

STAYING ON POINT: A CASE FOR LIMITED DEPARTMENT OF TRANSPORTATION REGULATION OF AIRLINE FREQUENT FLYER PROGRAMS

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Airline frequent flyer programs have, in recent years, undergone a significant change to their redemption structure. In particular, whereas airlines once charged reliable, fixed prices for award tickets, virtually all frequent flyer programs now charge variable or dynamic prices that are harder for consumers to predict. In addition, airlines retain the right, at any time, to devalue mileage that customers have already accrued. Advocates of consumer protections charge that frequent flyer programs have become unfair to the flying public, especially with regard to frequent and unannounced mileage devaluations. Now, these reformers are calling on the Department of Transportation (DOT) to instill greater consumer safeguards in frequent flyer programs by invoking its authority under 49 U.S.C. § 41712 to prohibit unfair or deceptive practices in air travel. More specifically, these advocates seek to have DOT curb airlines' ability to summarily devalue accrued points.

This Comment first argues that reformers' efforts will likely prove futile. Because award ticket prices are rates, DOT action on mileage devaluations would amount to setting rates on airfares. But airline rates, routes, and services are by law left for the free market to determine. As such, reformers will likely be unable to curtail through DOT action what they perceive to be the most anti-consumer tactic in frequent flyer programs. Nevertheless, DOT can—and should—use its authority under § 41712 to extend preexisting prohibitions on unfair or deceptive practices to those found in frequent flyer programs. This Comment thus highlights three areas in which DOT can act to prevent unfair or deceptive practices that current regulations fail to address adequately.

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INTRODUCTION

Everyone loves a free flight. Airlines, for their part, love repeat customers and will reward such frequent flyers with “free” flights in exchange for their loyalty.¹ But underneath this mutual rhetorical backscratching lies a more important truth: today’s frequent flyer programs are big business,² and airlines have learned to leverage them to their financial advantage.³ These

1. See *Achieve Status and More Benefits*, AM. AIRLINES, INC., <https://www.aa.com/web/i18n/aadvantage-program/discover/member-statuses.html> [https://perma.cc/TUS4-AQNL] (last visited Oct. 15, 2025) (discussing the benefits offered by American Airlines’ AAdvantage program); *Frequent Flyer Programs*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/individuals/aviation-consumer-protection/frequent-flyer-programs> (last updated Sept. 11, 2025) [https://perma.cc/7RYF-PJXG] (“Typical awards include a free ticket, food and beverage perks, or a free upgrade from economy seating to higher seating class.”).

2. See Ganesh Sitaraman, *Airlines Are Just Banks Now*, ATLANTIC (Sept. 21, 2023), <https://www.theatlantic.com/ideas/archive/2023/09/airlines-banks-mileage-programs/675374/> [https://perma.cc/7AZP-KB6P] (“[In 2020,] United’s MileagePlus program . . . was valued at \$22 billion, while the company’s market cap at the time was only \$10.6 billion.”).

3. In 2017, Delta expected to reap \$4 billion in revenue annually by 2021 from its relationship with American Express. See Justin Bachman, *Airlines Make More Money Selling Miles Than Seats*, BLOOMBERG (Mar. 31, 2017, 11:10 AM), <https://www.bloomberg.com/news/articles/2017-03-31/airlines-make-more-money-selling-miles-than-seats> [https://perma.cc/G8WM-QNSC].

programs serve hundreds of millions of members and bring in billions of dollars in revenue for airlines.⁴ Yet despite their sizeable presence in the economy, frequent flyer programs remain virtually unregulated.⁵ In practical terms, airlines have broad discretion to do whatever they want with their frequent flyer programs—including reducing the value of frequent flyer miles—as long as they adhere to the terms and conditions to which they and their customers agreed.⁶ Redemption rates—or prices—for award flights have also been rising, which means that consumers may get less value from their hard-earned miles.⁷

In September 2024, the state of affairs in the frequent flyer sector caught the attention of the Biden Administration’s Secretary of Transportation, Pete Buttigieg, who sent letters to the four largest domestic airlines—American, Delta, Southwest, and United—asking for information related to their frequent flyer programs.⁸ The Secretary of Transportation (the Secretary) is authorized under 49 U.S.C. § 41712 to prevent unfair or deceptive practices in air travel,⁹ and Secretary Buttigieg’s letter began a Department of Transportation (DOT) inquiry into potentially unfair or deceptive frequent flyer program practices.¹⁰

4. See Aaron Gordon, Allyson Versprille, Mary Schlangenstein & Armand Emamdjomeh, *The Airline Rewards Game Is Getting Tougher to Win*, BLOOMBERG (Dec. 20, 2024), <https://www.bloomberg.com/graphics/2024-airline-miles-points/> [https://perma.cc/P34Z-J6BD] (discussing revenue); Jacob Greenberg, *In Some Airline Loyalty Programs, Only 8% of Frequent Flyer Miles Are Redeemed. Here's Why It Might Be Getting Harder to Score a Free Ticket*, CBS NEWS (June 20, 2022, 6:56 AM), <https://www.cbsnews.com/news/airline-loyalty-programs-getting-harder-to-redeem-frequent-flyer-miles/> [https://perma.cc/A58N-F4T5] (listing membership statistics).

5. See Ben Schlappig, *DOT Investigating Airline Frequent Flyer Programs*, ONE MILE AT A TIME (Sept. 6, 2024), <https://onemileatatime.com/news/dot-investigating-airline-frequent-flyer-programs/> [https://perma.cc/33GK-RCKJ] (referencing the unregulated nature of the industry).

6. See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228 (1995) (declaring that frequent flyer programs create “privately ordered obligations”).

7. See JAY SORENSEN, 2025 U.S. DOMESTIC REWARD REPORT 4 (2025) [hereinafter Reward Report], <https://ideaworkscompany.com/wp-content/uploads/2025/02/2025-Reward-Report-Excerpt.pdf> [https://perma.cc/V63F-GRBS].

8. See Pete Buttigieg, Sec'y of the U.S. Dep't of Transp., Letter to American Airlines, Delta Air Lines, Southwest Airlines, and United Airlines (Sept. 5, 2024) [hereinafter Buttigieg Letter], https://www.transportation.gov/sites/dot.gov/files/2024-09/For%20Distribution_Letter%20on%20Airline%20Rewards%20Inquiry_Non%20Addressed_09.05.24_Final.pdf [https://perma.cc/HJ25-V2DV].

9. 49 U.S.C. § 41712(a).

10. See Buttigieg Letter, *supra* note 8.

Intentionally or not, Secretary Buttigieg joined a growing chorus of reformers calling for increased consumer protections in frequent flyer programs.¹¹ These reformers seek to have DOT institute consumer protections and stem the tide of mileage devaluations.¹² Crucially, however, § 41712's relevant grant of authority is confined to the prevention of unfair or deceptive practices, and the reformers may misread DOT's ability to regulate the frequent flyer space.¹³ This Comment discusses the likelihood of the reformers' success and, contravening the reformers' argument for regulation of frequent flyer program mileage valuations, recommends that DOT regulate frequent flyer programs in a limited scope within its statutory authority.¹⁴ The analysis considers a range of consumer protections that DOT may legally instill even if the Trump Administration, which has demonstrated its hostility to pro-consumer reforms, is unlikely to bring such protections into effect.¹⁵ The argument also presupposes no additional Congressional action or guidance; it considers only administrative remedies that Congress already authorizes DOT to implement pursuant to § 41712.¹⁶ Part I recounts the half-century history of airline loyalty programs in the United States.¹⁷ Part II discusses DOT's authority to regulate in the frequent flyer space and describes both the statutory and regulatory constraints under which DOT must operate.¹⁸

11. *See id.*; Sitaraman, *supra* note 2 (“A modernized set of rules could arrest the trajectory of airlines becoming financialized e-commerce platforms . . .”); Gordon et al., *supra* note 4 (highlighting two senators’ efforts to increase DOT oversight of frequent flyer programs); Ari Goldfine, Note, *The Financialization of Frequent Flyer Miles: Calling for Consumer Protection*, 77 VAND. L. REV. 233, 269 (2024) (calling for consumer protections).

12. *See, e.g.*, Goldfine, *supra* note 11, at 269 (recommending that DOT prevent airlines from devaluing accrued points).

13. *See* Buttigieg Letter, *supra* note 8 (invoking § 41712 authority).

14. *See infra* Part IV.

15. The Administration scrapped a proposed rule that “would have required carriers to provide compensation ‘to mitigate passenger inconveniences’ for cancellations or delays that were within a carrier’s control.” *See* Megan Cerullo, *Feds Scrap Proposal to Offer Cash to Airline Passengers for Flight Disruptions*, CBS NEWS (Sept. 5, 2025, 3:01 PM), <https://www.cbsnews.com/news/airlines-flight-disruption-transportation-department-cash-refund/> [https://perma.cc/EC8B-M937]; *see also* Joe Hernandez, *The Trump Administration Has Stopped Work at the CFPB. Here’s What the Agency Does.*, NPR (Feb. 10. 2025) <https://www.npr.org/2025/02/10/nx-s1-5292123/the-trump-administration-has-stopped-work-at-the-cfpb-heres-what-the-agency-does> [https://perma.cc/D2C4-R89M] (“The Consumer Financial Protection Bureau’s new leader has shuttered the agency’s headquarters and told staffers to stay at home and refrain from doing any work.”); Gordon et al., *supra* note 4 (“In general, industry executives have said they welcome the return of the former president.”).

16. *See* § 41712.

17. *See infra* Part I.

18. *See infra* Part II.

Part III discusses how DOT's authority to stop unfair or deceptive practices does not plainly include the ability to require airlines to set or maintain a value for frequent flyer miles, counter to the argument implicit in the reformers' calls for consumer protections.¹⁹ Part IV recommends that consumer protection advocates instead call on DOT to work within its existing framework to prohibit unfair or deceptive advertising practices that are present in frequent flyer programs and not addressed adequately by preexisting regulations.²⁰

I. A HISTORY OF FREQUENT FLYER PROGRAMS

Frequent flyer programs first took hold in the United States in the late 1970s and early 1980s following airline deregulation.²¹ The carriers sought to offer benefits to their most loyal customers—frequent flyers—including mileage reward programs and access to airport lounges.²² In the decades since their inception, frequent flyer programs have evolved from simple entities²³ to sophisticated schemes²⁴—and earned airlines a lot of money in the process.²⁵ Frequent flyer programs are now a multibillion-dollar sector of the economy²⁶ that airlines may use to induce brand loyalty and charge a premium.²⁷ But even if the details of frequent flyer programs have changed through the decades, the basic structure has not: airlines offer customers frequent flyer miles (“miles” or “points”) for each flight they take, and customers can redeem those miles for tickets (“award” or “reward” flights).²⁸

19. See *infra* Part III.

20. See *infra* Part IV.

21. See Sitaraman, *supra* note 2; Eric Rosen, *40 Years of Miles: The History of Frequent Flyer Programs*, THE POINTS GUY (May 20, 2021), <https://thepointsguy.com/loyalty-programs/evolution-frequent-flyer-programs/> [https://perma.cc/Y7WU-8NH4].

22. See Sitaraman, *supra* note 2 (discussing the impetus for frequent flyer programs in the 1980s).

23. See *id.*

24. See Gordon et al., *supra* note 4 (“Programs designed to encourage loyalty have gradually morphed into complex financial ecosystems”).

25. See Bachman, *supra* note 3.

26. See *id.* (showing that the estimated value of the five largest domestic frequent flyer programs is over \$100 billion).

27. See Mara Lederman, *Are Frequent-Flyer Programs a Cause of the “Hub Premium”?*, 17 J. ECON. & MGMT. STRATEGY 35, 63 (2008) (noting that frequent flyer programs may account for 25% of the premium that airlines can command on routes to their hub airports); Jon Sindreu, *Frequent-Flier Miles Are Piling Up. Fliers Won’t Benefit Like Airlines Will.*, WALL ST. J. (Mar. 26, 2021, 5:30 AM), https://www.wsj.com/articles/frequent-flier-miles-are-piling-up-fliers-wont-benefit-like-airlines-will-11616751036?mod=article_inline [https://perma.cc/6MFN-9RYY] (indicating that frequent flyer programs may allow airlines to charge a 5%–6% price premium).

