



U.S. Department
of Transportation

Office of the Secretary
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

MAY 23 2018

The Honorable Bill Nelson
Ranking Member, Committee on Commerce, Science and Transportation
United States Senate
Washington, DC 20510

Dear Ranking Member Nelson:

The Administration appreciates the efforts of both the House and Senate to reauthorize the U.S. Department of Transportation's (DOT or Department) aviation programs. A reauthorization free of unnecessary and counter-productive rulemaking mandates and costly reporting requirements that provides long-term funding stability for the Federal Aviation Administration (FAA) will be vital in enabling the Department to continue its critical mission of safety oversight and leadership.

In light of the recent House passage of H.R. 4, the FAA Reauthorization Act of 2018, this letter outlines the Administration's views on both the House bill and the pending Senate bill, S. 1405. Unfortunately, while both bills contain some helpful provisions, they also include numerous unnecessary and counter-productive rulemaking mandates and omit reforms that would be most effective in advancing aviation safety and efficiency. The Department looks forward to continuing to work with Congress to produce legislation that the President can support.

I. Leading Provisions

This Administration is committed to reducing regulatory burdens to enhance safety, reduce unnecessary costs on the economy, and strengthen American competitiveness. Some of the proposals in the House and Senate bills will support this important effort, including removing barriers to more effective unmanned aircraft systems (UAS) rules and harmonizing the statute of limitations for environmental reviews under section 1309 of the FAST Act.

A. Manufacturing

The Administration supports language that advances U.S. interests in the world, and the subtitle related to manufacturing reforms is a welcome inclusion. In particular, we appreciate provisions included in both the House and Senate bills that reform certification processes for U.S. aerospace manufacturers. The bills further U.S. leadership in setting aviation certification standards and enable the Department to advance these certification standards around the world. Both the House and Senate bills also advance U.S. leadership in the development and certification of, and expanded opportunities for supersonic aviation. These developments can change air travel as we know it, and create U.S.-led global economic opportunity. We are pleased to see the bills push to put America first in this field.

B. Airport/Infrastructure Development/NextGen

In addition to the existing provisions described above, the reauthorization bills provide further opportunities to improve the FAA's ability to carry out its mission to ensure aviation safety and efficiency. The Department supports provisions in H.R. 4 that enhance public-private partnerships in the Airport Investment Partnership Program and streamline the process for projects funded through Passenger Facility Charges, which will facilitate the renewal of important infrastructure as envisioned in the President's Infrastructure Proposal.

C. Infrastructure

The House bill also adds certain non-aviation provisions that the Department strongly supports. Section 168 of H.R. 4 adds welcome support for the Administration's efforts to stretch scarce taxpayer resources further by streamlining the infrastructure permitting process. In particular, the provision harmonizes the statute of limitations for programs approved under section 1309 of the FAST Act with the 150-day period applicable to other Department reviews. This change will ensure that states are able to take advantage of the program established by the FAST Act.

II. Problematic Provisions

In support of the Administration's commitment to reducing regulatory burdens to enhance safety and reduce unnecessary costs on the economy, the Department must object that, unfortunately, both bills could impose many unnecessary, expensive, and counter-productive regulatory burdens on the American people and the broader economy. Examples of unnecessary rulemakings include statutory dictates regarding airline seat sizes; prescriptive, inflexible rest periods for flight attendants; redundant flight deck security measures; creation of an unnecessary office of aviation consumer advocate; and many other new rulemakings that will have little or no safety or consumer benefit. In addition to onerous regulatory mandates, both bills contain many unnecessary and burdensome reports to Congress. The report requirements would divert scarce personnel time and resources from the Department's primary mission, and increase bureaucratic drag, impeding, for example, the FAA's efficient operation of the National Airspace System (NAS). Finally, the Department has serious objections to the many noise provisions in H.R. 4 that principally address parochial issues and establish new technical requirements that would interfere with FAA's mission, making it more difficult to effectively address aircraft noise in some cases. The Department strongly recommends the Senate consider a more measured approach to noise that reflects the FAA's history and current programs to reduce aircraft noise from a national perspective.

In the interests of aviation safety and efficient program management, we urge the Senate to reconsider its approach as it advances its bill. A more detailed discussion of additional provisions that concern the Department follows.

