

2015

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### Recommended Citation

David Heffernan, *Department of Transportation's Aggressive Approach to Consumer Protection Regulation and Enforcement*, 80 J. AIR L. & COM. 347 (2015)  
<https://scholar.smu.edu/jalc/vol80/iss2/3>

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## DEPARTMENT OF TRANSPORTATION'S "AGGRESSIVE" APPROACH TO CONSUMER PROTECTION REGULATION AND ENFORCEMENT

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**I**N RECENT YEARS, the U.S. Department of Transportation (DOT), through a combination of wide-ranging rulemakings and aggressive enforcement activity, has expanded the scope of its consumer protection-focused regulation of air transportation to a level that is unprecedented in the thirty years since Congress "deregulated" the domestic airline industry. As a result, air carriers and ticket agents today must comply with a highly detailed code of regulations, supplemented by extensive agency guidance interpreting those regulations. Any deficiencies in compliance, however inadvertent, may expose a regulated party to DOT enforcement action. In such cases, the regulated party typically faces a Hobson's choice between paying a substantial civil penalty (and enduring the opprobrium of a DOT-published consent order) or engaging in litigation against its regulator. Not surprisingly, most air carriers and ticket agents reluctantly accede to the first option.

DOT touts its expansionist approach to regulation and enforcement as a boon to consumers. Yet, DOT's expansion, and vigorous enforcement, of its regulatory scheme have increasingly resulted in the substitution of DOT's judgment (in place of market forces) as a primary determinant of outcomes for consumers. DOT's approach is based on an assumption that, but for

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DOT's intervention, consumers would be at the mercy of air carriers and ticket agents' unfair or deceptive practices in an environment in which market forces are an ineffective check on such anti-consumer conduct. As DOT continues to expand the scope of its regulatory and enforcement activities, however, critics object that DOT is exceeding its statutory authority and has failed to demonstrate that regulation is necessary to prevent actual or likely consumer harm. In addition, DOT has often failed to provide persuasive (and, in some cases, any) empirical evidence that the benefits of its regulations exceed their costs, which unquestionably hurt the airlines' bottom-line, but ultimately are likely to be borne by consumers. Some recent and proposed DOT regulations also threaten to curb the ability of air carriers and ticket agents to harness technological innovation and the power of the Internet in new ways that offer great potential to benefit consumers, but often do not fit well within the ever-stricter confines of DOT's regulatory regime. DOT has tended to focus on the collateral (and unquantified) risk of consumer confusion or deception rather than on promoting (or at least not inhibiting) innovations that could benefit consumers.

This article reviews the scope of DOT's regulatory authority, then examines some specific examples of DOT regulations and enforcement activity. In doing so, this article considers some basic, troubling questions: Has DOT exceeded its statutory authority? How much DOT regulation is too much? Has DOT passed a tipping point where regulation becomes so costly and restrictive that it harms consumers more than it helps them?

## I. THE SCOPE OF DOT'S "CONSUMER PROTECTION" AUTHORITY UNDER 49 U.S.C. § 41712

Section 41712 of the Transportation Code authorizes DOT to "investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."<sup>1</sup> Section 41712 does not direct DOT to regulate "in the *public interest*"—the statute is more specific than that.<sup>2</sup> DOT must find that a specific practice is "unfair or deceptive" or "an unfair method of competition."<sup>3</sup> Section 41712 focuses on how DOT may respond to evi-

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<sup>1</sup> 49 U.S.C. § 41712(a).

<sup>2</sup> *See id.*

<sup>3</sup> *Id.*

dence of unfair or deceptive practices that either are ongoing or have already occurred.<sup>4</sup> Thus, the section must be read as requiring *evidence* of an unfair or deceptive practice, not merely speculation about what may occur or an assumption that a particular practice that seems objectionable to DOT therefore must be unfair or deceptive.

Section 41712 presents a challenge for DOT to determine (and ultimately for the courts to adjudicate) how to regulate in the context of a statutory scheme that specifically recognizes the benefits of the free market (49 U.S.C. § 40101(a)(6) instructs DOT to “plac[e] maximum reliance on competitive market forces and on actual and potential competition.”).<sup>5</sup> Thus, regulation should only occur in response to market failure or clear evidence of necessity of government action to prevent actual consumer harm. Congress’s intention, when deregulating the domestic airline industry and transitioning a significantly circumscribed scope of authority from the Civil Aeronautics Board to DOT, intended that market forces be allowed to flourish without the heavy hand of government regulation.<sup>6</sup>

The language of section 41712 is substantively identical to that of section five of the Federal Trade Commission Act (15 U.S.C. § 45).<sup>7</sup> This suggests that Congress wanted the same consumer protection standard to apply to air transportation as to other industries but wanted an industry-specialist agency (DOT), rather than the Federal Trade Commission (FTC), to be the regulator.<sup>8</sup> Thus, the FTC’s interpretations of its identical

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<sup>4</sup> DOT’s authority under section 41712(a) is injunctive in nature. *Id.* (“[i]f the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method”).

<sup>5</sup> 49 U.S.C. § 40101(a)(6).

<sup>6</sup> See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995) (the Airline Deregulation Act (ADA) was intended to “leave largely to the airlines themselves . . . the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services”); *Morales v. TWA*, 504 U.S. 374, 378 (1992) (“Congress, determining that ‘maximum reliance on competitive market forces’ would best further ‘efficiency, innovation, and low prices,’ as well as ‘variety [and] quality . . . of air transportation services, enacted the [ADA]”); *Delta Air Lines, Inc. v. CAB*, 674 F.2d 1, 3 (D.C. Cir. 1982) (the ADA “replaced the old form of regulation with a new economic regime that relied heavily on free-market mechanisms”).

