



**Testimony of
John Breyault
Vice President, Public Policy, Telecommunications and Fraud
National Consumers League**

on

**“A Work in Progress: Implementation of
the FAA Reauthorization Act of 2018”**

**Before the
United States House of Representatives
Committee on Transportation and Infrastructure
Subcommittee on Aviation**

September 26, 2019

Summary

The Department of Transportation (“DOT”) is the sole agency in the United States with power to enforce consumer protection statutes in the air travel marketplace. The Airline Deregulation Act largely preempts and prohibits state attorneys general, state legislatures, municipalities and private litigants from stepping in to protect the health and safety of the flying public and basic fairness in the air travel marketplace. Recognizing this, the last two FAA reauthorization bills rightly mandated that the agency takes steps to promulgate regulations addressing concerns of the flying public in multiple issue areas, including overbooking, fee refunds, minimum seat sizes and family seating, just to name a few.

Unfortunately, progress on too many of these important consumer protection rules has slowed to a crawl at best and a halt at worst. Because of this, consumers continue to be harmed by abusive airline industry practices while the DOT dithers due to a combination of industry resistance, bureaucratic inertia and internal resistance to new regulations. October 2019 will mark one year since Congress passed the last FAA reauthorization bill. Many of the regulatory deadlines set in the legislation will soon come due. In addition, there are older rulemakings affecting family seating and data availability that the agency has indefinitely postponed or chosen not to act upon despite a Congressional mandates and compelling case for regulatory action.

Taken together, the DOT’s actions and inactions on these important rulemakings paint a picture of an agency that places consumer protection and consumer safety bottom of its list of priorities. A bipartisan majority of Congress gave the DOT statutory authority in the Airline Deregulation Act to promote competition and consumer protection. It is imperative that Congress act to ensure that its mandates are not unduly delayed, or worse, ignored completely.

Introduction

The National Consumers League appreciates the opportunity to provide the subcommittee with our views on the implementation of Congressionally-mandated consumer protection regulations by the DOT and the Federal Aviation Administration (“FAA”).

Founded in 1899, the National Consumers League (“NCL”) is the nation’s pioneering consumer and worker advocacy organization. Our non-profit mission is to advocate on behalf of consumers and workers in the United States and abroad.¹ NCL has long advocated for a fairer and more competitive airline industry for the 2.8 million consumers who fly in and out of U.S. airports every day.²

FAA Reauthorization Legislation Mandated Important Consumer Protection Regulations to Address Ongoing Harms to the Flying Public

In 2016³ and 2018⁴, Congress passed FAA reauthorization bills directing the DOT and FAA to commence important consumer protection-related rulemakings. These bills gave passengers and advocacy organizations like NCL hope that the DOT and FAA would begin to address some of the long-standing consumer protection concerns that have bedeviled and endangered the flying public for too long.

Today we find ourselves nearly a year removed from Congress passing its 2018 reauthorization bill. Yet, whether because of bureaucratic inertia, industry resistance, or policy differences within the DOT itself, many of these rulemakings

¹ For more information, visit www.nclnet.org.

² Federal Aviation Administration. “Air Traffic By the Numbers.” June 2019. Online: <https://www.faa.gov/air-traffic/by-the-numbers/>

³ Public Law 114-190: “FAA Extension, Safety, and Security Act of 2016.” (130 Stat. 615; Date: 7/15/2016). Online: <https://www.congress.gov/114/plaws/publ190/PLAW-114publ190.pdf>

⁴ Public Law 115-254: “FAA Reauthorization Act of 2018.” (Date: 10/5/2018). Online: <https://www.congress.gov/115/bills/hr302/BILLS-115hr302enr.pdf>

have languished. In too many cases, rulemakings that Congress mandated years ago have still not resulted in meaningful consumer protection regulations. The impact is that needed reforms to address consumer concerns languish. This dampens confidence of the flying public in the ability of the DOT – the sole agency charged with consumer protection in the airline marketplace – to do its job.

