BEFORE THE SECRETARY OF TRANSPORTATION
U.S. DEPARTMENT OF TRANSPORTATION

Anthony Foxx
Secretary of Transportation
U.S. Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590-0001

PETITION FOR RULEMAKING:
LIMITATION ON CHANGE FEES FOR INTERNATIONAL FLIGHTS

SUBMITTED BY:
FLYERSRIGHTS.ORG

February 11, 2015

Pursuant to § 553(e) of the Administrative Procedure Act\(^1\) and 49 C.F.R. 5.11, FlyersRights.org and the undersigned hereby petition the Department of Transportation (DOT) to regulate change fees for foreign air transportation under 49 U.S.C. §§ 41501 and 41509. A corollary of the right to petition in § 553(e) is the right to receive reasons if the petition is denied. The Supreme Court recently reaffirmed limited judicial review for the denial of a rulemaking petition and for the adequacy of the reasons given.\(^2\)

\(^1\) 5 USC § 553(e).
I. Introduction

FlyersRights.org is the largest nonprofit airline passenger organization with over 50,000 members and supporters nationwide. It was the principal advocate of the 2009 Three Hour Rule ending tarmac confinements, for truth in scheduling regulations by the Department of Transportation, and for the 2012 inclusion of airline passenger rights provisions in the 2012 FAA Modernization and Reform Act. It publishes a weekly online newsletter, operates a toll free hotline for airline passengers, and advocates for their rights and interests. FlyersRights was founded by Kate Hanni in 2007 after she, along with thousands of others, was stranded on the tarmac for over 9 hours.

In 1958, Congress enacted the Federal Aviation Act creating the Federal Aviation Administration and continuing the Civil Aeronautics Board while redefining their responsibilities. Congress fully deregulated the domestic airline industry through the Airline Deregulation Act of 1978 (ADA). However, the passage of the International Air Transportation Competition Act of 1979 (IATCA) did not fully deregulate foreign air transportation but instead left intact regulatory provisions from the Federal Aviation Act. The Civil Aeronautics Board was eventually disbanded and its remaining authority and responsibilities transferred to the Office of the Secretary within DOT. In 1994, Congress revised and codified existing transportation and aviation law. Every airline was required to establish and maintain “reasonable prices, classifications, rules and practices related to foreign air transportation.” By definition, “price” includes any “fare or charge” for air transportation. Every airline that engaged in foreign air transportation was required to file tariffs with the DOT. DOT could reject any tariff that was not consistent with the statutory requirements or DOT regulations. DOT could conduct a hearing, either on its own initiative or acting on a complaint, to determine

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3 See www.flyersrights.org.
10 49 U.S.C. § 41504(a) and (b).
11 49 U.S.C. § 41504(c).
whether a tariff was lawful.\(^{12}\) DOT adopted extensive regulations to implement this congressional plan.\(^{13}\)

In selectively exempting U.S. and foreign air carriers from international passenger tariffs, the DOT acknowledged a continuation in the "evolution of a policy where we rely on market forces rather than continual government oversight to set prices for air transportation."\(^{14}\) In providing international passenger tariff exemptions, DOT affirmed that this would "not materially lessen [DOT's] ability to intervene in passenger pricing matters should it be necessary."\(^{15}\) Further, the DOT stated that it "has always had the statutory authority to take action directly against unfiled passenger fees and rules."\(^{16}\) DOT confirmed that under 49 U.S.C. §§ 41501 and 41509, air carriers engaged in foreign air transportation must "establish reasonable rates and rules" and that DOT has the authority to "cancel a rule that is unreasonable after notice and hearing."\(^{17}\) However, in the more than "34 years since the passage of the Airline Deregulation Act," DOT has "declined to use this authority to strike down fare rules in foreign air transportation."\(^{18}\)

DOT also has authority under § 41712 to prohibit any "unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."\(^{19}\) This has been one of DOT's most noteworthy powers and has been used extensively to regulate air carriers, ticket agents, and other entities involved in air transportation.\(^{20}\) FlyersRights would like to see DOT take similar actions under the agency's § 41501 authority.

