

## **ASSOCIATION OF TRANSPORTATION LAW PROFESSIONALS**

### **UPDATE ON DOJ TASK FORCE "TARGETING RED TAPE THAT HINDERS FREE MARKET COMPETITION" IN THE AIRLINE INDUSTRY**

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Although the U.S. airline industry was technically "deregulated" in 1978, the fact remains of course that domestic (and international) air carriers are subject to a slew of regulatory requirements, and not those limited to safety of the traveling public. The last Administration adopted and pursued a highly invasive regulatory regime, going as far as killing two JetBlue Airways initiatives and, as a result of one, relegating ultra-low-cost carrier Spirit Airlines to unnecessarily challenging and potentially fatal economic conditions.

The new Administration claims to be pursuing less airline industry regulation, but these are early days and only time will tell what regulatory burdens, if any will be eased. In this regard, on March 27, 2025, the new Administration's Department of Justice, Office of Public Affairs, announced the Department's launch of "an Anticompetitive Regulations Task Force" intended to "eliminat[e] . . . anticompetitive state and federal laws and regulations that undermine free market competition and harm consumers, workers, and businesses. The announcement explained that "[r]egulatory capture is a well-studied phenomenon in which agencies become 'captured' by special interests and big businesses, rather than serving the interests of the American people." For example, "regulations can increase compliance costs, preventing businesses from competing on a level playing field with powerful corporations." With regard to the transportation industry, DOJ stated:

Laws and regulations in areas like airlines, rail, and ocean shipping can grant antitrust immunities, outright monopolies, or safe harbors for conduct that undermines competition. As a result, Americans pay more for travel, fuel, and a variety of other products.

DOJ afforded the public until May 27, 2025 to submit comments at [www.Regulations.gov](https://www.Regulations.gov) (Docket No. ATR-2025-0001).

Major U.S. airlines and their trade associations (Airlines for America and the International Air Transport Association) timely submitted comments to DOJ, which simultaneously praised prior federal government policies aimed at increasing airline competition while facilitating Open Skies and collaboration arrangements; and warned against further governmental efforts to stymie the ability of airlines to compete vigorously but also profitably.

#### **The Benefits of Antitrust Immunity**

One large carrier touted that "antitrust immunity ('ATI') provides many procompetitive and pro-consumer benefits (including furthering American foreign policy goals) in a unique industry that does not permit cross-border mergers," but lamented that "other regulatory restrictions create barriers for U.S. airlines competing with foreign competitors." The airline added:

ATI importantly counteracts [national security and related limitations on foreign airline ownership] by facilitating procompetitive business ventures across international partner airlines in a system governed by statute and carefully vetted through the [FAA's] International Aviation Safety Assessment program.

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ATI lays the foundation for a pair (or group) of international airlines to establish joint business agreements ("JBAs"), oftentimes also referred to as joint ventures ("JVs") or immunized "metal neutral" alliances. Airlines may seek ATI – or legally sanctioned permission – from DOT to collaborate and create an integrated, international alliance network. These antitrust-immunized JBAs allow member to collaborate on sales, marketing, pricing, revenue management, scheduling, and capacity decisions, thereby creating a more seamless travel experience for our customers.

In addition, "ATI . . . helps airlines during times of uncertainty, like the COVID-19 pandemic, by delivering value to the U.S. economy," and "U.S. airlines were able to utilize their ATI with foreign partner carriers to enhance aviation connectivity to facilitate a speedy economic recovery."

### **Undue Restrictions on International Air Travel**

The legacy air carrier went on to state that "Other regulatory restrictions on international air travel – including foreign airspace closures, overflight restrictions, and subsidies – impede, if not outright prevent, U.S. airlines from flying in or crossing certain territories. Some of these restrictions impact large swaths of airspace and access to destinations beyond, challenging the ability of . . . U.S. airlines to compete with foreign carriers that may not face the same limitations, while others prevent the full exercise of market freedoms guaranteed by applicable Open Skies agreements."

Furthermore, international air service is currently negatively "impacted by a restriction on use of Russian airspace to transit to other parts of the world, while airlines from other countries are still able to use Russian airspace to fly to the U.S."

### **Removal of Anticompetitive DOT Regulations**

The airlines also joined Airlines for America "in supporting the Department of Transportation's ('DOT') parallel deregulation efforts to remove anticompetitive and prescriptive DOT regulations that dictate how airlines must service their customers." This argument was also made by another large air carrier, which criticized DOT's April 26, 2024 Final Rule on refunds and other protections for consumers of air travel in response to COVID. The airline stated that DOT's Rule "was an exercise in regulatory overreach that imposed significant costs on industry and impacted competition." Despite significant efforts by the airline industry to compensate passengers impacted by the pandemic, "DOT opted to regulate away the different and varied approaches of the competitors and shifted the burden of underwriting risk entirely to the industry." The carrier added that "The refund rules manipulate the marketplace by essentially requiring airlines to provide communicable disease travel insurance (travel credits or vouchers)." Furthermore:

Part of this rule also mandated that when an airline changes a flight number (but nothing else about the itinerary) that flight must be considered canceled and eligible for a refund. Carriers change flight numbers for operational or commercial reasons that have no material impact on

the customer. This rule only confuses and inconveniences passengers, particularly those who do not monitor their pre-flight emails and are thus unaware that the government has mandated that they receive a refund instead of a flight with a new number. This rule does not prevent an unfair or deceptive practice, in fact, it may create one; an excellent example of regulatory overreach which distorts the market.

### **A Contrarian Voice**

Juxtaposed against the airline industry's support for ATI and criticism of DOT overreach, are the comments of interested members of the public which faulted the "current regulatory framework governing airline distribution" as "precisely the kind of regulatory capture that prevents American consumers from enjoying the full benefits of competitive markets in air transportation." The commenter stated:

The American airline industry exemplifies how unchecked consolidation creates de facto monopolistic conditions that harm consumers and entrepreneurs alike. The four largest carriers now control approximately 68% of the domestic market, a textbook example of how special interests and big businesses capture markets at the expense of the American people. This consolidation directly undermines President Trump's vision of an economic Golden Age by allowing dominant carriers to impose anti-competitive distribution practices that prevent smaller businesses from competing on a level playing field.

The commenter objected to "restrictive conditions on how" airline "content is distributed through indirect channels," including:

**Marketing Restrictions:** "Major US carriers impose conditions that prevent online travel agents from advertising their content on metasearch sites. Simultaneously, they require metasearch platforms to agree not to display competing online travel agents' offers alongside airline content."

**Content Withholding:** "Airlines selectively withhold their best fares and ancillary fee information from intermediaries, forcing consumers to visit multiple websites to fully understand pricing options."

**GDS Surcharges:** "Many airlines impose surcharges on bookings made through Global Distribution (GDSs), artificially raising the cost of tickets booked via online travel agents compared to direct bookings."

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So, the public debate on the proper role of U.S. regulators on the airline industries continues unabated by the change in presidential administrations. Now that the DOT and DOJ have almost fully transitioned into the new administration, time will tell whether long-pending regulatory issues (and problems) will be effectively addressed or left to yet another administration in the fullness of time.