecessarily burdensome and are not in line with contemporary airline-industry passenger information systems and procedures. The air traveler regulatory requirements elsewhere in OFAC's regulatory regime will remain and will provide the information gathering and retention necessary to fulfil OFAC's needs.

I. OVERVIEW

A. Background

On February 16, 2016, the United States Government ("USG") signed a Memorandum of Understanding ("MOU") with the Government of Cuba authorizing scheduled U.S. airline service between the two countries for the first time in over half a century.⁴ Thirteen air carriers have applied for a total of 80 U.S.-Cuba routes. The Department of Transportation ("DOT") is

¹ Airlines for America (A4A) on behalf of its Members advocates policies that promote safety, security and a healthy U.S. airline industry. A4A's members are: Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; and United Parcel Service Co. Air Canada is an Associate Member of A4A. Our website is accessible at www.airlines.org.

² 81 Fed. Reg. 10717, col. 1, March 1, 2016.

³ 31 C.F.R. part 515.

⁴ Memorandum of Understanding between the Government of the United States of America and the Government of the Republic of Cuba, Feb. 16, 2016, accessible at <http://www.state.gov/e/eb/rls/othr/ata/c/cu/>.

reviewing the applications and will award route authority to air carriers in the next several months.

The MOU authorizes scheduled and charter services between any point or points in the United States and any point or points in Cuba. In addition, under the MOU an air carrier on any or all of its flights can:

- a. Operate flights in either or both directions;
- b. Combine different flight numbers within one aircraft operation;
- c. Transfer traffic from any of its aircraft to any of its other aircraft at any point;
- d. Make stops for non-traffic purposes within or outside the territory of either country;
- e. Make stopovers at any points within the territory of either country; and
- f. Combine traffic on the same aircraft regardless of where such traffic originates.⁵

The introduction of scheduled air service accompanied by these operating rights will generate significantly greater passenger traffic between the United States and Cuba. Carriers' applications to DOT for route authority portend that expansion.

The pending introduction of scheduled air travel to Cuba is a historic event, is a priority for the Administration and has generated widespread public interest throughout the United States. The environment in which air carriers provide that service should be as efficient as possible so as to facilitate that much-anticipated travel.

B. The OFAC Regulations and the Act

The air transportation that air carriers will perform pursuant to the MOU remains subject to the Regulations.⁶ Of greatest concern to passenger carriers is section 515.572(b):

"(b) Required reports and recordkeeping. (1) Persons subject to U.S. jurisdiction providing services authorized pursuant to this section must retain for at least five years from the date of the transaction a certification from each customer indicating the section of this part that authorizes the person to travel or send remittances to Cuba. In the case of a customer traveling under a specific license, a copy of the license must be maintained on file with the person subject to U.S. jurisdiction providing services authorized pursuant to this section.

"(2) The names and addresses of individual travelers or remitters, the number and amount of each remittance, and the name and address of each recipient, as applicable, must be retained on file with all other information required by §501.601 of this chapter. These records must be furnished to the Office of Foreign Assets Control on demand pursuant to §501.602 of this chapter."

OFAC's February 29th notice solicits comments from the public about this requirement, the burden it may place on the industry and proposals to simplify the requirement. More specifically, the notice asks:

⁵ Id.

⁶ 31 C.F.R. §515.572.

“(a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.”⁷

As we describe more fully below, two related mandates of the Act are especially pertinent in evaluating the Regulations: that federal agencies evaluate the need for the collection of information and reduce information collection burdens on the public counsel.⁸ We believe that based on those statutory standards, the Regulations' passenger-information collection and retention requirements for air carriers should be withdrawn.

II. AIR CARRIERS PROVIDING SCHEDULED AIR SERVICE PURSUANT TO THE U.S.- CUBA MOU SHOULD NOT BE SUBJECT TO DOCUMENT COLLECTION AND RETENTION REQUIREMENTS

A. The MOU creates a new system of air transportation between the two countries.

The MOU establishes a new air transportation arrangement between the two countries, reflecting an improvement in relations involving the air services sector. U.S. information collection and retention requirements should reflect that change by unburdening air service providers from those requirements.

B. OFAC's information requirements continue for passengers. Relieving air service providers from those requirements will not compromise the data gathering and retention objective of the Regulations because, as discussed more fully below, passengers will continue to be subject to the information obligations that OFAC regulations impose and consequently OFAC will have access to necessary information about the air traveler.

C. Airlines are not required to verify the passenger's status. The Regulations do not require the air carrier transporting a passenger to Cuba to verify her or his qualification to travel. The passenger makes that determination. It is exclusively her or his responsibility. For example, once the passenger determines that one of the 12 travel-purpose categories applies, “[n]o further permission from OFAC is required...”⁹ With no role in this matter, the air carrier should not be obligated to collect and retain records about the passenger's determination. That would be needlessly duplicative.