<sup>7</sup> See 49 U.S.C. § 41712(a); 15 U.S.C. § 45.

<sup>8</sup> Ironically (in light of DOT’s recent proclivity for protracted, large-scale rulemaking proceedings), one reason why Congress decided to vest this authority in DOT rather than the FTC was “the prolonged rulemaking procedures which

statutory mandate should be viewed as an authoritative reference point for DOT. After all, the FTC is an agency with a longer history and deeper experience of applying this statutory authority to a wide range of industries.

The FTC's test for determining whether an act or practice is "deceptive" requires actual evidence: (1) of an intent to deceive (e.g., a material misrepresentation by act or omission); and (2) that such conduct has or is likely to mislead a reasonable consumer with respect to material information, to the consumer's detriment.<sup>9</sup> This requires evidence of the act or omission and intent of the regulated party, as well as evidence of consumer harm.<sup>10</sup> Where no actual consumer harm can be demonstrated, the question is one of likelihood to mislead or deceive a reasonable consumer.<sup>11</sup> The FTC applies a presumption that market forces inherently constrain the likelihood of deception.<sup>12</sup> In other words, deception is only likely in instances of market failure, such as impairment or disabling of a reasonable consumer's ability to obtain and act upon the information necessary to avoid deception. In determining whether an act or practice is unfair, the FTC refers to "unjustified consumer injury," which it defines as an injury that is (1) substantial; (2) not outweighed by countervailing benefits to consumers and competition; and (3) one that "consumers could not reasonably have avoided."<sup>13</sup>

DOT enjoys the benefit of *Chevron* deference: if the statute is silent or ambiguous, then "the court must sustain [DOT's] inter-

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FTC is required to undertake under the Magnuson-Moss Act.'" United Air Lines, Inc. v. CAB, 766 F.2d 1107, 1112 (7th Cir. 1985) (quoting the legislative history of the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443 (1984), H.R. REP. NO. 793, 98th Cong., 2d Sess. 6 (1984)).

<sup>9</sup> *In re Cliffdale Assocs. Inc.*, 103 F.T.C. 110, 174 (1984) (App.: FTC Policy Statement on Deception (Oct. 14, 1983)); see 15 U.S.C. § 45(n) ("the [FTC] shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition").

<sup>10</sup> See *In re Cliffdale*, 103 F.T.C. at 174.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 181.

<sup>13</sup> *In re Int'l Harvester Co.*, 104 F.T.C. 949, 97 (1984) (App.: Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction (Dec. 17, 1984)); see also Unfair or Deceptive Acts or Practices, Final Rule, 74 Fed. Reg. 5498, 5502-04 (Jan. 29, 2009) (describing the FTC's standards for determining unfairness). For a more detailed account of FTC interpretations of "unfair or deceptive practices," see Comments of American Airlines, Inc., Sept. 29, 2014 (Docket DOT-OST-2014-0056), at 3-8.

pretation of a statute it administers . . . if [its interpretation] is 'based on a permissible construction of the statute.'"<sup>14</sup> In the *Sabre* decision, the U.S. Court of Appeals for the District of Columbia Circuit stated that DOT's statutory authority is broad and that "'statutes written in broad, sweeping language should be given broad, sweeping application.'"<sup>15</sup> The *Sabre* court also stated that DOT may apply its statutory authority in ways Congress might not have originally anticipated.<sup>16</sup>

In sum, DOT can act (whether by regulation or enforcement action) with the confidence that regulated parties are reluctant to litigate against their regulators and that, if they do seek judicial review, they face a daunting challenge to overcome the courts' "substantial deference" to agencies' interpretation of their own statutory authority and regulations. Such judicial deference, however, should not lead DOT to disregard its obligation to maintain a balance between, on the one hand, allowing market forces to operate and, on the other hand, regulating, when necessary, in response to actual evidence of market failure or consumer harm. DOT also should not underestimate the costs and risks associated with adopting detailed, wide-ranging regulations. As the following sections demonstrate, however, DOT, in some cases, may have failed to strike that balance.<sup>17</sup>

## II. DOT'S DETAILED AND CONTROVERSIAL REGULATIONS

Critics cite numerous examples of overreaching regulation by DOT. This article focuses on two notorious recent examples of DOT proposals to expand the scope of its regulations: the so-called "Passenger Protections 3" or "PP3" notice of proposed

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<sup>14</sup> *Sabre, Inc. v. DOT*, 429 F.3d 1113, 1121 (D.C. Cir. 2005) (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)).

<sup>15</sup> *Id.* at 1124–25 (quoting *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)).

<sup>16</sup> *Id.* (quoting *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) ("a statute [such as DOT's] can be applied in situations not expressly anticipated by Congress")).

