DOT's Regulation of "Unfair or Deceptive Practices": Reform Is Urgently Needed

By Robert W. Kneisley

In the fall of 2017, Southwest Airlines was locked in an intense battle for the patronage of California air travelers. The stakes were high: California is the nation's largest air travel market, generating 134 million domestic passengers annually, more than a quarter of the total U.S. market.[1] While the Golden State has long been an airline battleground, Alaska Airlines' acquisition of Virgin America in 2016 greatly raised the stakes. Alaska Airlines had made no secret of the competitive purpose behind the transaction, stating that the Virgin America acquisition "will position us . . . with an unparalleled ability to serve West Coast travelers,"[2] and even claiming on a call with analysts that "Virgin gives us California."[3] Soon after the closing of the Virgin acquisition, Alaska Airlines launched an unprecedented expansion of California service, entering 24 new markets and adding 46 daily flights. As one headline stated, "Alaska Airlines Wants to Replace Southwest as California's Go-To Airline."[4]

Southwest, long California's largest airline, reacted quickly by reducing fares and adding dozens of new flights of its own. Both carriers also initiated aggressive new marketing programs to attract customers. For its part, Southwest launched an innovative loyalty promotion specially designed for California residents, the centerpiece of which was offering a Rapid Rewards "Companion Pass" to anyone who signed up for a Southwest credit card and used it for *a single purchase* (for anything, not necessarily air travel). A Companion Pass essentially enables two people to travel together for a year on any number of Southwest flights for little more than the price of a single ticket; the companion flies for free, paying only government taxes and fees. Travel bloggers raved about the California offer: "an insane offer,"[5] "a shockingly great opportunity,"[6] and "perhaps the greatest Southwest promotion of all time."[7]

Southwest advertised the Companion Pass offer via e-mails to existing California Rapid Rewards members, with the headline "FLY ONE. GET ONE FREE.* FOR A YEAR. (Seriously)." The asterisk led to a disclosure on the same page that read: "*Does not include taxes and fees from $5.60 one-way." The promotion proved to be extraordinarily popular with the public, generating tens of thousands of new Rapid Rewards members in less than two months.

DOT's Intervention in the Airline Battle for California—and How It Harmed Consumers

While the airline battle in California was raging, Southwest was surprised to receive a letter from the U.S. Department of Transportation's (DOT's) Office of Aviation Enforcement and Proceedings (Enforcement Office) expressing "concern" about Southwest's Companion Pass promotion, and threatening to levy penalties for Southwest's "apparent violation" of the DOT's full-fare advertising (FFA) rule and 49 U.S.C. section 41712 for having engaged in an "unfair or deceptive trade practice." The letter stated that the DOT believed Southwest's advertisement was "misleading" because it advertised a "fare" as "free" even though passengers were responsible for payment of applicable taxes and fees. The letter added that Southwest's use of an asterisk and same-page disclosure alerting customers to the need to pay applicable taxes "does not rectify the misleading statement." The letter also stated (unnecessarily) that "[v]iolation of the Federal aviation statutes and regulations is a serious matter" and warned that "Southwest's potential liability in this matter is therefore substantial."

Immediately after receiving the Enforcement Office letter, Southwest terminated the Companion Pass promotion, well before it was scheduled to end. This was a difficult decision, because there was no evidence that Southwest's offer had misled or confused anyone. Neither Southwest nor the DOT had received any consumer complaints about the offer. On the contrary, it had been extremely well received by the public. Moreover, Southwest had reasonable defenses to the DOT's challenge.[8] However, given the DOT's threat of "substantial" enforcement penalties, Southwest felt that the prudent course was to end the promotion.

The net result of the DOT's intervention was the abrupt termination of a highly popular and innovative travel offer, thereby depriving thousands of additional Californians of the "insane offer" and "great opportunity" that Southwest had made available for several weeks. The harm to consumers was actually even greater because the DOT's threat of heavy fines served as a deterrent to Southwest against offering similar promotions in other markets, or nationally. Thus, far from "protecting consumers," the DOT's intervention in the California battle served only to deny air travelers the benefits of vigorous airline competition and innovative marketing.