28. See Stefanie Waldek, *Everything You Need to Know About Earning and Redeeming Airline Miles*,

Perhaps the greatest shift in the evolution of frequent flyer programs is how customers *redeem* their miles.²⁹ In the early days, customers could earn an award flight after a certain number of qualifying flights—like the model of a coffee shop punch card.³⁰ Eventually, airlines differentiated prices for award tickets depending on distance traveled and class of service, and they advertised these prices in charts or tables.³¹ For instance, in the early 2010s, American Airlines charged 12,500 miles in economy and 25,000 miles in first class for a one-way “saver” award ticket from New York to San Francisco.³² An essential feature of the fixed-price model, however, was blackout dates, or dates on which airlines offered no seats available for mileage redemptions.³³ These blackout dates were particularly common during the busiest travel periods including federal holidays and school vacations.³⁴

In the mid-2010s, airlines started shifting the frequent flyer redemption scheme yet again.³⁵ Rather than offer award seats for sale at predictable or fixed prices, airlines began charging variable, market-based (or dynamic) prices that more closely correlated to the cash price of the ticket.³⁶ Under the

TRAVEL & LEISURE (Jan. 16, 2025), <https://www.travelandleisure.com/how-to-earn-and-use-airline-miles-7559089> [https://perma.cc/C2FM-E2CJ].

29. See Gordon et al., *supra* note 4 (explaining how airlines abandoned fixed-price award charts in favor of dynamic pricing).

30. See Sitaraman, *supra* note 2.

31. See Rosen, *supra* note 21.

32. See Gary Leff, *Breaking: American AAdvantage Reveals Their New Award Chart Effective March 22*, VIEW FROM THE WING (Nov. 17, 2015), <https://viewfromthewing.com/breaking-american-aadvantage-reveals-their-new-award-chart-effective-march-22/> [https://perma.cc/2SMZ-YXVD] (displaying American’s early-2010s fixed-price chart).

33. See Sarah Hostetler, *What Are Award Travel Blackout Dates—and How Do You Avoid Them?*, THE POINTS GUY (Aug. 15, 2024), <https://thepointsguy.com/loyalty-programs/airline-hotel-award-travel-blackout-dates/> [https://perma.cc/764K-UVLA] (discussing the basics of blackout dates).

34. See *id.* As a stand-in for now-defunct award travel blackout dates and for a sense of how an airline may restrict the use of travel certificates, *see also* *How to Redeem Travel Certificates*, JETBLUE, <https://www.jetblue.com/help/travel-certificates#terms-and-conditions-for-travel-certificates> [https://perma.cc/QTL2-ZKN5] (last visited Oct. 15, 2025). Even airlines that continue to publish distance-based award charts may vary the cost of award tickets according to “peak” season. See, e.g., Rhys Jones, *What are the 2025 and 2026 peak and off-peak Avios flight dates?*, HEAD FOR POINTS (Mar. 6, 2025), <https://www.headforpoints.com/2025/03/06/avios-peak-and-off-peak-flight-dates/> [https://perma.cc/692B-HALY] (showing that customers using Avios to book award tickets on British Airways, Iberia, and Aer Lingus paid “peak” or increased prices for travel in most if not all of June, July, and August 2025 and 2026).

35. See Gordon et al., *supra* note 4 (noting the shift to dynamic pricing).

36. See Ben Smithson, *What Is Dynamic Award Pricing?*, THE POINTS GUY (Sept. 13, 2023), <https://thepointsguy.com/loyalty-programs/what-is-dynamic-award-pricing/> [https://perma.cc/DDA5-24K2].

dynamic model, the average award redemption price has increased—albeit with some exceptions for routes with less demand or flights at off-peak times.³⁷ While the average price of an economy award ticket at Delta rose 26% between 2019 and 2025—and a whopping 153% at Southwest—prices at American dropped 21% over that same period.³⁸ Despite generally increased prices, consumers have realized some benefit from dynamic pricing as airlines largely reduced or eliminated blackout dates.³⁹ Rather than offer a paltry few award seats (or none at all) on any given flight, airlines have effectively made every seat available for mileage redemptions at a price tied to the cost of the paid ticket.⁴⁰ The scope of frequent flyer programs has also increased: customers can now redeem frequent flyer miles for vacation packages, hotels, car rentals, flight upgrades, lounge access, and even consumer goods.⁴¹

Earning frequent flyer miles and status has undergone a similarly disruptive transformation.⁴² Airlines once awarded status “based on how far you

37. See Reward Report, *supra* note 7, at 4; Stephen Pepper, *Virgin Atlantic Dynamic Award Pricing Is Live and It's Pretty Good . . . For Now*, FREQUENT MILER (Oct. 30, 2024), <https://frequentmiler.com/virgin-atlantic-dynamic-award-pricing-is-live-and-its-pretty-good-for-now/> [<https://perma.cc/HQF9-LXD9>]; Ben Schlappig, *American AAdvantage “Fully Dynamic” Award Pricing Now Live*, ONE MILE AT A TIME (May 12, 2023), <https://onemileatatime.com/news/american-aadvantage-dynamic-award-pricing/> [<https://perma.cc/H7SU-ZABX>].

38. See Reward Report, *supra* note 7, at 4. American’s prices may have dropped as part of an intentional effort to create better value for customers. *Id.* at 8. Southwest’s 2019 economy award prices were so low in 2019 that it could afford to raise prices through 2024 and still offer industry-leading prices. *See id.* By way of comparison, the rate of inflation between March 2019 and February 2025 was 26%. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/data/inflation_calculator.htm (last visited Oct. 15, 2025) (input \$1 into the CPI Inflation Calculator, March 2019 in the first date field and February 2025 in the second field, and then select “calculate”).

39. *See* Gordon et al., *supra* note 4 (“United said that since it moved to a new structure in 2017, about half of the airline’s customers have redeemed award travel in domestic economy for fewer points than its fixed award chart offered. The company also said it eliminated blackout dates, stopped charging fees to redeem miles, and dropped expiration dates.”). Airlines now highlight their lack of blackout dates. *See* Hostetler, *supra* note 33.

40. *See* Smithson, *supra* note 36.

41. *See, e.g.*, Anisha Sekar, *Should You Redeem Your Miles for Merchandise?*, NERDWALLET (Sept. 29, 2023, 1:53 PM), <https://www.nerdwallet.com/article/travel/airline-miles-merchandise> [<https://perma.cc/859K-LSLS>] (discussing various uses for frequent flyer miles); *see also* *Use AAdvantage Miles for Travel, Experiences and More*, AM. AIRLINES, INC., <https://www.aa.com/web/i18n/aadvantage-program/use-miles/use-miles.html> [<https://perma.cc/WL4K-2AQ3>] (last visited Oct. 15, 2025) (displaying the various ways to spend AAdvantage miles).

42. *See* Gordon et al., *supra* note 4 (highlighting the shift to credit card-based mileage earning).

flew.”⁴³ Now, airlines award a growing proportion of miles based on a consumer’s credit card spending.⁴⁴ Fully three-quarters of airline miles issued today now come from spending on co-branded credit cards.⁴⁵ Thanks to these credit cards, customers can also earn elite frequent flyer status without ever boarding a flight.⁴⁶ All of which means that flying is relatively less rewarding than in previous decades and that frequent flyer loyalty has less and less to do with a customer’s propensity to fly with just one airline.⁴⁷ Yet despite these changes, grumblings from some ultra-elite frequent fliers,⁴⁸ and reformers’ comments to the contrary,⁴⁹ frequent flyer programs do not seem to have generated a mass groundswell of outrage.⁵⁰ In May 2023, the latest month for which detailed DOT data is publicly available, less than one percent of the consumer complaints DOT received pertained to frequent flyer programs.⁵¹

The real reason behind the recent evolution in frequent flyer programs may be that, as reformer Ganesh Sitaraman puts it, “airlines are just banks now.”⁵² Indeed, airlines’ economic growth is increasingly tied to co-branded credit card deals with major banks, and employee pay is linked to the growth of those co-branded credit cards.⁵³ Some airlines would likely be unprofitable

43. Summer Hull, *Is This the End of the Runway for Frequent Flyer Programs as We Know Them?*, THE POINTS GUY (Oct. 11, 2019), <https://theointsguy.com/news/united-killing-frequent-flyer-programs/> [https://perma.cc/E49K-82GT].

44. Gordon et al., *supra* note 4 (“Customers today earn rewards based on dollars spent rather than how far they fly.”).

45. *See id.*

46. *See* Jacob Passy, *These Frequent Fliers Are Done with Loyalty Programs*, WALL ST. J. (Jan. 20, 2025, 9:00 PM), <https://www.wsj.com/lifestyle/travel/frequent-flier-points-loyalty-status-875b03f2> [https://perma.cc/LMQ7-ZX9F].

47. *See id.* (noting that some frequent flyers decided to “play the field”).

48. *See id.* (“Those backing away say the high cost of maintaining status isn’t rewarded with the same quality of customer service as before, and that rewards are harder to come by.”). *But cf.* Gordon et al., *supra* note 4 (“For people who regularly fly in premium classes on the company dime, or those able to put six figures of company expenses every year on a personal card, that means dynamic pricing hasn’t drastically altered what they can get out of airline loyalty programs.”).

49. *See* Sitaraman, *supra* note 2 (positing that frequent flyer programs are opaque and unfair).

50. *See* OFF. OF AVIATION CONSUMER PROT., AIR TRAVEL CONSUMER REPORT 45 (2023), https://www.transportation.gov/sites/dot.gov/files/2023-11/July%202023%20ATCR_Revised%20110823.pdf [https://perma.cc/GMM5-RUG4] (listing the number of consumer complaints to DOT related to frequent flyer programs).

51. *See id.*

52. *See* Sitaraman, *supra* note 2 (characterizing airlines as “financial institutions that happen to fly planes”).

53. *See* Bachman, *supra* note 3.

without their frequent flyer programs.⁵⁴ The airlines, of course, recognize the financial significance of their frequent flyer programs and lean in to the public's thirst for miles.⁵⁵ When airlines sell miles directly to consumers, they often charge a significant markup over the miles' anticipated redemption value.⁵⁶ It is perhaps no surprise, then, that the sale of miles, whether to banks (as part of co-branded credit card agreements) or consumers (directly), may account for "more than half of all profits for some airlines."⁵⁷

Key to Sitaraman's critique about the financialization of airlines is the assertion that frequent flyer miles function like a currency.⁵⁸ Assigning a value to frequent flyer miles, however, is an imprecise science.⁵⁹ Airlines unilaterally control both the amount of miles in circulation and the rate at which they may be redeemed.⁶⁰ In practical terms, airline miles may be valued between one and one-and-a-half cents apiece.⁶¹ In official terms, however,

54. See Chris Isidore, *Frequent Flyer Programs: The Most Profitable Part of the Airline Industry*, CNN (Sept. 8, 2024, 12:00 PM), <https://www.cnn.com/2024/09/08/business/frequent-flyer-programs-airlines/index.html> [<https://perma.cc/4SXP-ZC9U>] ("[T]he programs have become crucial for airlines to generate the profits needed to stay afloat."). In 2023, Delta reported an income of \$4 billion and frequent flyer revenue of \$6.8 billion due to its branded credit card partnership with American Express. *Id.* American similarly posted \$1.9 billion in revenue in 2023 largely to the \$5.2 billion it generated from its co-branded credit card partnerships with Citibank and Barclays. *Id.*; AM. AIRLINES GRP., INC., 2023 ANNUAL REPORT ON FORM 10-K, 77 (2023), <https://www.sec.gov/Archives/edgar/data/6201/000119312524114062/d636721dars.pdf> [<https://perma.cc/R3FJ-GJKK>] (indicating that American partners with both Citi and Barclays).

55. See Sitaraman, *supra* note 2 ("Consumers now charge nearly [one] percent of U.S. GDP to Delta's American Express credit cards alone.").

56. See Bachman, *supra* note 3; Sindreu, *supra* note 27 (discussing that Delta sells SkyMiles that are commonly valued at one cent for 3.5 cents apiece).

