Unintended Consequences:
Why the Biden Administration’s Proposed Aviation Consumer Protection Initiatives Will Worsen the Air Travel Environment

By Michael Deutsch

It is tempting to look back nostalgically to the pre-deregulated era of air travel between the 1950s and 1970s, when there was often a single class of service provided in a spacious passenger cabin, consisting of five-course meals presented with white gloves and gold-plated cutlery and an endless flow of champagne and caviar. While there is no denying the luxurious feel of this “golden age,” during that period air travel was generally limited to the wealthy. Average transatlantic flights in the early 1960s cost around $600, which is about $5,800 today. Indeed, in 1971, just 21 percent of Americans reported having flown commercially that year, and less than half of all Americans reported having flown commercially ever in their lifetimes. Safety was also a major issue during this golden era. For example, in 1965, there were 5,196 total accidents and a fatality rate of 6.15 per 100,000 flight hours; and, in 1969, there were a reported 50 aircraft hijackings.

Things are markedly improved today. The cost of air travel (inclusive of ancillary fees) has decreased 55 percent, recent data indicates 90 percent of Americans have flown commercially in their lifetimes, and in 2022 alone, U.S. airlines safely transported a staggering 853 million passengers. Airlines still offer luxurious amenities, especially in their international business and first-class cabins (and often at lower inflation-adjusted prices), but in contrast to the bygone golden age, the cost of air travel no longer represents an insurmountable barrier for most American consumers. In other words, despite recent headlines reporting on the hassle of air travel as the industry recovers from the pandemic-related challenges, the real golden era of air travel, at least in terms of availability and accessibility, is the present.

Unfortunately, in response to an increase in passenger complaints received by the Department of Transportation (“DOT” or “Department”) during the COVID-19 pandemic, the Department has proposed two rulemaking initiatives that are well-intentioned (and with respect to certain aspects, arguably necessary) but threaten to unravel the “democratization” of air travel if adopted as proposed by imposing poorly designed requirements on airlines and other travel providers that will directly lead to higher ticket prices and more consumer confusion.

Proposed Consumer-Protection Rulemakings
The Department published two Notices of Proposed Rulemaking (“NPRMs”) in the fall of 2022: one titled, “Airline Ticket Refunds and Consumer Protections” (the “Ticket Refund NPRM”), and the other titled “Enhancing Transparency of Airline Ancillary Service Fees” (“Ancillary Fee NPRM”). Taken together, these two NPRMs represent one of the most far-reaching intrusions into the marketplace in the post-deregulation era.

Michael Deutsch, mdeutsch@cozen.com, is an associate in the Washington, D.C., office of Cozen O’Connor, where he focuses on aviation regulatory matters. In addition, he serves as Co-Young Lawyer Liaison to the American Bar Association Forum on Air and Space Law.

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This is my last column as Forum Chair. It has been an honor to serve as Chair for the past two years and I have every confidence that the Forum will climb to even greater heights with Abby Bried at the controls. I am grateful for our wonderful members and for those who have given their time to serve on the Governing Council and as committee and program chairs. A special thanks goes to our American Bar Association Director Dawn Holiday. Anything good that happened in the Forum over the last two years is due to Dawn; anything bad was my fault.

Editors Jonathon Foglia and Kathy Yodice have again put together a superb issue of *The Air & Space Lawyer*. Jol Silversmith writes about the efforts of local governments to restrict airport access and Michael Deutsch writes about the Department of Transportation’s efforts to re-regulate the airline industry in the name of consumer protection. I especially commend your attention to the interview of Transportation Security Administration Chief Counsel Francine Kerner. Francine is a legendary lawyer and leader. It is no exaggeration to say that we are all safer, and the nation more secure, because of Francine Kerner.

In September, we will gather for our annual meeting and conference in Dallas, Texas. This will not only be our “best-ever” conference (what else?), but also our longest ever conference. It will run from Wednesday through Friday, 20-22 September. Register and make your travel and hotel reservations!

I hope that everyone has a safe and wonderful summer. See you in Dallas!
By Jonathon H. Foglia

As I write this column, we are a mere two months away from the Forum’s Annual Meeting in Dallas, Texas, where our Chair, Marc Warren, will pass the baton to Abby Bried. Both are long-serving, dedicated, and selfless supporters of the Forum’s mission. We are all grateful to Marc for his service and look forward to Abby’s tenure.

The upcoming Annual Meeting will also serve as the start of the term for a newly constituted Governing Committee (GC), which is comprised of nine members, each of whom will provide critical support for the Forum with defined roles and responsibilities. GC members must stand for election and if you did not toss your hat in the ring, have no fear: there are plenty of other opportunities with which to get involved in the Forum, through participation in the Advisory Committee. These opportunities include but are not limited to: chairing or co-chairing one of the Forum’s practice committees; serving as chair or co-chair of membership, sponsorship, scholarship, communications, or technology; serving as a young lawyer liaison or law student liaison; or volunteering to sit on this publication’s editorial board. If you have not previously held a position with the Forum, I hope you will consider getting involved through the Advisory Committee. And of course, if you have served in any of these roles in the past, you have the Forum’s gratitude and are invited to express your interest in serving again. For further details, please contact Jennifer Trock, jennifer.trock@baker-mckenzie.com, with a copy to Forum Director Dawn Holiday, dawn.holiday@americanbar.org.

I am excited to share the latest issue of The Air & Space Lawyer with you. Our first article is from Jol Silversmith of KMA Zuckert LLC. Many of our readers will recognize Jol from previous contributions to this publication. Drawing on his many years of practical experience advising clients in disputes between airport sponsors and aeronautical users, Jol concisely lays out some of the most important legal principles underpinning the FAA’s role in overseeing airport operations and monitoring airport sponsors’ compliance with conditions attached to their receipt of grants from the FAA. Jol also does a superb job in his article of surveying recent cases that have tested the boundaries of FAA grant assurances.

Our second article is from first-time contributor Michael Deutsch with Cozen O’Connor, who currently serves as one of the Forum’s young lawyer liaisons. Michael has prepared a thought-provoking piece that examines two very recent (and controversial) rulemaking initiatives undertaken by the Biden administration in the area of aviation consumer protection. Michael posits that these initiatives, although well-intentioned, risk increasing the cost of air travel and rendering the online shopping experience for tickets and ancillary services more confusing and time-consuming, thus undercutting the asserted benefits of the regulatory initiatives. Michael offers a compelling basis for his recommendation that the government modify certain aspects of these proposed rules and withdraw others.

Last but not least, we are thrilled to feature an interview with Francine Kerner, Chief Counsel of the Transportation Security Administration (TSA), a sprawling agency with 60,000 employees and an annual budget of $8.5 billion. Francine has served in this role since the TSA was formed in the wake of the 9/11 terrorist attacks, events that shaped an entire generation and forever changed both civil aviation security as we know it and how we anticipate–and minimize–threats to our nation’s transportation infrastructure. But Francine’s commitment to government service began well before she took up the position of...
Francine Kerner has been Chief Counsel of the Transportation Security Administration since 2002. Prior to that, she served as Deputy Assistant General Counsel for the Department of Treasury, and Assistant District Attorney in the Kings County District Attorney’s Office in New York.

