



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.¹ 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.² 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.³ 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.⁴

Things are markedly improved today. The cost of air travel (inclusive of ancillary fees) has decreased 55 percent,⁵ recent data indicates 90 percent of Americans have flown commercially in their lifetimes,⁶ and in 2022 alone, U.S. airlines safely transported a staggering 853 million passengers.⁷ 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at lower inflation-adjusted prices), but in contrast to the bygone golden age, the cost of air travel no longer represents an insurmountable barrier for most American consumers.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”),⁸ and the other titled “Enhancing Transparency of Airline Ancillary Service Fees” (“Ancillary Fee NPRM”).⁹ 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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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.”¹⁰ 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.”¹¹ The proposed codification is generally noncontroversial and even supported by many airlines (subject to their requested modifications to DOT’s proposed definitions).¹²

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.”¹³ 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. § 70.1,¹⁴ but then adds a highly subjective “serious” element that is not found in the CDC definition.¹⁵

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.¹⁶ One could argue that the flu is thus “serious” because it is “readily transmissible”¹⁷ 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,¹⁸ 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.”¹⁹ 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.²⁰ 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.”²¹ Unlike other industries, such as hotels,²² 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. In addition, passengers may still receive their money back on a nonrefundable fare if they purchase travel insurance, which is readily available for purchase in the marketplace. Remarkably, the Department did not consider the concept of travel insurance at all in the Ticket Refund NPRM.

As set forth above, the status quo is working extraordinarily well in terms of availability and affordability of airfares. However, the Department’s proposal to require airlines to issue *non-expiring* travel credits/vouchers to passengers who purchase

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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.²³

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

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airlines” to unbundle ancillary features and “empower its cost-conscious travelers to prioritize the aspects of the flying experience that they valued the most.”³³ 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.”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.”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.”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.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.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.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.”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.

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Endnotes

1. See Jacopo Prisco, What the “Golden Age” of Flying Was Really Like, CNN (updated Aug. 5, 2022), <https://www.cnn.com/travel/article/golden-age-flying-really-like/index.html>.
2. *Id.*
3. AIRLINES FOR AMERICA (A4A), AIR TRAVELERS IN AMERICA: KEY FINDINGS OF A SURVEY CONDUCTED BY IPSOS (Feb. 2022), <https://www.airlines.org/wp-content/uploads/2022/04/A4A-Air-Travel-Survey-Feb2022-Key-Findings-2.pdf>.
4. Prisco, *supra* note 1.
5. *Setting the Record Straight*, AIRLINES FOR AMERICA (Feb. 1, 2023), <https://www.airlines.org/setting-the-record-straight-3>.
6. AIRLINES FOR AMERICA (A4A), *supra* note 3.
7. *Full Year 2022 U.S. Airline Traffic Data*, BUREAU OF TRANSP. STAT. (Mar. 16, 2023), <https://www.bts.gov/newsroom/full-year-2022-us-airline-traffic-data>.
8. Ticket Refund NPRM, 87 Fed. Reg. 51,550 (Aug. 22, 2022).
9. Ancillary Fee NPRM, 87 Fed. Reg. 63,718 (Oct. 20, 2022).
10. *As Part of Ongoing Airline Consumer Protections Efforts, USDOT Announces New Rulemaking That Would Strengthen Protections for Consumers Seeking Refunds of Airline Tickets*, U.S. DEP’T OF TRANSP. (Aug. 3, 2022), <https://www.transportation.gov/briefing-room/part-ongoing-airline-consumer-protections-efforts-usdot-announces-new-rulemaking>.
11. Ticket Refund NPRM, *supra* note 8.
12. See Comments of Airlines for America, DOT-OST-2022-0089-0524 (Dec. 20, 2022).
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.
16. *2022–2023 U.S. Flu Season: Preliminary In-Season Burden Estimates*, CTNS. FOR DISEASE CONTROL & PREVENTION (May 26, 2023), <https://www.cdc.gov/flu/about/burden/preliminary-in-season-estimates.htm#:~:text=During%20the%202021%2D2022%20influenza,10%2C000%20hospitalizations%2C%20and%205%2C000%20deaths>.
17. Ticket Refund NPRM, *supra* note 8.
18. Roni Caryn Rabin, *Covid Remained a Leading Cause of Death Among Americans in 2022*, N.Y. TIMES (May 4, 2023), <https://www.nytimes.com/2023/05/04/health/covid-deaths-2022.html>.
19. Ticket Refund NPRM, *supra* note 8.
20. *Id.*
21. Dep’t of Transp., Order No. 2003-3-11 (Mar. 18, 2003).
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”).
23. Teva Pharms. USA, Inc. v. U.S. Food & Drug Admin., 514 F. Supp. 3d 66, 94–95 (D.D.C. 2020).
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.
28. 14 C.F.R. § 399.85(d).
29. *Id.*
30. *Id.*
31. *Id.*
32. See Press Release, White House, FACT SHEET: President Biden Highlights New Progress on His Competition Agenda (Feb. 1, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/fact-sheet-president-biden-highlights-new-progress-on-his-competition-agenda>.
33. Complaint ¶ 20, U.S. Dep’t of Just., United States v. Jet-Blue Airways Corp. & Spirit Airlines, Inc., No. 1:23-cv-10511 (D. Mass. Mar. 7, 2023).
34. *Id.*
35. *Id.* (emphasis added).
36. *Id.* ¶ 40.
37. See Comments of Airlines for America, DOT-OST-2022-0109-0090 (Jan. 23, 2023).
38. Ancillary Fee NPRM, *supra* note 9; see also Supplemental Comments of Airlines for America, DOT-OST-2022-0109-0745 (May 8, 2023).
39. U.S. DEP’T OF TRANSP., NOTICE REGARDING INVESTIGATORY AND ENFORCEMENT POLICIES AND PROCEDURES 1 (Jan. 3, 2023), <https://www.transportation.gov/sites/dot.gov/files/2023-01/OACP%20Enforcement%20and%20Sanction%20Practices%20Notice%2012%202022.pdf>.
40. *Id.*