The 2018 reauthorization bill included a number of consumer protection mandates that NCL supported but which have been neglected by the DOT. Among these are:

- **§ 421 - Refunds for other fees that are not honored by a covered air carrier** – The DOT is mandated to promulgate regulations requiring airlines to refund any ancillary fees paid by passengers for services that were not received.⁵ Congress directed this rulemaking to be initiated before October of this year. The DOT appears to have chosen to pair this rulemaking with action on baggage fee refunds that was initiated after the passage of the 2016 FAA reauthorization bill. In 2016, the DOT sought comments in response to an Advance Notice of Proposed Rulemaking (“ANPRM”) on baggage fee refunds. The agency has yet to issue a rule related to baggage fee refunds specifically or ancillary fee refunds generally. Consumers thus find themselves at the mercy of airlines when their bags are delayed and they request a refund. Similarly situated are consumers who do not promptly receive a refund of fees such as seat reservation fees when those services are not provided.
- **§ 425 - TICKETS Act** – The TICKETS Act was designed to address the widespread practice of airline overbooking and the resultant bumping of ticketed passengers – sometimes involuntarily. The case for regulations to stop this was vividly illustrated by the shocking video of Dr. David Dao being forcefully and brutally dragged off United Express Flight 3411 on April 9,

⁵ Online: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2105-AE53>

2017.⁶ § 425 rightly removed arbitrary limits on the amount of compensation that airlines offer ticketed passengers who are denied boarding. Despite passage of the TICKETS Act, no U.S. carrier (including United) has amended its Contract of Carriage to publicize its intent to comply with this change. We look forward to seeing the findings of the U.S. Government Accountability Office (“GAO”) report on oversales, which is required to be communicated to Congress within a year of enactment of the 2018 reauthorization bill.

- **§ 577 – Minimum Dimensions for Passenger Seats** – Passengers and flight attendants have long expressed concerns about shrinking seat sizes, dwindling seat pitch and possible links to serious health conditions such as deep vein thrombosis (“DVT”) that could put at risk passengers’ ability to quickly evacuate an aircraft in the event of an emergency. In response, Congress directed the FAA to issue regulations establishing minimum dimensions for seat pitch, width and length necessary for the safety of passengers. The FAA is required to issue regulations no later than October 2019 yet we have seen no indication that the agency is prepared to initiate such a rulemaking. Indeed, the FAA has actively resisted judicial efforts by consumer advocates pressing it to take action on this important safety issue.⁷ Concerns have also been expressed that such a rulemaking may give airlines a green light to shrink seats beyond their current cramped dimensions based on the statute’s “necessary for the safety of passengers” language.⁸ Congress must not allow the FAA to simply adopt whatever inhumane seat size standard the airline industry favors.

⁶ Victor, Daniel and Stevens, Matt. “United Airlines Passenger Is Dragged From an Overbooked Flight,” *New York Times*. April 10, 2017. Online:

<https://www.nytimes.com/2017/04/10/business/united-flight-passenger-dragged.html>

⁷ Glusac, Elaine. “FAA Declines to Regulate Airplane Seat Size,” *New York Times*. July 6, 2018. Online: <https://www.nytimes.com/2018/07/06/travel/faa-plane-seat-size.html>

⁸ Silk, Robert. “FAA’s seat size mandate likely changes nothing,” *Travel Weekly*. November 1, 2018. Online: <https://www.travelweekly.com/Robert-Silk/FAA-seat-size-mandate-likely-changes-nothing>

- **§ 424 – Aviation Consumer Advocate** - The 2018 reauthorization bill directed the DOT to create an Aviation Consumer Advocate (“ACA”) position within the Aviation Consumer Protection Division. The ACA is charged with assisting consumers in resolving complaints filed with the DOT, identifying ways that the Department can improve enforcement of aviation consumer protection rules and identifying and recommending regulations and policies to better resolve consumer complaints. In March 2019 the DOT named Blane Workie, Assistant General Counsel for the DOT’s Office of Aviation Enforcement and Proceedings to serve as the ACA.⁹ While NCL and other advocates’ views have been welcomed by the ACA, we believe that Congress’s intent would be better served by having an ACA whose sole portfolio is consumer protection. We urge Congress to appropriate sufficient budget so that DOT can fund a standalone ACA position.