A&SL: You have served as Chief Counsel for the Transportation Security Administration (TSA) for more than 20 years. Immediately prior to joining TSA, you held the position of Deputy Assistant General Counsel for Enforcement at the Department of Treasury. How did your appointment as TSA Chief Counsel come about?

Careers are driven by unpredictable events and circumstances. On the morning of September 11, 2001, I was sitting in my office at the Department of the Treasury just east of the White House. Someone in the hallway said a plane had hit a tower of the World Trade Center in New York. As a native New Yorker, I knew the World Trade Center with its Twin Towers very well. On September 11, my youngest brother, also an attorney, worked in a large office building on the perimeter of the World Trade Center.

The horrors of September 11 unfolded over the span of less than three hours. At Treasury, we saw smoke high in the sky before we knew the Pentagon was on fire. It was a grim day, with nearly 3,000 people dead. My brother had been among the lucky ones. He survived. Our nation was forever changed.

On September 12, I returned to Treasury to take part in the response. Administration leadership wanted to take immediate steps to cut off funding sources for terrorists. As the Deputy Assistant General Counsel for Enforcement, I was responsible for unifying Treasury’s position on proposed provisions of the USA PATRIOT Act.

After President George W. Bush signed the USA PATRIOT Act into law on October 26, 2001, I was asked to coordinate efforts with the Federal Reserve Board, the Securities and Exchange Commission, and other federal financial regulators to issue, by year-end, implementing regulations to facilitate the prevention, detection, and prosecution of international money laundering and the financing of terrorism. By December 31, Treasury had published three proposed rules, one interim rule, and one final rule for financial institutions and businesses.

At the same time, Congress sought to protect the transportation sector from further terrorist attacks. On November 19, 2001, Congress enacted the Aviation and Transportation Security Act (ATSA). ATSA created the Transportation Security Administration (TSA), headed by an Administrator. Under ATSA, the Administrator was granted sweeping authority to protect the transportation sector. President Bush quickly nominated, and the Senate promptly confirmed, John Magaw—a former Director of both the United States Secret Service and the Bureau of Alcohol, Tobacco, and Firearms—to become TSA’s first Administrator.

Administrator Magaw immediately called upon a cadre of federal career civil servants to help him with the enormous task of standing-up TSA. I was one of those who was asked to join the effort. As an Associate Chief Counsel at the Bureau of Alcohol, Tobacco and Firearms, I had worked with Mr. Magaw between 1997 and 1999. He was a great leader, dedicated to securing the transportation sector.

The aviation system remained in a fragile state. Reestablishing the freedom to travel without fear was a paramount goal. I was willing to support that effort in any way I could. I arrived at TSA’s makeshift offices in the Department of Transportation on January 14, 2002. The task ahead would constitute the largest mobilization of the federal government since WWII, and the largest civilian undertaking in the history of the U.S. government.

A&SL: With a yearly budget of more than $8.5 billion and nearly 60,000 employees, the TSA is a sprawling agency charged with protecting the nation’s transportation systems to ensure freedom of movement for people and commerce. How does the Office of Chief Counsel support that mission?

TSA’s current Administrator, David Pekoske, recently told me, “The legal team is a wonderful enabler and architect of TSA’s operational performance.” Since TSA’s inception, attorneys have provided essential legal and policy advice to advance the agency’s security mission.

From the outset, attorneys have played a critical role in helping TSA meet tight security-related statutory deadlines. Under ATSA, TSA had to hire and train Transportation Security Officers to perform screening of passengers and accessible property at 450 domestic

An Interview with Francine Kerner
Chief Counsel of the Transportation Security Administration
Airports by November 19, 2002. TSA also had to purchase and deploy more than 2,000 high-resolution x-ray machines to perform checked baggage screening by December 31, 2002. TSA attorneys reviewed billions of dollars in contracts to support the rapid hiring of personnel and acquire new screening technologies; they stood side-by-side new Federal Security Directors to help roll out federal airport screening across the country; and they prepared policies, procedures, and enforcement guidelines for use by a new agency.

Attorneys have helped TSA launch other important initiatives. Their efforts have resulted in security regulations under which all airline passengers are pre-screened against Government watchlists; 100 percent of cargo on passenger aircraft is physically screened for explosives; and passengers who enroll in TSA’s PreCheck® program as trusted travelers receive expedited screening. As recent incidents have demonstrated, an ongoing cybersecurity threat to critical transportation infrastructure now exists, and TSA attorneys are assisting the agency to establish outcome-focused and performance-based measures for implementation by pipeline and rail operators, airports, and air carriers.

TSA attorneys are located at major U.S. airports, regional mission support centers, and TSA’s new Headquarters in Springfield, Virginia. Wherever they work, TSA attorneys train and advise our clients on law and policy, and ably represent the agency’s interests in a multitude of venues, including administrative forums, courts, and Congress. We are guided by TSA’s mission: protecting the nation’s transportation systems to ensure freedom of movement for people and commerce.

In 2023, several attorneys at TSA received Secretarial recognition for their legal work in connection with efforts to improve pay and working conditions for frontline employees, strengthen employee accountability processes, and assist Operation Allies Welcome. We are fortunate to have a talented and dedicated team.

**A&SL: What are the essential skills needed in order to be an effective TSA Chief Counsel?**

To be effective, it helps to have broad legal experience, a determined focus on operational success, and the ability to engage with others on a personal and professional level to develop mutual understanding and trust. Before being named TSA Chief Counsel in 2002, I had held three positions in the Senior Executive Service: Counsel to the Inspector General at the Department of Commerce; Associate Chief Counsel (Administrative and Ethics) at ATF; and Deputy Assistant General Counsel (Enforcement) at main Treasury.

Over a span of years, these executive positions provided me with perspective on how agencies are organized to best achieve their missions. At TSA, in order to protect the transportation sector, we must rely upon and gain the cooperation of our stakeholders in order to achieve our shared objectives of securing the movement of people and commerce.

For this reason—as head of the legal shop—one of my primary goals is that we build relationships with the lawyers who represent air carriers, airports, and other regulated entities. By engaging on matters of mutual interest and participating in the activities of various professional organizations, such as the American Bar Association’s Forum on Air and Space Law, we aim to bolster the security of the aviation sector.

