Airline Passenger Bill of Rights 2.0 — 11/24/13

Background and History of Air Travel since 1978

Prior to the enactment of the Airline Deregulation Act of 1978 (ADA), air travel times decreased in each decade and reliability improved. Airlines were regulated by the Civil Aeronautics Board (CAB) which approved flight schedules, air fares, conditions and standards of service. The Federal Aviation Administration (FAA) controlled the number of flights at major airports which prevented congestion and operated the air traffic control system directly. Aircraft were placed in service each decade that were faster, more reliable, flight crews were better paid, and had arguably higher standards of training and experience. Finally, airport capacity increases and additions in the 1950s through the 1960s kept up with increased air traffic.

Since 1978, there has been no net increase in major US airports, so the skies around major cities such as New York and Chicago, whose need for an additional airport have been blocked by entrenched special interests, have become more and more congested. Deregulated airlines have discontinued the use of wide bodied jets carrying up to 500 passengers in favor of more frequent flights with narrow bodied airliners and regional jets carrying 20 to 140 passengers, thereby negating the principal strategy for increasing airport capacity. Airport authorities enjoy exemptions from most antitrust law and lack any significant representation of airline passenger consumer interests, so that they are permitted to and regularly do engage in anticompetitive behavior that drives up air travel costs and increases air travel delays and passenger inconvenience.

Regulations requiring minimum reserve capacity of equipment and flight crews have been allowed to lapse. So have rules that allowed passengers on a significantly delayed or canceled flight to use their ticket on another airline's flight at no additional cost (known as Rule 240 or reciprocity rule), and as have regulations requiring other airlines to honor a bankrupt airlines tickets.

Flight delays since 1980 of over one hour have increased dramatically. This situation not only inconveniences, stresses and results in hardship for airline passengers, but also burdens airlines and the entire economy. The US economy depends upon safe, convenient, relatively low cost air travel, as this is the primary and often only means of long distance transportation.

Airfares declined about 50% from 1980 to 2009, but have increased rapidly since 2010 especially when fees and taxes are included.

Tarmac Delays and Confinements

In 2007, it was discovered and proven by FlyersRights.org that stranding and involuntary confinement on the tarmac was far more prevalent than previously thought based on a few publicized incidents. It was admitted in June 2007 by the US Department of Transportation Bureau of Transportation Statistics (BTS) that airlines were not reporting and BTS was not

requiring them to report most long on ground delays**,** delays for diverted flights, cancelled flights and multiple gate return flights. These statistics were "lost in space" and not reported for time on the tarmac. New regulations were then adopted and the first report for October 2008 showed over 50 flights (which would imply 120,000 passengers per year) were delayed on the ground over 3 hours, though some analysts believe even those statistics greatly underreported these delays.

There was a strong financial incentive that the flight crews had to pull away from the gate (and not go back) even if they knew the flight is not taking off for a long time, if at all. Nearly all airlines only pay flight attendants & pilots their full wages from the time that the cabin door closes, and some pay nothing for time spent with the aircraft at the terminal gate.

FlyersRights.org (fka Coalition for a Passengers Bill of Rights (CAPBOR)), the Aviation Consumer Action Project (ACAP), Public Citizen, Consumers Union, US PIRGs, New York State and several other state governments, the Business Travel Coalition and even some former airline executives all supported a 3 hour rule to give passengers the opportunity to deplane if a flight is delayed more than 2-3 hours and to require that water, food, and sanitary facilities be provided.

The DOT in December 2009 took major steps to reduce delays caused by congestion by enacting regulations that discouraged over scheduling of flight times. By enacting a version of Truth in Scheduling that ACAP had long advocated, there has been a major reduction in chronically delayed flights and virtually elimination of deceptively scheduled flights. Airlines had previously had a financial incentive to schedule take offs and landings at the most popular times at major airports far in excess of airport capacity and then blame delays on air traffic control or weather. Now they must disclose on time statistics for their flights to the public, explain to the DOT chronically late flights and eliminate deceptively scheduled flights.

Passenger service regulations were slightly strengthened in 2012 in the FAA reauthorization legislation, but much, much more is needed both to improve air transportation service and for basic consumer protection in the increasingly concentrated airline industry.

