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STATEMENT OF
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BEFORE THE
HOUSE SUBCOMMITTEE ON AVIATION
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
ON
THE FUTURE OF THE CIVIL AERONAUTICS BOARD'S
CONSUMER PROTECTION FUNCTIONS

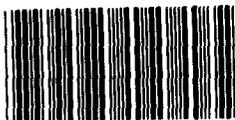
Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to be here today to discuss our ongoing review of the future of the Civil Aeronautics Board's (CAB) consumer protection functions. This review, undertaken at the request of Representative Elliott H. Levitas, Chairman, House Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, concentrated on three areas:

- the extent to which the plans of DOT and others provide for an orderly transfer of CAB's consumer protection functions,
- the potential changes in consumer protection should no further legislation be enacted, and
- legislative options for ensuring an orderly transfer of CAB's consumer protection functions.

BACKGROUND

Much of CAB's regulatory authority was repealed in the Air-line Deregulation Act of 1978, but the CAB has continued to administer a number of consumer protection regulations and functions. The bulk of the remaining regulations still in effect were issued



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pursuant to section 404(a) of the Federal Aviation Act which concerns safe and adequate service, and section 411 which addresses unfair methods of competition and deceptive practices. Examples of these regulations include airlines' liability for lost or damaged baggage, procedures airlines must follow when they overbook a flight, requirement for a nonsmoking section on aircraft, procedures which charter operators must follow and provisions that prohibit discrimination against the handicapped. Also, the Board has recently published a final rule prohibiting new airlines from collecting money or issuing tickets until they obtain CAB approval to operate. In addition, the CAB has the authority to permit airline agreements, and grant antitrust immunity, when the Board finds it to be in the public interest. Although the CAB is continuing to carry out a broad range of consumer protection regulations, its functions are scheduled to terminate on January 1, 1985.

In a January 1980 report on CAB's sunset planning efforts (The Civil Aeronautics Board Should Expand Its Sunset Planning (CED-80-46), January 4, 1980), we concluded that the disposition of CAB's consumer protection regulations was not specifically addressed in the Airline Deregulation Act. At that time, we recommended that CAB expand its sunset planning to include the development of a legislative proposal to address this gap. Based on our current review, plans for transferring CAB's consumer protection regulations at sunset do not resolve this issue.

**PLANNING FOR TRANSFER IS
INCOMPLETE AND INCONSISTENT**

Current planning for the transfer of CAB's responsibilities is incomplete, and views of the three agencies directly involved

--DOT, CAB, and FTC--differ on which agency should assume CAB functions. DOT's current planning suggests no further legislation is required to continue CAB's consumer protection regulations. The Department believes that DOT and the Federal Trade Commission will have authority to administer these functions and regulations under their existing statutes. DOT believes that FTC will be able, under its own authority, to regulate domestic air carriers in all areas currently regulated by the CAB under section 411. In this regard, DOT suggests that the legislative requirement exempting air carriers from FTC jurisdiction will no longer apply when the CAB sunsets. DOT's planning further envisions establishing a consumer affairs office within DOT to handle all airline consumer complaints, even though many enforcement actions under their plan may fall under the authority of FTC.

CAB, on the other hand, now favors placing authority to regulate all air transportation--including consumer protection regulations--at DOT. The Board's position appears to be that, without further legislation, no agency will have specific authority to enforce consumer protection regulations promulgated under sections 404(a) and 411 after CAB's sunset.

In our discussion with FTC officials, they indicated that their capacity to take over CAB's consumer protection functions would be impeded by two factors. First, they believe the FTC would continue to be precluded under its act from regulating aviation matters. The FTC further believes that it would be constrained in revising existing CAB regulations or in issuing new rules because of FTC's formal, time-consuming rulemaking

procedures as contrasted to the more expeditious process available under existing CAB procedures.

IMPACT ON CONSUMER PROTECTION
ABSENT ADDITIONAL LEGISLATION

Based on our assessment of the factors affecting CAB's consumer protection functions, we offer a number of observations on what could happen should no further legislation be enacted. The future of CAB's regulations is unclear, the authority of FTC to assume those functions is questionable, and the permissible range of state actions is uncertain. Thus, a decline in consumer protection could possibly occur with a potential for increased litigation.

The Future of CAB's Existing and
Proposed Consumer Protection
Regulations Is Unclear

The sunset provisions of the 1978 Deregulation Act, including its legislative history, provide neither for the survival nor the transfer of the CAB's consumer protection regulations. Moreover, the legal authorities for issuing these regulations as they relate to domestic air service--sections 404(a) and 411--are not clearly transferred to any agency. Thus, it is unclear, in our view, whether the regulations survive. And if they do, which if any, federal agency can enforce them.