**A&SL: What challenges did the pandemic present for the TSA’s regulation of the aviation sector?**

The disruption caused by the pandemic to the aviation sector and TSA cannot be overstated. During 2019, TSA was staffed to screen between 2.5-3 million air travelers per day, with passenger loads on an upward trend. After the pandemic began in 2020, passenger loads fell precipitously to one-tenth of those daily averages. Thousands of Transportation Security Officers contracted COVID-19, dozens of whom died. Pursuant to Presidential proclamations issued by President Donald Trump in 2020 to mitigate the spread of COVID-19, attorneys worked on tight deadlines to draft TSA Security Directives and Emergency Amendments that restricted travel to the United States from high-risk locations abroad. The Security Directives (SDs) and Emergency Amendments (EAs) required all flights carrying persons to the United States (including any U.S. territory) from high-risk areas to be funneled to a handful of U.S. airport gateways for pre-entry passenger health screening.

Some rules were relaxed during the pandemic. Multiple amendments to security program requirements were issued upon request. TSA’s screening requirements were modified to permit passengers to carry more hand sanitizer in accessible property, and crewmembers to travel with larger quantities of commercial disinfectant. Aviation workers were permitted to access the checkpoint with expired IDs.

Upon taking office in January 2021, President Joseph Biden issued an Executive Order (EO) requiring face masks to be worn in airports, on commercial aircraft, and in various modes of surface transportation. The EO tasked federal officials, including those at the Department of Homeland Security (DHS)/TSA, to implement the mask requirement in accordance with U.S. Centers for Disease Control and Prevention (CDC) guidelines. This was a substantial TSA undertaking, and the Office of Chief Counsel provided input on and helped craft the CDC Order implementing the Executive Order (EO); a Secretarial Determination of National Emergency; Security Directives (SDs) for airports, air carriers, and surface modes; internal direction to Transportation Security Officers and Transportation Security Inspectors on mask requirements; and frequently asked questions for the public and regulated industries.
On December 10, 2021, the U.S. Court of Appeals for the D.C. Circuit affirmed TSA’s authority to issue the mask mandate. TSA litigators worked hand-in-hand with Department of Justice attorneys to defend TSA’s actions. In *Corbett v. TSA*, the D.C. Circuit ruled that Congress had clearly empowered TSA to issue security directives requiring individuals to wear masks on conveyances and in transportation hubs to help prevent the spread of COVID-19, which “qualifies as a threat to both safety and security.” On October 31, 2022, the Supreme Court declined to review the *Corbett* decision.

**A&SL: Looking back, was there anybody in the practice of law who had a lasting effect on you?** I met one of my most important mentors while studying at New York University School of Law and interning at the New York City Law Department. During my internship, the New York Civil Liberties Union and the Legal Aid Society filed suit against six state and city officials and seventy-seven voluntary agencies and their directors over the provision of child welfare services to New York City children.

Mary P. Bass, a section head in the Law Department, asked me to work with her directly, doing some basic research for the City’s response to the lawsuit, *Wildman v. Sugarman*. Ms. Bass was a superb litigator, a skilled negotiator, an avid runner, and an upbeat person, with a delightful laugh.

That same year, Ms. Bass was named General Counsel and Vice Chancellor for Legal Affairs for the New York City Board of Higher Education. She asked me to continue interning for her at the Board of Higher Education. I worked at the Board part-time until I graduated from NYU and joined the District Attorney’s Office in Brooklyn.

In March 1979, President Jimmy Carter announced that he would nominate Mary Bass to be the first Inspector General of the Department of Commerce. When I called to congratulate her, she said, “I’ve been meaning to call you. How would you like to come to Washington?” By June, we were both in Washington, D.C., working on the seventh floor of the Commerce Department in the new Inspector General’s suite.

For me, it was an introduction to federal service at an unusually high level, as well as a master class on the politics of integrating a new “independent” organization into a well-established one. I could not have had a better teacher. Mary Bass also had ideas on staffing an office: “Hire energetic people,” she said. “It’s easier to tamp down than to pump up.” And, “Never be afraid to hire someone smarter than yourself. It will serve you well.” I like to think I have followed her advice in shaping the legal shop at TSA.

**A&SL: Earlier in your career you served as an Assistant District Attorney in the Kings County District Attorney’s Office in Brooklyn. What was that like and what skills did you gain that continue to serve you today?**

As a trial attorney in the Major Offenses Bureau, I prosecuted some of the county’s most serious felony cases. I gained the skills to judge credibility, to empathize with victims in distress and overworked police officers, to handle opponents effectively, to make persuasive arguments to judges and juries, and to go the distance needed to obtain a conviction.

During my last trial, an itinerant sailor testified against three defendants who had robbed him and shot him six times. Miraculously, he had survived to make an identification. He took the stand on a Friday. He was cross-examined by defense counsel who made certain he would need to return to court on Monday. They were conjecturing he wouldn’t return. I had the same fear. So, on Sunday, I drove over to his apartment to explain the importance of his finishing his testimony. I also had a subpoena served on a hospital for records that would confirm parts of his testimony. Come Monday, the sailor returned to finish his testimony, the hospital records were admitted, closing arguments were made, and the case was sent to the jury. When the jury delivered a guilty verdict that day, the defendants leapt out of their chairs, trying to reach the prosecutor’s table and the jury. Fortunately, court officers were prepared and the defendants were bodily carried out of the courtroom. They were dangerous and off the street.

**A&SL: What advice do you have for new lawyers and law students interested in pursuing a career in transportation law, particularly at DHS, its sub-agency the TSA, or another federal transportation regulatory agency?**

There are many practice areas at TSA that require specialized expertise. Attorneys may be hired with that expertise or have an interest in the area and develop expertise over time. It is good to take courses that focus on transportation, administrative law, litigation, constitutional law, contracts, labor law, ethics, law enforcement, cybersecurity, and national security. Join professional groups to make contacts. The first position you get will probably not be your last. Be flexible. That said, TSA’s legal shop is currently hiring and we welcome talented candidates.

**A&SL: What are your interests outside of work?**

Right now, I am a joyful grandmother with three wonderful grandchildren under the age of three. Family is the focus of most of my time outside of work. And I am grateful for it.
Almost since the beginning of aviation in the United States, tension has existed regarding the extent to which requirements for aeronautical activities may be set by states and municipalities (which are typically the owners and operators of public-use airports), and the extent to which they may only be regulated by the federal government. An early and oft-cited opinion—by Supreme Court Associate Justice Robert Jackson—concluded that “[f]ederal control is intensive, and exclusive. Planes do not wander about in the sky like vagrant clouds.” But that ruling did not put an end to the debate about preemption and “local control.” The limits of federal oversight over aviation continue to be disputed, in contexts ranging from the operational rules for uncrewed aircraft to consumer protection rules for air carriers.

However, less attention has been devoted to the legal underpinnings of federal control over airports, and the extent to which local control is allowed. This article is intended to provide a brief introduction to the relevant statutes and principles, as well as highlight examples of some of the airports and issues that are currently testing the boundaries of federal oversight.