\(^{13}\) See 14 C.F.R. § 221.
\(^{15}\) Id.
\(^{16}\) Id.
\(^{18}\) Id.
\(^{19}\) 49 U.S.C. § 41712.
FlyersRights.org petitions DOT to exercise its statutory authority under §§ 41501 and 41509 to impose reasonable regulations limiting the extent of change fees in foreign air transportation.

II. Massachusetts v. E.P.A. and DOT’s Statutory Obligation and Authority

A. The U.S. Supreme Court in Massachusetts v. E.P.A. held that a federal agency cannot refuse to regulate matters within its regulatory mandate for policy or political reasons

In 1999, a group of private organizations filed a rulemaking petition asking the EPA to regulate “greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.” In 2003, EPA entered an order denying the petition stating that: “(1) the Clean Air Act does not authorize EPA to issue regulations addressing climate change; and (2) that even if EPA had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time.” The U.S. Supreme Court rejected these arguments, holding instead that EPA did have authority to issue such regulations and that EPA could avoid taking regulatory action only if it determined that greenhouse gases do not contribute to climate change or if it provided some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. The Court took the standard EPA was required to use during rulemaking proceedings and required it to apply that standard in deciding whether to institute rulemaking proceedings in the first place.

The Court disposed of the authority issue first. The Clean Air Act in relevant part “provides that EPA ‘shall by regulation prescribe … standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Since the Clean Air Act

22 Id. at 511.
23 Id. at 497.
25 Massachusetts v. E.P.A., 549 U.S. at 528 (citing 42 U.S.C. § 7521(a)(1)).
defines “air pollutant” as including any substance emitted or entering the atmosphere, the statute is unambiguous and EPA possesses authority to regulate greenhouse gas emissions.\textsuperscript{26}

The Court next disposed of EPA’s second reason for denial. The Clean Air Act language above does condition the exercise of EPA’s authority on the Administrator’s judgment. However, that judgment only relates to whether an air pollutant “cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.”\textsuperscript{27} “Put another way, the use of the word ‘judgment’ is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.”\textsuperscript{28}

“If EPA makes a finding of endangerment, the Clean Air Act requires the Agency to regulate emissions of the deleterious pollutant from new motor vehicles.”\textsuperscript{29} EPA has significant latitude as the how to go about regulating the pollutant but once it has responded to a rulemaking petition, its reasons for action or inaction must conform to the authorizing statute.\textsuperscript{30} EPA could avoid taking further action only if it either determined that greenhouse gases pose no endangerment or if it provided a reasonable explanation as to why it would not make that determination in the first place.\textsuperscript{31} To the extent that “this constrains agency discretion … [it] is the congressional design.”\textsuperscript{32}

Instead of complying with its “clear statutory command,” EPA instead offered a “laundry list of reasons” not to regulate.\textsuperscript{33} The Court acknowledged that while the judiciary has “neither the expertise nor the authority” to evaluate the merits of such policy judgments, it is immaterial as “they have nothing to do with whether greenhouse gas emissions contributed to global warming.”\textsuperscript{34} For the EPA, the statutory question was whether sufficient information existed to make an endangerment finding, not whether policy reasons exist to not make that finding.\textsuperscript{35}

\textsuperscript{26} See id. at 528-29.  
\textsuperscript{27} Id. at 532.  
\textsuperscript{28} Id.  
\textsuperscript{29} Id. at 533.  
\textsuperscript{30} See id.  
\textsuperscript{31} Id.  
\textsuperscript{32} Id.  
\textsuperscript{33} Id.  
\textsuperscript{34} Id. at 524.  
\textsuperscript{35} Id.
Court suggested that EPA would need to present a reason it “could not” make a statutory endangerment finding, rather than rely on policy reasons why it would “prefer not” to do so.\textsuperscript{36}

**B. DOT’s statutory authority and obligations require it to regulate and prohibit unreasonable, unfair and deceptive international change fees**

