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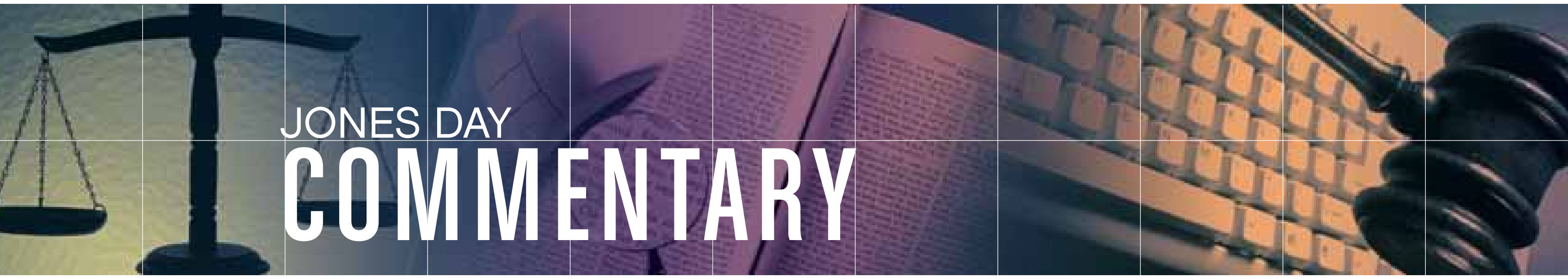

U.S. DEPARTMENT OF TRANSPORTATION SETS AIRLINE CUSTOMER SERVICE STANDARDS WITH STRINGENT NEW RULES ON U.S. AND FOREIGN CARRIERS

Acting under its statutory authority to prevent "unfair and deceptive practices" by airlines and travel agents, the U.S. Department of Transportation ("DOT") has adopted sweeping new rules on customer service and extended several existing ones to foreign air carriers, over their objection. The broad rulemaking governs everything from how long airlines must let a passenger hold a discounted seat without paying for the reservation to where they must display ancillary fees on their web sites. While the Department elected not to adopt a few proposals that the industry had vociferously fought—such as one that would have opened the floodgates to plaintiffs' litigation by turning each customer service *plan* into a binding *contract*—these various rules will nevertheless have a significant impact on both domestic and international airline operations.

The final rule, which was published on April 25, 2011, as 76 Fed. Reg. 23110, is essentially a compilation of at least 11 separate regulations, all establishing new customer service obligations for airlines. Several of the newly enacted rules, specifically those related to tarmac delay contingency plans, expand existing regulations that only just went into effect on April 29, 2010.[1] The new rule expands the 2010 tarmac delay contingency plan requirements by including international flights operated by both U.S. and foreign carriers and widening the number of airports where these airlines must have a contingency plan in place.

Under the regulation, all carriers serving the U.S. must develop customer service plans as well as tarmac delay plans, post these plans on their web sites, report tarmac delay data to DOT, incorporate

1 74 Fed. Reg. 68983.

government taxes/fees into essentially all price quotes, warn customers of baggage and service fees up front, and update passengers continually of any delay longer than 30 minutes regardless of the source (*i.e.,* including delays created by FAA's air traffic control system). In addition, the regulations specify the procedures by which an airline must respond to customer complaints, drastically raise the amounts of compensation that must be offered to passengers when denied boarding due to oversales, and prohibit carriers from determining the forum for dispute resolution as part of the contract of carriage.

This rulemaking represents perhaps the most expansive regulation of airline "routes, rates and services" since those aspects of the business were ostensibly deregulated in 1978. The regulation is far reaching both in terms of the number of foreign and domestic airlines that it now encompasses (all airlines operating any aircraft with a passenger capacity of 30 or more to and from the U.S.) and in the precision with which the regulations detail how airlines must now interact with their customers. The rules contain highly prescriptive standards for customer service that are uncommon (if not unheard of) in deregulated industries, and they prohibit, as "unfair and deceptive," several marketing practices that are used by well-known retailers online.

Interested parties have 60 days from the publication of the rule to appeal by filing a petition for review with the U.S. Court of Appeals for the D.C. Circuit.

A FAR-REACHING REGULATION THAT ATTACKS PRODUCT UNBUNDLING

Many retail web sites—offering products and services ranging from car rentals to laptop computers to holiday gift baskets—drive consumers to buy a multitude of related services or products during the purchase process. This is one of the oldest selling techniques on the books—unbundling the basic product, and then "selling up." Often these add-ons, such as product insurance, equipment upgrades, or faster shipping, are preselected by the retailer in the checkout process, and a consumer who really wants to buy only the no-frills product at the absolutely lowest price must uncheck a box to "opt out" of ancillary services before completing the purchase.