57. Bachman, *supra* note 3.

58. See GANESH SITARAMAN, WHY FLYING IS MISERABLE 107 (2023).

59. See Sitaraman, *supra* note 2 ("Online analysts try to offer estimates of points' cash value, but airlines can reduce these values after the fact and change how points can be redeemed. Airlines even sell points at above their exchange-rate valuation, meaning that people are paying for something worth less than the money they're buying it with, in part because it's so hard to know what the real value is.").

60. See Sitaraman, WHY FLYING IS MISERABLE, *supra* note 58; see also Sindreu, *supra* note 27 (comparing airline miles to the feudal system of seigniorage). "In bygone days," the European Central Bank notes, "it was the 'seigneur' or lord who had the right to mint coins—hence the name." *What is Seigniorage?*, EUR. CENT. BANK (Apr. 7, 2017), <https://www.ecb.europa.eu/ecb-and-you/explainers/tell-me/html/seigniorage.en.html> [<https://perma.cc/SP47-QUYG>].

61. See Reward Report, *supra* note 7, at 4; Craig Joseph & Meghan Coyle, *How Much Are Travel Points and Miles Worth in 2025?*, NERDWALLET (Aug. 28, 2025, 9:04 AM), <https://www.nerdwallet.com/article/travel/airline-miles-and-hotel-points-valuations>

no such valuation exists.⁶² With the advent of dynamic pricing, the average value of frequent flyer miles has trended downwards for most major carriers.⁶³ And as this valuation approaches one cent per mile, frequent flyer programs essentially function as “glorified cashback” schemes.⁶⁴ Banks or not, Sitaraman sees the airline industry as an “unregulated oligopoly” and pines for a “modernized set of rules” protecting consumers.⁶⁵ But still to be determined is whether Sitaraman and other reformers can get the changes they seek through DOT’s ability to crack down on unfair or deceptive practices.⁶⁶

II. DOT’S AUTHORITY TO REGULATE FREQUENT FLYER PROGRAMS

A. *Statutory Framework for DOT Regulation of Frequent Flyer Programs*

49 U.S.C. § 41712 sits at the nexus of reformers’ calls to expand consumer protections in frequent flyer programs.⁶⁷ Under § 41712, the Secretary may declare and prevent unfair or deceptive practices in air travel.⁶⁸ Historically, the Secretary has exercised this authority to institute rules and issue cease and desist orders and fines.⁶⁹ Facially, § 41712 grants the Secretary broad authority to decide which practices are unfair or deceptive.⁷⁰ Practically, however, the Secretary’s power is much more limited: the Secretary must provide affected parties notice before deeming a practice unfair or deceptive.⁷¹ DOT thus interprets the § 41712 notice provision as requiring

[<https://perma.cc/4TAY-2UN7>] (demonstrating that point values for a particular airline may rise or fall over time); Gordon et al., *supra* note 4; Sindreu, *supra* note 27.

62. See, e.g., Sitaraman, *supra* note 2 (discussing analysts’ attempts to value miles).

63. See Press Release, IdeaWorks Co., Frequent Flyer Programs Deliver Lower Reward Value (Apr. 2, 2024), <https://ideaworkscompany.com/wp-content/uploads/2024/04/Press-Release-183-Reward-Seat-Availability-2024-1.pdf> [<https://perma.cc/S3QD-ZC9U>]; Reward Report, *supra* note 7, at 4; Gordon et al., *supra* note 4. But see Joseph & Coyle, *supra* note 61 (arguing that award prices trended upwards, towards 1.5 cents apiece, since the COVID-19 pandemic).

64. Gordon et al., *supra* note 4.

65. See Sitaraman, *supra* note 2.

66. See Buttigieg Letter, *supra* note 8.

67. See 49 U.S.C. § 41712; see, e.g., Buttigieg Letter, *supra* note 8 (“DOT has authority under 49 U.S.C. § 41712 to investigate and take action against airlines . . .”).

68. The statute grants the Secretary the authority to “decide whether an air carrier . . . has been or is engaged in an unfair or deceptive practice.” § 41712. Furthermore, the Secretary may, “after notice and an opportunity for a hearing, . . . order the air carrier . . . to stop the [unfair or deceptive] practice or method.” *Id.*

69. 49 U.S.C. §§ 40113, 41712, 46301.

70. § 41712.

71. See *id.*

rulemaking that establishes unfair or deceptive practices.⁷² As they pertain to frequent flyer programs, therefore, the prospects for consumer protections depend on DOT's rule on unfair or deceptive practices, the latest of which took effect in January 2021.⁷³

B. 2021 Final Rule on Defining Unfair or Deceptive Practices

In 2020, DOT engaged in notice-and-comment rulemaking to provide the public with official definitions of "unfair" and "deceptive" practices.⁷⁴ Under the resulting final rule (2021 Final Rule), "[a] practice is 'unfair' to consumers if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition."⁷⁵ Additionally, "[a] practice is 'deceptive' to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter," and material matters are those "likely to have affected the consumer's conduct or decision with respect to a product or service."⁷⁶ With its 2021 Final Rule, DOT adopted a reasonable person standard as the basis for unfair or deceptive practices.⁷⁷ Despite the inclusion of this language, DOT "stress[ed]" that the updated construction of unfair and deceptive did not constitute "a substantive departure from past DOT practice."⁷⁸

C. 2022 Guidance Document on Unfair or Deceptive Practices

The 2021 Final Rule provides the basis for determining which practices are unfair or deceptive, but DOT's 2022 guidance document (2022 Guidance Document) expands upon the agency's understanding of its own authority.⁷⁹ Under the Administrative Procedure Act (APA), interpretive rules and general statements of policy do not carry the force of law and do not need to follow traditional notice-and-comment rulemaking procedures.⁸⁰ While the Supreme Court has yet to offer guidance on the question of what

72. See 85 Fed. Reg. 78,707 (Dec. 7, 2020) (to be codified at 14 C.F.R. pt. 399).

73. See *id.*

74. 14 C.F.R. § 399.79 (2025). The 2021 Final Rule brought DOT's definitions of unfair and deceptive practices into alignment with those of the Federal Trade Commission's under the Federal Trade Commission Act. 85 Fed. Reg. at 78,708–10.

75. § 399.79.

76. *Id.*

77. See *id.*; 85 Fed. Reg. at 78,708.

78. See 85 Fed. Reg. at 78,710.

79. See 87 Fed. Reg. 52,677 (Aug. 29, 2022).

80. See 5 U.S.C. § 553(b)(3)(a).

constitutes an interpretive rule or policy statement, several courts of appeal have.⁸¹ In *Professionals & Patients for Customized Care v. Shalala*,⁸² the Fifth Circuit explained that interpretive rules “simply explain something the statute already requires”⁸³ and are permissible to the extent that they 1) allow agencies to make individualized determinations and 2) do not establish “binding norms”.⁸⁴ Further, the Seventh Circuit noted in *Hector v. U.S. Department of Agriculture*⁸⁵ that interpretive rules are exempt from notice-and-comment rulemaking when they “derive[] from the regulation by a process reasonably described as interpretation.”⁸⁶

The 2022 Guidance Document passes muster as an interpretive rule under the *Professionals & Patients for Customized Care* framework.⁸⁷ First, DOT states clearly that its 2022 Guidance Document carries neither the force of law nor serves as a basis for individual enforcement determinations.⁸⁸ Second, DOT relies on open-ended language and cost-benefit analyses in determining unfair or deceptive practices.⁸⁹ According to DOT, express misrepresentations and implied representations are “potentially actionable.”⁹⁰ The failure to provide services as promised “can” constitute a deceptive practice.⁹¹ DOT “ha[s] also found” that failing to provide a reasonable number of seats available at an advertised fare is deceptive.⁹² DOT’s balancing language thus serves to define unfair and deceptive practices more precisely but still grants the agency broad discretion to assess each case individually.⁹³ As a result, the 2022 Guidance Document will not run afoul of the *Professionals & Patients for Customized Care* standard.⁹⁴

81. See *Hector v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996); *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995).

82. 56 F.3d 592.

83. *Id.* at 602.

84. See *id.* at 596.

85. 82 F.3d 165.

86. *Id.* at 170.

87. See *Pros. & Patients for Customized Care*, 56 F.3d at 596.

88. See 87 Fed. Reg. 52,677, 52,678 (Aug. 29, 2022). DOT states that it published the 2022 Guidance Document as an interpretive rule to “clearly apprise the public of the Department’s interpretation of the definitions of the terms ‘unfair’ and ‘deceptive.’” *Id.*

89. See 14 C.F.R. § 399.79 (2025).

90. 87 Fed. Reg. at 52,680.

91. *Id.*

92. *Id.*

93. See *id.* at 52,679 (“Like FTC, the Department recognizes that some practices may be harmful to consumers in some respects, but beneficial to consumers in other respects.”).

94. See *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995).

In DOT's interpretation, the basis for legal unfairness under § 41712 is the likeliness of potential economic harm to consumers.⁹⁵ That determination necessarily involves a cost-benefit analysis, as indicated by the 2022 Guidance Document's inclusion of "harm . . . not outweighed."⁹⁶ DOT also notes that it has the ability to consider matters of public policy, as outlined in 49 U.S.C. § 40101(a), in carrying out its authority under § 41712.⁹⁷ As to deception, the 2022 Guidance Document defines "deceptive" according to a practice's tendency to mislead consumers.⁹⁸ Specifically, DOT lists several potentially deceptive practices: express misrepresentations, implied representations, not providing services as promised, and failing to have a reasonable number of seats available at an advertised fare.⁹⁹

D. The Airline Deregulation Act of 1978

49 U.S.C. § 41712 is not the only force bearing on potential frequent flyer program regulations.¹⁰⁰ The airline industry exists in the context of the Airline Deregulation Act of 1978 (the Act),¹⁰¹ which ushered in a wave of changes for air carriers and the flying public.¹⁰² Prior to 1978, the Civil Aeronautics Act controlled airlines' pricing, routes, and frequencies; this regulation limited new entrants in the air travel industry and kept prices high.¹⁰³ Because airlines were prevented from competing on price, they instead competed for customers by offering glamour and luxury in what became known as the "golden age" of flying.¹⁰⁴ The Act upended the model: it spurred competition in the marketplace by preempting state regulation of commercial airline rates, routes, and

95. See 87 Fed. Reg. at 52,680.

96. See *id.* at 52,679.

97. See 49 U.S.C. § 40101(a); 87 Fed. Reg. at 52,679.

98. See 87 Fed. Reg. at 52,680.

99. See *id.*

100. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

101. *Id.*

102. See *Airline Deregulation: When Everything Changed*, SMITHSONIAN (Dec. 17, 2021) [hereinafter Airline Deregulation], <https://airandspace.si.edu/stories/editorial/airline-deregulation-when-everything-changed> [https://perma.cc/WYQ4-7L8W].

103. See Gregory Navasarkian, *Economic Regulation of the Commercial Aviation Sector and the 1978 Airline Deregulation Act*, LIBRARY OF CONGRESS BLOGS (Jun. 2, 2022), <https://blogs.loc.gov/law/2022/06/economic-regulation-of-the-commercial-aviation-sector-and-the-1978-airline-deregulation-act/> [https://perma.cc/5GP3-CWRK].

104. See Jacopo Prisco, *What the 'Golden Age' of Flying Was Really Like*, CNN (Aug. 5, 2022, 7:30 AM), <https://edition.cnn.com/travel/article/golden-age-flying-really-like> [https://perma.cc/6MVT-ZPZS].

services.¹⁰⁵ So while consumers benefitted from low fares and more frequent flights in the ensuing years, they also sacrificed comfort and amenities.¹⁰⁶ Consumers frustrated by today's relatively cramped cabins and the "miserable" state of air travel thus blame deregulation for their woes.¹⁰⁷

Legal challenges to frequent flyer programs have repeatedly fallen flat at the Supreme Court in the decades following the Act's passage.¹⁰⁸ In *Morales v. Trans World Airlines, Inc.*,¹⁰⁹ the National Association of Attorneys General threatened major airlines with legal action for violating fare transparency guidelines that the attorneys general themselves created.¹¹⁰ The Court struck down these guidelines, however, because the guidelines affected fares, and the Act preempted state regulation of fares.¹¹¹ Three years after *Morales*, litigants brought a class action suit against American over changes to the AAdvantage frequent flyer program that devalued previously accumulated miles.¹¹² In *American Airlines, Inc. v. Wolens*,¹¹³ the Court weighed whether the retroactive effect of changes to the AAdvantage program violated Illinois consumer protection law.¹¹⁴ The Court again held that the Act preempted state laws but left open the possibility that airlines could be liable to consumers for mileage devaluations as a breach of contract.¹¹⁵ Importantly, the Court found that the "terms and conditions airlines offer and passengers

105. *See Nw., Inc. v. Ginsberg*, 572 U.S. 273, 288 (2014) (noting that the Act is premised on a view that the free market best promotes the interests of passengers); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). *See also* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705–06 (stating that the Act's purpose is to "encourage, develop, and attain an air transportation system which relies on competitive market forces" and considers "efficient[] and low-price services" as in the public interest).