<sup>17</sup> This concern applies not only to DOT's approach to regulation under section 41712, but also with respect to other statutory provisions. See *infra* note 64 (discussing the current controversy over DOT's proposal to interpret 49 U.S.C. § 46301(a) as authorizing DOT to impose civil penalties on a per-passenger basis, even though the statutory text only authorizes the assessment of violations on a per-flight or per-day basis).

rulemaking (PP3 NPRM)<sup>18</sup> and the advance NPRM considering the adoption of a ban on the use of cell phones to make voice calls on aircraft (Voice Calling ANPRM):<sup>19</sup>

° PP3: DOT has proposed to require airlines to display detailed ancillary fee information at all points of sale, on the first web page on which a fare is displayed, including passenger-specific fee information. DOT claims this proposed rule is necessary to ensure “transparency,” but carriers’ websites already must include prominent disclosures of all ancillary fees.<sup>20</sup> Yet DOT states that it “lack[s] sufficient data to be able to quantify the extent” to which consumers are currently able to “price shop for air transportation in an effective manner” and requests information about “whether it is difficult to find baggage and seat assignment fee information and how much of an impact this has on their ability to comparison shop among carriers.”<sup>21</sup> If this rule is implemented, it will require expensive reprogramming of booking engines and fundamental redesign of websites.<sup>22</sup>

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<sup>18</sup> Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, Notice of Proposed Rulemaking, Docket DOT-OST-2014-0056, 79 Fed. Reg. 29,970 (May 23, 2014) [hereinafter PP3 NPRM]. For a diversity of perspectives on the PP3 NPRM, see 27 No. 3 AIR & SPACE LAW. 3 (2014).

<sup>19</sup> Use of Mobile Wireless Devices for Voice Calls on Aircraft, Advance Notice of Proposed Rulemaking, Docket DOT-OST-2014-0002, 79 Fed. Reg. 10049 (Feb. 24, 2014) [hereinafter Voice Calling ANPRM].

<sup>20</sup> 14 C.F.R. § 399.85(d). DOT already regulates fare displays on carrier and ticket agent websites with great specificity. See 14 C.F.R. § 399.84(a) (regulating the font size of display of the total fare relative to the separate display of the amount of government-imposed fees and taxes that are included in the total fare).

<sup>21</sup> PP3 NPRM, *supra* note 18, at 29975. DOT subsequently clarified that “the purpose of the rule is not to enable comparison shopping, but rather to ensure that consumers are aware of the total cost of travel.” DOT Meeting with A4A, at 4 (response to Question #9) (Aug. 7, 2014) (Docket DOT-OST-2014-0056).

<sup>22</sup> DOT has previously acknowledged “the limits imposed by Congress on our authority to regulate the airline and airline distribution businesses. Congress has given us the authority to prevent practices that violate the antitrust laws or antitrust principles and practices that are deceptive, but no comprehensive oversight authority over airline distribution.” Computer Reservations System (CRS) Regulations, 69 Fed. Reg. 976, 978 (Jan. 7, 2004) (Final Rule). Despite those prior expressions of caution about regulating airline distribution, DOT, in the PP3 NPRM, also proposes to require airlines to provide ancillary service fee information to Global Distribution Systems (GDSs) and travel agents. This new proposal would insert DOT into the commercial relationships between airlines and GDSs—something DOT said it would no longer do when it eliminated its CRS rules a decade ago. Ironically, this proposal comes at a time when airlines and each of the “big three” GDSs are negotiating agreements for the distribution of fee and other information about ancillary services—precisely the type of informa-

- ° *Voice Calling Ban Proposal*: in the Voice Calling ANPRM, DOT considers whether to adopt a rule to ban voice communications on passengers' mobile wireless devices on flights to, from and within the United States. DOT would impose this ban pursuant to its authority to prohibit practices that are "unfair," but not deceptive, under section 41712.<sup>23</sup> Such a regulatory prohibition would deny air carriers the right to determine whether and, if so, how their passengers might be permitted to make voice calls during flight even though non-U.S. carriers have offered this service for years.<sup>24</sup> Indeed, U.S. carriers also have offered the service using phones installed in seat-backs.

If DOT finalizes these proposed rules, stakeholders may seek judicial review. Such a review may focus on whether, by adopting such rules, DOT exceeded its statutory authority under 49 U.S.C. § 41712. Courts generally accord "substantial deference" to an agency's interpretation of its own regulations unless "plainly erroneous or inconsistent with the regulations."<sup>25</sup> Regulations, however, must be "reasonable and . . . supported by substantial evidence in the record."<sup>26</sup> Yet DOT's proposals lack the support of "substantial evidence" of actual consumer harm; rather, DOT has largely relied on its own speculation or assumptions about the risk of consumer harm.

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tion distribution DOT would require by regulation. See David A. Berg, *DOT's 'Transparency of Airline Ancillary Fees' Rulemaking is Bad Policy and Wrong on the Law*, 27 No. 3 AIR & SPACE LAW. 3, 3 (2014) (citing Travelport's agreements with twelve airlines, including Delta, American, and Air Canada, to sell ancillary services; Sabre's similar agreements with United and US Airways; and Amadeus' similar agreements with American and other carriers).

<sup>23</sup> Voice Calling ANPRM, *supra* note 19, at 10051 (DOT, echoing the FTC's interpretation, states that practices are "unfair" under section 41712 "if they are harmful to passengers but could not be reasonably avoided by passengers"). DOT also states that it could impose such a ban pursuant to 49 U.S.C. § 41702 on the basis that voice calling during flight would "be inconsistent with adequate air transportation." Voice Calling ANPRM, *supra* note 19, at 10049. Section 41702, however, only applies to interstate air transportation and so would not provide a legal basis for imposing a ban on flights to and from the United States.

<sup>24</sup> For example, Emirates has allowed voice calling on flights outside the United States since 2008 and reports that its passengers have made more than one million inflight calls using their own cell phones. Emirates only ever received two complaints from passengers about such calls. Comments of Emirates (Mar. 25, 2014) (Docket DOT-OST-2014-0002).

<sup>25</sup> *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403, 410 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1723 (2013).

<sup>26</sup> *Id.* at 416.