Three Years of DOT Inaction on Family Seating Leaves the Most Vulnerable Flyers at Greater Risk

While the 2016 FAA reauthorization bill required the DOT to undertake many consumer protection-related rulemakings, the lack of agency action on the issue of family seating is particularly egregious. § 2309 mandated that within a year after enactment, the DOT review and “if appropriate” create rules requiring airlines to seat children aged 13 or under next to an accompanying family member.

This is a common-sense consumer protection issue. Parents should not have to absorb the expense of paying an expensive seat reservation or priority boarding fees in order to sit together with their young children. Incredibly, after a review that apparently included no input from family advocates, no comments from

⁹ Department of Transportation. “DOT Announces April 4 Meeting of the Newly Reestablished Aviation Consumer Protection Advisory Committee, Names New Aviation Consumer Advocate.” Press release. March 20, 2019. Online: <https://www.transportation.gov/briefing-room/dot1319>

psychologists, or any public statements from the airlines, the DOT decided that no regulation was necessary.¹⁰

Recently, in response to a Freedom of Information Act request by Consumer Reports, the DOT provided a number of complaints it had received from passengers regarding airlines' family seating policies. Several themes emerged. First, complainants mentioned consistently unhelpful airline employees, including reservation staff, gate agents and flight attendants. Second, the reactions by airline staff to concerns about families being separated were sometimes actively harmful, including ejecting families from flights. Finally, there appear to have been cases where children over the age of 2 were required to travel in their parents' laps, in violation of federal law.

Since family seating was first raised, two trends have made the situation even more difficult for passengers traveling with small children. First, the number of seats that airlines consider "premium" (and which require an additional fee to reserve) continues to increase.¹¹ The industry is moving beyond charging extra for seats with extra legroom and is now charging for seats that are a little closer to the front of the plane or are aisle or window seats. It is not uncommon for single, middle seats near the back of the aircraft to be the only seats available for assignment without an additional fee.¹² Second, the percentage of seats that are occupied, known as "load factors," continues to increase.¹³ That means that if a flight is cancelled or a connection is missed, it will be much harder for families to find any seats together on another flight.

¹⁰ McCartney, Scott. "Flying Together With Your Children Keeps Getting Tougher," *Wall Street Journal*. ("The agency recently determined 'issuing a policy was not appropriate at this time,' a DOT official says.") September 12, 2018. Online: <https://www.wsj.com/articles/flying-together-with-your-children-keeps-getting-tougher-1536764795>

¹¹ Koenig, David. "United is Adding 1,600 Premium Seats to Its Fleet," Associated Press. February 7, 2019. Online: <https://www.afar.com/magazine/united-is-adding-1600-premium-seats-to-its-fleet>

¹² Villano, Matt. "Airline seat selection fees: It's pay to play," CNN Travel. January 5, 2019. Online: <https://www.cnn.com/travel/article/airline-seat-selection-fees/index.html>

¹³ IATA. "Passenger load factor hits 28-year high." October 19, 2018. Online: <https://airlines.iata.org/news/passenger-load-factor-hits-28-year-high>

The DOT's inaction is especially troubling in the face of voluminous evidence that sexual assault on airplanes against minors is a significant safety concern.^{14 15 16} According to the Federal Bureau of Investigation ("FBI"), in-flight sexual assaults increased by 66% from FY2014 to FY2016. In 2017 alone, the FBI opened 63 investigations into sexual assault on aircraft.¹⁷ DOT complaint data obtained by FlyersRights.org detailed 20 incidents of in-flight sexual assault from 2012-2018, including one against a child on an Air France flight in 2017.¹⁸ The cases that are reported to law enforcement are likely just the tip of the iceberg. And yet, the DOT claims that the number of complaints about families sitting together in the air do not justify action by the agency to protect the most vulnerable flyers.¹⁹