106. *See* Airline Deregulation, *supra* note 102.

107. *See* Sitaraman, *supra* note 2 (noting that flying is "miserable" and blaming deregulation); Danielle Nerman, *Why the Golden Age of Flying Is Never Coming Back — and It Might Not Be a Bad Thing*, CBC NEWS (Jan. 29, 2023, 4:00 AM), <https://www.cbc.ca/radio/costofliving/golden-age-air-travel-1.6726341> [https://perma.cc/M247-YVNT] ("What most Canadians remember as the golden age of flying was the era when commercial aviation was regulated . . . [i]t was a time when airlines didn't have to cut costs to stay competitive, because the federal government didn't allow them to compete with one another.").

108. *See* *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 224–25 (1995); *Morales*, 504 U.S. at 384.

109. 504 U.S. 374 (1992).

110. *See id.* at 379.

111. *See id.* at 384.

112. *See Wolens*, 513 U.S. at 224–25.

113. 513 U.S. 219 (1995).

114. *See id.* at 225.

115. *See id.* at 228, 234.

accept are privately ordered obligations.”¹¹⁶ In a footnote, the Court also confirmed that DOT may prohibit unfair and deceptive airline practices on behalf of consumers pursuant to its authority under § 41712.¹¹⁷

The Supreme Court also reaffirmed § 41712 as the proper mechanism for safeguarding consumers in the airline industry in *Northwest, Inc. v. Ginsberg*.¹¹⁸ There, the plaintiff argued that Northwest Airlines’ termination of his frequent flyer account violated the covenant of good faith and fair dealing, and that the Act did not preempt such common law claims.¹¹⁹ However, the Court invoked its reasoning in *Wolens* and again refused to hold frequent flyer programs liable to breach of covenant claims under state law.¹²⁰ In particular, the Court saw the imposition of the implied covenant of good faith and fair dealing under state law as an impermissible attempt to “expand” the parties’ contractual obligations.¹²¹ Moreover, the Court stressed that implied covenants escaped preemption “only if the law of the relevant State permits an airline to contract around those rules in its frequent flyer program agreement.”¹²² There, the Court explicitly relied on free market principles as the best restraint on frequent flyer programs:

While the inclusion of [a disclaimer of the implied covenant of good faith and fair dealing] may impose transaction costs and presumably would not enhance the attractiveness of the program, an airline can decide whether the benefits of such a provision are worth the potential costs.

Our holding also does not leave participants in frequent flyer programs without protection. The ADA is based on the view that the best interests of airline passengers are most effectively promoted, in the main, by allowing the free market to operate. If an airline acquires a reputation for mistreating the participants in its frequent flyer program (who are generally the airline’s most loyal and valuable customers), customers can avoid that program and may be able to enroll in a more favorable rival program.¹²³

The Supreme Court also affirmed in *Ginsberg* that mileage award tickets relate to both rates and services and are thus subject to the Act’s preemption protections.¹²⁴ But while the Act limits *state* oversight of frequent flyer

116. *Id.* at 228.

117. *See id.* at 228 n.4.

118. 572 U.S. 273 (2014).

119. *See id.* at 278.

120. *See id.* at 287, 289–90.

121. *Id.* at 276.

122. *Id.* at 288.

123. *Id.*

124. *Id.* at 284 (“Like the frequent flyer program in *Wolens*, the Northwest program is connected to the airline’s ‘rates’ because the program awards mileage credits that can be redeemed for tickets and upgrades. When miles are used in this way, the rate that a customer pays, i.e., the price of a particular ticket, is either eliminated or reduced. The program is

programs, it remains unclear exactly how much the law restricts DOT's ability to affect rates, routes, and services.¹²⁵ In broad terms, the Act prohibits the federal government from setting airfares.¹²⁶ DOT is allowed, however, to police the unfairness or deceptiveness in rates, routes, and services through § 41712.¹²⁷ Under that construct, courts have been willing to allow federal regulations on practices affecting rates when those practices harm consumers (as in the case of post-purchase fee increases)¹²⁸ or to protect free-market principles (as in the case of prohibiting price discrimination).¹²⁹ Additionally, in *Airlines for America v. Department of Transportation*,¹³⁰ the Fifth Circuit upheld DOT's rate transparency requirement for ancillary services (such as checked bag fees) and did not see rate transparency as a rate-setting issue.¹³¹ There, the airlines also argued that DOT lacked the ability to issue rules at all under § 41712.¹³² The Fifth Circuit unequivocally rejected the airlines' position, however, stating that the Secretary's authority to issue rules prohibiting unfair and deceptive practices stemmed clearly from "plain text" of both § 40113 and § 46301.¹³³

Airlines for America is unremarkable in that Article III courts have long recognized DOT's authority to promulgate rules related to unfair and deceptive practices.¹³⁴ In support of DOT's ability to require price disclosures, the Fifth Circuit noted that "the federal government has been issuing rules, including disclosure rules, based on § 41712 and its predecessor since 1960."¹³⁵ The

also connected to 'services,' i.e., access to flights and to higher service categories.") (internal citation omitted).

125. *See* *Airlines for Am. v. Dep't of Transp.*, 127 F.4th 563, 576 (5th Cir. 2025) (declining to find a conflict between the Act and DOT's action on unfair or deceptive practices).

126. *Spirit Airlines, Inc. v. Dep't of Transp.*, 687 F.3d 403, 408 (D.C. Cir. 2012).

127. *Ginsberg*, 572 U.S. at 288–89.

128. *See Spirit Airlines*, 687 F.3d at 417.

129. *See United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1110–11, 1113 (7th Cir. 1985).

130. 127 F.4th 563 (5th Cir. 2025).

131. *See id.* at 576 ("[T]he Rule is a disclosure requirement, not a rate-filing requirement.").

132. *See id.* at 570–72.

133. *Id.* at 573; 49 U.S.C. §§ 40113(a), 46301.

134. Federal regulation of unfair and deceptive airline practices dates to the days of the Civil Aeronautics Board, a forerunner to DOT established in 1940 by the Civil Aeronautics Act. *See Governing Flight*, NAT'L AIR AND SPACE MUSEUM, <https://airandspace.si.edu/explore/stories/governing-flight> [https://perma.cc/2JYA-7TW8] (last visited Oct. 15, 2025); *United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1111 (7th Cir. 1985); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 294 (1976) (noting that the Civil Aeronautics Board required compensation for passengers denied boarding).

135. *Airlines for Am.*, 127 F.4th at 576 (internal quotation marks omitted).

court also held that DOT's ability to issue rules pursuant to § 41712 violates neither the major questions doctrine nor the nondelegation doctrine.¹³⁶ The court reasoned that, because airlines already disclose ancillary fees on their websites, “[r]equiring that these disclosures merely move to a more prominent position on the websites is not a vastly significant economic or political issue . . .”¹³⁷ In sum, DOT has good authority to argue not only that potential regulations on frequent flyer programs are permissible, but also that regulations related to price transparency are grounded in its authority under § 41712.¹³⁸

E. Additional Case Law on Frequent Flyer Programs

The Act limits frequent flyer programs' liability under state law.¹³⁹ As a result, consumers may find little protection from the unfriendly frequent flyer terms to which they agreed.¹⁴⁰ Under *Wolens*, mileage devaluations may give rise to breach of contract claims but not causes of action under state law.¹⁴¹ Following *Wolens*, courts have permitted airlines to reserve the right to change redemption rates retroactively.¹⁴² Per its current Mileage Plan policies, for instance, Alaska Airlines reserves the right to change program terms and redemption rates without notice.¹⁴³ Perhaps unsurprisingly, then,

136. *See id.* at 577–79.

137. *Id.* at 578. The court did not, however, appear to consider whether rate disclosures *indirectly* affect rates by altering demand. *See id.* at 576–77. When a price including taxes is advertised, the higher resulting total may affect (depress) sales and, consequently, rates. *See* Leslie Kramer, *How Does the Law of Supply and Demand Affect Prices?*, INVESTOPEDIA (Nov. 15, 2024), <https://www.investopedia.com/ask/answers/033115/how-does-law-supply-and-demand-affect-prices.asp> [<https://perma.cc/B662-N2MU>] (discussing that price is an equilibrium between supply and demand).

138. *See Airlines for Am.*, 127 F.4th at 576–77; *see also* Nw., Inc. v. Ginsberg, 572 U.S. 273, 288–289 (2014) (reaffirming DOT's authority to police unfair or deceptive practices pursuant to § 41712).

139. *See Ginsberg*, 572 U.S. at 281, 283; Am. Airlines, Inc. v. *Wolens*, 513 U.S. 219, 228 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

140. *See Ginsberg*, 572 U.S. at 289 (preempting airlines from claims alleging violations of an implied covenant of good faith and fair dealing); *Wolens*, 513 U.S. at 228–29 (stating that frequent flyer programs give rise to “privately ordered obligations”).

141. *See Wolens*, 513 U.S. at 228.

142. *See Gordon v. United Cont'l Holding, Inc.*, 73 F. Supp. 3d 472, 478–79 (D.N.J. 2014); *Monzingo v. Alaska Air Grp., Inc.*, 112 P.3d 655, 664 (Alaska 2005).

143. *Atmos Rewards Terms and Conditions*, ALASKA AIRLINES, INC., <https://www.alaskaair.com/atmosrewards/content/legal/terms#changes> [<https://perma.cc/4D8S-Z9VN>] (last visited Oct. 15, 2025) (“Alaska Airlines may, in its sole discretion, amend the Atmos Rewards conditions of membership, including terminating any member's ability to redeem miles already accrued, at any time with or without notice.”).

frequent flyer terms do not typically weigh in consumers' favor: customers generally have no property right in their miles,¹⁴⁴ airlines can restrict mileage transfers between members, and they may close a member's account upon death and zero out the miles in that account.¹⁴⁵

F. DOT's History of Regulating Unfair or Deceptive Practices

Lastly, it is helpful to consider what a future DOT *may* do under § 41712 in the context of what it *has already* done. A hallmark of past DOT enforcement against unfair or deceptive practices is aggressive action against false fare advertising.¹⁴⁶ By way of examples, under current rules, DOT does not permit airlines to advertise ticket prices that are 1) available only when offered in combination with a special package, and the additional requirement is inconspicuously disclosed, or 2) advertised as discounted one-way prices that require a round-trip purchase unless "the round-trip purchase requirement is clearly and conspicuously noted in the advertisement."¹⁴⁷ Generally, two classes of practices will trigger DOT sanctions: the failure to advertise the full price of a ticket including taxes, and the failure to offer enough seats for sale at an advertised price.¹⁴⁸ In 2016, for instance, DOT levied a fine on Frontier Airlines for advertising "buck" fares that cost more than \$1 when accounting for taxes and fees.¹⁴⁹ Elsewhere, DOT fined Southwest \$200,000 for advertising \$59 fares for which "no seats were available at all."¹⁵⁰

144. *See Monzingo*, 112 P.3d at 661 ("Because these provisions informed members that they have no vested right in their previously accumulated mileage . . . Alaska Airlines has the power to alter or change the value of miles."). Some frequent flyer terms and conditions expressly state that miles are not the account holder's property. *See, e.g., AAdvantage Terms and Conditions*, AM. AIRLINES, INC. (Jan. 30, 2025) [hereinafter *AAdvantage Terms*], <https://www.aa.com/i18n/aadvantage-program/aadvantage-terms-and-conditions.jsp> [https://perma.cc/7GWF-82HE] ("Accrued AAdvantage® Rewards and Benefits do not constitute property of an AAdvantage® member or their estate, do not have any residual property rights value, and . . . are not transferable upon their death.").