The situation addressed in *Massachusetts v. E.P.A.* is analogous in many ways to DOT’s refusal to provide any regulation of prices in foreign air transportation. § 41501 provides that every “air carrier and foreign air carrier shall establish, comply with and enforce … reasonable prices, classifications, rules, and practices related to foreign air transportation.”\textsuperscript{37} “Price” includes any “rate, fare, or charge.”\textsuperscript{38} The Secretary “may conduct a hearing to decide whether a price … is lawful” and if after the hearing the Secretary “decides that the price … is or will be unreasonable” then the Secretary may “prevent the use of the price.”\textsuperscript{39} The Secretary may also, with or without a hearing, “prevent the use of a price … when the Secretary decides … [it] is in the public interest.”\textsuperscript{40} The combination of §§ 41501 and 41509 creates a similar set of statutory authority and obligations as § 41712, under which DOT has regulated extensively to combat unfair and deceptive practices.

While DOT’s regulatory authority over prices is discretionary this it is not a roving license to ignore the statutory text. DOT must determine whether or not the price of fares and fees charged in foreign air transportation are “reasonable” and exercise its regulatory authority when they are not. DOT can only avoid taking regulatory action if it determines that the prices are “reasonable” or if it can provide a valid explanation as to why it cannot or will not make that determination. The congressional design of the statute was to constrain DOT discretion. It does this by imposing a mandate of reasonableness on prices in foreign air transportation. DOT has latitude in how to address unreasonable prices and fees, but it must address them.

\textsuperscript{36} Rosen, *supra* note 24, at 7-8.  
\textsuperscript{37} 49 U.S.C. § 41501.  
\textsuperscript{38} 49 U.S.C. § 40102(a)(39).  
\textsuperscript{39} 49 U.S.C. § 41509(a)(1).  
\textsuperscript{40} 49 U.S.C. § 41509(a)(2).
DOT has offered policy arguments for not regulating, but regardless of their merits such policy judgments are immaterial as they have nothing to do with whether or not a fare or fee is reasonable. For DOT, just as in Massachusetts v. E.P.A., the statutory question is whether sufficient information exists to make a reasonableness finding, not whether policy reasons exist to ignore their statutory obligations and abdicate their responsibilities. As DOT does not contest that it has the authority to regulate ancillary fees for foreign air transportation, it must regulate such fees where they are found to be unreasonable.

Further, in any attempt to avoid making a determination of reasonableness, any argument that limiting excessive ancillary fees was not intended by Congress and therefore outside the purview of the DOT is incorrect. The U.S. Supreme Court has held that because “a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.”

Finally, the Court in Massachusetts reemphasized the broad discretion afforded to government agencies under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. in choosing how best to marshal their limited resources and personnel to carry out their delegated responsibilities. However, the Court acknowledged key differences surrounding the denial of a rulemaking petition. “Refusals to promulgate rules are thus susceptible to judicial review, though such review is ‘extremely limited’ and ‘highly deferential.’”

III. Reasonableness

A. DOT currently lacks any regulatory scheme for regulating or prohibiting unreasonable fees for international air travel

In an antitrust price-fixing case brought against foreign airlines in U.S. District Court, neither the district court nor any party could find evidence that the DOT ever disapproved of an

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41 DOT has a general belief in using the “marketplace” and “pro-competitive policies” when dealing with prices, reasonable or not, in foreign air transportation. See Pevsner Denial, supra note 17, at 5.
43 Id. at 527.
44 See id.
45 Id. at 527-28.
international rate or fare based on its pricing level or reasonableness.\textsuperscript{46} The court found no evidence “that the DOT has ever rejected as unreasonable any international air fare” and that with respect to unfiled air fares the agency had “effectively abdicated its authority.”\textsuperscript{47} This lack of DOT regulation also extends to additional fees such as fuel charges, with the DOT announcing that it “would not ‘effectively monitor’ fuel surcharges” and the court finding “no evidence of any ongoing regulation.”\textsuperscript{48} Finally, DOT has itself stated that in the more than “34 years since the passage of the Airline Deregulation Act,” it has “declined to use this authority to strike down fare rules in foreign air transportation.”\textsuperscript{49}