A. MEASURING WHETHER THE BENEFITS OF DOT'S RULES  
EXCEED THEIR COSTS

Executive Order 12866 requires DOT to conduct a cost-benefit analysis for any "significant" action, such as the PP3 NPRM.<sup>27</sup> The NPRM's cost-benefit analysis has been the target of derision, with critics arguing that, on cost/benefit grounds alone, DOT has failed to establish a basis for finalizing the proposed rule.<sup>28</sup> Under DOT's own analysis, quantifiable costs exceed quantifiable benefits by nearly two to one (\$46.2 million versus \$25.1 million over ten years).<sup>29</sup> Overall, the rulemaking would impose a net cost (negative benefit) of \$53.8 million.<sup>30</sup> DOT attempts to circumnavigate this huge benefits deficit by claiming that "unquantified" benefits will exceed unquantified costs: if consumers are willing to pay one cent more per trip for what the rule will offer them, overall benefits will exceed costs.<sup>31</sup> This rationale would obviate the need for cost/benefit analysis; after all, why have a requirement to develop an objective, empirical accounting of costs and benefits if the agency may simply override the "quantified" results by conjuring "unquantified" additional factors to reach a new result that supports the agency's proposed regulation? In any event, the cost to consumers would not be a penny per trip. That "quantified" \$53.8 million cost would not simply be borne by air carriers and ticket agents, but ultimately by consumers. That figure also does not include the cost of potentially denying consumers access to new services that may not be implemented if DOT imposes additional regulatory impediments to innovation.<sup>32</sup>

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<sup>27</sup> Exec. Order. No. 12866 § 1(a), 50 Fed. Reg. 51735 (Sept. 30, 1993).

<sup>28</sup> David A. Berg, *DOT's 'Transparency of Airline Ancillary Fees' Rulemaking is Bad Policy and Wrong on the Law*, 27 No. 3 AIR & SPACE LAW. 3, 4-5 (2014).

<sup>29</sup> See PP3 NPRM, *supra* note 18, at 29972, 29993-94.

<sup>30</sup> See *id.*; HDR, U.S. DEP'T OF TRANSP., INITIAL REGULATORY IMPACT ANALYSIS FOR PROPOSED CONSUMER RULEMAKING REGARDING TRANSPARENCY OF AIRLINE ANCILLARY FEES AND OTHER CONSUMER PROTECTION ISSUES 2 (Apr. 16, 2014).

<sup>31</sup> PP3 NPRM, *supra* note 18, at 29993 ("if the value of the unquantified benefits, per passenger, is any amount greater than one cent, and unquantified costs are minimal, then the entire rule is net beneficial. In other words, if passengers are willing to pay, on average, one penny per trip for all eight provisions of the proposal, then the value of the proposal outweighs its costs.").

<sup>32</sup> Berg, *supra* note 28, at 5.

B. DOT'S RELIANCE ON GUIDANCE INTERPRETING  
ITS OWN REGULATIONS

DOT's increasing propensity for large-scale, multi-issue "passenger protections" rulemakings has spawned a related phenomenon: an increasing reliance by DOT on the issuance of detailed supplementary written guidance (often in the form of answers to "frequently asked questions" or "FAQs").<sup>33</sup> While such guidance may not be legally binding, it effectively constitutes notice to regulated parties (for enforcement purposes) of DOT's interpretation of its own regulations.<sup>34</sup> In some cases, such interpretive guidance has appeared to establish new requirements or broaden the scope or applicability of DOT's regulations. For example, in April 2011, DOT issued a final rule<sup>35</sup> that included a new regulation prohibiting any seller of scheduled air transportation from increasing the price of that transportation for a consumer after the consumer has purchased the transportation.<sup>36</sup> In a written response to a series of subsequently issued FAQs, DOT introduced an interpretation of that rule that was not discussed in the final rule: that DOT deems the post-purchase price rule to prohibit a seller of air transportation from "increase[ing] the price of that air transportation, even when the fare is a 'mistake.'"<sup>37</sup> Thus, under this interpretation (which DOT adopted without prior notice and public comment), if, due to a temporary technical problem, a carrier were to advertise a patently erroneous fare, for example, for travel from New York (JFK) to Abu Dhabi for \$187, and hundreds of consumers were to purchase that fare, the carrier would be re-

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<sup>33</sup> See generally, OFFICE OF AVIATION ENFORCEMENT AND PROCEEDINGS, DEP'T OF TRANSP., ANSWERS TO FREQUENTLY ASKED QUESTIONS CONCERNING THE ENFORCEMENT OF THE SECOND FINAL RULE ON ENHANCING AIRLINE PASSENGER PROTECTION, (Aug. 19, 2011; revised Sept. 6, 2011, Oct. 19, 2011, Jan. 11, 2012, and June 15, 2012), [www.dot.gov/sites/dot.gov/files/docs/EAPP-2\\_FAQ.pdf](http://www.dot.gov/sites/dot.gov/files/docs/EAPP-2_FAQ.pdf) [hereinafter EAPP #2].

<sup>34</sup> See *Perez v. Mortgage Bankers Ass'n*, No. 13-1041, slip op. at 3 (U.S. Mar. 9, 2015).

<sup>35</sup> Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110 (Apr. 25, 2011) (codified at 14 C.F.R. pts. 244, 250, 253, 259, and 399).

<sup>36</sup> Prohibition on Post-Purchase Price Increase, 14 C.F.R. § 399.88 (2012) (the only exception DOT recognizes is that carriers may increase the price post-purchase in the case of an increase in a government-imposed tax or fee, but only if the passenger was advised of such a potential price increase before purchasing a ticket).