While this process is common on the Web, DOT has now specifically banned it from air transportation sales as "an unfair and deceptive practice in violation of 49 U.S.C. 41712."[2] Under the new regulation, airlines may not preselect any sort of upgrade for customers, whether it be for more legroom, additional frequent flyer miles, checked bags, travel insurance, or otherwise. Instead, the consumer must affirmatively "opt in" before putting any of these add-ons in the virtual "shopping cart."

DOT's new rules also require that all ancillary fees to consumers be grouped together and highlighted on a centralized web page—linked to the carrier's homepage—so that the consumer can comparison shop among airlines even before beginning the reservation process. "The reason for this requirement is that the Department considers it too difficult currently for consumers to effectively comparison shop and determine the total cost for travel, including ancillary fees for optional services…. The Department considers it to be unfair and deceptive to charge an ancillary fee to a consumer, when that consumer had no simple, practical, and reasonable way of knowing about the fee prior to purchasing the ticket."[3] DOT does not explain why the disclosure of these fees on the check-out page—before the *actual* purchase transaction occurs—would be inadequate to prevent fraud or deception. The Department then acknowledges that it could not go further: "With regard to commenters who wanted the Department to mandate certain ancillary items that must be free, the law does not provide us the authority to do so."[4]

For many airlines, ancillary fees now represent the difference between profit and loss. According to press reports, ancillary fees now account for five percent of all airline revenues and for some "no-frills" carriers, like Spirit Airlines, as much as 27 percent.[5] DOT's evident policy goal of impeding the sale of

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2 14 C.F.R. § 399.84(c), 76 Fed. Reg. 23166.
3 76 Fed. Reg. 23148.
4 *Id.*
5 *See* Susan Carey, *Airlines to Load On More Fees*, Wall St. J., Mar. 7, 2011 *available at* http://online.wsj.com/article/SB1000142405274870 4728004576176521453253668.html.

ancillary services and slowing down the airlines' unbundling strategy may thus have undesirable consequences for the industry's "bottom line."

ELIMINATING NONREFUNDABLE FARES

In another illustration of their extensive reach, the new rules require airlines to allow consumers to hold a reservation at a quoted fare for 24 hours without a fee or obligation to purchase, as long as the first segment of the itinerary is at least a week away. This essentially eliminates nonrefundable tickets from the marketplace for the most heavily discounted seats (which normally have restrictions requiring they be purchased at least a week in advance); all such tickets are now refundable at least for a day. Some airlines already offer a 24-hour cancellation window voluntarily as part of their customer service plans (for tickets purchased through travel agents), but to impose this as a federal *requirement* on every airline serving the U.S. would seem unprecedented. Here again, the rule forbids airlines from another common retail practice, selling their merchandise on a "no refunds, no returns" basis.

Pricing of tickets for air travel is a highly specialized and complex business, with repricing sometimes occurring several times per day. Arguably, this regulation undermines airline yield management, which is an integral part of the pricing process and allows airlines to precisely allocate the supply of discount fares based on demand. The regulation would allow consumers to make "phantom"' bookings, holding the most deeply discounted seats (and taking them out of inventory) while they shop around for a better deal. Doubtless, computer programs and online travel agents will emerge to enable consumers to play this pricing game without personally checking prices every day. DOT's decision to intervene in the free market in this manner was, however, scantly supported by any evidence in the administrative record that the sale of truly nonrefundable tickets was actually harming consumers.

A COST-BENEFIT ANALYSIS SHOWING SURPRISINGLY SMALL EFFECTS

In its Final Regulatory Analysis, DOT estimates a net benefit from the regulation of just $14.3 million over the 10-year period following the enactment of the rules.[6] In calculating this $14.3 million, DOT identifies 11 different "areas" of the regulation for which it provides estimates. One single area, the requirement for full-fare advertising and prohibition on opt-out provisions, is estimated to create a net benefit to consumers of $22.2 million. Only two other areas are calculated to provide any benefit at all. The first is a requirement prohibiting post-purchase price increases; for this requirement, DOT estimates a net benefit of $6.1 million (an odd conclusion, given that the two major trade groups for passenger airlines state that the new requirement is consistent with current practice). The other is the addition of foreign carriers to those airlines whose customer service plans must meet minimum regulatory standards, predicted to produce a net benefit of $300,000.