To compound the harm caused by DOT’s abdication of authority and responsibility in ensuring reasonable prices and fees in foreign air transportation, there is no private right of action in order to enforce the provisions of 49 U.S.C. § 41501.\textsuperscript{50} Federal preemption also denies consumers state law remedies.\textsuperscript{51} Therefore, the onus is solely on DOT to act to protect consumers. DOT has not previously regulated prices in foreign air transportation. We urge them to rectify this mistake.

\textbf{B. What is reasonable?}

The hardest question to answer in this petition is defining what exactly is reasonable for change and cancellation fees in foreign air transportation. Airlines may argue that any and all fees are reasonable at any level and DOT, by declining to regulate at all in this arena, has apparently accepted that premise.

In life there are many eventualities that consumers cannot expect or plan for. They should not be left holding the bag while airlines charge exorbitant fees unrelated to the actual costs of the passengers’ actions. Neither should airlines needlessly suffer financially because of their passengers’ actions. Therefore, reasonableness, for the purposes of § 41501, should be tied to the actual cost or loss incurred by an air carrier when a passenger changes a flight.

\begin{footnotesize}
\textsuperscript{47} Id. at *10-12.
\textsuperscript{48} Id. at *13.
\textsuperscript{49} Pevsner Denial, supra note 17, at 5.
\textsuperscript{51} 49 U.S.C. § 41713.
\end{footnotesize}
In most instances, the airline bears no burden from passengers changing flights, quite the opposite. The passenger typically must pay the differential in price for the new flight along with a hefty change fee. As the costs associated with shifting a passenger’s electronic reservation from one flight to another are minimal, the effect of changing that passenger from what is typically a cheaper to a more expensive ticket, coupled with a change fee, amounts to a windfall profit for the airline. As a result, such change fees end up being an unfair and unreasonable profit source for airlines, not a reasonable charge to cover the actual costs.

Furthermore, there is no deterrence rationale strong enough for a passenger changing flights that would necessitate the exorbitant change fees we currently see. However, airlines have made deterrence-based arguments for higher change fees and at least one airline CEO has stated that change fees are in fact intended to discourage changes. Airlines have argued that lower change fees could lead to consumers speculatively buying tickets far ahead of potential travel, but since airlines charge the differential in ticket price along with the change fee this would not in fact be a beneficial practice for consumers. Airlines have also argued that another cost necessitating high change fees is the loss of revenue airlines will experience if consumers purchase regular fares instead of high priced flexible or refundable fares. Once could argue this would force airlines to increase regular fares to compensate. However, as we address in the next section, refundable/flexible fares are already a minority of tickets purchased and priced so comparatively high that a reduction in change fees would have little to no impact on their sale. Furthermore, Southwest continues to successfully charge no change fees without succumbing to the plethora of negative consequences described by others in the airline industry.

There is, to some minor extent, an opportunity cost for airlines when a person makes a reservation, as it deprives the airline of the opportunity to sell that seat to another. If the passenger ultimately returns the seat by changing flights, the airline is free to sell it to someone else but now has a smaller window within which to make that sale. However, a passenger who changes flights is still flying with that airline, just in a different seat (and after adjusting for the difference in fares and a change fee, paying significantly more). When customers make changes far in advance, airlines can usually resell their original seat while still charging them the fare

differential and a change fee.\textsuperscript{53} When changes are made several weeks or more in advance there is really no rationale for a change fee at all.