<sup>37</sup> EAPP #2, *supra* note 33, at 45 (answer to Question #8 in Section IX).

quired to honor those tickets regardless of the cost to the carrier.<sup>38</sup>

DOT's interpretation, which did not entertain the possibility of exceptional circumstances, lacked any acknowledgment of what essentially all carriers and many opportunistic consumers know: that websites exist that specialize in detecting these types of "mistake fares" and alerting consumers about the opportunity to purchase them before the carrier realizes its error and corrects the fare.<sup>39</sup> DOT's guidance suggested a form of strict liability for carriers with respect to "mistake fares," even though it is self-evident that such errors involve no intent to deceive consumers and the party most likely to be harmed by the error is the airline itself, not consumers who purchase tickets knowing that the fare is an error. DOT's position was at odds with FTC policy as well as federal and state law. As the FTC has noted, "there is no federal statute requiring merchants . . . to honor erroneous pricing unless it is misleading or deceptive."<sup>40</sup> DOT is now reviewing the issue of mistaken fares as part of the pending PP3 rulemaking, having belatedly recognized that "increasingly mistaken fares are getting posted on frequent-flyer community blogs and travel-deal sites, and individuals are purchasing these tickets in bad faith and not on the mistaken belief that a good deal is now available."<sup>41</sup>

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<sup>38</sup> Ted Reed, *Etihad: We Will Honor the Ridiculously Low Fares We Mistakenly Offered*, FORBES, Dec. 28, 2014, <http://www.forbes.com/sites/tedreed/2014/12/28/etihad-we-will-honor-the-ridiculously-low-fare-tickets-we-mistakenly-offered/>. This also was the case in 2012 when consumers rushed to buy tickets to Myanmar that were mispriced after a currency devaluation. Evelyn D. Sahr & Drew M. Derco, *Airlines Need Protection Too*, 26 No. 1 AIR & SPACE LAW. 1, at 14 (2013) (citing a \$125 one-way, first-class fare from Yangon, Myanmar to Montreal, Canada, among other examples of fares that were "clearly erroneous (in many cases less than one percent of the correct fare)").

<sup>39</sup> See, e.g., AIRFAREWATCHDOG, [www.airfarewatchdog.com/top-50-fares/](http://www.airfarewatchdog.com/top-50-fares/) (last visited Sept. 9, 2015).

<sup>40</sup> See Sahr & Derco, *supra* note 38, at 16 n.32 (quoting an FTC spokesman as stating that "[h]onest mistakes do happen, and a transaction can be undone"). In addition, "most state laws allow a merchant to correct an inadvertent pricing error." *Id.* at 16.

<sup>41</sup> PP3 NPRM, *supra* note 18, at 29991. In May 2015, DOT issued a notice stating that, as a matter of "prosecutorial discretion," it would not enforce the prohibition against post-purchase price increases when a carrier or ticket agent corrects a mistaken fare, subject to certain conditions. Notice, Enforcement Policy Regarding Mistaken Fares (May 8, 2015), [https://www.transportation.gov/sites/dot.gov/files/docs/Mistaken\\_Fare\\_Policy\\_Statement\\_05082015.pdf](https://www.transportation.gov/sites/dot.gov/files/docs/Mistaken_Fare_Policy_Statement_05082015.pdf).

C. STRIKING THE APPROPRIATE BALANCE BETWEEN MARKET FORCES AND REGULATION

Even assuming DOT has the requisite statutory authority to adopt regulations such as those discussed above, this does not resolve the question of whether it serves the public interest to do so. Highly detailed regulations curb innovation, impose inefficiencies on the marketplace, and mandate a sameness in how carriers and intermediaries structure and market their services to consumers. Such micro-regulation may be justified if necessary to prohibit specific instances of market failure or actual consumer harm. DOT's recent approach, however, appears to resemble the regulatory equivalent of "helicopter parenting": a determination to micro-manage the relationship between air carriers/ticket agents and consumers, whom DOT apparently does not believe to be capable of making reasonably informed purchasing decisions based on comparing product offerings and relying on their own and other consumers' service experiences.<sup>42</sup>

The pervasive role of the Internet in our commerce and society, including in the business of air transport, has substantially enhanced consumers' ability to inform themselves quickly and conveniently about the full range of travel service options that are available to them. Consumers have almost instantaneous access to more and better information, and DOT has recognized that this is a great benefit to consumers.<sup>43</sup> Yet DOT is now seeking to regulate the Internet's role in the advertising and sale of air transportation.<sup>44</sup> What is the evidence that Internet-based innovations in air travel distribution are increasing the risk of con-

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<sup>42</sup> While DOT's "re-regulation" of air transportation has been aggressive in the consumer protection arena, ironically, DOT has failed to act with sufficient urgency when the efficient establishment of foundational regulations is essential to enable market development. For example, the FAA was dilatory in issuing proposed regulations governing the commercial use of small unmanned aircraft. *See generally* Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015). DOT, meanwhile, has failed to explain the reasons for its delay in issuing final charter broker regulations, thereby inhibiting companies from implementing new, innovative business models that may transform the charter market for FAR Part 135 operators. *See generally* Enhanced Consumer Protections for Charter Air Transportation, 78 Fed. Reg. 59,880 (proposed Sept. 30, 2013).

<sup>43</sup> Computer Reservations System (CRS) Regulations, 69 Fed. Reg. 976, 1019 (Jan. 7, 2004); Computer Reservations System (CRS) Regulations, Statement of General Policy, 67 Fed. Reg. 69,366, 69,373 (proposed Nov. 15, 2002).