A. Consumer Aviation Mandates:

The Department takes seriously its commitment to enhancing consumer protection in the aviation sector, and we note that, even though demand for air travel is greater than ever before, ticket prices, when adjusted for inflation, are at historic lows. These results, however, cannot be sustained by the imposition of rulemaking mandates that impose ever more unnecessary and costly burdens on industry and travelers, with uncertain consequences for the future of air travel. There should be no more regulations than necessary, and those regulations should be straightforward, clear, and designed to minimize burdens consistent with safety, consumer protection, and access to air travel. Moreover, the airline industry is highly competitive, and consumers continue to realize enormous benefits from our market-based system for air travel.

The number of rulemakings, advisory committees, and reports to Congress required by the two bills will consume a significant portion of the resources that could otherwise be used to enforce aviation consumer protections. Worse, several of the provisions could effectively reverse decades of precedent that have established the solid foundation for our successful, vital market-based airline industry.

One of the more objectionable provisions appears in section 3129 of the Senate bill, which would require the Secretary to prescribe regulations to determine which airline fees “are unreasonable or disproportionate to the costs incurred by the air carrier.” Simply put, this provision marks a return to the pre-1978 era when the federal Civil Aeronautics Board controlled domestic airline fares and other rates charged to the public.

Under this provision, DOT must issue regulations prohibiting U.S. airlines from imposing so-called “unreasonable” fees and establishing standards to determine when fees are reasonable. Fees to be examined by DOT include flight cancellation fees, checked baggage fees, seat selection fees, flight change fees, and “any other fee imposed by an air carrier relating to a flight in interstate air transportation.” This measure, if enacted, would reverse to a significant extent the ground rules that have governed the airline industry since the Carter Administration. Under the 1978 Airline Deregulation Act (ADA), DOT generally does not have the authority to regulate the prices, routes, and services of U.S. airlines. The ADA was enacted because Congress and the Carter Administration recognized that market-based economies are superior to command-and-control economies in every significant respect, in part because in a free market, supply is generated to meet demand. The result of the ADA is nothing short of astounding: middle and working class Americans today routinely fly across the country whereas airline travel of the 1970s was something generally reserved to the wealthy “jet set.” Section 3129, however, represents a giant step backwards, presents a risk of even wider re-regulation of the airline industry, and ultimately would harm air carriers and consumers alike.

We are also concerned with section 3108 of the Senate bill, relating to disclosure of fees to consumers. The provision would require DOT, within one year of the bill’s enactment, to mandate that airlines and ticket agents disclose to consumers the baggage fee, cancellation fee, change fee, ticketing fee, and seat selection fee at all points of sale. This provision is exceedingly broad, resource intensive, and of limited value to consumers. It would require airlines to incur significant costs to implement and is not necessary to meet the objective of fee transparency. It would also potentially dictate with whom airlines must engage in contractual relations. DOT already requires air carriers to prominently disclose on the carrier’s website information about fees for all optional services that are available for purchasing. Further, the current rule requires that the disclosure must be clear, with a conspicuous link from the carrier’s homepage directly to a page or a place on a page where all such optional services and related fees are disclosed. The Department urges the Senate to reject this unnecessary provision.

In addition to these concerns, we have noted in the enclosure a number of other consumer mandates (both House and Senate) that the Administration views as unnecessary and wasteful and that, if enacted, would constitute significant regulatory overreach.

B. Management Efficiency

Both bills impose additional requirements that may impede the Department’s efficiency and cost-effectiveness. For example, both bills mandate an unnecessary level of detail as to how the FAA should conduct benefit to cost analyses of contract towers, and both restrict the FAA’s ability to

manage aviation weather services. Further, the House bill would mandate the FAA to make investment decisions that are not cost beneficial. In addition, some proposed airport grant adjustments jeopardize the Department's safety and efficiency goals. The FAA is committed to regulatory humility, and we are well aware that the commercial aviation industry's enviable safety record can only be achieved through collaboration among all industry stakeholders. We are also concerned that the proliferation of mandatory federal advisory groups with conflicting and in some cases overlapping agendas could cause the FAA to focus resources on establishing and maintaining those groups, rather than focusing on effectively managing current and emerging safety issues.

C. Essential Air Service (EAS):

The Department is disappointed that neither the House nor the Senate takes the opportunity to adopt any aspect of the Administration's EAS reform proposal. Both bills leave the program unimproved, and neither offers any meaningful reforms to rein in spending. Although the House bill would require the Government Accountability Office to conduct a study of the program, including potential options for future program reforms, the Administration believes that program reform is overdue and urges Congress to seriously consider the Administration proposals contained in the President's FY 2019 Budget Request.