145. *See id.*

146. *See* 14 C.F.R. § 399.84 (2025); *see also* Société Air France, U.S. Dep't of Transp. Order 2012-11-1, at 2–3 (Nov. 1, 2012) (noting that the failure to disclose taxes and fees at the first page of search results is unfair and deceptive).

147. 14 C.F.R. § 399.84 (2025).

148. *See* Société Air France, U.S. Dep't of Transp. Order 2012-11-1, at 4 (Nov. 1, 2012); *see also* Robert W. Kneisley, *DOT's Regulation of Unfair or Deceptive Practices*, 31 AIR & SPACE L. 1, 12 (2018) (DOT threatened Southwest with fines for advertising "free" fares that incurred at least \$5.60 in taxes).

149. *See* Frontier Airlines, U.S. Dep't of Transp. Order 2016-12-5, at 3 (Dec. 9, 2016). DOT levied \$60,000 in fines. *Id.*

150. Southwest Airlines Co., U.S. Dep't of Transp. Order 2014-5-13, at 2–3 (May 29, 2014).

Airlines may also violate DOT's fair advertising standards even without making express misrepresentations.¹⁵¹ The Supreme Court has noted that “[a]dvertisements as a whole may be misleading although every sentence separately considered is literally true.”¹⁵² In this vein, online travel agencies may deceive consumers when they claim to offer the best-available hotel prices—and do—but engage in price fixing so that the price is not market-rate.¹⁵³ Accordingly, with respect to air travel, DOT may find a deceptive practice when an advertisement is factually true (seats are available at the advertised price) but misleading (the advertised price is available only in select markets or on select itineraries).¹⁵⁴

DOT further requires airlines to issue timely refunds and adhere strictly to their contract of carriage; the failure to do either may constitute an unfair or deceptive practice.¹⁵⁵ In 2023, DOT assessed a fine of \$140 million on Southwest when the carrier failed to communicate delays or issue prompt refunds related to Winter Storm Elliott.¹⁵⁶ In 2018, DOT fined Allegiant Air for not assisting passengers with disabilities as it promised in its customer service plan.¹⁵⁷ And in 2016, DOT sanctioned JetBlue for issuing slow or incorrect compensation to passengers who were denied boarding.¹⁵⁸

III. DOT CANNOT REGULATE IN THE WAY THAT REFORMERS HOPE

The regulatory and judicial landscape poses a distinct challenge for advocates looking for DOT to instill consumer protections in frequent flyer programs. At bottom, the reformers posit that frequent flyer programs are unfavorable and thus unfair to consumers.¹⁵⁹ Indeed, reasonable consumers

151. *See* United Air Lines, Inc., U.S. Dep’t of Transp. Order 2007-2-13, at 1 (Feb. 9, 2007).

152. *Donaldson v. Read Mag.*, 333 U.S. 178, 188 (1948) (“This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead.”).

153. *See* *In re Online Travel Co. Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526, 530, 545 (N.D. Tex. 2014). Here, online travel agencies displayed the best-available rates but deceptively engaged in price fixing so that the advertised rate was not a true free-market rate. *Id.*

154. *See* United Air Lines, Inc., U.S. Dep’t of Transp. Order 2007-2-13, at 1–2 (Feb. 9, 2007). United advertised fares that were unavailable for international itineraries. *Id.*

155. 14 C.F.R. §§ 260.2, 260.6 (2025). A contract of carriage is a “legally binding contract between the carrier and its passengers.” *Common Terms in Air Travel*, U.S. DEP’T OF TRANSP. (last updated Sept. 2, 2014), <https://www.transportation.gov/airconsumer/common-terms-air-travel> [<https://perma.cc/AX6G-W44F>].

156. *See* Sw. Airlines Co., U.S. Dep’t of Transp. Order 2023-12-11, at 5, 12 (Dec. 15, 2023).

157. *See* Allegiant Air, L.L.C., U.S. Dep’t of Transp. Order 2018-4-8, at 5 (Apr. 13, 2018).

158. *See* JetBlue Airways Corp., U.S. Dep’t of Transp. Order 2016-12-4, at 5 (Dec. 9, 2016).

159. *See* Sitaraman, *supra* note 2 (weighing whether frequent flyer programs are a good

may find it unfair that airlines are allowed to sell miles at a 200% markup.¹⁶⁰ They may also be frustrated by unannounced mileage devaluations, which Secretary Buttigieg highlighted as an issue driving DOT's frequent flyer program inquiry.¹⁶¹ Secretary Buttigieg noted that "[a]irlines may apply changes retroactively to rewards that customers already earned in ways that reduce or eliminate accrued value" and that hidden or dynamic pricing "makes it harder to compare the redemption price against the cash price across different rewards."¹⁶² But the reformers may conflate a consumer environment that is merely unfavorable with one that is impermissibly unfair or deceptive.¹⁶³ In other words, *popular* unfairness is not necessarily *legal* unfairness.¹⁶⁴ Crucially, DOT cannot act without first deciding which practices are unfair or deceptive.¹⁶⁵ The threshold issue thus becomes: Are mileage devaluations and dynamic pricing unfair or deceptive to the point where DOT can regulate them?

The desire to stop mileage devaluations is perhaps the clearest point of consensus among reformers.¹⁶⁶ Here, though, reformers may fail to account for the limits of DOT's statutory authority.¹⁶⁷ In order to prohibit mileage devaluations, DOT would also need to require airlines to set and publish a valuation for their miles.¹⁶⁸ Practically, such a move would turn all frequent flyer programs into fixed-value cashback programs not dissimilar to the model used by Southwest for much of the history of its Rapid Rewards program.¹⁶⁹

deal for consumers); Press Release, U.S. Dep't of Transp., USDOT Seeks to Protect Consumers' Airline Rewards in Probe of Four Largest U.S. Airlines' Rewards Practices (Sept. 5, 2024) [hereinafter DOT Press Release], <https://www.transportation.gov/briefing-room/usdot-seeks-protect-consumers-airline-rewards-probe-four-largest-us-airlines-rewards> [<https://perma.cc/R2N5-4PN2>].

160. See Interview by Rachel Reed with Ganesh Sitaraman, *How Much Are Your Airline Miles Really Worth?*, HARV. L. TODAY (Oct. 23, 2024)], <https://hls.harvard.edu/today/how-much-are-your-airline-miles-really-worth/> [<https://perma.cc/MT4E-UXZC>].

161. See DOT Press Release, *supra* note 159.

162. *Id.*

163. For an interpretation of unfair or deceptive practices, see 87 Fed. Reg. 52,677, 52,678 (Aug. 29, 2022).

164. See *id.*

165. See 49 U.S.C. § 41712; Nw., Inc. v. Ginsberg, 572 U.S. 273, 288-89 (2014).

166. See DOT Press Release, *supra* note 159 ("Our goal is to ensure consumers are getting the value that was promised to them"); Goldfine, *supra* note 11, at 269 ("DOT should also regulate the programs' ability to alter the point-to-dollar conversion rate.").

167. See § 41712.

168. See Goldfine, *supra* note 11, at 267-68.

169. See Sean Cudahy, *Southwest Airlines' 'Variable' Raid Reward Redemption Rates Take Effect*, THE POINTS GUY (Mar. 26, 2025), <https://thepointsguy.com/news/southwest-airlines-rapid->

Fixed-value programs are simple to understand and make it easy to know the value of miles.¹⁷⁰ In these programs, the airline fixes the value of a mile, and the price of a mileage ticket always corresponds to that of its cash counterpart.¹⁷¹ But requiring airlines to place a public dollar value on miles—or something approaching a dollar valuation—may constitute rate setting,¹⁷² and such a regime may exceed DOT’s authority under § 41712 and conflict with the free-market principles of the Act.¹⁷³ And even if mile value transparency is not rate setting, prohibiting airlines from devaluing—changing—their prices certainly is.¹⁷⁴

In support of mileage value transparency, reformers may highlight *Airlines for America*, where the Fifth Circuit upheld DOT’s ability to require price disclosures for ancillary services.¹⁷⁵ However, the key difference between DOT’s price transparency rule in that case and the reformers’ mileage value transparency plan is that consumers *already* had access to the rate-related information at issue in that case.¹⁷⁶ Under the reformers’ model, airlines would be required to publicize proprietary pricing information.¹⁷⁷ As such, courts may see this move as a step beyond DOT’s previous efforts—and outside the scope of its authority.¹⁷⁸ And perhaps as consequential for consumers, there is no guarantee that mandatory mile value disclosures would effect a decrease in consumer costs given the oligarchic nature of the airline market.¹⁷⁹

rewards-variable-redemptions/ [https://perma.cc/4YYP-T6YY] (explaining the formerly fixed-value of Southwest’s program and its transition to dynamic pricing). Fixed-value cash-back programs reduce the possibility that consumers will reap outsized value from their miles. *See generally* Peter Thornton, *7 Economy Award Redemptions That Provide Excellent Value*, THE POINTS GUY (Mar. 10, 2022), https://thepointsguy.com/loyalty-programs/economy-award-redemptions-value/ [https://perma.cc/5UPS-HSH5] (indicating that premium cabin award redemptions “almost always” offer “more bang for your buck” and demonstrating ways for frequent flyer program members to redeem points that exceed commonly accepted point valuations).

170. *See* Ian Synder, *How to Maximize Fixed-Value Miles in 2024*, AWARDWALLET (July 21, 2025), https://awardwallet.com/blog/maximize-fixed-value-points-miles/ [https://perma.cc/3N9A-RTP8].

171. *See id.*

172. *See* *Airlines for Am.* v. Dep’t of Transp., 127 F.4th 563, 576 (5th Cir. 2025).

173. *See* Nw., Inc. v. Ginsberg, 572 U.S. 273, 280 (2014) (citing 49 U.S.C. §§ 40101(a)(6), (12)(A)).

174. *But cf.* Goldfine, *supra* note 12, at 269 (arguing for a constant value for accrued points).

175. *See* *Airlines for Am.*, 127 F.4th at 576-77.

176. *See id.* at 578 (noting that airlines already disclose ancillary fees to customers).

177. *See* Goldfine, *supra* note 11, at 267.

178. *See* 49 U.S.C. § 41712; 14 C.F.R. § 399.84(a) (2025).

179. According to a study conducted on Germany’s mandatory gas price disclosures, where customers could see a map of real-time gas prices, consumers saw slight decreases in

Devaluations aside, reformers may also struggle to convince DOT that dynamic pricing is unfair or deceptive.¹⁸⁰ Principally, the Act stresses “maximum reliance on competitive market forces” and prohibits state intervention in rates, routes, or services.¹⁸¹ Accordingly, airlines can argue that award ticket prices should logically rise (or fall) along with demand—this is how the free market is supposed work.¹⁸² In contrast, government-mandated redemption rates for frequent flyer miles are the very antithesis of free-market principles,¹⁸³ and courts have allowed airlines to devalue their miles so long as the airlines adhere to the terms and conditions to which their customers agreed.¹⁸⁴ Airlines can also demonstrate that their award pricing is transparent and upfront: with some airlines, customers do not need to have the requisite miles for an award ticket—or a frequent flyer account—to search award prices.¹⁸⁵ Ultimately, even if devaluations rankle reformers and the flying public, unfavorable contractual terms and consumer dissatisfaction do not provide a strong basis for establishing an unfair or deceptive practice.¹⁸⁶

Some reformers also contend that frequent flyer programs are unfair and deceptive inasmuch as they profit off of consumer mistakes in direct-to-

fuel costs. *See* Felix Montag, Alina Sagimuldina & Cristoph Winter, *When Does Mandatory Price Disclosure Lower Prices? Evidence from the German Market*, 344 STIGLER CTR. NEW WORKING PAPER SERIES 1, 36 (2024). However, in a study of the Dutch concrete market, which imposed a similar price transparency scheme, the price of concrete rose significantly. *See* Svend Albæk, Peter Møllgaard & Per B. Overgaard, *Government-Assisted Oligopoly Coordination? A Concrete Case*, 45 J. OF INDUS. ECON. 429, 430 (1997). In that case, the producers with the “low” prices raised theirs to the market average, thus eliminating secret discounts. *Id.* at 440. Two years after the introduction of the transparency rule, the Dutch government abandoned the initiative. *Id.* at 441.