<sup>44</sup> Berg, *supra* note 28, at 4.

sumer deception? If a carrier or ticket agent holds out a deceptive display regarding fares and services, consumers will recognize the deception and communicate their displeasure, not only via complaints to the service provider and/or DOT, but also to the public, for example, via social media.<sup>45</sup> The ultimate sanction will be the reluctance of consumers to purchase from that air carrier or ticket agent or to rely on that air travel website as a public perception takes hold as to the unreliability or untrustworthiness of that source. That is the power of the Internet. The FTC refers to this as the power of markets to “self-correct.”<sup>46</sup>

The Internet’s other great power in the air transport context is as a driver of innovation.<sup>47</sup> Air transport service providers are among the most innovative in the global economy.<sup>48</sup> These innovations defy the boundaries of DOT’s regulatory framework, which continues to be rooted in a 20th century frame of reference: terms like “ticket agents” and “indirect air carriers” are poor catch-all categories for purposes of understanding the consumer benefits of a meta-search site, such as Google Flight or Kayak, or other companies that are devising new models for brokering air charter services.<sup>49</sup> DOT, instead of focusing on adapting its regulatory regime to harness (or at least not undermine) the potential of the new marketplace, has responded by looking for ways to place innovators within one of DOT’s long-established categories of regulated entities and then to require these companies to conform their new, innovative products to DOT

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<sup>45</sup> Lauren Silverman, *Airline Social Media “Command Centers” Direct Complaint Traffic*, NPR (Sept. 10, 2014), <http://www.npr.org/2014/09/10/347468354/air-line-social-media-command-centers-direct-complaint-traffic>.

<sup>46</sup> *In re Int’l Harvester Co.*, 104 F.T.C. 949, 97 (1984) (App.: Commission Statement of Policy on the Scope of the Consumer Unfairness Jurisdiction (Dec. 17, 1984)).

<sup>47</sup> Berg, *supra* note 28, at 3.

<sup>48</sup> See AIR TRANSPORT ACTION GRP., *The Economic & Social Benefits of Air Transport* 22 (Sept. 2005), [http://www.icao.int/meetings/wrdss2011/Documents/JointWorkshop2005/ATAG\\_SocialBenefitsAirTransport.pdf](http://www.icao.int/meetings/wrdss2011/Documents/JointWorkshop2005/ATAG_SocialBenefitsAirTransport.pdf).

<sup>49</sup> Paul Ruden, *The Travel Agency Perspective: Ancillary Service Transactability Will Benefit Consumers and Competition*, 27 NO. 3 AIR & SPACE LAW. 11, 11–12 (2014). DOT has proposed to regulate meta-search sites such as Google Flight and Kayak under a new definition of “ticket agent,” even though these companies do not sell tickets but rather provide a quick, user-friendly source of aggregated information about schedules and fares and the ability for a consumer to click-through to the website of a particular travel service provider without any cost to the consumer or obligation to purchase. PP3 NPRM, *supra* note 18, at 29974.

rules that were adopted decades earlier.<sup>50</sup> It is understandable that a regulatory agency cannot adapt and reform itself with the dynamism of start-up private sector companies. But the problem is not just one of nimbleness and responsiveness: it is also one of focus. DOT is focused on saying “stop” and “don’t do this” and “do it this way and only this way,” with little apparent concern that these strictures, imposed in the cause of protecting consumers, may actually be harming consumers by denying them a broader range of innovative new service options and the greater intensity of competition that such innovation can deliver.

In a recently published article, Robert Kneisley, Associate General Counsel of Southwest Airlines, sounded a warning against what he calls the “regulatory ratchet.”<sup>51</sup> Kneisley’s argument is that regulations, once adopted, are rarely revised or eliminated.<sup>52</sup> They often remain in the Code of Federal Regulations for years, even decades, after market forces have changed the circumstances under which the rules were adopted.<sup>53</sup> He argues that new regulations must be weighed against their costs and advocates a fundamental paradigm shift in terms of agencies’ accountability for the continuing net benefit of their regulations.<sup>54</sup> These regulations unquestionably impose ongoing costs on airlines, ticket agents, and consumers,<sup>55</sup> but it is unknown whether these regulations deliver benefits and, if so, whether those benefits sufficiently outweigh their costs. Kneisley advocates the adoption of “sunset” provisions that would require an agency to conduct periodic rulemaking proceedings (on the record, with an opportunity for public comment) to determine whether a rule should be retained, modified, or eliminated.<sup>56</sup>

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<sup>50</sup> Ruden, *supra* note 49, at 11–13.

<sup>51</sup> Robert W. Kneisley, *Fixing the Regulatory Ratchet*, 27 No. 1 AIR & SPACE LAW. 4, 4 n.1 (2014).

<sup>52</sup> *Id.* at 4.

<sup>53</sup> *Id.* at 6.

<sup>54</sup> *Id.* at 4, 6.

<sup>55</sup> *Id.* at 4.

<sup>56</sup> *Id.* at 6–7. Presidential administrations periodically direct agencies to conduct reviews of their regulations. *See, e.g.*, Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822–23 (Jan. 21, 2011) (Obama administration order for agencies to review and potentially eliminate unnecessary regulations). Such reviews, however, have not resulted in a fundamental change in DOT’s approach to regulation.