D. Small Community Air Service Development:

Contrary to the President's FY 2019 Budget Request, the Senate bill would unnecessarily expand the Small Community Air Service Development Program and authorize it through 2021. Additionally, the House bill adds a new Regional Air Transportation Pilot Program and requires dedication of \$4.8M of the \$10M funding authority. The Department opposes reauthorization of the program overall and notes that the proposed pilot program, which would provide eligibility to medium-hub airports that already have robust air service, is contrary to the original intent of the program.

E. "Flag of Convenience" Restriction on United States-European Union Air Transport Agreement:

Section 530 of the House bill is of significant concern to the Administration as it would introduce new government regulation in the aviation market, potentially frustrate U.S. implementation of international air services agreements, and likely risk harmful retaliatory actions by foreign countries. The proposal would require DOT to take actions to prevent the licensing of foreign air carriers found to be a "flag of convenience" carrier, defined to mean a carrier that is established in a country other than the home country of the majority owner(s) to avoid regulations there. It would also prescribe a detailed public interest analysis of every foreign air carrier application, far beyond what is now required. If enacted, section 530 could greatly complicate and lengthen the process for licensing foreign air carriers, regardless of their country of origin. Particularly, by requiring DOT to apply the "intent" rather than the letter of an international agreement, it could also put DOT in the position of taking actions that foreign countries may allege are contrary to U.S. obligations under international agreements. DOT has an express statutory mandate to act consistently with U.S. international obligations. The proposal would also require the Department to determine the intent of commercial decisions by foreign air carriers in deciding where to establish their operations. Implementation of section 530 could result in retaliatory action by foreign governments that would harm U.S. carriers, their employees, and U.S. travelers and shippers. The Senate did not

include such a provision in its bill, and the Administration urges the Senate not to adopt the House provision.

III. Unmanned Aircraft Systems (UAS)

Another concern relates to UAS. While we welcome efforts to advance the integration of UAS into the NAS, the UAS detection, enforcement, and mitigation provisions in both bills are of significant concern. The details of the provisions in each bill are slightly different, but the overall effect is to require the FAA to deploy systems to detect, identify, and, if necessary to disable or to destroy UAS.¹ It is a priority of the Department to keep the FAA out of the business of deployment of these counter-UAS technologies, especially in the airport environment. The FAA does not interdict other hazards, such as lasers (handled by local law enforcement), wildlife (handled by the airport), or threats presented by manned aircraft (handled by the Department of Defense (DOD) and local law enforcement). Such tasks are best suited to law enforcement and security agencies. Therefore, we seek changes to protect the FAA's long-standing role in enhancing aviation safety, and to keep it from expending scarce resources on issues far outside its core mission.

As mentioned above, law enforcement and security agencies are the appropriate federal agencies to address the growing threats posed by malicious UAS operations. The Administration submitted a legislative proposal to Congress earlier this year that would authorize the Department of Homeland Security (DHS) and the Department of Justice (DOJ) to conduct limited counter UAS operations to protect certain facilities, assets, and operations critical to national security and public safety. Both agencies are constrained in their ability to mitigate UAS threats by statutes enacted long before UAS technology was available for commercial and consumer use. The legislative proposal mirrors the existing statutory authority that Congress granted to the DOD in the Fiscal Year 2017 and 2018 National Defense Authorization Acts (NDAA). With enactment of this proposal, Congress would reduce risks to public safety and national security, and would accelerate the safe integration of UAS into the NAS and ensure that the U.S. remains a global leader in UAS innovation.

Similarly, both H.R. 4 and S. 1405 direct the FAA to pursue cargo delivery by creating a small UAS air carrier certificate. The Department is currently advancing toward UAS cargo delivery by alternative and better approaches to certification. We would prefer to engage with Congress on the Department's current approach, which we believe will achieve these objectives more quickly. We are already working on revisions to our current regulations that would allow for UAS cargo delivery within the same proven regulatory framework as manned operators adhere to today. We also note that the Senate bill would eliminate existing requirements that carriers be U.S. citizens and carry insurance. Not only does this constitute a substantial change in the U.S. approach towards certification and cabotage, but it would also be difficult to implement. We request that the Senate engage with the Department on this important issue before adopting legislation that would not only implement regulations unwinding the significant progress that has been made, but could also open the U.S. internal market to foreign operators without normal negotiations and reciprocity.

¹Such measures by the FAA and other Federal agencies (such as DOD and DHS) to pursue enforcement actions against UAS operators who intentionally violate applicable laws and regulations are referred to as "counter-UAS."