DOT Bans "Free" Offers; FTC Allows Them

To put this unfortunate incident in a broader context,

Robert W. Kneisley (*bob.kneisley@wnco.com*) is Associate General Counsel of Southwest Airlines Co. The views expressed in this article are the author's and not necessarily those of his employer.

it is useful to compare the DOT's policy on offers of "free" air travel with the Federal Trade Commission's (FTC's) policy toward offers of free goods or services by non-airline businesses. In 1971, the FTC issued *voluntary* guidance to merchants offering "free" goods or services, specifying numerous conditions and qualifications that had to be met in order to advertise goods or services as "free."[9] However, after only a few years of experience with that policy, the FTC quickly abandoned it. This decision was explained by Georgetown law professor (and later FTC chairman) Robert Pitofsky:

> When the [FTC] acted as a surrogate enforcement arm for competitors, as it often did in ad regulation . . . , it characteristically became entangled in *nit-picking, literalistic disputes over the meaning of words in ads*. During this period, many enforcement complaints against advertisers grew directly out of competitor complaints and appear to have been primarily intended to protect sellers against competition . . . . Many of these cases involved disputes over *relatively inconsequential items of information . . . [including] the definition of "free."*[10]

Professor Pitofsky added:

> The [FTC's] decision to downplay enforcement against alleged fictitious pricing, thereby permitting some exaggeration and ambiguity in price claims, is *consistent with the principle of minimum enforcement where consumers, as opposed to competitors, are unlikely to be seriously injured* and where rigid substantiation requirements might suppress a useful form of competition.[11]

Yet, more than four decades after the FTC abandoned its own guidelines against advertising "free" merchandise, the DOT continues to aggressively enforce restrictions against using "free" in air fare advertisements.[12] In so doing, the DOT appears unconcerned about "nit-picking, literalistic disputes over the meaning of words in ads." Perhaps the DOT is unaware of the FTC's experience with similar issues in a far broader swath of the U.S. economy than just air transportation. In any event, the DOT seems oblivious to "the principle of minimum enforcement where consumers, as opposed to competitors, are unlikely to be seriously injured." While significant in its own right, this policy difference is just one example of how the DOT's regulation of *airline* advertising and customer service is much more intrusive and prescriptive than the FTC's regulation of the same activities in other sectors of the economy—under a *substantially identical* statutory standard.

"Unfair or Deceptive Practices": The Four Words Behind DOT's Regulation of Airline Customer Service

The basis for virtually all of the DOT's consumer-related regulations is 49 U.S.C. section 41712, which authorizes the DOT to "investigate and decide whether an air carrier . . . has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation." In practice, most of the DOT's consumer regulations are premised on the "unfair or deceptive practices" portion of the statute—and primarily the "deceptive practices" portion of that phrase. It is ironic, considering how little regulatory authority the DOT possesses over this "deregulated" industry, that the agency has used these four words as a springboard to develop an extensive regulatory regime that controls airlines' consumer-facing activities in extraordinary detail. Indeed, the DOT's expansive regulation of airline customer service is far out of proportion to anything Congress could have intended when it freed the airlines from the heavy-handed economic regulation of the Civil Aeronautics Board 40 years ago.[13]

In fact, important limitations on the DOT's authority are apparent from the face of the statute. First, the DOT is not authorized to regulate "in the public interest," i.e., to restrict or prohibit any airline practice which it happens to dislike on the grounds that it is adverse to the public interest. Rather, the DOT must find, *based upon relevant evidence*, that a specific action is "an unfair or deceptive practice." Further, section 41712 specifies that only if the DOT finds, "after notice and an opportunity for a hearing," that an air carrier "is engaged in an unfair or deceptive practice" may the agency order the air carrier "to stop the practice." This language reinforces the need for the agency to have specific *evidence* of an "unfair or deceptive practice" before taking action against it.

Moreover, section 41712 must be read in concert with Congress's directives to the DOT in the Airline Deregulation Act (ADA), which repealed nearly all of the federal government's economic authority over air carriers and air transportation. In the ADA, Congress instructed the DOT to place "maximum reliance on competitive market forces and on actual and potential competition" to provide "efficiency, innovation, and low prices," as well as "the variety and quality" of air transportation services.[14] The U.S. Supreme Court has emphasized that Congress intentionally left the DOT with a very limited role in regulating airline customer service matters in order to allow "free-market mechanisms" to flourish.[15] Thus, the DOT should rely primarily on the competitive marketplace to determine customer service matters, and intervene only where there is clear evidence of market failure.