Generally, recent years have seen an increasing demand for local control of airports, at least in certain communities—an agenda typically driven by a small-but-vocal set of neighbors who are critical of noise, overflights, environmental impacts, and other perceived negative effects of aeronautical activities. Although federal law offers tools with which to defend airport access, they are not all-encompassing—and they assume active enforcement and engagement by the Federal Aviation Administration (FAA), which unfortunately is not always forthcoming.

**FAA Regulation of Airport Access**

Unlike for the design and operation of aircraft, relatively few FAA regulations set mandatory standards for airports; despite their importance for aviation, the regulation of airports historically has received less emphasis than that of aircraft and airspace. FAA does set standards for airports that are required to maintain a Part 139 certificate to enable certain commercial operations—of which there are approximately 500 in the United States. But for the thousands of other publicly accessible airports, the standards set forth in FAA advisory circulars and other guidance are just that—advisory guidance, not binding mandates.

However, FAA can obligate airports to comply with agency-imposed standards through other means—most notably, the so-called grant assurances that are statutorily required under the FAA’s Airport Improvement Program (AIP), which provides grants to airports. Approximately 3,300 out of the 20,000 airports in the United States are listed in FAA’s National Plan of Integrated Airport Systems (NPIAS) and accordingly are eligible to apply for AIP funds to pay for capital maintenance and improvements related to safety, capacity, and noise compatibility. The majority of the airports listed in the NPIAS actually do apply and receive grants on a recurring basis; in a typical year, more than $3 billion is available, with additional funds having been made available during the pandemic.

Some of the commitments are largely uncontroversial—such as to comply with federal civil rights law and other statutes of general applicability. But several are of particular impact because they restrict local decision-making regarding airport access—including No. 22, a prohibition on “unjust economic discrimination” (typically requiring all types of aeronautical activities to be allowed to operate at an airport); No. 23—a prohibition on “exclusive rights” (which prohibits both direct grants of exclusivity to operators at an airport and also “constructive” rights—i.e., in practice, it is the mirror image of No. 22); and No. 5—a prohibition on surrendering an airport sponsor’s rights and powers over the airport to another party (such as a tenant or another municipality). What the grant assurances require in practice is not always straightforward. For example, the prohibition on unjust economic...
discrimination incorporates an exception for safety—but FAA repeatedly has emphasized that the agency, and not an airport, has the final word as to what activities can be safely conducted.

In 1996, FAA established a specific regulatory procedure for airport tenants and users to submit complaints of noncompliance, which has generated a body of administrative decisions that elaborate upon the grant assurances’ requirements. FAA also routinely generates letters to airports and their state/municipal sponsors, setting forth its interpretation of the grant assurances. Relatively few disputes have been elevated to a federal court. The FAA may enforce an airport’s grant assurance-based obligations by several methods, but FAA’s most effective enforcement tool is the threat or actual withholding of other AIP grants.

Typically, the obligations associated with AIP grants remain in effect for 20 years and apply to the entire airport, not just to the federally funded project. Some obligations, however, are perpetual. For example, if AIP grants are used to acquire real property, not just that parcel but the entire facility must remain permanently available for airport use. An airport that has ever accepted federal assistance—not limited to AIP grants—must abide by the prohibition on exclusive rights as long as it remains in operation. On the other hand, in certain situations—such as if the grant recipient is privately owned and the funded improvement has a limited useful life—the obligations might have a duration shorter than 20 years. And federal law includes a procedure whereby an airport may request a release from any or all of its obligations, but requests for releases to enable closure or otherwise significantly circumscribe an airport’s obligations are rarely granted.

In addition to the grant assurances, the Airport Noise and Capacity Act (ANCA) was adopted by Congress in 1990 for the specific purpose of restraining publicly owned airports from adopting new access restrictions, including but not limited to noise-based restrictions. ANCA operates separately from the AIP assurances, and—in conjunction with its implementing regulations—requires any airport considering limits on jets, helicopters, and certain other aircraft to first perform an analysis of the proposal and submit it to FAA for possible approval. If the restrictions would apply to aircraft with a “Stage 2” noise rating, FAA’s affirmative approval of the study is not required—but its approval is required if the regulated aircraft include those with a “Stage 3” rating or above. To date, only three studies have been submitted to FAA. The first, for a Stage 2 restriction, was challenged in court but determined to be justified. The latter two, proposing Stage 3+ restrictions, were each found by FAA to have not fulfilled the applicable statutory and regulatory predicates.

Also highly relevant for airport access—and independent of both the grant assurances and ANCA—is preemption. The courts routinely have recognized that federal law establishes a wide-ranging regulatory regime for aviation and that, as a result, most state or local regulation is not allowed because FAA could or actually does occupy the entire field. Notably, states and municipalities may not restrict how aircraft may operate in airspace. Nevertheless, the exact boundaries of this regime are unresolved, and there is relatively little guidance as to how its limits apply to regulation that is directed specifically at airports—in contrast to aircraft, their operators, or their operations.

Further, the Airline Deregulation Act of 1978 (ADA) codifies some of the elements of preemption—but only to the extent that regulation relates to the prices, routes, or services of air carriers. Additionally, the ADA incorporates an exception to preemption for the exercise of “proprietary powers,” although that exception typically has been interpreted narrowly. As for the overall concept, the precise limits of ADA-based preemption continue to be disputed in various contexts, and again there is relatively little airport-specific jurisprudence.

Other, lesser-known statutes also impose further limits on states and municipalities—and thus on airports. For example, the Anti-Head Tax Act (AHTA) was adopted by Congress in 1973 to constrain the local taxation of air transportation. Although there is a carveout from the statute for landing fees and similar airport charges, they nevertheless must be reasonable. Additionally, the Environmental Protection Agency (EPA)—in coordination with FAA—has exclusive jurisdiction to regulate aircraft emissions, preempting any different state, municipal, or airport standards.

In sum, although FAA’s preemptive authority derives from multiple sources—sometimes overlapping and not always coordinated in their construction—such authority nevertheless is wide-ranging and should prohibit most endeavors at local control.

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Recent Assertions of “Local Control”

Examples of airports that have been at the forefront
of recent efforts to impose their own access requirements, circumventing or challenging FAA’s oversight, include those discussed below.

Santa Monica Municipal Airport, Santa Monica, California
An airport that could be described as a “poster child” for access disputes is Santa Monica Municipal Airport (SMO)—one of the oldest in the United States and once the home of Douglas Aircraft, but which its municipal parent since the dawn of the jet age has sought to restrict.

A 1984 settlement with FAA resolved then-pending disputes by allowing certain restrictions (notably, a noise limit and a curfew) in return for a commitment to operate the airport until 2015. As the end of the agreement’s term approached, new disputes arose, including if the City’s AIP grants actually obligated it through 2023 and if its surplus property deed—including if the City’s AIP grants actually obligated it in perpetuity.38

In 2017, in the last days of the Obama administration, FAA entered into a new settlement with the City, preserving certain obligations at the airport until 2028 while allowing its complete closure by releasing the airport from any obligations after 2028; the agreement also allowed the immediate truncation of the SMO runway (from 4987’ to 3500’).39 Stakeholders challenged the settlement, but the cases were dismissed on procedural grounds.40 Left unresolved is whether FAA actually had the substantive authority to agree to such a settlement—as well as questions for its implementation, such as what, if any, limits the City can impose on the sale of leaded avgas, or if the City can repurpose airport revenue for general purposes when/ if it closes the airport.