The Federal Trade Commission's
Authority to Assume CAB's Consumer
Protection Functions Is Questionable

The FTC is legally barred from regulating unfair methods of competition and deceptive practices of air carriers subject to the Federal Aviation Act of 1958. In our opinion, specific legislation appears necessary to allow FTC to act in aviation matters.

Based on our interviews, the FTC agrees that it could not absorb CAB's consumer protection functions until the statutory bar was removed.

Even if the bar were removed and FTC could assume CAB's consumer protection functions, it is questionable whether the FTC could assume and enforce the CAB's existing regulations without specific legislative authority to do so. Absent such legislation, if the FTC wanted to amend the CAB's regulations, or promulgate new regulations, it would have to commence new rulemaking under the formal procedures--a lengthy process--set forth in the FTC Act.

The Future of Federal Preemption Is Unclear

The Airline Deregulation Act of 1978 includes a specific Federal preemption section (105(a)(1) of the Federal Aviation Act of 1958); it prohibits states from enacting and enforcing state laws and regulations covering services provided by air carriers having authority to provide interstate air transportation under Title IV of the Federal Aviation Act of 1958. However, since most of Title IV lapses with CAB's sunset, it is unclear whether the prohibition will continue to apply. We were told that many states have statutes which exclude air carriers from state regulation but the exclusion is usually based on carriers being licensed to operate under Title IV. State officials we interviewed and the Air Transport Association agree the future role of the states is unclear.

These officials also believe that the situation is clouded by the uncertain status of Section 404(a). They express concern that, as the authority under section 404(a) has not been transferred to any federal agency, the federal government would be

powerless to enforce it. Thus, if the federal preemption section continued to survive, it is possible that neither the federal government nor the states would have legal authority to issue and enforce consumer protection regulations on interstate air transportation. Officials of the Air Transport Association expressed concern that states, recognizing the unenforceability of the federal preemption and consumer protection statutes, would develop their own regulations. Such a situation, they argue, could lead to overlapping and burdensome state regulation and taxation. Further, officials of the Air Transport Association noted that, faced with the anomaly of section 404(a) being unenforceable by any federal agency, consumers could argue for, and federal courts could sustain, a private right of action under section 404(a), a result which does not appear to have been intended by the Congress. Thus, without clarifying legislation, the potential exists for unnecessary litigation concerning the respective rights and obligations of consumers and the airlines.

POTENTIAL LEGISLATIVE CONSIDERATIONS
TO CLARIFY CONSUMER PROTECTION FUNCTIONS

Officials from airlines, trade associations, state agencies, and consumer organizations we talked with generally agreed that some form of legislation was needed. While there was no overall consensus on the content of the legislation, the following areas were of most concern:

- (1) Whether to repeal or continue the CAB's consumer protection regulations,
- (2) If regulation should continue, who should regulate,

- (3) The future and scope of federal preemption, and
- (4) The proper jurisdiction for the oversight of antitrust immunity and joint air carrier agreements.

Whether to Repeal or Continue
The CAB's Consumer Protection
Regulations

Those who support full repeal of all the consumer protection regulations and functions believe that true deregulation requires that the government not dictate the terms of the contract between airlines and passengers. They point out that with deregulation, airlines are highly competitive and will have an incentive to please their customers because they rely so heavily on repeat business. They also agree, however, that the absence of federal standards will lead to disparity in the practices of various airlines such as the limit on baggage liability. They further state that consumers will benefit by allowing airlines to "unbundle" the services currently included in a ticket price. This would permit airlines to set the price of separate aspects of service such as baggage handling and inflight amenities and allow consumers to choose whether or not to purchase those services.

Those favoring continuation of the regulations express concern that without regulations the marketplace will not handle most areas of consumer rights adequately. They believe that the relationship between airlines and passengers is such that protection would decrease without a commensurate gain to consumers. They cite the difficulty of comparison shopping and the limited incentive for carriers to conduct negative advertising such as "we pay you more when we lose your bag." They believe these factors would diminish the information available to consumers--a necessary condition for an effective competitive market.

Particular areas of support for continued regulation included the continuation of CAB's rules designed to ensure unbiased computer reservation systems, limit the advertising and sales of tickets prior to CAB's approval to operate, and regulate charter operators. There was somewhat less agreement on the continuing need for CAB's rules on baggage liability limits and denied-boarding compensation.

Given the differences in view, GAO believes the best approach would be legislation transferring CAB's current and proposed consumer protection functions to another federal agency. While a number of the current regulations are strongly supported and seem to have continuing merit in a deregulated environment, other rules might be unnecessarily restrictive and could impede the achievement of the full benefits of a competitive market. Under this approach all CAB's consumer protection functions and existing rules would be transferred intact, however, the receiving agency would have sufficient flexibility to revise, amend, or even rescind the rules. If this is done, we believe the agency should conduct a careful evaluation of the impact of such changes, and retain the right to act quickly if such reforms fail to yield overall public benefits.