Six of the eight remaining areas will impose costs that, according to DOT, outweigh any benefits. These include expanding the tarmac contingency plan and reporting requirements to include foreign carriers, requiring them to post these plans on their web sites, requiring them to handle consumer complaints according to U.S. DOT guidelines, revamping denied boarding compensation, and mandating the disclosure of baggage and other optional fees. In total, these rules are calculated to come at a net cost of $14.4 million. For the last two areas, the requirement to notify customers of flight status changes and the prohibition against including a forum selection clause in the contract of carriage, DOT was unable to even estimate their costs or benefits.

What is most surprising about the cost-benefit analysis is that, for all the publicity DOT has garnered about the new rules, it shows they will have surprisingly little economic impact on consumers or carriers. Of course, this holds true *only if* one accepts DOT's calculations and assumptions as

6 Final Regulatory Analysis § 5.2.

realistic, and "therein lies the rub." While federal agencies have no statutory obligation to perform a cost-benefit analysis (except for small entities) of a rulemaking when the anticipated impact is less than $100 million a year (*see* 2 U.S.C. §§ 1532-1538), once they choose to provide such an analysis, it will be closely scrutinized for reasonableness by the Court of Appeals. The agency can then be reversed under the Administrative Procedure Act if the assumptions they make or calculations they perform don't pass muster.[7]

One area that may spell trouble for DOT is its analysis of the predicted benefits—and costs—of the newly tightened "full fare advertising" rule, under which airlines will be forced to quote upfront the entire price of the ticket, including all taxes and fees. Excise taxes and other charges the government imposes on airline tickets are so high that they now account for a significant portion of the total fare, nearly 17 percent by some estimates.[8] This means that the true "full fares" will seem significantly higher to consumers than they do today, a development that undoubtedly will reduce demand even though the *actual* prices are unchanged.

Yet DOT's regulatory impact analysis barely deals with the issue, or does so in a way that assumes the net effect can only be beneficial to consumers, while excluding the impact of lost sales on air carriers. After first acknowledging research "which showed that providing consumers with more complete information about the final prices of products being purchases did in fact reduce the quantity purchased," DOT's economists then gloss over this "unsurprising result" in predicting the rule's true impact. They write:

> An axiom of mainstream economic theory is that consumers make optimal purchasing choices based on the information available at the time buying decisions are made. It must therefore be the case that providing consumers with more accurate information about the final purchase price earlier in the buying process improves their welfare. In the context of air travel, ticket purchasers on most travel web sites will be aware to varying degrees that additional taxes and fees will be included in the final purchase price. However, it is also clear that most consumers will not know the exact amount of these taxes and fees until they are provided with that information by the ticket agent (carrier, travel agency, etc.)….
>
> However, to address the concerns raised about various calculation issues by the ATA and in other comments, we have not included estimates of the increase in consumer surplus from the full-fare advertising requirement in net benefits calculated for the Rule. The final [Regulatory Impact Analysis] does include, as an unquantifiable benefit of the full-fare advertising requirement, the value to consumers from avoiding purchases at prices higher than they would be willing to pay if they were disclosed initially.[9]

While this is cited by DOT as a way of understating the benefits, it more likely understates—by many orders of magnitude—the cost to industry of foregone sales.

HEIGHTENING AIRLINE EXPOSURE TO CONSUMER LITIGATION

In one important nod to the concerns of the carriers, DOT's final rule does not require them to incorporate the customer service plans in the airline contracts of carriage. Protection of the terms of the contract of carriage is vitally important to carriers. If each customer service plan were to be incorporated into the contract of carriage, then every violation of the plan could become a breach of the carrier's contract with its customers, as well as a regulatory violation. This, in turn, would open the carrier up to seemingly constant litigation from unhappy customers.

DOT acknowledges that this was the second time it had proposed (but not adopted) a rule mandating the incorporation of these plans into the contract of carriage.[10] Notably, however, DOT does not state that it is convinced that this proposal is a bad policy choice or should never become a rule. Rather, DOT indicates that, for now, it seems sufficient for consumers to be able to read the customer service plan on

7 *See e.g., Owner-Operator Indep. Drivers Ass'n. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007).
8 *See* Airline Ticket Tax Project, http://web.mit.edu/TicketTax/.
9 Final Regulatory Analysis § 1.2.4.
10 76 Fed. Reg. 23130.

the carriers' web sites. This leaves plenty of room to address this issue again in the future.