Unfortunately, DOT regulators too often have disregarded these judicial decisions and policy directives. In recent years, the agency has issued a blizzard of highly prescriptive rules, guidance documents, and "frequently asked questions" (FAQs) that specify in extreme detail how air carriers are and are not permitted to communicate with and treat their customers. This intrusive regulatory scheme over airline marketing and customer

service not only is at odds with Congress's directive to "place maximum reliance on competitive market forces," but it is also out of step with the policies of the FTC and other federal regulatory agencies that govern other sectors of the U.S. economy.

DOT's Interpretation of "Unfair or Deceptive Practices" Differs Greatly from FTC's

The language of section 41712 is substantively identical to that of section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. section 45, which empowers the FTC to prevent entities from engaging in "unfair or deceptive acts or practices in or affecting commerce." Section 5 does not apply to airlines, other common carriers, and certain financial institutions, but it applies to nearly all other businesses and lines of commerce in the United States. Section 41712 is closely modeled on section 5 of the FTC Act, and courts have long held that the FTC's interpretation of section 5 is an authoritative guide for the DOT's implementation of its section 41712 authority.[16]

The FTC's standard for finding an act or practice "deceptive" under section 5 requires three core findings:

1. The person or business must *intend to mislead consumers* via a false statement, misrepresentation, or material omission. Thus, an innocent misstatement of fact alone would not constitute "deception" under the statute.
2. The practice in question must *actually mislead or be likely to mislead consumers acting reasonably in the circumstances*. It is not sufficient that *any* consumer is deceived, but only those who are acting reasonably.
3. The act or *practice must be "material,"* i.e., such that a reasonable consumer would act in reliance on it to his or her detriment.[17]

In order to establish a violation of section 5, the FTC must have *evidence* sufficient to establish each of these core elements—i.e., that the practice is intended to mislead, and does in fact mislead or is likely to mislead reasonable consumers to their detriment.[18] Importantly, the FTC applies a presumption that market forces inherently constrain the likelihood of deception.[19] Thus, the FTC regards deception to be likely only in instances of market failure, i.e., where a reasonable consumer is unable to obtain and act upon information that would avoid the deception.

The standards discussed above represent a significant tightening of the FTC's practices under section 5 that occurred during President Reagan's tenure. As a former FTC commissioner observed, prior to 1984, "proof of actual deception was not necessary. It was enough that the act or practice had the *tendency or capacity to deceive*."[20] In the 1980s, the FTC reined in its standards for finding deception at the behest of President Reagan's new commissioners, who believed that "the old principles could result in unwarranted federal government challenges to advertising."[21] Hence, the FTC no longer challenges practices that merely have a "tendency or capacity to deceive," but only those for which there is *evidence of actual deception or the likelihood of deception* of reasonable consumers.

In contrast to the FTC's deliberate and transparent approach to determining whether a practice is "deceptive," the DOT has taken a different path. Unlike the FTC, the DOT has not adopted a statement of general policy that clearly articulates the DOT's interpretation of "unfair or deceptive practices" in air transportation under the ADA. This is a disservice to both regulated parties and the traveling public because it fails to provide appropriate guidance before disputes or questions arise. However, this may change, as the DOT recently issued a notice that it plans to conduct a rulemaking to define "unfair or deceptive practices" under section 41712.[22] Such a proceeding would be welcome, but the notice raises questions about the sincerity of the agency's commitment in this regard.[23]

In the absence of an overarching policy statement, the DOT typically resorts to an ad hoc, case-by-case process to determine whether a particular practice is "unfair or deceptive" under section 41712. Significantly, there is no indication that the DOT adheres to the FTC's three-part standard for finding deception. Indeed, the DOT's findings that particular practices are "deceptive" often appear to turn on the personal beliefs of agency personnel rather than objective evidence. Thus, the DOT's process resembles the FTC standard used under section 5 *before* being tightened during the Reagan years, i.e., where evidence of actual deception was unnecessary and it was sufficient that a practice had a "tendency or capacity to deceive."