180. *See* DOT Press Release, *supra* note 159.

181. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1706.

182. *See* Smithson, *supra* note 36 (discussing the structure of dynamic awards).

183. *See* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1706.

184. *See* Gordon v. United Cont'l Holding, Inc., 73 F. Supp. 3d 472, 478–79 (D.N.J. 2014); Monzingo v. Alaska Air Grp., Inc., 112 P.3d 655, 664 (Alaska 2005).

185. American, Delta, and Southwest do not require customers to log in to see a flight’s price in points or miles. *See* AM. AIRLINES, INC., <https://www.aa.com/> (last visited Oct. 15, 2025); DELTA AIRLINES, INC., <https://www.delta.com/> [<https://perma.cc/D3A9-UAMP>] (last visited Oct. 15, 2025); SW. AIRLINES CO., <https://www.southwest.com/> [<https://perma.cc/F858-X5LP>] (last visited Oct. 15, 2025).

186. Roughly, DOT’s basis is practices that are “likely to cause substantial injury” or “likely to mislead.” 87 Fed. Reg. 52,677, 52,678, 52,680 (Aug. 29, 2022). *See also* Gordon et al., *supra* note 4 (“[C]onsumer advocates warn that the changes have made airline loyalty programs unfair to customers, who often find they are earning points that are worth less than they thought.”); Bachman, *supra* note 3 (discussing customers’ dissatisfaction with devaluations but the positive effect for an airline’s bottom line).

consumer mileage sales.¹⁸⁷ In truth, airlines *do* sell miles at higher rates than they expect customers to redeem those same miles, and often significantly so.¹⁸⁸ As one leading reformer puts it, “[e]ffectively, the airlines are saying, ‘Give me \$30 and I’ll give you \$10 back.’ No one would take that deal, if there was transparency about the value.”¹⁸⁹ But value is a subjective concept, and consumers may have good reasons for buying these miles even at unfavorably high rates.¹⁹⁰ A person who is only 1,000 miles away from an award flight might well consider a top-up miles purchase of \$35 so that they may redeem miles in lieu of a paid ticket worth \$500.¹⁹¹ The airlines themselves seem to contemplate that very scenario: on United’s miles storefront, the airline invites customers to purchase miles if they are “. . . short on miles for [their] next award trip . . .”¹⁹² As currently constituted, the direct-to-consumer sale of miles is restrained only by competition in the marketplace, exactly as required by the Act.¹⁹³ Furthermore, even if airlines suggested that miles purchased in such sales would retain a certain value, DOT’s preexisting rules would apply to prohibit false claims and misrepresentations.¹⁹⁴

Reformers’ strongest argument for unfairness or deception in frequent flyer programs is that airlines and banks deceptively offer miles for credit card spending when blackout dates limit consumers’ ability to spend them.¹⁹⁵

187. See Goldfine, *supra* note 11, at 259 n.179.

188. See Bachman, *supra* note 3.

189. Reed with Sitaraman, *supra* note 160.

190. See Ben Smithson, *When Does It Make Sense to Buy Points and Miles?*, THE POINTS GUY (Jul. 18, 2024), <https://thepointsguy.com/loyalty-programs/when-to-buy-points-miles/> [https://perma.cc/3WA2-Q2PH].

191. See *id.*

192. See *Buy Miles*, UNITED AIRLINES, INC., https://buymiles.mileageplus.com/united/united_landing_page/ [https://perma.cc/A9EY-H9ZA] (“If you’re short on miles for your next award or want to boost your balance for future travel, we got you! Buying miles has never been easier.”) (last visited Oct. 15, 2025). But see Goldfine, *supra* note 11, at 268 (positing that direct-to-consumer mileage sales rely on consumers’ misunderstanding the value of points).

193. See *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 280 (2014).

194. See Southwest Airlines Co., U.S. Dep’t of Transp. Order 2014-5-13, at 2 (May 29, 2014).

195. See DOT Press Release, *supra* note 159 (“Airlines may impose new restrictions, such as increasing the blackout dates for flight redemptions . . .”); see also Meghna Maharishi, *Are Loyalty Programs Fair?*, SKIFT (Dec. 8, 2024), <https://skift.com/2024/12/08/are-frequent-flier-programs-fair> [https://perma.cc/ZT5V-FJGH] (noting that two congressional bills “seek to put more regulations on credit cards and points and miles”). According to Consumer Financial Protection Bureau Director Rohit Chopra, “airlines and credit card companies can ‘quickly and dramatically’ devalue points by making them more difficult to redeem or limiting what items can be purchased with points.” *Id.*

Indeed, in the era of fixed-price awards, banks and airlines advertised that their frequent flyer miles would be “enough” for various types of awards, implying that award seats would be available at those prices.¹⁹⁶ In a 2013 offer, for instance, Citi warranted that 30,000 AAdvantage miles earned as a credit card sign-up bonus would be “enough for a domestic round-trip MileSAAver award.”¹⁹⁷ In other advertisements, American promised that 25,000 AAdvantage miles were “enough for a domestic round-trip MileSAAver award.”¹⁹⁸ Due to blackout dates, however, these promises were not always true,¹⁹⁹ and such advertisements may have been liable to charges of deception as implied representations.²⁰⁰

Unfortunately for reformers, however, this charge is largely moot because airlines have changed how they advertised the utility of their miles.²⁰¹ Now, banks simply state how many miles a customer will earn after meeting a minimum spending requirement.²⁰² By transitioning away from hard promises of miles’ utility, frequent flyer programs have avoided problematic implied representations.²⁰³ Similarly troubling for the reformers’ charges of unfairness or deception is the airline industry’s practical elimination of blackout dates.²⁰⁴ Under DOT’s 2022 Guidance Document, reformers may argue that blackout dates are potentially deceptive if they mean that too few or no seats are available at an advertised price.²⁰⁵ But airlines no longer make those promises, nor do they limit the times or days on which customers can travel

196. See Ann Morales Olazabal, Howard Mamorstein & Dan Sarel, *Frequent Flyer Programs: Empirically Assessing Consumers’ Reasonable Expectations*, 51 AM. BUS. LJ. 175, 182 n. 18 (2014).

197. *Id.*

198. Brian Kelly, *DirecTV Sign-Up Bonuses: 30,000 United Miles or 25,000 AAdvantage Miles – Worth It?*, THE POINTS GUY (Aug. 19, 2023), <https://thepointsguy.com/deals/directv-sign-up-bonuses-30000-united-miles-or-25000-aadvantage-miles-worth-it/> [https://perma.cc/B8D-VXB9].

199. See Hostetler, *supra* note 33 (explaining award availability and blackout dates).

200. See 87 Fed. Reg. 52,677, 52,680 (Aug. 29, 2022).

201. For an archetypical present-day credit card offer, see Gregory Karp & Melissa Lambarena, *Citi AAdvantage Platinum Card Review: Worth the Fee for Airline Loyalists*, NERDWALLET (Apr. 2, 2025, 11:39 AM), <https://www.nerdwallet.com/reviews/credit-cards/citi-aadvantage-platinum> [https://perma.cc/7FTU-8YEE].

202. See Karp & Lambarena, *supra* note 201.

203. See 87 Fed. Reg. at 52,680.

204. See Gordon et al., *supra* note 4 (discussing United’s elimination of blackout dates); Hostetler, *supra* note 33 (professing that blackout dates are “becoming a thing of the past”).

205. See 87 Fed. Reg. at 52,680; Olazabal et al., *supra* note 196, at 182 n.18 (showing a common credit card advertisement’s claim of miles’ utility); Hostetler, *supra* note 33 (acknowledging blackout dates); *see also infra* Part IV.A.2.

using their miles.²⁰⁶ On the whole, there is more flexibility in the system, which the airlines assert is good for consumers.²⁰⁷

IV. RECOMMENDATION

A. DOT Should Commence Notice-and-Comment Rulemaking to Regulate False Advertising in Frequent Flyer Programs

If reformers are serious about realizing consumer protections in frequent flyer programs, they should aim low. Reformers should call on DOT to first identify legally—as opposed to popularly—unfair or deceptive practices that are distinct to frequent flyer programs by using DOT’s preexisting understanding of those terms.²⁰⁸ They should then urge DOT to exercise its authority pursuant to § 41712 to commence notice-and-comment rulemaking on frequent flyer consumer protections as § 40113 allows and as set forth by the APA.²⁰⁹ DOT is no stranger to notice-and-comment rulemaking: in 2024 alone, the agency issued several noteworthy final notice-and-comment rules, including those that touched on transparency in ancillary airline fees, mandatory refunds, and accommodations for passengers in wheelchairs.²¹⁰

DOT should be able to find a handful of legally unfair or deceptive practices in frequent flyer program advertising. First, DOT may reasonably act to prohibit falsely advertised award tickets that induce mileage transfers from banks.²¹¹ Second, DOT may also declare award blackout dates potentially unfair or deceptive.²¹² Finally, DOT may also deem unfair or deceptive express promises of mileage validity in frequent flyer program advertisements.²¹³ The broad effect of this recommendation is to enshrine in federal regulation the voluntary, market-based changes that frequent flyer programs have adopted since the mid-2010s.²¹⁴ While these modest changes would undoubtedly disappoint reformers and consumer advocates, they would at least comport with DOT’s actual rather than imagined authority.²¹⁵

206. See Gordon et al., *supra* note 4.

207. See Gordon et al., *supra* note 4.

208. See 87 Fed. Reg. 52,677, 52,678–80 (Aug. 29, 2022).

209. See 49 U.S.C. §§ 40113(a), 41712(a); 5 U.S.C. § 553; 14 C.F.R. § 399.79 (2025); 87 Fed. Reg. at 52,677.

210. 14 C.F.R. §§ 259.5, 382.95, 399.80, 399.84–85 (2025).

211. See *infra* notes 216–237 and accompanying text.

212. See *infra* notes 238–263 and accompanying text.

213. See *infra* notes 264–277 and accompanying text.

214. See Gordon et al., *supra* note 4 (discussing the transition both from blackout dates and to dynamic pricing).

215. See 49 U.S.C. § 41712.

1. “*Phantom*” Awards

DOT’s construction of unfair or deceptive practices already guards against falsely advertised award tickets.²¹⁶ However, a small subset of award fares that an airline’s website displays but which cannot be booked through any channel—sometimes called “phantom” awards²¹⁷—present a unique challenge compared to their cash counterparts because they may induce customers to irreversibly convert bank points to airline miles.²¹⁸ The key feature behind the bank-airline relationship, which occupies a multibillion-dollar sector of the economy,²¹⁹ is the ability of bank customers to convert points they accrue through credit card spending to miles with a selection of the bank’s airline partners.²²⁰ Crucially, while airlines allow conversions of bank points into their programs, they do not permit the reverse transfer of airline miles to bank points.²²¹ Consequently, some customers may 1) see a phantom fare advertised on an airline’s website, 2) convert bank points sufficient to book that fare, but 3) get an error message at the ticketing stage because the award does not exist.²²² In this scenario, the airline effectively captures the customer’s bank miles because the customer loses the ability to convert those bank points to miles of another airline.²²³

To address the inequities of phantom awards and bank point transfers, DOT should issue a rule requiring the refunding of converted bank points in

216. See 14 C.F.R. § 399.79(b) (2025); 87 Fed. Reg. 52,677, 52,680 (Aug. 29, 2022); *see, e.g.*, Edelman, U.S. Dep’t of Transp. Order 2016-3-9, at 3 (Mar. 4, 2019) (finding an incorrect display of taxes on an award ticket to be unfair and deceptive).

217. See Benji Stawski & Katie Genter, *Phantom Award Space: What Is It and Ways to Avoid It*, THE POINTS GUY (Feb. 23, 2024), <https://thepointsguy.com/loyalty-programs/phantom-award-space/> [https://perma.cc/GRY6-LJHP] (explaining the basics of phantom awards).

218. See 14 C.F.R. § 399.79; 87 Fed. Reg. at 52,680.

219. See Bachman, *supra* note 3.

220. See Benjamin Din, *The Guide to Chase Transfer Partners*, NERDWALLET (Aug. 28, 2025, 7:20 AM), <https://www.nerdwallet.com/article/travel/chase-transfer-partners-guide> [https://perma.cc/89SQ-Y6G2] (providing a list of airlines to which Chase allows transfers of its Ultimate Rewards points).