This begs the question: How many children will have to be assaulted on aircraft before the DOT acts? Is the DOT putting the desire of airlines to continue generating more than half a billion dollars annually in lucrative seat reservation fees ahead of

¹⁴ Miller, Michael. "'This was 30 minutes of hell for this young lady': Unaccompanied minor groped on flight," *Washington Post*. June 20, 2016. Online: <https://www.washingtonpost.com/news/morning-mix/wp/2016/06/20/this-was-30-minutes-of-hell-for-this-young-lady-unaccompanied-minor-groped-on-flight/>

¹⁵ "Creep' harasses teen during flight; Canadian journalist intervenes," *The Strait Times*. March 27, 2019. Online: <https://www.straitstimes.com/world/united-states/creep-harasses-teen-during-flight-canadian-journalist-intervenes>

¹⁶ Burton, Lynsi. "Teen sexually assaulted on Seattle flight; lawsuit says United Airlines did nothing," *SeattlePI.com*. January 22, 2019. Online: <https://www.seattlepi.com/local/crime/article/Teen-sexually-assaulted-on-Seattle-flight-13552767.php>

¹⁷ De Diego, Javier *et al.* "FBI: Sexual assaults on flights increasing 'at an alarming rate,'" *CNN.com*. June 20, 2018. Online: <https://www.cnn.com/2018/06/20/politics/fbi-airplane-sexual-assault/index.html>

¹⁸ Applebaum, Andrew. "Recent In-Flight Sexual Abuse Complaints to Feds Released By Airline Passenger Group ... Nothing Done?" *FlyersRights.org*. November 29, 2018. Online: <https://flyersrights.org/press-release/recent-in-flight-sexual-abuse-complaints-to-feds-released-by-airline-passenger-group/>

¹⁹ U.S. Department of Transportation. "DOT's Review of U.S. Airline Family Seating Policies." September 17, 2019. ("Based on the low number of complaints received and review of airline family seating policies, the Department determined that it was unnecessary to direct airlines to establish policies on family seating.") Online: <https://www.transportation.gov/individuals/aviation-consumer-protection/review-us-airline-family-seating-policies>

children's safety?²⁰ As FBI Special Agent David Gates, who regularly investigates instances of mid-air sexual assault, accurately stated "even one victim is unacceptable."²¹ Congress should demand answers from the DOT on the process it used to determine that it should take advantage of a legislative loophole in the 2016 reauthorization bill and leave children at greater risk.

The DOT Should Reinstate the RFI on Fare, Schedule and Availability Information and Act Promptly to Define Its Unfair or Deceptive Practices Authority

In addition to rulemakings mandated by the last two FAA reauthorization bills, it is important to highlight pending interpretive and non-legislative consumer protection rulemakings that DOT should act upon.

Of special note, the DOT should reinstate the Request for Information (RFI) on Airline Distribution and Display of Fare, Schedule and Availability Information that it suspended in March 2017.²² The DOT's October 2016 RFI inquiry came in response to concerns expressed by consumer groups, online travel bookings websites and Members of Congress regarding restrictions placed on distribution and display of airline flight information, such as fares, fees and schedules.

Reinstating the RFI is supported by every major national consumer organization as well as travel industry economists and the General Services Administration (which oversees air travel by federal officials). This support is based on the knowledge that

²⁰ Gilbertson, Dawn. "Skyrocketing seat selection fees enrage flyers, enrich airlines," *USA Today*. December 18, 2018. Online: <https://www.usatoday.com/story/travel/flights/2018/12/19/united-american-delta-preferred-seat-fees/2293721002/>

²¹ Federal Bureau of Investigation. "Sexual Assault Aboard Aircraft: Raising Awareness About a Serious Federal Crime," April 26, 2018. Online: <https://www.fbi.gov/news/stories/raising-awareness-about-sexual-assault-aboard-aircraft-042618>

²² Docket ID: DOT-OST-2016-0204

withholding of critical information from independent online travel agencies (“OTA”) and metasearch websites makes it more difficult for consumers to conveniently and reliably comparison shop.