Additionally, H.R. 4 and S. 1405 require the FAA to issue regulations providing for the operation of micro UAS (under 4.4 lbs.) without an airman certificate or airworthiness certificate. We suggest instead allowing the FAA to determine whether to require airman certificates for some micro UAS operators after a risk assessment. Absent such assessment, the potential security risks of allowing all individuals to operate micro UAS without an airman certificate are unknown. Currently, the FAA requires small UAS operators (under 55 lbs.) conducting operations under Part 107 to obtain a remote pilot certificate, which includes completing a security background check by the Transportation Security Administration (TSA) pursuant to 49 U.S.C. § 44903(j)(2)(D)(i). Under this authority, TSA vets applicants against the appropriate records in the consolidated and integrated terrorist watch list maintained by the federal government. We request that the legislation allow the FAA to consider whether such vetting would be necessary to operate certain micro UAS.

The Department also appreciates the Senate's efforts to advance policies that will improve safety, advance innovation, and support a first-class aviation infrastructure. In that regard, the Senate bill contains a number of UAS provisions that foster sound aviation policy. In particular, while both the House and Senate are addressing UAS integration, the Senate has been more proactive in its legislation by adding provisions that assist in the integration of UAS into the NAS. Unquestionably, the current restrictions on FAA's ability to regulate UAS "modelers" and hobbyists has been a significant roadblock to successfully facilitating rules for more sophisticated nationwide operations, such as operations over people and beyond the operator's visual line of sight. Initially, the model aircraft provisions in H.R. 4, as it was introduced, allowed only a narrow exception to support the registration of UAS and did not include a broader exception for remote ID and tracking rules. These provisions were improved by amendments adopted during Floor consideration, but the current lack of a reliable and universally usable "ID and tracking" system complicates law enforcement efforts, as well as DHS and DOD support of expanded small UAS operations. While full repeal of section 336 of the FAA Modernization and Reform Act of 2012 (49 U.S.C. 40101 note) would provide the greatest flexibility to address issues posed by hobbyist drones, the Department still welcomes the approach the Senate has taken in authorizing important safety and security standards for small UAS, aeronautical safety testing and registration requirements, while also providing additional flexibilities in dealing with the smallest and least risky UAS.

Finally, section 338 of the House bill would require the Inspector General of the Department of Transportation to conduct a study and report to Congress on the regulation and oversight of low altitude operations of UAS, including the roles and responsibilities of Federal, State, local, and Tribal governments in regulating UAS in airspace up to 400 feet above the ground. Although we question the need for the report, the Department believes that a study on this subject should be conducted by the Department rather than by the Inspector General. We would further welcome the abolishment of unnecessary or outdated advisory bodies, such as the Air Traffic Services Committee.

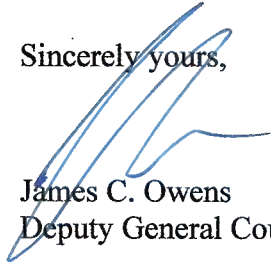
IV. Conclusion

As the Senate moves forward with consideration of aviation reauthorization, we strongly encourage that it be mindful of the Administration's commitment to reduce and streamline the regulatory burden, and minimize the administrative burden on the Department that otherwise diverts resources away from important aviation programs such as aviation safety.

The Administration appreciates the opportunity to share its views and looks forward to working with Congress to produce an aviation reauthorization measure that the President can support.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this letter to Congress.

Sincerely yours,



James C. Owens
Deputy General Counsel

Enclosure

ENCLOSURE

Additional Consumer Protection Proposals that are Objectionable.

Senate Bill:

Section 3118. Denied Boarding (TICKETS Act): Prohibits denied boarding of a revenue passenger that has been cleared by the gate attendant to the board an aircraft.

- **Why Problematic:** This would make it difficult for airlines to continue the current practice of overselling their scheduled flights to compensate for “no shows.” It may result in increase in ticket prices. In addition, even if an airline does not engage in the practice of selling more tickets than available on an aircraft, the airline may still need to involuntarily bump passengers after they have been cleared to board an aircraft in rare circumstances such as when a seat is needed for a Federal Air Marshal.

Section 3111. Consumer Complaint Process Improvement: Requires air carriers and ticket agents to inform customers at the point of sale of DOT’s Aviation Consumer Protection Division, and to include on the carrier’s website the Aviation Consumer Protection Division’s telephone number and other contact information.