East Hampton Airport, East Hampton, New York
This airport on Long Island—often depicted as a gateway for the wealthy commuting to second homes—may have always had detractors, but it has become a flash point in recent years as commercial helicopter and seaplane services have made it more accessible, but also more heavily trafficked. Although the Town, which owns the airport, last accepted AIP funds in 2001—and thus was obligated through 2021—an unusual settlement between FAA and third-party litigants provided that certain of its obligations would not be enforced starting in 2015.41 On that basis, the Town adopted access restrictions, including a noise limit, trip limits, and a curfew.42 Stakeholders successfully challenged the restrictions, with a federal appeals court ultimately confirming that ANCA was applicable irrespective of East Hampton’s grant status, further preempting the restrictions.43 Subsequently, after its grant-based obligations had expired, the Town—with the implicit support of at least some regional FAA officials—adopted a new strategy: the Town posited that by closing the airport for 33 hours, it could “extinguish” the statutory obligations that were still applicable and reopen as a “new” airport, at which time it would have local control and could restrict operations—including restrictions similar to those previously adopted and beyond (such as a weight limit and a punitive landing fee schedule for larger aircraft).44 Stakeholders also challenged these restrictions, and in October 2022 a state court ruled that the Town’s restrictions violated ANCA and, further, that the restrictions had not been adopted in conformity with the applicable state environmental requirements.45 The Town has appealed the decision and also initiated a new environmental study.46 Unresolved is how/if it will also endeavor to comply with ANCA or if it will attempt other stratagems for restrictions and/or closure.

Heliports, Manhattan, New York
As discussed above, much of the traffic destined for East Hampton departs from the Manhattan heliports, and the helicopter operations at those facilities have historically been the target of public ire, as well as restrictions.47 In 2022, the state legislature adopted a bill that would have restricted the use of the West 30th Street Heliport, as well as enabled noise-based lawsuits by private individuals against helicopter operations throughout the state.48 The governor vetoed the bill after a concerted lobbying campaign by industry, citing ANCA, the ADA, and preemption, among other issues.49 Notably, any restrictions that might have been adopted by New York could not regulate sightseeing flights that originated in and returned to New Jersey.50

Reid-Hillview Airport, San Jose, California
Inspired by Santa Monica and East Hampton, the leaders of Santa Clara County, California, decided to cease accepting AIP funds for its primary general aviation airport (RHV), with the intent of closing it after its obligations expire in 2031.51 In the meantime, the County has banned the sale of avgas at both of its airports, citing alleged health effects on airport neighbors from lead.52 This ban triggered an informal FAA investigation,53 but the agency subsequently ended the proceeding and entered into a settlement to enable RHV to serve as a pilot program for the sale of a replacement fuel.54 However, a complaint filed by stakeholders is ongoing.55 The endgame is likely to be of national significance; other sponsors are likely to seek to leverage avgas and other environmental issues as a justification for access restrictions.

Naples Municipal Airport, Naples, Florida
Naples Municipal Airport in Florida (APF) has the distinction of being the only airport at which access restrictions successfully were implemented
in conformity with ANCA—although only on older, louder “Stage 2” fixed-wing aircraft (which subsequently were phased out on a national basis), and only after protracted litigation with FAA and stakeholders. In recent years, the City has expressed interest in imposing new limits on operations at the airport, in response to complaints. The airport’s counsel has cautioned that doing so likely would be difficult, as well as expensive, but also suggested circumventing FAA and seeking a release from Congress of the applicable grant-based obligations and statutes.

Zamperini Field, Torrance, California
Zamperini Field (TOA) is another airport with an unusual history—which the sponsor is seeking to use to its advantage to restrict operations. Although it is included in the NPIAS and eligible for AIP grants, the airport has not accepted federal funding since 1966. Moreover, although it was transferred to the City as surplus property after World War II, FAA later released it from its federal obligations except for a bare mandate to continue operating as an airport. Nevertheless, the City’s discretion to set local requirements is limited, by both preemption and statutes of general applicability. Notably, FAA has warned the City that an ordinance that purports to restrict departure flight paths is unenforceable. Torrance nevertheless is considering whether to enforce the so-called no early left turn rule and adopt other limitations—setting up another conflict with stakeholders, as well as FAA.

Conclusion
The importance of airport access for the future of aviation in the United States cannot be understated. Absent a place for aircraft to take off and land, every other concern of the industry is effectively irrelevant. Yet recent years have seen a surge of efforts to impose restrictions, including new targets (e.g., helicopters) and new stratagems (e.g., emissions). Ironically, these restrictions, including new targets (e.g., helicopters) and new stratagems (e.g., emissions), may serve to impede the introduction of new technologies that could best benefit those who complain. Although still relatively few in number, such campaigns may serve to impede the introduction of new technologies that could best benefit those who complain. Although still relatively few in number, such campaigns may serve to impede the introduction of new technologies that could best benefit those who complain. Although still relatively few in number, such campaigns may serve to impede the introduction of new technologies that could best benefit those who complain. Although still relatively few in number, such campaigns may serve to impede the introduction of new technologies that could best benefit those who complain. Although still relatively few in number, such campaigns may serve to impede the introduction of new technologies that could best benefit those who complain.

Aviation is today an established method of transportation. The future, even the near future, will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.

Endnotes
2. Jol A. Silversmith, You Can’t Regulate This: State Regulation of the Private Use of Unmanned Aircraft, 26 Air & Space Law. 1 (Dec. 2013).
5. 49 U.S.C. § 47104 et seq.
11. Courts typically have deferred to FAA’s AIP-related decision-making, Palm Beach County, 53 F.4th 1318, but on occasion have concluded that it was deficient. City of Naples Airport Auth. v. Fed. Aviation Admin., 409 F.3d 431 (D.C. Cir. 2005).
12. 49 U.S.C. § 47111. FAA also can request an injunction in federal court and, if the misuse of revenue is at issue, pursue civil penalties of up to three times the diverted funds (in addition to reimbursement) as well as request that the U.S. Department of Transportation withhold all federal transportation grants from the airport’s sponsor. Id. § 46106.