Research commissioned by the airlines themselves found that 40% of leisure travelers feel they have to visit too many sites when booking travel. The airlines’ data found that the average number of digital channels being used increased 73% in five years, that 43% of travelers disclosed that they want to spend less time researching flights and that 56% of passengers say they will change airlines to save money. In the same study, the airlines reveal that they want to increase sales through their own sites at the expense of independent comparison websites, because they make more money on tickets sold on their websites, which only show their own fares and schedules.²³

A study commissioned by the Travel Technology Association found that consumers pay an average \$30 more per ticket, or \$6.7 billion more in airfare annually when airlines restrict flyers’ ability to comparison shop. It is estimated that 41 million Americans will choose not to travel each year, as a result of sticker shock stemming from the airlines’ blocking of flight data used by comparison sites.²⁴ This finding is backed up by data from the GAO, which found that despite fewer passenger comforts, the cost of air travel has increased.²⁵ As what consumers must pay to fly goes up, it will become even more critical for the DOT to safeguard consumers’ ability to comparison shop.

²³ International Air Transport Association. *The Future of Airline Distribution, 2016-2021*. October 2016. Online: <https://www.iata.org/whatwedo/airline-distribution/ndc/Documents/ndc-future-airline-distribution-report.pdf>

²⁴ Charles River Associates. *Benefits of Preserving Consumers’ Ability to Compare Airline Fares via OTAs and Metasearch Sites*. May 15, 2015. Online: <https://www.airtravelfairness.org/wp-content/uploads/2017/09/CRAFinalReport.pdf>

²⁵ Government Accountability Office. “Information on Airline Fees for Optional Services.” September 2017. Online: <https://www.gao.gov/assets/690/687258.pdf>

The evidence clearly shows that the airlines' practice of denying fare, fee and schedule data to OTAs and metasearch websites harms consumers. Unfortunately, the DOT acquiesced to the airlines' wish list and terminated even a cursory examination of their anticompetitive practices. Congress should press the DOT to reinstate this important proceeding.

Finally, the DOT will soon publish proposed rules defining the agency's unfair or deceptive practices authority.²⁶ The DOT is the sole agency at any level of government charged with consumer protection in the airline industry. Given the deregulatory stance of the current DOT leadership, we are concerned that the agency could potentially use this rulemaking as an excuse to weaken its already dubious willingness to hold airlines to account for their many anti-consumer practices. Congress should closely monitor this rulemaking to ensure that the DOT does not become a consumer protection agency in name only.

Conclusion

The DOT is the agency that the millions of American travelers and foreign visitors to the U.S. depend on to hold the airline industry accountable for their safety, security, reasonability of fees and fair treatment in air travel. In addition, the DOT is charged with ensuring that the airlines do not abuse their dominant position in the domestic air travel marketplace. The numerous rulemaking processes mandated by Congress are intended to address many of the consumer protection ills that have frustrated and endangered the flying public for far too long.

Unfortunately, in too many cases, it appears that industry resistance coupled with bureaucratic inertia and internal opposition at the DOT has caused important

²⁶ RIN: 2105-AE72. Online: <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2105-AE72>

rulemakings to languish for months and even years. The DOT has availed itself of legislative loopholes, particularly in regards to families sitting together, to delay or deny rulemakings that would address pressing safety and competition issues in the industry.

Allowing an industry like the airlines to self-regulate is a recipe for disaster. It is incumbent upon Congress to use its oversight role to ensure that the DOT is not asleep at the switch when it comes to consumer protection. States, counties and cities, are preempted from acting to hold the airlines accountable. Private litigants are largely restricted to small claims courts where compensation is limited. Only Congress and DOT have the power to protect competition, promote fairness and ensure the safety of all passengers, particularly children, in the air.

Chairman Larsen, Ranking Member Graves and the members of the Aviation Subcommittee, on behalf of the National Consumers League, thank you for including the consumer perspective as you consider these important issues.