The decision by DOT not to require the incorporation of customer service plans into passenger contracts of carriage was not an unqualified victory for the industry. The new regulations may still indirectly burden carriers through heightened exposure to lawsuits from customers unhappy over service failings. DOT does not estimate this potential cost in its Regulatory Analysis, simply stating that the Department "does not possess adequate information to estimate the costs associated with lawsuits that would be incurred by carriers."[11]

At several points, the rulemaking seems to pry open the door to consumer lawsuits against carriers. Indeed, by making statements such as "courts of law are one avenue of ensuring appropriate company conduct toward consumers," DOT appears to go out of its way to suggest the plausibility of such litigation and, at the very least, undermining the defense of federal preemption to state law tort claims.[12]

The proposed rule would have required that each customer service plan include a promise that not only would "every reasonable effort" be made to return mishandled baggage within 24 hours but also that passengers would be compensated for their reasonable expenses from delays in baggage delivery. In addition, DOT sought comment on how to determine when bags are timely delivered and whether to force a complete refund of baggage fees when bags are not delivered on time. In explaining why it chose not to require reimbursement for damages caused by delay in the delivery of baggage, DOT notes that "[c]onsumers may, of course, [file] a claim with the airline or, if dissatisfied with the airline's resolution of the matter, with an appropriate civil court."[13]

Undoubtedly, inventive plaintiffs' attorneys will take this as a cue that the Department does not believe common law tort claims are preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b). The counter argument will be that DOT's reference to an "appropriate" civil court does not mean, standing alone, that the Department intended to decide that state law tort claims against airlines are no longer preempted. Yet with this almost offhand comment, DOT seems to direct consumers to file follow-on litigation in civil court if their statutory remedies are not satisfactory.

To the same effect is DOT's decision to adopt a rule that flatly bars any carrier from including a choice-of-forum clause in its contract of carriage that would preclude a passenger from bringing a claim against the carrier in any court of competent jurisdiction, including one where the passenger resides.[14] While industry expressed less concern with this change than with the proposal to require the incorporation of customer service plans into ticket contracts, DOT may still have overstepped its bounds. This regulation as written also precludes carriers from incorporating binding alternative dispute resolution mechanisms in their contracts of carriage, for example, a provision requiring that disputes be resolved through *arbitration* rather than in civil courts. As the U.S. Supreme Court reiterated just this month, the Federal Arbitration Act (9 U.S.C. § 2) creates "both a 'liberal federal policy favoring arbitration,'… and the 'fundamental principle that arbitration is a matter of contract.'"[15] Binding arbitration provisions have been upheld in a multitude of consumer contracts, as arbitration has been demonstrated to reduce litigation costs for all parties involved. Yet as written, the choice-of-forum provision in the new rule precludes contracts of carriage from mandating the arbitration of airline passenger claims.

The substance of the rules also create numerous opportunities for litigious consumers to claim that airlines failed to meet one or another of the myriad new regulatory requirements, leaving carriers little ability to dispute these allegations. For example, the regulations require that consumers onboard all flights delayed on the tarmac receive notifications regarding the status of the delay every 30 minutes. In another provision, carriers are required to verbally inform customers who are involuntarily denied boarding of the option to receive a cash payment in lieu of a voucher—along with of all "material" terms and conditions of any voucher. If

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11 Final Regulatory Analysis § 4.11.4.

12 Preliminary Regulatory Analysis § 5.11. *See also* Steven R. Pounian & Justin T. Green, *Does Federal Aviation Act Preempt State Law Product Liability Actions?*, 244 N.Y.L.J. 3 (2010). *Cf. Martin v. Midwest Express Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009) (holding that federal regulation had not preempted state tort claims as applied to air stairs); *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999) (holding that federal regulation had preempted state tort claims in the field of aviation safety).

13 76 Fed. Reg. 23128.

14 14 C.F.R. § 253.10, 76 Fed. Reg. 23163.

15 *AT&T Mobility LLC v. Concepcion*, 563 U.S. _______, No. 09-893, slip op. (Apr. 27, 2011)

a gate agent dealing with an oversold flight forgets to read aloud all the contract terms as written on the voucher or if, in dealing with a rapidly developing weather delay, the captain fails to announce the status of the delay at 30-minute increments, will the carrier have violated the rights granted to the customer that are now enforceable in his or her hometown court? And even when the carrier makes all of the required announcements and verbally confirms that the customer understands the contract terms, how is an airline to dispute charges that it failed to do so?