14. Additionally, approximately 550 airports were transferred to their sponsors pursuant to the federal Surplus Property Act (now codified at 49 U.S.C. § 47151 et seq.)—many in the aftermath of World War II, but some at later dates. These deeds typically impose restrictions similar to those that now appear in the assurances, but each should be individually reviewed. See, e.g., Id. §§ 3.1, 3.8.
15. 49 U.S.C. § 40103(c).
16. Order 5190.6B, supra note 13, § 4.3.
17. 49 U.S.C. § 47107(b); see, e.g., Letter from Brian Armstrong, Manager, L.A. Airports District Office (ADO), to Jim Wood, Mayor, Oceanside, Cal., at 1–2 (Jan. 26, 2007). (“FAA has only rarely granted a sponsor a release from its Federal obligations sufficient to allow for the closure of an airport. . . . A request for airport closure from a sponsor requires a demonstration that closure results in a net benefit to aviation.”).
19. 14 C.F.R. § 161.5 (“noise or access restrictions” include “a limit, direct or indirect” on aircraft operations).
22. 49 U.S.C. § 47524(b)–(c). Most jets, helicopters, and certain other aircraft are assigned stage ratings based on their noise emissions, as part of the FAA certification process. 14 C.F.R. pt. 36. Most operations of jets with a Stage 1 or Stage 2 rating are now prohibited in the U.S. 49 U.S.C. §§ 47528, 47534.
23. Naples, 409 F.3d at 456. Technically, that case concerned only if the restrictions complied with the assurances, not ANCA. But pursuant to its overall authority—e.g., 49 U.S.C. § 46106—FAA has the authority to allege in court that an airport’s Stage 2 restrictions are inconsistent with the procedures or substance of ANCA, even if the agency’s affirmative approval of a study performed by that airport is not a predicate to their adoption.

25. City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973) (“It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is preemption.”).
26. Blue Sky Ent., Inc. v. Town of Gardiner, 711 F. Supp. 678, 692 (N.D.N.Y. 1989) (“[F]ederal law in the area of aviation is so pervasive that it preempts a municipal ordinance which attempts to govern the flight paths of aircraft using an airport which has no control tower, is not served by a certified carrier and has no regularly scheduled flights.“).

27. Seaplane Adventures, Inc. v. County of Marin, 572 F. Supp. 3d 857 (N.D. Cal. Nov. 5, 2021), appeal pending (concluding that local pandemic restrictions on general aviation for sightseeing/leisure purposes were not preempted).
28. Contrast Tweed–New Haven Airport Auth. v. Tong, 930 F.3d 65, 74 (2d Cir. 2019) (concluding that state law limiting length of airport runway was preempted because it had a direct impact on air safety).
30. Id. § 41713(b)(3).
31. City & County of San Francisco v. Fed. Aviation Admin., 942 F.2d 1391, 1394 (9th Cir. 1991) (“Congress made it clear . . . that the power delegated to airport proprietors to adopt noise control regulations is limited to regulations that are not unjustly discriminatory.”).
32. Bernstein v. Virgin Am., Inc., 990 F.3d 1157 (9th Cir. 2021) (holding that ADA did not preempt state wage and break requirements).
33. Contrast Goodspeed Airport, LLC v. E. Haddam Inland Wetlands & Watercourses Comm’n, 681 F. Supp. 2d 182, 207 (D. Conn. 2010) (holding that ADA preemption was applicable to air carrier activities at privately owned airport, although finding specific state statutes at issue not to be preempted).
34. 49 U.S.C. § 40116.
36. 42 U.S.C. §§ 7571, 7573; Control of Air Pollution from Aircraft and Aircraft Engines: Emission Standards and Test Procedures, 70 Fed. Reg. 69,664, 69,667 (Nov. 17, 2005); 14 C.F.R. § 34.3(i).
37. Final Agency Decision, NBAA v. City of Santa Monica, California, No. 16-14-04 (Aug. 15, 2016).
38. City of Santa Monica v. United States, 650 F. App’x 326 (9th Cir. 2016).
42. East Hampton Town Code § 75.38.
43. Friends of the E. Hampton Airport, Inc. v. Town of East Hampton, 841 F.3d 133 (2016). Despite the significance of the issues, FAA did not participate in the case. Unfortunately, FAA often has declined to opine on matters that are within its jurisdiction and of significant import to airports. Seaplane Adventures, Inc. v. County of Marin, 572 F. Supp. 3d 857, 860 (N.D. Cal. 2021), appeal pending (“An order requested that the FAA weigh in on the preemption question. . . . [T]he agency declined to do so.”).


47. Nat’l Helicopter Corp. of Am. v. City of New York, 137 F.3d 81 (2d Cir. 1998).


49. N.Y. Governor Veto No. 107 (Dec. 15, 2022) (“Regulation of aircraft and airspace is primarily a federal responsibility, and federal law significantly constrains the State’s ability to legislate in this area. Recent federal case law makes clear that non-federal actors must carefully consider how state and local restrictions interact with federal laws governing aviation and must be attentive to federally mandated processes for enacting policy in this area. Certain elements of this legislation run counter to the federal scheme regulating New York’s airports and airspace.”).


51. However, the County—when it contemplated a similar strategy nearly 30 years ago—conceded that closing the airport also would require compliance with the California Environmental Quality Act. DRAFT ENVIRONMENTAL IMPACT REPORT: REID-HILLVIEW AIRPORT CLOSURE PROJECT (Mar. 1996).


54. Memorandum of Understanding Between the Federal Aviation Administration and the County of Santa Clara Regarding Part 13 Investigation (Feb. 8, 2023).

55. Aircraft Owners & Pilots Ass’n (AOPA) v. Santa Clara County, California, No. 16-22-08.

56. Pub. L. No. 112-95, § 506.


61. Id.

62. Torrance City Code § 51.2.3(e).


65. Even though FAA may have no direct financial leverage over TOA, it does have the authority to go to court to seek an injunction. United States v. City of Santa Monica, 330 F. App’x 124 (9th Cir. 2009).

66. Generally, decisions regarding the situs of airports are a matter of local zoning law and not within the jurisdiction of FAA. Gustafson v. City of Lake Angelus, 76 F.3d 778, 785 (6th Cir. 1996). This is another issue likely to be of growing importance for the industry going forward, especially for advanced air mobility (AAM) operators.


The Ticket Refund NPRM

The Ticket Refund NPRM would, in the words of Secretary Pete Buttigieg, “protect the rights of travelers and help ensure they get the timely refunds they deserve from the airlines.” Among other things, the Ticket Refund NPRM would codify the Department’s “longstanding interpretation” that it is an “unfair business practice” for an airline to refuse to provide requested refunds to consumers when an airline has cancelled or made a significant change to a scheduled flight and, along those lines, would define, for the first time, the terms “cancelled flight” and “significant change of flight itinerary.” The proposed codification is generally noncontroversial and even supported by many airlines (subject to their requested modifications to DOT’s proposed definitions).

However, the Ticket Refund NPRM goes well beyond this noncontroversial proposal and adds a new extraordinary requirement that airlines issue non-expiring travel credits or vouchers to passengers if they are unable or unwilling to travel due to a “serious communicable disease.” The Ticket Refund NPRM proposes a definition of “serious communicable disease” that follows the U.S. Centers for Disease Control and Prevention (CDC) definition of a communicable disease” under 42 C.F.R. § 70.1, but then adds a highly subjective “serious” element that is not found in the CDC definition.