In reality, change fees no longer bear any resemblance to a reasonable approximation of the cost incurred by the airlines but exist merely as a tool to gouge consumers faced with the unpredictable nature of life. The CEO of American Airlines stated that demand is “what we should base our pricing on, not our cost structure.”\textsuperscript{54} The standard change fee for the major U.S. airlines has progressively gone up in the last 15 years from “$50, then $75, then $100” before hitting $150 in 2008.\textsuperscript{55} In April of 2013, the major U.S. airlines raised their change fees again so that the average fee to change international tickets hovered around $300.\textsuperscript{56} At the high end, on some discounted first class international tickets, American Airlines charged $750.\textsuperscript{57} From 2007 to 2014, airline revenue from cancellation and change fees went from $915 million to over $2.9 billion, an increase of more than 225 percent.\textsuperscript{58} Accordingly, current international change and cancellation fees (often in excess of $300) should be considered \textit{per se} unreasonable given that a dozen years ago airlines charged fees of $25-50 and there has been no material increase in the costs associated with flight change to justify the astronomical growth of these fees.

\textbf{C. Refundable fares and travel insurance are not real alternatives}

A common refrain, both within the airline industry and from DOT,\textsuperscript{59} is that passengers concerned with the possibility of having to change or cancel a flight are able to purchase fully refundable tickets for a higher fare that allow them to avoid change and cancellation fees. The DOT has reiterated “that the lower price for nonrefundable tickets is a trade-off for passengers agreeing to a restriction that allows a carrier to manage its inventory and cash flow.”\textsuperscript{60} However,

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{54}] Thomas Frank, \textit{Airline profits soar yet no relief for passengers}, USA Today, Jan. 27, 2015, \texttt{available at http://www.usatoday.com/story/news/2015/01/27/airline-profits-soar-passengers-fuel/22395509/}.
\item[\textsuperscript{56}] Reed, \textit{supra} note 52.
\item[\textsuperscript{57}] \textit{Id.}
\item[\textsuperscript{59}] See Pevsner Denial, \textit{supra} note 17, at 5.
\item[\textsuperscript{60}] \textit{Id.}
\end{enumerate}
\end{footnotesize}
this argument falls apart when presented with the typically wide gulf between standard and refundable fares.

Indeed, DOT acknowledged that by purchasing a standard fare and paying the change fee the petitioner in the Pevsner matter "would have saved $1338 over purchasing a fully refundable ticket."61 A National Consumer League study of the least expensive refundable and non-refundable fares available in major U.S. air corridors found that "on average, a refundable ticket is 350% more expensive than a non-refundable ticket."62 Since 1993, restricted fare tickets have "made up more than 80% of all ticket sales across all fare classes."63 While such data is for domestic fares it is instructive for foreign air transportation. The cost is simply prohibitive for the majority of consumers. Offering refundable tickets at an unreasonably prohibitive price as a realistic option for consumers to avoid change fees is absurd on its face.

Another common answer from airlines is that passengers should buy travel insurance. Unfortunately, travel insurance policies exclude most of the common reasons leading passengers to change or cancel and trip and often leave them uncovered.64 The marketing of travel insurance all too often relies on misleading language and dense policy descriptions.65 Due to such broad exclusions, confusing policies and misleading marketing, travel insurance is not a realistic option for the majority of passengers.

D. Change fees in foreign air transportation should be capped

In looking to change fees in foreign air transportation, there are several potential ways to create a reasonable cost cap such as limiting change fees to a percentage of the base or new fare, a flat cap, or a tiered fee structure based on chosen flight factors. We ultimately believe a cap of $100 for change fees, while allowing airlines to charge for the differential in fare values, would prove reasonable. However, when changes are made far enough in advance (long enough for airlines to resell the seat) the onus should be on the airlines to justify the reasonableness of

61 Id.
63 Id. at 7.
64 See id. at 14-20.
65 See id. at 10-17.
anything but the most minimal fee. For specific flight circumstances where airlines can demonstrate a cost greater than $100, then DOT may approve higher fees.

IV. Competition and DOT Policy

A. DOT’s policy of relying solely on airline competition is flawed and obsolete

In 1995, DOT reiterated its unwavering policy since deregulation that “the best way to achieve this goal is to rely on the marketplace and unrestricted, fair competition to determine the variety, quality, and price of air service.” This was reaffirmed in 2003 and again in 2012 for both domestic and foreign air transportation. DOT applies this logic to change fees.