D. Airline information systems are not currently configured to record or store this information. Adding new passenger-information collection and retention capabilities, functionality to websites and training employees will be costly and divert limited, valuable technology resources.

III. THE REGULATIONS' DOCUMENT COLLECTION AND RETENTION REQUIREMENTS ARE UNREASONABLY BURDENSOME TO AIR CARRIERS

⁷ 81 Fed. Reg. 10717, col. 3, March 1, 2016.

⁸ 44 USC §3506(b)(1)(A), (c)(2)(A)(i).

⁹ U.S. Department of the Treasury, Frequently Asked Question About Cuba at 2, FAQ 6, updated April 21, 2016, accessible at https://www.treasury.gov/resource-center/sanctions/Programs/Documents/cuba_faqs_new.pdf.

A. Unique requirement. Air carriers are not required in other USG regulations to capture and retain passenger information comparable to what the Regulations require. Other federal agencies that have a regulatory role in air carrier activities, such as the Department of Transportation and the Federal Aviation Administration, do not impose that type of obligation. Moreover, the USG does not require that air carriers retain copies of international travel documents, such as passports and visas, irrespective of the passenger's itinerary. Why that government-wide practice should be departed from with respect to air travel to Cuba is not clear.

B. Lop-sided costs compared to benefits. This situation produces a skewed cost-benefit outcome: airlines, which do not have an existing information collection and retention system that can accommodate the Regulations' data requirements, will have to develop that capacity. These new capabilities will merely correspond to what OFAC regulations require of passengers traveling to Cuba without improving data quality or usefulness.

IV. REQUIRING AIRLINES TO RETAIN GENERAL LICENSE CERTIFICATIONS AND COPIES OF SPECIFIC LICENSES FOR FIVE YEARS IS REDUNDANT AND UNNECESSARY

The OFAC regulations require the passenger traveling to Cuba to certify compliance with a general license category or obtain a specific license. Passengers must retain records of their time in Cuba proving their qualification for the license they elect. Passengers must retain all documentation for five years. The passenger is responsible for meeting the requirements and OFAC has the authority to enforce those obligations.

Imposing a separate document collection and retention requirement on airlines, whether in the context of general or specific licenses, is redundant and unnecessary. It creates a duplicative, parallel information gathering system.

V. THE ADVERSE IMPLICATIONS FOR AIR CARRIERS OF THE REGULATIONS

U.S. airlines have operated charter flights to and from Cuba for a quarter of a century. While those flights have provided experience in air operations between the two countries, as we work on the introduction of MOU-authorized service, we must recognize that the charter and scheduled air-service environments are fundamentally different in structure, operational complexity, number of customers and expectations of customers. The scheduled environment is not the mirror image of the charter environment.

Scheduled operations in the airline industry are based on the system that the particular carrier has created to perform them. The system is dependent on a series of interactions involving a variety of inputs: Aircraft, flight-deck and cabin crews, airports, global distribution systems (reservation systems), customers (passengers and shippers), airports, etc. These and many other inputs are necessary to produce air transportation. It is remarkably complex.

One implication of this environment is that unnecessary requirements not only produce needless cost but impede efficiency. The passenger-information requirements imposed on air carriers in section 515.572, although they are less burdensome than the previous reporting requirements imposed on Carrier Service Providers, will create such a situation in the high-volume, highly automated scheduled services environment.

Section 515.572(b) requires that air carriers serving Cuba must retain for at least five years from the date of the transaction a certification from each passenger indicating the provision of the Regulations that authorizes the passenger to travel to Cuba. For a passenger traveling under a

specific license, a copy of it must be maintained on file. The names and addresses of individual travelers must also be maintained on file for at least five years.¹⁰

The Regulations, as noted above, impose information collection and retention requirements not otherwise present in scheduled operations. Neither other government agencies nor the airline industry impose these requirements. Thus, substantial modifications to existing systems will be required; this is not a simple matter of checking a box and filing a form.

Airline reservation systems, which are the backbone of passenger information capabilities in our industry, were introduced in 1964. Many reflect that provenance. They are bespoke systems that are designed to collect discrete categories of information about the passenger's journey and the underlying commercial transaction.¹¹ The passenger's address is not a required field, and any billing address may or may not correspond with the passenger's address (for example, work-related travel, relatives purchasing tickets for one another, etc.).¹² Moreover, after the journey is completed, information in the passenger's original reservation is not retained. This reflects the industry's goal of streamlining information retention, something at which the Regulations are at cross purposes.