### III. DOT'S "AGGRESSIVE" ENFORCEMENT APPROACH

In recent years, DOT's enforcement office has adopted a "very, very aggressive"<sup>57</sup> approach to investigating and initiating legal action against air carriers and ticket agents for a wide range of alleged violations of DOT's expanding body of regulations.<sup>58</sup> The staffing of DOT's Office of Aviation Enforcement and Consumer Protection has roughly doubled in size over the past fifteen years.<sup>59</sup> As of September 2014, its legal function, the Office of Aviation Enforcement and Proceedings (C-70), had a twenty-person staff, including seventeen attorneys, while the Aviation Consumer Protection Division (C-75) also had a twenty-person staff.<sup>60</sup> DOT has deployed these additional resources in a concerted effort to increase the number and range of its investigations and enforcement activity.<sup>61</sup> In addition, DOT has extracted substantially inflated amounts of civil penalties from its targets.<sup>62</sup> As former DOT Secretary Ray LaHood reported, "[u]nder the Obama Administration, the Department has aggressively enforced its airline consumer rules. Between 2009 and 2012, the Department's Aviation Enforcement Office issued 203 civil penalties totaling \$16.5 million in fines, compared to 105 penalties and \$8.8 million in fines the previous four years."<sup>63</sup>

DOT's staff of enforcement attorneys have discretion to determine the cases they wish to investigate and how aggressively they

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<sup>57</sup> U.S. Dep't of Transp., Transcript of First Meeting of Advisory Committee on Aviation Consumer Protection (June 28, 2012), 14–15 (opening statement of Robert Rivkin, General Counsel, U.S. Department of Transportation); *see also* Press Release, U.S. Dep't of Transp., Lowest Numbers of Tarmac Delays on Record in 2014 (Feb. 10, 2015) (quoting DOT Secretary Anthony Foxx: "We have aggressively enforced, and will continue to aggressively enforce, our tarmac delay rules"); Press Release, U.S. Dep't of Transp., Airline Consumer Protection (Jan. 31, 2013) ("the Department has aggressively enforced its airline consumer rules") [hereinafter *Airline Consumer Protection Press Release*].

<sup>58</sup> U.S. Dep't of Transp., Transcript of First Meeting of Advisory Committee on Aviation Consumer Protection (June 28, 2012), 14–15.

<sup>59</sup> Anne Hammond et al., U.S. Dep't of Transp. Aviation Consumer Prot. Div., Powerpoint Presentation to Association for Airline Passenger Rights in Washington, D.C. (Sept. 26, 2014).

<sup>60</sup> *Id.* By contrast, in 1988, the Office of Aviation Enforcement and Proceedings had a staff of eight attorneys, while the Consumer Affairs Division had thirteen employees. GEN. ACCT. OFFICE, DOT AIRLINE INDUSTRY OVERSIGHT, STATEMENT OF KENNETH M. MEAD, ASSOCIATE DIRECTOR, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, BEFORE SUBCOMMITTEE ON TRANSPORTATION, SENATE COMMITTEE ON APPROPRIATIONS (Apr. 21, 1988), 7.

<sup>61</sup> Airline Consumer Protection Press Release, *supra* note 57.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

wish to pursue civil penalties,<sup>64</sup> as well as the amount of penalty to be sought. In recent years, however, prosecutorial restraint has become less evident at DOT, even in cases in which the alleged violation was indisputably inadvertent, the evidence of actual consumer harm non-existent, or in cases involving a carrier or ticket agent of small size and limited financial resources. DOT's ability to generate a large number of consent orders and a substantial total amount of civil penalties is attributable not only to the broad scope of detailed, exacting regulations, but also due to the restrained response of air carriers and ticket agents, which are naturally reluctant to litigate against their regulator.<sup>65</sup> Consequently, DOT has been able to establish precedent, the legal validity of which has not been tested in court.

DOT recently appears to be seeking to establish what may effectively be a strict liability regime for certain types of alleged violations. While DOT eschews the term "strict liability," it seems appropriate when DOT seeks to hold carriers and ticket agents culpable even in cases in which there is no evidence of either intent to deceive or actual consumer harm. Holding carriers lia-

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<sup>64</sup> In the PP3 NPRM, DOT proposes to amend "the tarmac delay rule to clarify that the Department may impose penalties for tarmac delay violations on a per passenger basis." PP3 NPRM, *supra* note 18, at 29992. Carriers have consistently disputed DOT's assertion that it has statutory authority to assess civil penalties on a per-passenger basis. DOT claims that "[i]t has long been the Department's policy that each consumer affected by an unlawful carrier practice is a separate violation." PP3 NPRM, *supra* note 18, at 29992. Significantly, however, DOT does not cite any statutory language or legislative history to support its position. Airlines for America (A4A), by contrast, roots its opposition to DOT's proposal in the statutory text, legislative history, and case law. As A4A points out, the applicable statutory provision authorizes DOT to assess civil penalties on a per-violation basis, with a "separate violation" being deemed to occur "for each day" or "if applicable, for each flight involving the violation." Comments of Airlines for America, Sept. 29, 2014 (Docket DOT-OST-2014-000056), at 29 (citing 49 U.S.C. § 46301(a)(2)) [hereinafter A4A Comments]. This legally questionable effort (under the guise of providing a "clarification") to elude clear statutory language is intended to enable DOT to inflate exponentially the maximum amount of a potential civil penalty for a tarmac delay violation. As A4A pointed out, under DOT's proposal, in the case of a tarmac delay involving a B747-400 aircraft carrying 416 passengers, the maximum penalty amount would be \$11.44 million instead of \$27,500 (the maximum amount authorized under the statute per flight or per day). *Id.* at 27–28.