Times have changed however, and DOT’s policy of relying totally on “market forces” with a complete lack of regulation in foreign air transportation pricing no longer makes sense. Consolidation has caused the U.S. airline industry to become incredibly concentrated. Now only four airlines control 87 percent of domestic flights and control of international flights are similarly concentrated. While the public once benefited from lower fares flowing from deregulation, the tide has turned in the other direction due to airline consolidation. The industry is no longer as competitive as it once was or as it should be.


68 Pevsner Denial, supra note 17, at 5.
70 U.S. GOV’T ACCOUNTABILITY OFFICE, REP. NO. GAO-14-515, AIRLINE COMPETITION 5 (2014) [hereinafter GAO].
71 See Exhibit 3 (timeline of mergers for four remaining major carriers).
72 GAO, supra note 70, at 5.
ranging tide” by boosting airline profits, but it has also managed to “drown consumers with fee and fare hikes.”

Since 2008, airlines have greatly improved their financial positions. Airlines made a combined $8 billion in the first three quarters of 2014 and have seen their stock prices skyrocket. The recent strong financial results from U.S. airlines are partially a result of pricing power made possible through consolidation within the industry. The GAO determined that the success of the airline industry was primarily driven by a growth in revenues coming from three factors: (1) an increase in passenger traffic; (2) capacity restraint (i.e., limiting the supply of available seats in relation to the level of demand); and (3) increased ancillary fees.

Restriction in capacity has contributed significantly to airline profitability since 2007. Until only recently it was “common in the U.S. airline market for any reduction in capacity to be quickly replaced.” This has led to ever higher load factors as planes today fly at over 86 percent capacity. Flights were 69 percent full on average in 2003 and 56 percent full in 1991. Between 2007 and 2013, U.S. airlines eliminated about 1.2 million flights. As demand has increased, capacity restraint has resulted in higher airfares. For example, domestic fares have increased not including fees by about 9 percent for network airlines and 17 percent for low-cost airlines between 2007 and 2012.

Once you include the unbundling of fares and the increased use of ancillary fees by airlines, this increase is even higher. Many fees that were

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74 See GAO, supra note 70, at 11-12.
75 Frank, supra note 54.
76 Id. (In June, 2009, United’s stock traded at $3.17. In January 2015 it was up to $73.62).
77 See Sanati, supra note 73.
78 GAO, supra note 70, at 13.
79 Id. at 14.
80 Id.
82 Frank, supra note 54.
83 Id.
84 GAO, supra note 70, at 16.
85 Id.
previously included in the price of airfare are now “optional” and priced independently. The growth in these ancillary fees has significantly supplemented airline revenues. 87

Consolidation has made capacity restraint a viable option for the airline industry. 88 It has also created opportunities for other collusive behaviors, including parallel price increases. For example, in April 2013, United, American, Delta and US Airways all raised their domestic change fees to $200 within two weeks of each other. 89

Consumers bear the brunt of the costs associated with consolidation. Airline complaints to DOT have risen 30 percent over the past five years. 90 In the past, consumers might have balked at such treatment, such as being subjected to exorbitant change fees, and chosen to fly on a different airline. They have no such option today. Consolidation has further resulted in leaving many routes and destinations directly serviced by only one carrier. 91

The situation is further exacerbated in foreign air transportation by the fact that DOT has exercised its statutory authority to grant certain groups of airlines within international alliances immunity from U.S. antitrust laws affecting international transportation. 92 This permits the participants to coordinate on prices, scheduling, and marketing, 93 which has provided the impetus for a shift for network airlines as they focus more on international routes that “are more profitable” and “face less competition.” 94 In 2012, the international capacity of U.S. network airlines represented 42 percent of their total capacity. 95

B. DOT regulation

DOT already has promulgated extensive regulations in similar areas. 96 There are many other examples of successful “government intrusion” into the free market of the airline industry,