Who Should Regulate

A number of views were expressed during our interviews on where CAB's consumer protection functions should be housed. Some favor transferring the functions to the FTC, while others favor continuation of the CAB. However, most observers we talked with believe the best option is to transfer CAB's consumer protection functions, including the existing and proposed regulations, to DOT.

Those favoring FTC note that regulation of unfair methods of competition and deceptive practices--the statutory basis for much of CAB's consumer protection activities--is the prime responsibility of the FTC. Supporters of this option generally want airlines to be treated like any other industry and favor transferring only the CAB's functions and not their regulations. DOT's rationale for preferring FTC appears to be based on their assumption that CAB's consumer protection functions can be transferred to FTC without legislation.

A number of the state officials we interviewed expressed an interest in retaining the CAB, not to reverse the economic deregulation accomplished under the Airline Deregulation Act of 1978, but rather to ensure the continuity of CAB's positive role in providing a single forum for most nonsafety aviation matters. Alternatively, the choice of these officials was generally to transfer CAB's consumer protection functions and regulations to DOT.

Overall, most officials we interviewed--from airlines, trade associations, state agencies, and consumer organizations--favored transferring CAB's consumer protection functions to DOT. While the views of these officials varied, their reasons for favoring DOT as the sole recipient agency were to avoid fragmentation of responsibilities across several agencies and to capitalize on DOT's transportation expertise. A number of officials also cited reasons which contrast the advantages of assignment to DOT rather than to the FTC:

- DOT would be in a better position to act more expeditiously, using informal rulemaking procedures,
- DOT's plan to assume CAB's consumer complaint processing activity is likely to have a greater deterrent effect if DOT also has the authority to initiate appropriate enforcement action against those violating the rules,
- The efficiency of DOT's state liaison effort would be enhanced if it also had the authority to provide legal interpretations of federal regulations and the scope of federal preemption.

While we are not taking a position on this matter and our analysis of the issues involved is not complete, we believe these reasons present a strong case for transferring CAB's consumer protection functions and regulations to DOT.

The Future and Scope of Federal Preemption

It is clear that the Congress intended to prohibit state regulation of air carrier services, but the Airline Deregulation Act does not ensure that result. If the preemption section lapses when the CAB sunsets, states could enact their own consumer protection laws and regulations covering the airline industry. This would appear to be in direct conflict with Congress' intention to deregulate the industry. No one--airlines, or consumers--are likely to be well served if this occurs. Moreover, a proliferation of state laws and regulations could possibly lead to extensive and costly litigation, as well as confusion among consumers and airlines about which laws apply to them.

Although we believe that federal preemption of state regulation should continue, it might prove beneficial to grant some enforcement authority. Even with appropriate authorizing legislation, the ability of the designated federal agency to prosecute

cases of violations of federal laws and regulations governing consumer protection obligations of air carriers could be limited. A carefully prescribed enforcement role for states, perhaps parallel to provisions in federal commodity exchange laws, could augment the enforcement capacity of the designated federal agency thereby enhancing protection of consumers without sacrificing the benefits of an efficient and uniform federal regulatory mechanism.

Thus, we could support an amendment to the act that would continue federal preemption rather than allowing it to possibly lapse with CAB sunset. Such an amendment could also be used to clarify the definition of services and to designate an auxiliary state enforcement role.

Jurisdiction for Reviewing
Carrier Agreements and
Granting Antitrust Immunity

The 1978 Act specifically provides for a transfer of CAB's authority over carrier agreements and grants of antitrust immunity to the Department of Justice presumably because of that Department's antitrust responsibilities.

Officials from trade associations and airlines we interviewed frequently expressed concerns about this prospect, believing Justice would be less sensitive to the benefits of varied airline agreements and would not continue to grant antitrust immunity. These critics favor legislation to transfer the authority to DOT, thereby avoiding fragmentation of federal activities concerning the airline industry. They note that such an arrangement would consolidate authority over all airline agreements in one agency, since DOT is already slated to assume responsibility for reviewing and overseeing international agreements.

Advocates of transferring agreements authority to DOT also argue that as a result of DOT's responsibilities and expertise over national transportation policy, DOT would be in a better position to evaluate, monitor, and collect information necessary to grant antitrust immunity and oversee agreements. DOT and Justice disagree and support the transfer of CAB's authority over carrier agreements and grants of antitrust immunity to Justice, as provided for by CAB's sunset legislation. While we take no position on this issue, we would point out that to transfer CAB responsibilities under sections 412 and 414 of the FAA Act to DOT instead of Justice would require legislative action.

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In conclusion, Mr. Chairman, we will be providing Chairman Levitas a more detailed report on the issues we discussed today.

That concludes my statement and we will be glad to respond to your questions.

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