221. See *id.* (explaining that point transfers from banks to airlines are a one-way street).

222. See Gary Leff, *Chase Points Trapped: United’s Refusal to Return Points Leads to DOT Showdown*, VIEW FROM THE WING (Mar. 8, 2024) [hereinafter Leff, *Chase Points Trapped*], <https://viewfromthewing.com/chase-points-trapped-uniteds-refusal-to-return-points-leads-to-dot-showdown/> [https://perma.cc/B8BY-5BYQ].

223. See *id.*; *see also* Letter from Michael Bell, FOIA Officer, Dep’t of Transp., to author (Mar. 11, 2025) (on file with author). One consumer complained to DOT that they are “stuck with a giant pile of BA Avios that [they] can’t use” after seeing a phantom award advertised. *Id.*

instances of false award advertising.²²⁴ Requiring this class of refund fits squarely with DOT's prohibition on practices that are not reasonably avoidable and cause substantial economic injury.²²⁵ Customers cannot reasonably know that an advertised fare is unbookable until after they have converted bank points to airline miles.²²⁶ Phantom award fares are also a clear manifestation of a deceptive "material matter" proscribed by the 2021 Final Rule because phantom fares directly affect a consumer's decision to convert valuable bank points.²²⁷ Moreover, DOT already requires airlines to issue certain classes of refunds,²²⁸ and airlines already have the technical capacity to refund converted points.²²⁹ Thus, while these refunds would impose a greater responsibility on airlines, such a requirement would not amount to a conceptual reimagination for airlines nor likely place a heavy burden on their operating structures.²³⁰ Most importantly for reformers, refunds for deceptive advertisements fit squarely within DOT's existing suite of powers.²³¹

Despite the phantom award refund rule's clear benefits, there are two potential drawbacks—one unlikely to occur, the other more probable. First, airlines could simply stop allowing transfers of bank points.²³² However, this scenario is improbable because selling miles to banks is a major source of airline revenue.²³³ Second, phantom awards may be more likely to occur when an airline offers an award seat on a partner airline's flight.²³⁴ Rather

224. See text accompanying notes 217–223.

225. 14 C.F.R. § 399.79(b) (2025); 87 Fed. Reg. 52,677, 52,678–79 (Aug. 29, 2022).

226. See Leff, *Chase Points Trapped*, *supra* note 222.

227. 14 C.F.R. § 399.79(b)(2).

228. See 14 C.F.R. §§ 260.6, 260.10 (2025).

229. See Leff, *Chase Points Trapped*, *supra* note 222.

230. See 14 C.F.R. §§ 260.6, 260.10; *Airlines for Am. v. Dep't of Transp.*, 127 F.4th 563, 578 (5th Cir. 2025) (noting that because airlines already disclosed ancillary fees through hyperlinks, DOT's requirement to display such fees more prominently was not a major economic question).

231. 14 C.F.R. §§ 260.10, 399.79.

232. See Ben Schlappig, *Bilt Rewards Losing American AAdvantage as Transfer Partner*, ONE MILE AT A TIME (May 23, 2024), <https://onemileatatime.com/news/bilt-rewards-american-aadvantage/> [https://perma.cc/RR99-LNLC] (explaining why airlines may choose to end their relationship with a bank).

233. See Bachman, *supra* note 3 (noting that bank relationships are a "cash cow" for airlines).

234. See JT Genter, *My Trick to Booking an American Airlines Award that Includes a Partner*, AWARDWALLET (July 12, 2024), <https://awardwallet.com/blog/aadvantage-partner-award-booking-workaround/> [https://perma.cc/6DA6-D5GJ] (providing an example of phantom awards with American Airlines' partner airlines). Partner awards may be a better value to consumers but typically come with blackout dates. See Nick Reyes, *A Beginner's Guide to Searching*

than deal with the hassle of refunding customers for unavailable-as-advertised partner awards, airlines may choose not to offer partner award seats at all,²³⁵ which would harm consumers by decreasing lucrative redemption options.²³⁶ Nevertheless, DOT could effect meaningful change for a subset of consumers by extending its refund and false advertising protections to customers tricked by phantom award fares.²³⁷

2. *Award Seat Availability*

Award redemption blackout dates have long frustrated consumers.²³⁸ Now, as a logical extension of DOT's current interpretation of practices that are likely to mislead consumers, reformers should urge DOT to issue a rule declaring award blackout dates potentially unfair or deceptive—in other terms, a *per se* rule against blackout dates.²³⁹ The rule fits squarely within DOT's preexisting authority because DOT currently expects airlines to have a “reasonable number of seats available at the advertised fare,” and an over-reliance on blackout dates may frustrate customers’ reasonable expectations.²⁴⁰ Second, DOT has already issued guidelines on blackout dates for vouchers given as compensation in instances of denied boarding.²⁴¹ Such protections should thus be extended to award fares.

An express rule establishing blackout dates as potentially unfair or deceptive is also warranted despite DOT's preexisting protections against false advertising.²⁴² Simply put, the 2021 Final Rule and 2022 Guidance Document do not speak clearly enough to the issue.²⁴³ Perhaps because blackout dates

for Partner Award Flights, FREQUENT MILLER (July 19, 2024) [hereinafter Reyes, *A Beginner’s Guide*], <https://frequentmiler.com/booking-partner-award-flights/> [https://perma.cc/EYH5-GAN5].

235. See Nick Reyes, *Impressive: Air Canada Aeroplan’s Solution for Cancelled Etihad Bookings*, FREQUENT MILLER (Nov. 3, 2023), <https://frequentmiler.com/impressive-air-canada-aeroplan-solution-for-cancelled-etihad-bookings/> [https://perma.cc/883H-J3AF] (explaining the lengths to which Air Canada went to honor partner bookings that the partner canceled unexpectedly).

236. See Reyes, *A Beginner’s Guide*, *supra* note 234 (highlighting the value of partner awards).

237. See 87 Fed. Reg. 52,677, 52,680 (Aug. 29, 2022).

238. See Claire Tsosie, ‘No Blackout Dates’ Doesn’t Mean Unlimited Availability, HUFFPOST (Jan. 7, 2016), https://www.huffpost.com/entry/no-blackout-dates-doesnt_b_8933660 (acknowledging consumers’ frustration over low award availability).

239. See 87 Fed. Reg. at 52,680; *see also* text accompanying notes 95–97.

240. *Id.*

241. See 14 C.F.R. § 250.5(c) (2025).

242. See 87 Fed. Reg. at 52,680.

243. See *id.*; 14 C.F.R. § 399.79 (2025).

are problematic primarily in the context of award fares,²⁴⁴ or because passengers on award tickets comprise only a small percentage of customers on any given flight,²⁴⁵ DOT has not felt the need to issue guidance on award blackout dates.²⁴⁶ The agency's silence on these availability restrictions is especially curious given its requirement that blackout dates be clearly disclosed for denied boarding compensation vouchers.²⁴⁷ DOT's failure to mention blackout dates for *award* tickets may thus signal that the agency does not consider blackout dates to be within the practices it seeks to prohibit as unfair or deceptive.²⁴⁸ An explicit stance against blackout dates is thus justified because it serves to notify the public that DOT applies seat availability advertising standards evenly to both award and cash fares.²⁴⁹

This recommendation would not mean that blackout dates would *always* be an unfair or deceptive practice, or that every flight must carry award passengers—although they likely will.²⁵⁰ Nor would the rule be likely to infringe upon airlines' ability to contract for blackout dates so long as they are properly disclosed in a program's terms and conditions.²⁵¹ Rather, the rule would serve to put airlines on notice that blackout dates—or an overuse of them—are inherently unfair or deceptive and thus potentially actionable in ways that may not seem clear from DOT's current language.²⁵² By declaring that blackout dates *may* be unfair or deceptive, DOT gives itself the flexibility to enforce the prohibition against anti-consumer practices, as authorized by

244. *See* Hostetler, *supra* note 33.

245. *See* Gary Leff, *American Discloses That Percentage of Seats Redeemed With Miles Fell—Again, VIEW FROM THE WING* (Feb. 21, 2018), <https://viewfromthewing.com/american-discloses-percentage-seats-redeemed-miles-fell/> [https://perma.cc/84D7-RH3D].

246. *See, e.g.* 87 Fed. Reg. at 52,680 (failing to mention blackout dates or award tickets).

247. *See* 14 C.F.R. § 250.5(c) (2025).

248. *See generally* 87 Fed. Reg. at 52,680.

249. *See* Southwest Airlines Co., U.S. Dep't of Transp. Order 2014-5-13 at 2 (May 29, 2014); United Air Lines, Inc., U.S. Dep't of Transp. Order 2007-2-13 at 1–2 (Feb. 9, 2007) (stating that the failure to disclose that a promotion was limited to domestic itineraries was unfair and deceptive).

250. *See, e.g.* 14 C.F.R. § 399.84(a),(e) (2025) (declaring certain fare advertisements unfair or deceptive *unless* the conditions required to realize the fare are properly disclosed “at the outset”). *But see id.* § 388.84(b) (“The Department considers it to be an unfair and deceptive practice to advertise each-way fares contingent on a round-trip purchase requirement as ‘one-way’ fares, even if accompanied by prominent and proximate disclosure of the round trip purchase requirement.”); Hostetler, *supra* note 33 (noting that blackout dates are “becoming a thing of the past”).

251. *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995) (noting that “terms and conditions airlines offer and passengers accept are privately ordered obligations”).

252. *See* 14 C.F.R. § 399.79 (2025); 87 Fed. Reg. at 52,680.

§ 41712, while also honoring the Act’s freedom of contract provisions.²⁵³

A rule effectively curbing blackout dates may also appear to conflict with the earlier discussion on dynamic (variable) award pricing.²⁵⁴ If airlines do not guarantee award prices, how can they be fined for failing to offer seats at those prices?²⁵⁵ But airlines indeed warrant that their miles can be redeemed for flights.²⁵⁶ Moreover, airlines built frequent flyer programs around the concept of redeeming miles for flights and, because DOT bases its interpretation of deceptive on a reasonable person standard, it would be inconceivable to claim that reasonable consumers *do not* expect to use their miles for flights.²⁵⁷ Significantly, the airlines themselves would be unlikely to protest a blackout date rule: the industry’s practical elimination of award blackout dates suggests that the rule would be unproblematic for airlines even if DOT moved to require a reasonable number of award seats on *every* flight.²⁵⁸ And because the rule would allow airlines to charge a dynamic (market-based) price for the award seats that DOT suggests should be on offer, DOT can argue that the regulation honors the market-based principles of the Act.²⁵⁹

253. See *Wolens*, 513 U.S. at 228–30.

254. See text accompanying notes 29–41.

255. See Gordon et al., *supra* note 4 (discussing the real-time pricing of awards).

256. See, e.g., *Use Miles on American Airlines*, AM. AIRLINES, INC., <https://www.aa.com/web/i18n/aadvantage-program/use-miles/american-airlines-flights.html> [https://perma.cc/QZ92-ATQT] (last visited Oct. 15, 2025) (“You worked hard to earn AAdvantage miles, so why not use them to fly somewhere great? Choose from thousands of daily American Airlines flights to hundreds of destinations.”). American also expressly states that its redemption prices start at 7,500 miles. *Id.*

257. See *Sitaraman*, *supra* note 2 (explaining the original scheme of frequent flyer programs). DOT’s language is “a consumer, acting reasonably under the circumstances.” 14 C.F.R. § 399.79.

258. See *Hostetler*, *supra* note 33 (discussing blackout dates). This rule would not apply to partner award tickets. See *Nick Reyes, A Beginner’s Guide*, *supra* note 234 (discussing the basics of partner award tickets); see also *Partner Airlines*, AM. AIRLINES, INC., <https://www.aa.com/i18n/aadvantage-program/miles/partners/partner-airlines.jsp> [https://perma.cc/2Y39-QAZ5] (last visited Oct. 15, 2025) (listing the partner airlines on which AAdvantage customers can redeem AAdvantage miles). American Airlines AAdvantage members can redeem miles for flights on British Airways, but because American does not operate those flights, it has no control over the award seat inventory, and those flights should not be subject to the reasonable award seat minimum. See *id.*; Ben Schlappig, *What Causes Airline Award Availability Discrepancies?*, ONE MILE AT A TIME (Jun. 12, 2024), https://onemileatatime.com/insights/airline-award-availability-discrepancies/#airlines_dont_make_all_award_space_available_to_all_partners [https://perma.cc/2RT3-JP94] (explaining that partner airlines may restrict award availability).