In short, the combined effects of this regulation raise the specter that carriers will increasingly find themselves in court facing nuisance lawsuits, attempting to prove facts that are difficult or impossible to prove.

EXTRATERRITORIAL APPLICATION OF U.S. CONSUMER REGULATIONS

Perhaps the most controversial aspect of the regulations is their broad application to foreign airlines. The rules cover foreign air carriers with respect to all of their flights to or from the U.S., as well as their marketing on the internet to U.S. consumers. Because most carriers cannot or will not go to the trouble of making granular distinctions in customer service policies based on flight numbers, or point of sale, or the citizenship of their customers, DOT has effectively extended U.S. regulation on customer service to every international airline that serves the American market.

Consider the example that DOT itself provides in explaining how "to ensure that we are not applying U.S. rules to a foreign carrier when that carrier does not market its services to the U.S."[16] The Department writes:

> [A] "flight" that a foreign carrier operates to and from the U.S. means a continuous journey in the same aircraft or with one flight number that begins or ends at a U.S. airport. For example, if a carrier were to operate flight 100, a direct flight from San Francisco to Singapore with a stop in Hong Kong, the customer service plan applies to both segments of this flight with respect to U.S.-originating passengers. It would not apply to any Hong Kong originating passengers who board the aircraft there and go to Singapore. On the reverse routing, the plan would apply to passengers who board in Singapore or Hong Kong and travel to the U.S.; it would not apply to passengers boarding in Singapore whose destination is Hong Kong. Temporarily deplaning at the intermediate stop on a direct flight (Hong Kong in the above example) does not break the journey for purposes of the applicability of the customer service plan requirements for passengers who re-board and continue on that same flight operation. If an international passenger whose journey originates or terminates in the U.S. makes a connection to a flight with a different flight number, the carrier's customer service plan applies only to the direct flight to or from the U.S. In the case of change of gauge, all flight segments with the same flight number that begin or end in the U.S. are covered by the Customer Service Plan even if passengers must change aircraft due to a change of gauge.[17]

Now, consider two passengers on the hypothetical flight 100 from San Francisco above, both planning to change planes in Hong Kong before continuing on their trips. The first passenger plans to continue on flight 100 to Singapore, and the second passenger plans to continue on a different flight number with the same carrier to Beijing, but unfortunately both passengers are "bumped" from their connecting flight due to oversales. According to the DOT hypothetical above, the first passenger will be compensated as outlined in the DOT-imposed minimums while the second passenger is outside of DOT control. This is true regardless of whether the flights are flown by a U.S. or a foreign carrier and regardless of whether the passengers are U.S. or foreign citizens. This attempt to carve out DOT jurisdiction is at least confusing, if not completely arbitrary. As a result, this guidance may prove to be impractical.

The regulations may also be invalid under international law. While DOT largely dismisses the arguments made by foreign airlines and their trade groups that the proposed rules' extraterritorial reach violates the Chicago Convention, various

16 76 Fed. Reg. 23123.
17 *Id.*

bilateral agreements, and other U.S. international obligations, it remains to be seen whether DOT's analysis will withstand scrutiny. As a matter of customary international law, it is well established that no country has the legal right to extend its sovereignty over either third countries or the high seas. The assertion of extraterritorial jurisdiction over the overseas activities of foreign airlines invariably draws protests and leads to intractable disputes, as is the case today with pending challenges by various U.S. airlines to Europe's legislation extending its emission trading scheme to international aviation.

Article 1 of the Chicago Convention establishes that each state has sovereignty over its own territory, while Article 11 provides that the laws and regulations of a contracting state relating to the admission to or departure from its territory of aircraft engaged in international air navigation shall be complied with by the aircraft *upon entering, departing from, or while within the territory* of that state. Read together, they are plainly intended to ensure that territorial sovereignty is respected and would call into question DOT regulations that apply to flights at the time they are departing from foreign points to the U.S. or re-entering foreign territory. Article 12 further enforces this regime, stating that over the high seas, the rules in force shall be those established by the Chicago Convention, *i.e.*, by ICAO, not DOT or the United States.