This proposed definition presents a litany of problems and at its core is simply unworkable. For example, during the 2021–2022 flu season, the CDC reported that the flu caused 9 million illnesses, 4 million medical visits, 10,000 hospitalizations, and 5,000 deaths. One could argue that the flu is thus “serious” because it is “readily transmissible” and caused significant health consequences (i.e., hospitals or death) in 15,000 people. Conversely, one could argue that, compared to COVID-19, which resulted in 186,702 deaths in 2022 and was our nation’s fourth leading cause of death, the flu is not serious. The issue is not whether the flu by itself is or is not considered serious. Rather, the issue is the DOT’s definition is open to multiple subjective interpretations where reasonable minds may differ on what does or does not constitute “serious.” If DOT keeps this aspect of the Ticket Refund NPRM (which it should not), DOT should, at a minimum, provide an objectively manageable definition of “serious communicable disease.”

Further, DOT’s documentation requirements are ripe for abuse. The Ticket Refund NPRM states the two categories of evidentiary documentation airlines are permitted to request as a condition for issuing travel credits are (1) government-issued travel restrictions/guidance/advisories and (2) “a written statement by a licensed medical professional issued to the individual passenger.” The Ticket Refund NPRM does not require that the “licensed medical professional” be trained in infectious disease, or even trained in primary care. Indeed, under DOT’s proposal, dentists, orthopedic surgeons, and other licensed medical professionals would be qualified to author documentation, despite practicing in areas that clearly have nothing to do with infectious disease.

The Ticket Refund NPRM also would require airlines that receive “significant government financial assistance” (which, as discussed below, is undefined) in the future to issue cash refunds, in lieu of non-expiring travel credits. Fundamentally, if the Ticket Refund NPRM is enacted as proposed, it will inevitably result in higher ticket prices.

The key issue can be summed up as follows: airlines are able to offer historically low ticket prices (as noted above, fares are 55 percent lower now than they were in the 1970s) with the understanding that the lowest fares available will be nonrefundable. As the Department has long acknowledged, “the lower price for nonrefundable tickets is a trade-off for passengers agreeing to a restriction that allows a carrier to manage its inventory and cash flow.” Unlike other industries, such as hotels, airlines often exceed their legal requirements by offering passengers holding nonrefundable tickets a travel credit or voucher for future use if they need to cancel their planned travel. However, these travel credits or vouchers are issued in the case of nonrefundable fares and typically expire within one year. Passengers who want to receive a cash refund if they must cancel their travel can (and should) purchase, for a higher price, a refundable fare.

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Simply put, there is no “compelling evidence” of consumer deception around ancillary fees.

a nonrefundable fare threatens to unravel the public benefits resulting from lower fares. Airlines may be able to fill a seat from a last-minute cancellation here and there, but given that many travelers book airfare well in advance, airlines will likely have difficulty filling the vast majority of seats from last-minute cancellations of nonrefundable fares. As DOT knows from its now-rescinded regulation that required airlines to transport emotional support animals in the passenger cabin, consumers are all too able to take advantage of loosely defined DOT rules, and one does not have to stretch the imagination to envision the potential for fraud and abuse around the ticket refund requirement. For example, just as there were websites dedicated to providing bogus emotional service animal documentation, one can imagine a propagation of websites that provide documentation (for a fee) completed by a medical professional who has never met, much less examined, the passenger whose health condition is the very subject of the documentation.

Further, DOT’s proposal to require airlines that receive “significant government financial assistance” in the future to provide cash refunds, in lieu of non-expiring travel credits/vouchers, directly undermines the very purpose of such government financial assistance, particularly when distributed in times of emergency (i.e., carriers would have to think twice about accepting, and might even decline, the government financial assistance, even if the result would be laying off or involuntarily furloughing employees). This proposal is also legally deficient as it fails to define what would be considered “significant government financial assistance.” Indeed, as courts have recognized, the object of notice and comment rulemaking “is one of fair notice . . . ; notice-and-comment processes that result in an unfair surprise being sprung on regulated entities are [] deficient” under the Administrative Procedure Act.25

In sum, DOT should heed its more-than-20-year-old warning that “[t]he public benefit in low fares found to exist under our present deregulated environment could be undone by [] government intrusion.”24 Rather than intruding into the marketplace with a proposal that would entitle nonrefundable ticket holders to non-expiring travel credits or (as applicable) refunds in lieu of such travel credits when they elect not to travel for reasons related to a serious communicable disease, DOT should instead focus on refining its proposal to codify its long-standing enforcement policy that it is an unfair business practice to refuse to provide requested refunds to consumers when an airline has cancelled or made a significant change to a scheduled flight.

Ancillary Fee NPRM
The Ancillary Fee NPRM would require airlines and travel agencies to disclose on their websites “passenger-specific or itinerary-specific” baggage fees, change fees, cancellation fees, and family seating fees (if any) at the “first point in a search process where a fare is listed in connection with a specific flight itinerary,” and would further require that family seating fees be transactable via travel agencies.25 This proposal presents a litany of problems for airlines, other sellers of air transportation, and passengers, and, at its core, is simply not needed in today’s technological environment.26

The Department has long recognized that it has “extremely limited powers with respect to domestic airfares and related conditions,” and thus, “[a]bsent compelling evidence of consumer deception or unfair methods of competition,” DOT has “allowed the marketplace to govern carrier decisions regarding fares and their associated conditions.”27

Simply put, there is no “compelling evidence” of consumer deception around ancillary fees. As an initial matter, existing DOT regulations already require airlines to “prominently disclose” on their websites “fees for all optional services that are available to a passenger purchasing air transportation.”28 The disclosure “must be clear, with a conspicuous link from the carrier’s homepage directly to a page where all such optional services and related fees are disclosed.”29 DOT regulations define “optional services” as “any service the airline provides, for a fee, beyond passenger air transportation,” including “charges for checked or carry-on baggage, advance seat selection, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades.”30 Further, “baggage fees must be expressed as specific charges taking into account any factors (e.g., frequent flyer status, early purchase, and so forth) that affect those charges.”31 Thus, unlike other so-called “junk fees” that consumers do not discover until they are forced to pay (e.g., surprise resort fees, which travelers sometimes encounter for the first time when they check out of a resort property),32 airline ancillary fees are well-known to consumers at any time, including before they purchase their tickets.