Such systems have two characteristics that are pertinent in evaluating the Regulation's burdens on air carriers. First, they typically do not have the open architecture that exists in more contemporaneously-developed information systems. Second, they operate under worldwide airline industry standards that various stakeholders, such as airlines and global distribution systems (computer reservations systems), develop by consensus. This emphasis on harmonized standards is necessary because journeys can involve transportation on more than one air carrier. Non-U.S. stakeholders, however, may have little or no familiarity with or interest in accommodating the Regulations' demands. They are unlikely to sense the urgency of revising those standards. This means that U.S. air carriers may have to develop non-harmonized solutions to the Regulation's collection and retention requirements, particularly as they relate to passenger addresses. That will be burdensome, costly and inefficient.

Similar considerations apply to passenger certifications, which must be collected, retained and somehow linked to passenger data. Airline tickets are often purchased through third parties, meaning that the airline is often not in a position to collect directly a certification from the passenger at the time of booking (for example, if booking is made through a travel agent or an online travel agency). If certifications must be collected at airport check-in or at the gate, significant logistical issues will arise in dealing directly with the passenger and then preserving, filing, and linking the certification forms with her or his data (issues that will also arise with respect to collection of copies of individual licenses). In addition, the modern airline processing system emphasizes customer-enabled, electronic-based procedures, such as mobile device check-in. This focus is intended to shift transactions away from face-to-face interactions. Indeed, it means that checking-in often occurs well before the passenger arrives at the airport. Contemporary passenger processing procedures consequently are not designed for highly manual information-collection processes, which the Regulation would produce. We have spent the last quarter of a century migrating away from that antiquated approach. Modifying existing

¹⁰ Id. at 10, FAQ 38.

¹¹ See U.S. Customs and Border Protection, Passenger Name Record (PNR) Privacy Policy at 3 (June 21, 2013) (list of categories of information in a passenger name record) accessible at https://www.cbp.gov/sites/default/files/documents/pnr_privacy.pdf.

¹² Id.

systems to accommodate what will inevitably generate manual interventions would be a significant challenge.

We do not function in a “plug-in” environment. Some of what the Regulations specify are unknown in our operating environment and will be uneconomic to introduce. Moreover, they are superfluous in light of the passenger-focused regulatory foundation that the Regulations create.

VI. REQUEST FOR EXEMPTION

Airline compliance with the Regulation’s address collection and retention and license certification requirements thus would exceed current airline-information-system capabilities. This will necessitate the development of additional information collection and storage capabilities that would be expensive, burdensome and unnecessary in the context of the government’s travel-to-Cuba regime.

In that regime, it is the passenger, not the air carrier, who is responsible for determining whether her or his air travel qualifies for one of the 12 general-license exemptions in the Regulations or is subject to a specific license.¹³ The air carrier cannot make that determination or confirm the accuracy of the passenger’s determination that her or his travel is lawful.

OFAC’s regulations create a passenger-centric compliance arrangement, in which the air carrier has no role in verifying that compliance. That is the decisive factor in evaluating any information collection and retention rule applicable to air carriers. Assessed in that light, the Regulation’s air carrier information provisions are misplaced.

The foregoing considerations demonstrate that the Regulation’s information collection and retention obligations for air carriers can be waived without jeopardizing the ability of OFAC to ascertain who has been to Cuba and enforce its policies.¹⁴ We therefore urge that OFAC exempt air carriers from those regulatory obligations, whether the transportation is based on a general license or a specific license.

VII. CONCLUSION

The regulatory relief that we request satisfies two related mandates of the Act: that federal agencies evaluate the need for the collection of information and reduce information collection burdens on the public.¹⁵ It also advances the objective of the Administration that in implementing the Act that federal agencies collect and manage information in a way that will “reduce burdens on the public.”¹⁶ The information requirements placed on the air carriers are disproportionately burdensome and unnecessary in light of the requirements that the Regulations impose in the first instance on passengers. Finally, the bona fides of the passenger can be verified, as appropriate, by U.S. Customs and Border Protection upon the passenger’s return to the United States.

¹³ See 31 C.F.R. §515.560(a).

¹⁴ Customs and Border Protection maintains records of an airline passenger’s travel, including travel involving Cuba. CBP also has the authority to interview passengers as they return from overseas trips, including those to Cuba.

¹⁵ 44 USC §3506(b)(1)(A), (c)(2)(A)(i).

¹⁶ Cass R. Sunstein, Administrator of the Office of Administration and Regulatory Affairs, Information Collection under the Paperwork Reduction Act at 1, (April 7, 2010).

Respectfully submitted,



James L. Casey
Vice President and Deputy General Counsel
Airlines for America
1275 Pennsylvania Ave., NW
Washington, DC 20004
202.626.4000
jcasey@airlines.org

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