Other bilateral commitments by the United States, such as the EU-US Open Skies Agreement, have the same effect as Articles 1, 11, and 12 of the Chicago Convention. These agreements reflect the notion that states have complete and exclusive sovereignty over their territory. While bilateral agreements can be drafted to allow limited application of U.S. law within a foreign country, these provisions are always carefully negotiated and limited to areas where such extraterritorial application is considered essential, such as those involving safety or national security.[18]

By unilaterally extending nonessential *customer service* rules to foreign carriers, DOT creates potential conflict with foreign law in violation of these international treaties. Several of the new rules also place foreign carriers in the untenable position of having to reconcile DOT requirements with the potentially conflicting regulations of their home nations, such as the EU Regulation 261/2004 on compensation for cancellations and delays. Although the Department attempts to address this concern by limiting certain rules to operations at U.S. airports (specifically, tarmac contingency plans), other rules reach activities wherever they occur if the foreign carrier "markets to U.S. customers."[19]

DOT's logic is that it has the right to regulate any flight to or from the United States and any web site directed to U.S. consumers. For example, in rejecting the argument against requiring foreign carriers to modify their web sites to explain to their customers how to file complaints over customer service, DOT explains:

> Foreign carriers and carrier associations also oppose the requirement to inform consumers how to complain as an extraterritorial application of U.S. law. IATA asserts that this requirement would violate the Chicago Convention and U.S. Open Skies Agreement as it would necessitate foreign carriers modifying procedures and operations that take place outside the U.S. to meet U.S. regulatory requirements. For example, IATA states that this requirement would mandate that foreign carriers modify their home websites and foreign-issued tickets to include information mandated by the Department.
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> ...We are not seeking to govern the activities of foreign carriers outside the United States.... [T]he requirement to make information about how to file a complaint available on a carrier's website applies to a foreign carrier only if its website markets to U.S. consumers. Foreign carriers would not need to modify their home websites to ensure that they are complying with this requirement unless those sites market to U.S. consumers. We expect foreign carriers to follow U.S. law in the U.S. when marketing within the U.S. and

18 For example, under the EU-US Open Skies Agreement, certain provisions allow the U.S. to impose requirements on foreign security procedures to ensure homeland security. Yet even here, the Agreement requires the United States to "take into account the security measures already applied by the other Party and any view that the other Party may offer." Air Transport Agreement between the United States and Europe, Art. 9(5).

19 14 C.F.R. §§ 259.6-259.7, 76 Fed. Reg. 23165; 14 C.F.R. § 399.85, 76 Fed. Reg. 23167.

when flights are entering, operating within or departing from the U.S.[20]

Left largely unaddressed by DOT is that many of the rules may for all practical purposes require foreign carriers to comply with *U.S. regulations* when interacting with *citizens of their own countries* in transactions that occur entirely outside of the United States. Consider, for example, the 24-hour penalty-free cancellation period that DOT has now awarded to every "U.S." consumer—that is, anyone in the world accessing either the U.S. homepage of the foreign airline web site (or the web site's main page if the carrier chooses not to have a special page for U.S. customers). A passenger booking his or her itinerary through the portal gets this protection, even if the itinerary being booked does not involve the U.S. at all; if a Canadian citizen wants his discount ticket from Canada to India on British Airways to be fully refundable within 24 hours, then he need simply book it through the BA homepage intended for the U.S. market.

Despite the ostensible limitation of the rule to web sites that market to U.S. citizens, this rule bans as "unfair trade practices" activities that may be otherwise completely lawful for foreign carriers in their home country markets. For example, a web site (non-country specific) that preselects upgrades or does not collect all ancillary fees on a single page is now out of compliance with U.S. regulation. In still other cases, the rules require disclosures by foreign carriers to foreign citizens that may not be required under home country laws. For example, Section 259.7 requires foreign and U.S. carriers alike to respond to complaints by customers within uniform deadlines and procedures.

Will airlines really be able to follow different rules for their home countries? Again, the carve out for foreign carriers' web sites that are not marketed to U.S. consumers does not effectively relieve the carrier from applying U.S. rules to interactions with citizens of their home countries as to conduct that occurs entirely outside the United States.

A PATTERN OF INTRUSIVE REGULATION?

This latest rule continues what some believe to be a trend under the current administration toward reregulation of the aviation industry. DOT's first extensive regulations regarding airline operations during tarmac delays just went into effect in April of last year. Less than a year later, DOT has expanded these regulations in nearly every way, adding new requirements and including more airlines and more routes, to more destinations and to diversion airports. As stated by IATA in its comments to this rulemaking, "It would appear the Department, through this NPRM, is moving away from the letter and spirit of the Airline Deregulation Act of 1978 that affirmatively recognized passengers are better served by private sector competition than by public sector regulation."

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20 76 Fed. Reg. 23132-33.