This was especially common during the Obama administration, when the DOT issued a torrent of highly prescriptive regulations governing airline marketing and customer service, including three separate multipronged rulemakings titled "Enhancing Airline Passenger Protections." As Airlines for America (A4A), the U.S. airline trade association, noted, since 2009, the DOT issued 84 completed or pending regulations targeted at or significantly affecting airlines, the majority of which were "significant regulatory actions" as defined by Executive Order 12,866.[24]

Indeed, the Obama DOT made no secret that interpreting section 41712 in a way to justify greater regulation of the airline industry was a high priority. As the DOT's then general counsel stated: "[W]e have specifically the power to oversee and take action when we determine that there has been unfair or deceptive practices in the industry. We have, I think in this Administration, been *very, very aggressive about figuring out ways to do that that really haven't been done before*."[25] And, the DOT was true to that claim during those years.

The DOT's adoption of the FFA rule in 2011 is a

good example.[26] For several decades prior to the issuance of this new rule, airlines were permitted to advertise their base airfares so long as applicable government taxes and fees were prominently disclosed so consumers could clearly see the total price of their air travel including taxes before purchase. This policy was consistent with the FTC's rules for price advertising, and reflected the way that nearly all sellers of goods and services across the economy displayed prices. Indeed, the DOT repeatedly touted the public benefits of this practice: "Not only is the separate listing of [government taxes and fees] not deceptive, but we believe that passengers benefit from knowing how much they are paying government entities apart from fares they pay the carriers."[27] In 2005, the DOT again reaffirmed the policy, stating that it protects consumers, facilitates price comparisons, and fosters fare competition.[28]

In 2010, however, early in the Obama administration, the DOT proposed to reverse this decades-long policy, to require that all advertised prices for air transportation must include government taxes and fees. In doing so, the DOT offered *no evidence* that consumers had suffered harm from the existing policy.[29] Instead, the DOT *speculated* that consumers may have been confused or deceived by airline pricing, citing postings on a website called the "Regulation Room," an online forum that invited comments on proposed federal regulations. Most of the site's postings did not even relate to airfare advertising, and those that did offered nothing more than speculation that the DOT's previous policy may have confused the public. The DOT conceded that such comments amounted to no more than "feelings" of deception rather than *evidence of actual deception*.[30] Yet, in its final rule, the DOT concluded: "[w]e believe that consumers are deceived when presented with fares that do not include numerous required charges."[31] Although the DOT may have "believed" that consumers were deceived, it presented no credible *evidence* that they actually were deceived.

Moreover, the DOT relied on a seriously flawed cost-benefit analysis to justify the new rule. The DOT claimed that the new advertising policy would generate "net monetized benefits" of $22 million over 10 years.[32] This conclusion was highly questionable at best,[33] but in any event was essentially meaningless—because $22 million in benefits, when divided by the DOT's own estimate of 2.4 billion affected airline passengers over the same 10 years, amounted to *only 0.9 cents per person*.[34] Although the DOT did not mention this calculation in the proceeding, such a profound change in federal policy should never have been premised on claimed "benefits" of *less than a penny per passenger*.[35]

Beyond that—and to come full circle—the deeply flawed FFA rule was the basis for the DOT's issuance of its guidance on the marketing and sale of "free" air transportation, the asserted authority on which the Enforcement Office challenged Southwest's California Companion Pass promotion. The DOT's "free" guidance is independently flawed for reasons noted earlier, but the important point is that if the DOT had adhered to the FTC's interpretation of "deceptive practices," the DOT would have had no basis to adopt the FFA rule or its "free" guidance in the first instance. Instead, the only way the DOT was able to justify these sweeping policy changes was by consciously *ignoring* the FTC's contrary interpretation of the identical governing law.

DOT's Highly Prescriptive Regulation of Airline Customer Service Is Out of Step with Federal Regulation of Other Forms of Transportation

The DOT's "very, very aggressive" interpretation of section 41712 during the Obama administration resulted in an extensive compilation of rules, guidance documents, and FAQs that prescribe in extreme detail how airlines may advertise their services to, communicate with, and otherwise interact with members of the public. This intrusive regulatory control is inconsistent with the FTC's oversight of customer service in other sectors of the economy under an identical statutory mandate. Moreover, the DOT's highly prescriptive rules and guidance documents are also out of step with federal regulation of other modes of travel and transportation, including Amtrak and other passenger rail lines, interstate bus lines, cruise lines, hotels, and transit systems. These transportation and travel entities are variously subject to oversight by numerous federal agencies: the FTC, Surface Transportation Board (STB), Federal Railroad Administration (FRA), Federal Motor Carrier Safety Administration (FMCSA), Federal Maritime Commission (FMC), and Federal Transit Administration (FTA), among others. Yet none of these regulatory agencies has a "full-price advertising rule," prohibits use of the word "free" in advertisements, prescribes the content of websites, or otherwise replicates the many prescriptive rules, standards, and guidance requirements that the DOT imposes uniquely on *airline* customer service in order to eradicate alleged "unfair or deceptive practices."