259. See *Smithson*, *supra* note 36; see also *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 288 (2014) (affirming the Act’s free market basis).

Even if award blackout dates remained legal in a technical sense, airlines would likely forgo the use of blackout dates altogether rather than risk the threat of DOT fines.²⁶⁰ Unfortunately for consumers, however, the rule would not provide much for frequent flyers to cheer²⁶¹ because the airlines have *already* abandoned the blackout date model.²⁶² If anything, then, the goal of the proposed rule would be to make unassuming but reasonable consumers aware of blackout dates so that they could both plan accordingly and more fairly assess whether to participate in a particular frequent flyer program.²⁶³

3. *Implied Mileage Utility*

DOT may also use its authority under § 41712 to curb illusory promises in frequent flyer program advertising.²⁶⁴ Up until the late 2010s, banks and airlines advertised that miles earned through credit card spending would be “enough for” a particular itinerary.²⁶⁵ However, blackout dates significantly restricted customers’ ability to cash in on those offers, and reasonable consumers could thus be induced into applying for a credit card for what amounted to a false promise.²⁶⁶ It thus takes little imagination to assume that DOT could find these advertisements deceptive because § 41712 guards against implied representations.²⁶⁷

The airlines, perhaps sensing increased scrutiny, effectively ended the practice of advertising that miles will be “enough for” an award seat on any given route.²⁶⁸ Nevertheless, consumers should not have to resort to formal complaints or litigation when airlines deceive them into believing that frequent flyer miles will retain the advertised value.²⁶⁹ DOT should thus

260. *See* Gordon et al., *supra* note 4 (highlighting United’s effort to eliminate blackout dates); Southwest Airlines Co., U.S. Dep’t of Transp. Order 2014-5-13, at 2–3 (May 29, 2014). DOT fined Southwest for advertising fares for which “no seats were available at all.” *Id.*

261. Consumers could thus expect award availability even during peak travel periods. *See* Hostetler, *supra* note 33.

262. *See supra* notes 35–40 and accompanying text.

263. *See Ginsberg*, 572 U.S. at 288 (2014) (discussing consumers’ ability to engage with an airline’s competitors based on disclosures in frequent flyer program terms).

264. *See* 87 Fed. Reg. 52,677, 52,680 (Aug. 29, 2022).

265. *See* Olazabal et al., *supra* note 196, at 182 n.18. For an illustration of an advertisement that restricted the number of fares available at the advertised price, see Southwest Airlines Co., U.S. Dep’t of Transp. Order 2014-5-13 at 2 (May 29, 2014).

266. *See* 14 C.F.R. § 399.79(b)(2) (2025) (using a “consumer, acting reasonably” standard); Olazabal et al., *supra* note 196, at 182 n.18 (demonstrating the nature of such advertisements); *see also* Hostetler, *supra* note 33 (explaining blackout dates).

267. 87 Fed. Reg. at 52,680.

268. *See* Karp & Lambarena, *supra* note 201.

269. *See* DOT Press Release, *supra* note 159 (“When earned value disappears before it

promulgate a rule declaring warranties of mileage valuation in frequent flyer program advertisements unfair or deceptive unless the airline demonstrates good faith efforts to fulfill such representations.²⁷⁰

The rule would virtually ban advertisements such as those promising that 30,000 miles are “enough for” a round-trip domestic ticket.²⁷¹ At the same time, it would permit well-meaning airlines to use express promises as a competitive advantage when the airline’s redemption structure allows *all* customers to take advantage of the promised price instead of a select few or at limited times.²⁷² The rule would thus grant airlines the flexibility, in the face of a changing industry, to take advantage of market inefficiencies by offering customers better value than their competitors.²⁷³

Here again, though, reformers would likely be frustrated that the proposed rule does not address complaints about frequent and unannounced mileage devaluations.²⁷⁴ Nor would the rule greatly affect how banks and airlines market airline credit cards.²⁷⁵ Instead, the rule would aim to ensure that frequent flyer program advertisements give rise to reasonable expectations as to lessen the chance that consumers will be misled.²⁷⁶ And even though airlines have recently shifted away from problematic implied representations in their advertising, the rule would protect against future abuses in frequent flyer program marketing.²⁷⁷

CONCLUSION AND IMPLICATIONS

Calls for increased consumer protections and reforms in frequent flyer programs have grown both numerous and prominent in recent years.²⁷⁸ Much of the commentary has centered on the public’s belief in the unfairness of frequent flyer programs due to runaway award prices under dynamic

can be redeemed, customers have little recourse to reclaim it from the airline.”).

270. *See* 87 Fed. Reg. at 52,680 (listing implied representations as a potentially deceptive practice).

271. *See* Olazábal et al., *supra* note 196, at 182 n.18.

272. *But cf.* Southwest Airlines Co., U.S. Dep’t of Transp. Order 2014-5-13 at 2–3 (May 29, 2014). Southwest failed to offer the listed price to all customers. *Id.*

273. *See* Nw., Inc. v. Ginsberg, 572 U.S. 273, 288 (2014) (discussing airlines’ cost-benefit analysis in offering unfavorable terms).

274. *See* DOT Press Release, *supra* note 159.

275. *See* Karp & Lambarena, *supra* note 201.

276. *See* 14 C.F.R. § 399.79(b)(2) (2025) (“A practice is ‘deceptive’ to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter.”).

277. *See* 87 Fed. Reg. 52,677, 52, 680 (Aug. 29, 2022) (explaining the 2021 Final Rule’s position against implied representations).

278. *See* *supra* notes 11–12 and accompanying text.

pricing schemes.²⁷⁹ Reformers have thus urged DOT to stop mileage devaluations by invoking its power to police unfair or deceptive practices in air travel pursuant to § 41712.²⁸⁰ Yet a popular belief in frequent flyer program unfairness or deception does not make it legally so. Accordingly, reformers aiming to institute changes in frequent flyer programs via DOT rulemaking should call on the agency to extend its current authority on unfair or deceptive practices in a *limited* manner.²⁸¹ DOT can work within its legally sound and preexisting construct of unfair or deceptive practices to guard against induced bank transfers due to phantom award tickets, compel airlines to offer a reasonable number of award tickets for purchase, and prohibit airlines from making misleading claims about the validity of their miles in frequent flyer marketing materials.²⁸² To the reformers' likely dismay, this recommendation is not ambitious. But it should withstand judicial scrutiny.²⁸³

The point is not that regulations attempting to institute meaningful consumer protections for frequent flyer customers are impossible or unworthy. Rather, § 41712 does not permit DOT to regulate rates or services through novel price disclosures or prohibitions on devaluations.²⁸⁴ Such action veers into rate setting, which the Act prohibits, and runs counter to the Act's free market goals, which the Supreme Court stressed as it declined to invalidate anti-consumer provisions in frequent flyer programs.²⁸⁵ DOT's charge is to prohibit unfair or deceptive practices, but contracted-for obscure frequent flyer program point valuations are not inherently unfair or deceptive.²⁸⁶ Ultimately, if the flying public wants substantive consumer protections in frequent flyer programs, it will likely need to look somewhere other than DOT unless Congress expands the agency's authority to include ratemaking.²⁸⁷

279. See DOT Press Release, *supra* note 159; Gordon et al., *supra* note 4 (relaying the belief that a reduction in value increases consumers' calls for unfairness).

280. See Buttigieg Letter, *supra* note 8; Goldfine, *supra* note 11, at 269.

281. See *supra* Part IV.A.

282. See *supra* Part IV.

283. See 49 U.S.C. § 41712.

284. See *supra* Part II.D.

285. See Nw., Inc. v. Ginsberg, 572 U.S. 273, 288 (2014); Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 230 (1995); see also Airlines for Am. v. Dep't of Transp., 127 F.4th 563, 576–78 (5th Cir. 2025).

286. See § 41712; *Wolens*, 513 U.S. at 228 ("[T]erms and conditions airlines offer and passengers accept are privately ordered obligations").

287. See, e.g., Press Release, Senator Dick Durbin, Durbin Introduces Protect Your Points Act, (Sept. 26, 2024) [hereinafter Durbin Press Release] <https://www.durbin.senate.gov/newsroom/press-releases/durbin-introduces-protect-your-points-act> [https://perma.cc/L4CQ-VW4C] (promoting a bill that would expressly grant DOT the authority to require mile value disclosures).

Less clear is whether airline frequent flyer programs *should* be regulated—whether by DOT or Congress. These programs, operating exclusively in the context of the free market era, have undergone various iterations since the early 1980s.²⁸⁸ That the airlines have the upper hand is nothing new: frequent flyer programs went from being unfavorable to consumers because of blackout dates (but with predictable prices) to being unfavorable to consumers because of high and ever-changing prices (but with excellent availability).²⁸⁹ Regulating these programs so that mileage value is clear and devaluations are both infrequent and disclosed long in advance, as some proposed legislation does, would not necessarily stop airlines from making miles harder to come by.²⁹⁰ And regulations targeting mileage valuations may not shield customers from other from anti-consumer frequent flyer program changes: the airlines' co-branded credit cards are themselves subject to reductions in benefits and increased annual fees.²⁹¹ More importantly, DOT's charge is to prevent unfair or deceptive practices, not ensure that consumers enjoy optimal frequent flyer programs.²⁹² How comprehensive, exactly, would regulations need to be to make customers feel that they are getting a good—or even a fair—deal?

In short, there has always been some modicum of unfairness in the frequent flyer system. But even absent heavy regulation from DOT or Congress, the airlines *do* compete on the quality of these programs, and some have even looked to increase value for their customers over time.²⁹³ A poor industry-wide value proposition of frequent flyer programs may thus create an advantage that airlines seek to exploit for consumers' benefit; consumers are free to choose among the best or “enroll in a more favorable rival

288. See Gordon et al., *supra* note 4 (“Airline rewards programs were once fairly straightforward These days, it’s not so simple.”); see also Sitaraman, *supra* note 2 (discussing the origins of domestic frequent flyer programs).

289. See text accompanying notes 29–41.

290. See Durbin Press Release, *supra* note 287 (indicating that the bill affects the value only of accrued, not prospective, miles).

291. See Craig Joseph, *Negative Changes Coming to Some AmEx Delta Credit Cards*, NERDWALLET (Sept. 15, 2023), <https://www.nerdwallet.com/article/credit-cards/negative-changes-to-delta-platinum-reserve> [https://perma.cc/4VRC-5KXF] (explaining the loss of benefits to some of Delta's American Express cardholders); Ryan Smith, *Changes Coming to American Airlines Admirals Clubs and Citi AA Executive Card*, AWARDWALLET (Mar. 26, 2025), <https://awardwallet.com/blog/admirals-club-executive-card-changes-2023/> [https://perma.cc/D36P-94C9] (highlighting the increased annual fee for the premium Citi-issued American Airlines card).

292. See 49 U.S.C. § 41712.

293. See Reward Report, *supra* note 7, at 8, 15 (indicating that American's award prices may have dropped as part of an intentional effort to create better value for customers).

program.”²⁹⁴ In the end, the best restraint on unfair or deceptive practices inherent in frequent flyer program pricing may just be the free market. Irrespective of an increased regulatory environment, frequent flyer program practices will remain subject to DOT’s watchful eye and time-tested action against bait-and-switch tactics.²⁹⁵

294. Nw., Inc. v. Ginsberg, 572 U.S. 276, 288 (2014); *see also* Joseph, *supra* note 61 (indicating one points value prognosticator’s assessment that airlines do not always decrease the value of their miles over time); Reward Report, *supra* note 7, at 8, 15.

295. *See, e.g.*, Southwest Airlines Co., U.S. Dep’t of Transp. Order 2014-5-13, at 2–3 (May 29, 2014) (fining Southwest for advertising \$59 fares “for which no seats were available at all”).