<sup>65</sup> Delta Air Lines recently bucked this trend when it refused to settle a case in which DOT is alleging that Delta violated DOT's codeshare disclosure regulations. The case is now pending before a DOT administrative law judge. *See* Complaint, Delta Air Lines, Inc. Violations of 14 C.F.R. Part 257 and 49 U.S.C. § 41712 Enforcement Proceeding (Dec. 23, 2014) (DOT-05T-2014-0229).



ble for mistaken fares is an example of this trend;<sup>66</sup> another is a recently issued consent order involving a foreign air carrier, Lufthansa (LH).<sup>67</sup>

In that Order, LH agreed to pay a \$30,000 civil penalty (\$15,000 of which was due immediately with the balance to be forgiven based on subsequent compliance).<sup>68</sup> The Order, for those who are familiar with such DOT documents, reads in a formulaic way, which masks the fact that the Order establishes what appears to be a new precedent<sup>69</sup> whereby a carrier or ticket agent may be deemed to have violated the prohibition against unfair or deceptive practices based on an inadvertent error, even in the absence of any evidence of intent to deceive or actual consumer harm.<sup>70</sup>

The facts of the case are straightforward: Due to a temporary malfunction on LH's website, certain fares that were identified in response to a consumer search were not available for purchase on the website.<sup>71</sup> This was not a "bait and switch" scenario in which a carrier is accused of having advertised a low fare that was not actually available for purchase (either because the fare was illusory or due to a lack of inventory for sale) in an effort to lure consumers into purchasing a higher, but available, fare. In LH's case, the fare was correct and inventory was available for purchase.<sup>72</sup> Indeed, inventory remained available for purchase at all times, both directly from LH by phone and through ticket agents.<sup>73</sup> LH remedied the temporary website malfunction promptly, but while it was in effect, a single con-

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<sup>66</sup> 14 C.F.R. § 399.88.

<sup>67</sup> See Lufthansa German Airlines Violations of 49 U.S.C. § 41712, Dep't of Transp., Order 2015-1-17, Docket 05T 2015-0002 (Jan. 22, 2015).

<sup>68</sup> *Id.* at 3.

<sup>69</sup> In the LH Order, DOT "holds that providing erroneous and misleading information in connection with fare advertisements to be a violation of 49 U.S.C. 41712." *Id.* at 1. DOT cites one previous airline consent order from 2008 and an Industry Letter issued by the Secretary of Transportation to the airline and travel agent community in 1994 as precedent to support this statement. *Id.* at 1 n.1. Those cited materials support the proposition that the dissemination of "misleading information" may violate section 41712, but make no reference whatsoever to "erroneous . . . information" or the proposition that an air carrier (or ticket agent) could be deemed to have violated section 41712 for an unintentional act or omission that actually redounds to the detriment of the carrier. *Id.* at 1 (emphasis added).

<sup>70</sup> *Id.* at 2 n.2.

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

sumer complained to DOT that she could not book the fare on LH's website.<sup>74</sup> When LH became aware of the situation, it offered to sell the fare to the consumer and insisted that if the consumer had called LH (as its website encourages consumers to do) it would have sold her the fare.<sup>75</sup> Thus, far from being the type of "bait and switch" scenario DOT has long prohibited, the website malfunction was harmful to LH, temporarily undermining the airline's ability to sell tickets.

DOT, despite a lack of evidence of intent to deceive on LH's part or actual consumer harm, initiated enforcement action. LH ultimately (and reluctantly) agreed to settle the matter rather than litigate against its regulator.<sup>76</sup> In doing so, LH continued to dispute the legal basis for DOT's action.<sup>77</sup>

The LH Order appears to impose a new, strict liability standard for technical malfunctions affecting the operation of a carrier's (or ticket agent's) website, even where there is no evidence of intent to deceive or actual consumer harm, as is generally required under the FTC's interpretation of its "unfair and deceptive practices" authority. This standard is one that no organization (certainly not a government agency) could be certain of satisfying: that its website will never (even on a temporary basis) fall victim to a technical malfunction.

#### IV. CONCLUSION

DOT, in recent years, has expanded dramatically the scope of its regulations and adopted an avowedly aggressive approach to enforcement. This has imposed an unprecedented level of compliance complexity on regulated parties, particularly in an environment in which any violations or even minor compliance lapses may be subject to enforcement action by DOT in pursuit of ever larger civil penalty amounts. Recent DOT actions (in both the rulemaking and enforcement contexts) raise questions about whether DOT has exceeded the scope of its statutory authority. Those questions may ultimately be adjudicated in court. Given the reluctance of regulated parties to litigate against DOT, however, such legal challenges to DOT action are rare. Before DOT proposes a new rule or initiates enforcement action

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 3.

<sup>77</sup> *Id.* ("Lufthansa . . . disagrees with [DOT's] view that a technical malfunction of its website constitutes a violation of 49 U.S.C. 41712.").

in unprecedented ways, it should consider carefully the legal foundation for its proposed action. While DOT's statutory authority is broadly worded, it remains limited, both by its own terms and also by Congress's direction to DOT to "plac[e] maximum reliance on competitive market forces and on actual and potential competition."<sup>78</sup> In promulgating new regulations, DOT should not preempt the generally "self-correcting" marketplace unless it has developed a detailed record, including an objective analysis demonstrating that the quantified benefits of DOT's proposed regulations exceed quantified costs by a substantial margin, recognizing that those costs are likely to be borne by consumers and that the imposition of regulations may undermine market innovations that would benefit consumers.

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<sup>78</sup> 49 U.S.C. § 40101(a)(6).