- **Why Problematic:** If there is an airline service problem, it is most productive if the consumer first tries to resolve the matter with the airline who can address the matter directly. This requirement will likely result in DOT being contacted for assistance before the consumer tries to resolve the matter with the airline. This would unnecessarily absorb DOT resources with no benefit to consumers.

Section 3112. Aviation Consumer Advocate: Establishes a Consumer Advocate at DOT and requires the Department to submit through the Consumer Advocate an annual report to Congress summarizing airline service complaint data and any recommendations made by the Consumer Advocate.

- **Why Problematic:** A new Consumer Advocate position would result in an increase in cost with no benefit. The analysts in DOT’s Aviation Consumer Protection Division already serve as consumer advocates. They speak with consumers every day to facilitate a resolution to their air travel service problems. DOT also already submits an annual report to Congress on the total number of disability complaints that airlines receive.

Section 3117. Cell Phone Voice Communications: Requires the Secretary to issue regulations to prohibit an individual on an aircraft from engaging in voice communications using a mobile communications device.

- **Why Problematic:** In the NPRM on Use of Mobile Wireless Devices for Voice Calls on Aircraft, DOT proposed that airlines be required to disclose in advance if a specific flight allowed voice calls so consumers can make the best choice for themselves. In addition, although FCC issued a proposed rule in 2013 that would permit the expanded use of cellular frequencies onboard aircraft, there has been no movement in that rule.

Section 3119. Transparency for Disabled Passengers: Sets a compliance date of January 1, 2018 for a rule requiring the reporting of data for mishandled baggage and wheelchairs in cargo compartments.

- **Why Problematic:** This date has already passed. DOT extended the compliance date from January 2018 to January 2019 because of the implementation challenges that the airlines were facing. Requiring the data any earlier than January 2019 would likely result in inaccurate data being submitted to DOT.

House Bill:

Section 406. Involuntarily Bumping Passengers After Aircraft Boarded: Makes involuntary bumping of passengers that have a reservation and have checked in before the check-in deadline, an unfair or deceptive practice.

- **Why Problematic:** It would prohibit airlines from continuing the current practice of overselling their scheduled flights to compensate for “no shows.” It would likely result in increase in ticket prices. In addition, even if an airline does not engage in the practice of selling more tickets than available on an aircraft, the airline may still need to involuntarily bump passengers after they have checked-in in rare circumstances such as when a seat is needed for a Federal Air Marshal.

Section 402. Cell Phone Communications Ban: Requires the Secretary to issue regulations to prohibit an individual on an aircraft from engaging in voice communications using a mobile communications device.

- **Why Problematic:** In the NPRM on Use of Mobile Wireless Devices for Voice Calls on Aircraft, DOT proposed that airlines be required to disclose in advance if a specific flight allowed voice calls so consumers can make the best choice for themselves. In addition, although FCC issued a proposed rule in 2013 that would permit the expanded use of cellular frequencies onboard aircraft, there has been no movement in that rule.

Section 535. Consumer Protection Requirements Relating to Large Ticket Agents: Requires the Secretary to issue rules to require large ticket agents to adopt minimum customer service standards.

- **Why Problematic:** It is not clear that the current customer service standards that apply to airlines should apply ticket agents. Some things may be under the direct control of the airline and not the ticket agent. It is also not clear that there is a problem in this area that needs to be addressed by rule. DOT has an open rulemaking on this issue and is reviewing it to determine if it is necessary.

Section 412. Advisory Committee for Transparency in Air Ambulance Industry: Requires the Secretary to establish an advisory committee that in turn is required to report to Congress, after which the Secretary is required to issue a rule to provide consumer protections for air ambulance customers.

- **Why Problematic:** In 2017, GAO issued a recommendation to DOT that it consider disclosure requirements for air ambulance providers. DOT responded that we would monitor and evaluate air ambulance complaints to assess the issue of disclosure requirements. Since then, we have received fewer than 12 consumer complaints related to air ambulances.

Section 419. Aviation Consumer Advocate and Complaint Resolution Improvement:

Creates the position of Aviation Consumer Advocate at the Department to resolve consumer complaints, recommend actions to improve enforcement of consumer protection rules, and to submit annual reports to Congress on airline service complaints data.

- **Why Problematic:** A new Consumer Advocate position would result in an increase in cost with no benefit. The analysts in DOT's Aviation Consumer Protection Division already serve as consumer advocates. They speak with consumers every day to facilitate a resolution to their air travel service problems. DOT also already submits an annual report to Congress on the total number of disability complaints that airlines receive.