The DOT has never publicly acknowledged this glaring regulatory disparity, much less attempted to explain or defend it. This is odd, as there is no apparent reason why the federal government should single out airline marketing and customer service for micromanagement while paying little to no attention to such matters by other forms of transportation or businesses in other lines of commerce.

Conclusion

While the DOT often claims that it uses its regulatory and enforcement powers under section 41712 to "protect consumers," a substantial number of the DOT's regulatory actions have been founded on an improper interpretation of its legal authority, particularly during

the Obama administration. Moreover, experience has shown that many of the DOT's regulatory activities during that period stifled publicly beneficial airline competition and innovation, increased the cost of air travel, and placed unnecessary restrictions on normal interactions between air carriers and their customers—all to the detriment of consumers.

Until now, there has been no serious public discussion of this unfortunate situation, and much less have any significant corrective measures been taken. Hopefully this will change in the Trump administration, given its professed commitment to meaningful regulatory reform. The opening of a "Regulatory Review" docket is a welcome development, but no significant changes to the DOT's regulatory regime have yet been implemented. A good start would be for the DOT to conform its interpretation of "unfair or deceptive practices" to the standards applied by the FTC to other sectors of the economy. There should also be a serious, de novo review of rules, actions, and guidance documents that were premised on the "very, very aggressive" legal interpretation employed by the previous administration. Existing DOT rules and other actions that are found not to meet the FTC's standards for unfair or deceptive practices should be promptly rescinded or scaled back.

DOT personnel are earnest and professional, and can no doubt apply the same kinds of standards as the FTC, but they must be directed to do so by senior DOT leaders who are committed to serious reform.[36] These measures would go a long way toward ensuring that the DOT does in fact place "maximum reliance on competitive market forces" to best achieve "efficiency, innovation, and low prices" as well as the "variety and quality" of airline services, as Congress intended.

Endnotes

1. U.S. Dep't of Transp., Origin and Destination Survey (2017), https://www.bts.gov/topics/airlines-and-airports/origin-and-destination-survey-data.

2. Alaska Airlines, Investor Presentation (Nov. 28, 2016), http://investor.alaskaair.com/static-files/2c06b879-10db-4544-92f6-22b647e0ec49.

3. Transcript of ALK - Q2 2016 Alaska Air Group Inc Earnings Call (July 21, 2016), http://investor.alaskaair.com/static-files/2611b3f7-929f-44b4-ad4a-219c6f6d1d52.

4. Hugo Martin, *Alaska Airlines Wants to Replace Southwest Airlines as California's Go-To Airline*, L.A. Times, May 15, 2016, http://www.latimes.com/business/la-fi-alaska-southwest-20160515-snap-story.html.

5. Summer Hull, *Open to All California Residents: Southwest Companion Pass with One Purchase on New Card!*, Points Guy (Oct. 19, 2017), https://thepointsguy.com/2017/10/open-to-all-california-residents-earn-southwest-companion-pass-with-just-one-purchase-on-new-card/.

6. Mark Lamb, *Free Southwest Companion Pass for CA Residents*, Points to Neverland (Oct. 24, 2017), https://pointstoneverland.com/free-southwest-companion-pass-for-ca-residents/.

7. Claire Tsosie, *Limited Time: California-Only Southwest Companion Pass Deal*, NerdWallet (Nov. 15, 2017), https://www.nerdwallet.com/blog/credit-cards/limited-time-california-only-southwest-companion-pass-deal/.

8. Aside from the lack of any consumer harm, the advertisement in question offered a credit card, not any specific air transportation, and was thus outside the DOT's jurisdiction.

9. Guide Concerning Use of the Word "Free" and Similar Representations, 36 Fed. Reg. 21,517 (Nov. 10, 1971).

10. Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 673–74 (1977) (emphasis added).

11. *Id.* (emphasis added).

