

United States Senate

June 10, 2020

The Honorable Elaine L. Chao
Office of the Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Dear Secretary Chao:

We urge the Department of Transportation (DOT) to stop promulgating rules that would hamstring its ability to protect aviation consumers. Instead, DOT must focus on finalizing the numerous consumer protection rules that Congress directed in the 2016 and 2018 Federal Aviation Administration (FAA) reauthorization bills, which DOT has thus far ignored.

For example, in the 2016 FAA reauthorization, Congress specifically directed DOT to promulgate a rule requiring refunds for delayed checked baggage. The rule is now almost three years overdue, and consumers continue to lose thousands of dollars every day that DOT ignores its statutory mandate to protect consumers.¹ Similarly, in the 2018 FAA reauthorization, Congress directed DOT to require airlines to refund ancillary fees for products and services that are not delivered.² This requirement is almost one year overdue and, again, DOT has taken no action to protect consumers.

Rather than implement regulations Congress specifically directed, DOT now seems solely focused on actually removing consumer protections. We are particularly alarmed by DOT's proposed rule for "Defining Unfair or Deceptive Practices" in its aviation consumer protection statute,³ which creates new definitions for "unfair" and "deceptive" that mirror the definitions in the Federal Trade Commission (FTC) Act.⁴ Although this change may sound innocuous, it fails to consider important differences between the agencies that make copying the FTC approach inappropriate. For example, in addition to the FTC, state Attorneys General throughout the country have the authority to protect consumers from unfair and deceptive acts and practices in general commerce.⁵

¹ FAA Extension, Safety, and Security Act of 2016, sec. 2305, P.L. 114-21 (July 15, 2016) (stating that the "Secretary of Transportation shall issue final regulations" requiring air carriers to refund fees for delayed checked baggage no later than July 16, 2017).

² FAA Reauthorization Act of 2018, sec. 421, P.L. 115-254 (Oct. 5, 2018) (stating that the "Secretary of Transportation shall promulgate regulations that require each covered air carrier to promptly provide a refund to a passenger of any ancillary fees paid for services related to air travel that the passenger does not receive" not later than Oct. 6, 2019).

³ Defining Unfair or Deceptive Practices, 85 Fed. Reg. 11881 (proposed Feb. 28, 2020) (to be codified at 14 C.F.R. pt. 399).

⁴ 15 U.S.C. § 45(a)(2).

⁵ Carolyn L. Carter, *Consumer Protection in the States – A 50-State Report on UDAP Statutes*, National Consumer Law Center (Feb. 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

By contrast, only DOT can tackle consumer protection issues in the aviation industry, including ticket refunds, oversold flights, and tarmac delays.⁶ DOT therefore needs more flexible and robust enforcement authority than the FTC — a distinction reinforced by Congress expressly legislating definitions in the FTC Act,⁷ but not doing the same for DOT’s authority to regulate airlines. We believe that mirroring the FTC’s definitions would needlessly narrow DOT’s consumer protection authority, undermining existing passenger protections and limiting your agency’s ability to hold airlines accountable.

The proposed rule also introduces procedural obstacles that, by DOT’s own admission, “could translate into the Department performing fewer enforcement and rulemaking actions.”⁸ For example, the proposed rule creates “formal hearing procedures” for discretionary aviation consumer protection rulemakings and gives the airline industry an “opportunity to present evidence” before DOT issues enforcement orders.⁹ However, formalizing these new procedures is not necessary when existing processes already allow for the expression of all points of view. Instead, industry groups could exploit these new procedural hoops — which the airlines themselves appear to be driving — to delay any DOT action to protect consumers.¹⁰

Finally, the timing of DOT’s proposed rule is especially troubling. DOT’s enforcement actions for consumer protection reportedly fell to a historic low in 2019. As of December, DOT had issued only seven aviation enforcement orders, a 75% decrease from the 28 fines recorded in 2016.¹¹ This drop in enforcement actions occurred despite the continued prevalence of anti-consumer conduct in the aviation industry, as evidenced by the thousands of complaints consumers filed every year about problems ranging from flight delays to baggage issues. Most alarmingly, DOT is proceeding with this rulemaking even as the number of consumer complaints have skyrocketed during the coronavirus pandemic. In March and April alone, air travelers filed more than 25,000 complaints with DOT, many of them about the airlines’ refusal to refund payments for unused airline tickets during this global health emergency.¹² Given these unprecedented and disturbing trends, it is difficult to understand how DOT can justify making it harder to protect consumers at this time.

In light of these concerns, we urge DOT to focus on implementing the consumer protection rules Congress has specifically directed, and stop prioritizing airline special interest requests to further undermine consumer protection in the aviation system. During the coronavirus pandemic, more than ever, DOT must not only preserve its authority, but also use it to act boldly and protect the rights of the flying public.

⁶ 49 U.S.C. § 41712.

⁷ 15 U.S.C. § 45(a)(2).

⁸ Defining Unfair or Deceptive Practices, *supra* note 3, at 11888.

⁹ *Id.* at 11885-86.

¹⁰ Comment of A4A, Docket DOT-OST-2017-0069-2753, available at www.regulations.gov.

¹¹ Christopher Elliott, *Airline fines have fallen to historic lows. That could be bad news for travelers*, Wash. Post (Dec. 4, 2019), https://www.washingtonpost.com/lifestyle/travel/as-passenger-dissatisfaction-soars-airline-fines-hit-a-historic-low/2019/12/04/1a8c0922-1519-11ea-9110-3b34ce1d92b1_story.html.

¹² U.S. Department of Transportation, *Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel* (May 12, 2020), <https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds-%20Second%20Enforcement%20Notice%20FINAL%20%28May%2012%202020%29.pdf>.

Thank you for your attention to this important matter. Due to the telework policies of many congressional offices during the coronavirus outbreak, physical signatures are unavailable. The listed Senators have asked to be signatories to this letter.

Sincerely,

Edward J. Markey
United States Senator

Maria Cantwell
United States Senator

Tammy Baldwin
United States Senator

Richard Blumenthal
United States Senator