87 See GAO, supra note 70, at 17; see also Exhibit 1.
88 See GAO, supra note 70, at 33.
90 Shekhtman, supra note 81.
91 See Sanati, supra note 73.
92 GAO, supra note 70, at 48-49.
93 GAO, supra note 70, at 49.
94 GAO, supra note 70, at 17.
95 Id.
96 See, e.g., 14 C.F.R. 253.7, 14 C.F.R. 259.5(b)(4), and 14 C.F.R. 399.84(a).
such as the three hour rule for tarmac delays, which penalizes airlines who kept passengers waiting on the tarmac for more than three hours. Airline executives complained vociferously about the introduction of the tarmac rule, stating it “would create chaos” and describing it as “stupid, unreasonable and costly.”\textsuperscript{97} However, carriers quickly learned how to cope and DOT stated that the regulations on tarmac delays “have virtually eliminated the long waits aboard aircraft that passengers used to experience too frequently.”\textsuperscript{98} In 2009, the last full year before the tarmac rule went into effect, airlines reported 868 domestic flights with tarmac delays over three hours and 55 international flights with tarmac delays longer than four hours.\textsuperscript{99} 2014 saw a record low with only 30 domestic flights with tarmac delays longer than three hours and nine international flights with tarmac delays longer than four hours.\textsuperscript{100} In other words, government regulation addressing the problem of tarmac delays worked wonders. The exercise of DOT’s statutory authority to regulate airline change fees would be just as effective.

While Congress has recognized that “there are differences between international and domestic aviation,” it has also instructed that even in the foreign sphere reliance will be placed “to the maximum extent possible” on competition, rather than on “detailed and burdensome government regulation.”\textsuperscript{101} Nevertheless, in enacting the IATCA Congress tasked DOT with “taking account, nevertheless, of material differences … between interstate … and foreign air transportation.”\textsuperscript{102} Congress left in place DOT’s regulatory authority over prices and rules in foreign air transportation for a reason and clearly recognizes that not all government regulation is burdensome. Here, with regard to change fees which are clearly unreasonable and have reach exorbitant levels, the Secretary of Transportation has the power and duty to act.

V. Conclusion

DOT has the statutory authority to regulate fares and fees in foreign air transportation and is obligated to do so. While DOT has regulated extensively in analogous areas it has yet to promulgate rules concerning change fees in foreign air transportation. We urge DOT to rectify

\textsuperscript{97} Tuttle, \textit{supra} note 55.
\textsuperscript{98} \textit{Id.}
\textsuperscript{100} \textit{Id.}
\textsuperscript{102} International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35 (1980).
this situation and prevent unreasonably high fees by imposing caps on change fees. While the use of competition to mitigate high fares was the intent of Congress in passing the Airline Deregulation Act and has been DOT’s policy since, consolidation within the industry and antitrust exemptions granted by DOT have thwarted this hands-off approach. Some level of government intervention is necessary to protect consumers. Accordingly, we respectfully petition DOT to cap change fees at $100 on international routes absent a convincing cost justification by airlines.

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Exhibit 1

Full year reservation cancellation/change fee revenue for U.S. airlines

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<th>Year</th>
<th>Revenue</th>
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<td>2007</td>
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<tr>
<td>2008</td>
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<tr>
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<td>$2,373,019,000</td>
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<td>2014*</td>
<td>$2,982,948,000</td>
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Source: United States Department of Transportation, Bureau of Transportation Statistics

*Data not yet available for quarter 4, estimated by average quarters 1 through 3.

Exhibit 2

% Differences Between Non-Restricted & Restricted Fares on Major U.S. Air Routes

Source: National Consumers League (2013)
## Exhibit 3

### Figure 1: Selected U.S. Airline Mergers and Acquisitions, 1929–2013

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<td></td>
<td>1994</td>
<td></td>
<td></td>
<td>2011</td>
</tr>
</tbody>
</table>

- Acquisition or merger
- Company founded

Sources: Cathay Financial and airline company documents.