12. U.S. Dep't of Transp., Guidance on the Use of the Term "Free" in Air Fare Advertisements and Disclosure of Consumer Costs in Award Travel (May 17, 2012), https://cms.dot.gov/sites/dot.gov/files/docs/Use_of_the_word_free_in_fare_advertisements_0.pdf. However, as this is only a guidance document, it is not independently enforceable. *See* Memorandum from the U.S. Attorney Gen. on Prohibition on Improper Guidance Documents (Nov. 16, 2017), https://www.justice.gov/opa/press-release/file/1012271/download.

13. For a more thorough discussion of these issues, see David Heffernan, *Department of Transportation's "Aggressive" Approach to Consumer Protection Regulation and Enforcement*, 80 J. Air L. & Com. 347 (2015).

14. 49 U.S.C. § 40101(a)(6), (12).

15. *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995) (observing that the ADA was intended to "leave largely to the airlines themselves . . . the selection and design of marketing mechanisms appropriate to the furnishing of transportation services"); *see also* Delta Air Lines, Inc. v. Civil Aeronautics Bd., 674 F.2d 1, 3 (D.C. Cir. 1982) (noting that the ADA "replaced the old form of regulation with a new economic regime that relied heavily on free-market mechanisms").

16. Am. Airlines, Inc. v. N. Am. Airlines, Inc., 351 U.S. 79, 82 (1956); United Air Lines, Inc. v. Civil Aeronautics Bd., 766 F.2d 1107, 1111–12 (7th Cir. 1985).

17. *See In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984); FTC Policy Statement on Deception (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

18. *See Cliffdale*, 103 F.T.C. at 174.

19. *Id.* at 181 (finding that "market incentives place strong constraints on the likelihood of deception").

20. J. Thomas Rosch, FTC Comm'r, Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence 2 (May 18, 2007) (emphasis added) (citing Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942)), https://www.ftc.gov/sites/default/files/documents/public_statements/deceptive-and-unfair-acts-and-practices-principles-evolution-and-convergence/070518evolutionandconvergence_0.pdf.

21. *Id.* at 5.

22. Department Regulatory and Deregulatory Agenda; Semiannual Summary, 83 Fed. Reg. 27,162 (June 11, 2018).

23. First, the notice gives no date for starting the proceeding. Second, the notice implies that the DOT already adheres to the FTC's statutory interpretations; e.g., it states that "the Department has found a practice to be deceptive if it misleads or is likely to mislead a consumer acting reasonably . . . with respect to a material issue." But that is untrue, as demonstrated above. One wonders if this could be an effort to rewrite the history of the DOT's activities under section 41712.

24. Comments of Airlines for America, Part One: Proposals for Fundamental Reform of DOT Economic Regulation and Enforcement, Docket No. DOT-OST-2017-0069, at 12 (Dec. 1, 2017).

25. Transcript of First Meeting of Advisory Committee on Aviation Consumer Protection 14–15 (June 28, 2012) (opening statement of Robert Rivkin, DOT Gen. Counsel) (emphasis added), https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/286126/acacp-1st-meeting-transcript.pdf.

26. *See generally* Supplemental Comments of Airlines for America Regarding 14 CFR §399.84 – the "Full Fare Advertising Rule," Docket No. DOT-OST-2017-0069 (Mar. 15, 2018) [hereinafter A4A Supplemental Comments].

27. Request of Air Transp. Ass'n of Am., DOT Order No. 85-12-68, at 8 (Dec. 24, 1985).

28. Price Advertising, 70 Fed. Reg. 73,960 (Dec. 14, 2005).

29. *See* A4A Supplemental Comments, *supra* note 26, at 6–9.

30. *Id.* at 9.

31. Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110, 23,143 (Apr. 25, 2011).

32. A4A Supplemental Comments, *supra* note 26, at 10.

33. A4A asserted that a proper analysis would show the proposed rule would *cost* the public $24 million. *Id.* at 11.

34. *Id.*

35. As the Office of Information and Regulatory Affairs (OIRA) stated in its 2018 Regulatory Priorities, "Unless specifically required by law, agencies should regulate only when the benefits *substantially outweigh* the costs . . . ." Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions—Fall 2017, 83 Fed. Reg. 1664, 1670 (Jan. 12, 2018) (emphasis added).

36. *See, e.g.*, Jeff Rosen, *Putting Regulators on a Budget*, Nat'l Aff., Spring 2016, https://www.nationalaffairs.com/publications/detail/putting-regulators-on-a-budget.