Consumers are fully capable of utilizing the internet to (a) review airline ancillary fee information that airlines are already required to “prominently disclose” and, using that information, (b) decide which services they would like to purchase. Indeed, the Department of Justice (“DOJ”) relies on this proposition in support of its challenge to the pending JetBlue-Spirit merger, stating that Spirit “was among the first domestic
airlines” to unbundle ancillary features and “empower its cost-conscious travelers to prioritize the aspects of the flying experience that they valued the most.”\textsuperscript{35} DOJ states that Spirit “became one of the first airlines to unbundle carry-on luggage from the overall price of a ticket” and later “it became one of the first airlines to unbundle advance seat assignments from the cost of a ticket.”\textsuperscript{34} Thus, per DOJ, “Spirit allowed customers to decide what amenities and features they valued most while at the same time keeping base fares low.”\textsuperscript{35}

DOJ later goes even further, asserting that, “in response to increased competition from Spirit and its use of unbundled fares, the three largest airlines in the country—Delta, United, and American Airlines—introduced their ‘basic economy’ fares . . . , which offered customers more choice and control over how they spent their money.”\textsuperscript{36}

Moreover, the Department’s proposed six-month implementation timeline for the Ancillary Fee NPRM is simply not realistic given the myriad of unresolved technological questions. While a variety of ancillary products and services are easily transactable on airline websites, a technological solution does not readily exist in the marketplace, on commercially reasonable terms, for many sellers of air transportation to comply with the proposed rule text as drafted. Thus, because airlines currently offer products and services on their platforms that many third parties cannot distribute due to technology limitations, airlines might be forced to remove and downsize their offerings and wait for third-party platforms to catch up.\textsuperscript{37}

Simply put, the technology that would be required to implement the individualized ancillary disclosure sought by DOT in indirect distribution channels is incredibly complex, and requiring the adoption of any one compliance method (e.g., mandating that global distribution systems (GDS) receive all customer-specific ancillary data) would disruptively shift market dynamics and conflict with DOT’s stated intent in the Ancillary Fee NPRM not to interfere with private business arrangements.\textsuperscript{38}

In sum, DOJ has plainly stated what travelers and DOT already know: consumers have options and are fully capable of finding ancillary fee information online and making decisions accordingly. Rather than introducing a burdensome new regulation, under dubious legal authority and with major question marks around existing technical capabilities, DOT should instead focus on enforcing its current ancillary fee disclosure regulations and taking enforcement action where warranted.

DOT’s Current Regulations Provide it with the Tools Necessary to Protect Consumer Welfare

Over the last 15 years, DOT has issued extensive regulations to improve the air travel environment for consumers. These include the requirement, in 14 C.F.R. part 259, for carriers to adopt and adhere to minimum customer service standards set by DOT, including deadlines for making refunds when due. As noted above, DOT has also adopted a number of requirements in 14 C.F.R. part 399 pertaining to the disclosure of ancillary fees. These regulatory authorities, combined with DOT’s statutory authority to investigate and prohibit unfair or deceptive practices in air transportation and its sensible proposal to codify its long-standing enforcement policy in the Ticket Refund NPRM, provide the agency with the tools necessary to protect consumer welfare. Indeed, from 2021–2022, DOT took enforcement action under its existing authority against multiple airlines for failing to provide timely refunds and issued civil penalties ranging from a low of $750,000 to a high of $4.5 million, which served as a powerful tool to ensure compliance with its regulations.

Further, in January 2023, DOT issued a notice announcing a tougher enforcement stance, stating bluntly that the Department “intends to intensify enforcement action” and that it believes it is “necessary to recalibrate the penalties” imposed on airlines for violations of consumer protection requirements.\textsuperscript{39} Specifically, the Department’s notice states it intends to hold airlines “accountable and deter future misconduct by seeking higher penalties that would not be viewed as simply a cost of doing business.”\textsuperscript{40} Such individual enforcement actions can (and do) achieve the Department’s stated consumer protection goals without the need for intrusive new regulations that will upend decades of consumer benefits in the form of lower fares or otherwise introduce unnecessary, complex, and ultimately unworkable requirements into the display and sale of flights and ancillary services.

Conclusion

For the reasons set forth above, the Department should consider focusing its efforts on refining the Ticket Refund NPRM’s proposal to codify its well-established enforcement policy that it is an unfair business practice to refuse to provide requested refunds to consumers when an airline has cancelled or made a significant change to a flight itinerary, but should withdraw the other portions of the Ticket Refund NPRM and the Ancillary Fee NPRM in its entirety.
Endnotes
2. Id.
4. Prisco, supra note 1.
6. AIRLINES FOR AMERICA (A4A), supra note 3.
11. Ticket Refund NPRM, supra note 8.
13. See Ticket Refund NPRM, supra note 8.
14. The CDC defines communicable disease as “illnesses due to infectious agents or their toxic products, which may be transmitted from a reservoir to a susceptible host either directly as from an infected person or animal or indirectly through the agency of an intermediate plant or animal host, vector, or the inanimate environment.” 42 C.F.R. § 70.1.
15. Indeed, the DOT states in the Ticket Refund NPRM that the “common cold” would not be considered a “serious communicable disease” because, although it is communicable, it is not, by the DOT’s standards, “serious”; but COVID-19 would, according to the DOT, be considered “serious” because, per the DOT, it is “readily transmissible in the aircraft cabin and would likely cause significant health consequences in many people.” Ticket Refund NPRM, supra note 8.
17. Ticket Refund NPRM, supra note 8.
20. Id.
22. See, e.g., Christopher Elliott, Ridiculous or Not? No Credit for Your Nonrefundable Hotel Room, ELLIOTT REP. (Apr. 13, 2011), https://www.elliott.org/blog/ridiculous-or-not-no-credit-for-your-nonrefundable-hotel-room (contrasting “nonrefundable” hotel stays with “nonrefundable” airline tickets in which airlines, unlike hotels, “offer customers who cancel their nonrefundable flights the ability to use their flight credit”).
24. Dep’t of Transp., supra note 21.
25. Ancillary Fee NPRM, supra note 9.
26. In addition to the litany of problems presented by the Ancillary Fee NPRM, the DOT (following the issuance of the proposal) submitted draft legislation to Congress that would “require that airlines provide fee-free family seating,” thus rendering moot the proposed requirement in the NPRM to disclose, and make transactable across all distribution channels, family seating fees. Press Release, U.S. Dep’t of Transp., DOT to Propose Requirements for Airlines to Cover Expenses and Compensate Stranded Passengers (May 8, 2023), https://www.transportation.gov/briefing-room/dot-propose-requirements-airlines-cover-expenses-and-compensate-stranded-passengers (noting the submission of such draft legislation to Congress).
27. Dep’t of Transp., supra note 21.
29. Id.
30. Id.
31. Id.
34. Id.
35. Id. (emphasis added).
36. Id. ¶ 40.
38. Ancillary Fee NPRM, supra note 9; see also Supplemental Comments of Airlines for America, DOT-OST-2022-0109-0745 (May 8, 2023).
40. Id.
TSA Chief Counsel, having served in senior positions in the departments of Treasury and Commerce, and as a county prosecutor early on in her career. Francine's story and career path epitomize the best in government service, and I hope you enjoy the interview as much as we enjoyed conducting it.

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