FlyersRights.org after extensive consultations has developed the following Airline Passenger Bill of Rights 2.0 (APBOR 2.0), which after receiving comments from its members and the traveling public in the next several weeks will be presented for introduction in Congress and to the US Department of Transportation.

PROPOSED AIRLINE PASSENGER BILL OF RIGHTS 2.0

Traveler Delay Avoidance & Mitigation

For many decades by far the largest number of consumer complaints to the DOT has involved flight delays. Starting in 1980, each decade has seen air travel times increase and excessive flight delays become more prevalent.

The airlines generally blame air traffic control and weather, but this rings hollow when the particulars are examined. At times up to one third of flights are now delayed, and the figure is always over 10%.

1. Reinstate the reciprocity rule (aka Rule 240) allowing passengers on canceled or excessively delayed (over 90 minutes) to use their tickets on another airline with available seating flying to the same or nearby destination.

Current situation: Some airlines still have private arrangement with other airlines to carry their delayed passengers but most do not. The rule would reward airlines that provide timely service and penalize those that do not, as well as maximize the efficiency of the entire air transportation system. Now the opposite is true.

2. Set a minimum fine of $3,000 per passenger for tarmac delays in violation of the 3 hour rule with $1,000 of fine paid to affected passenger plus $10 per minute for delays over 3 hours.

Current situation: Most airline violations of the 3 hour rule are not fined by DOT, or are fined at less than $1,000 per passenger (vs the maximum fine of $27,500 per passenger). There is no minimum fine. There is no requirement that passengers receive any compensation for a 3 hour rule violation and in only two incidents since 2010 have passengers received anything and usually that is in the form of coupons for future air travel on the offending airline. Courts have generally ruled that under the Airline Deregulation Act of 1978 passengers cannot recover unless they are killed or physically injured in the course of airline operations, and have disallowed all airline passenger class actions since enactment of the Class Action Fairness Act of 2005. The DOT takes 1 to 3 years to investigate violations, and has always issued fines under consent orders and generally reduces fines by at least 50% based on airline promises.

In 2010 and 2011 there were only a few incidents, but in 2012 it rose to one per week and in the first half of 2013 to two per week. Prior to the promulgation for the 3 hour rule in 2010, airlines were stranding 150,000 to 250,000 passengers per year on the tarmac for over 3 hours, sometimes up to 12 hours without permitting passengers to exit the aircraft and sometimes without adequate water, food and toilet facilities, or proper ventilation and air quality. Airlines and their employees financial reasons for tarmac confinements, including avoiding ticket refunds, alternative transportation and overnight lodging expenses, and for flight crews obtaining flight pay for tarmac delays vs no or very low pay for in terminal delays.

3. Require airlines to conduct live testing of emergency or irregular operation plans at least annually or more frequently for airlines that fail practice tests or actual emergency operation performance standards.

Current situation: Airlines are required to have filed approved emergency operation plans (to provide for graceful degradation of air transportation in stormy weather, airport closures, severe congestion with the DOT/FAA but not to have actually tested or practiced or trained their employees to execute them, making failure to perform them as planned the norm rather than the exception. Without workable emergency or irregular operation plans air travel is plagued with defacto blackouts or brownouts from storms and other conditions that unnecessarily disrupt air transportation regionally for days or even weeks at great expense to travelers, businesses and the US economy, which depends on reliable air transportation to operate efficiently and competitively.

4. Reinstate lapsed legislation requiring airlines to honor tickets of shut down by insolvency.

Current situation: Larger carriers who face insolvency generally declare chapter 11 bankruptcy that allows them to continue operating, however, smaller ones generally shut down operations, sometimes abruptly leaving ticket holders as unsecured creditors and with disruption and extra travel expenses. As all airlines are required to maintain insurance or bonds for such eventualities, airlines who honor tickets of an insolvent shutdown airline will be reimburse by insurance. Without such legislation, carriers in weakened financial condition may be blacklisted by travel agents and travelers thereby hastening or causing failure.

5. Require airlines to maintain a ready reserve of equipment and flight crews sufficient to provide good service and a flight cancellation rate due to equipment or crew shortages to under 2% and on time performance of over 85%.

Current situation: Most airlines operate with little or no reserve capacity so that when equipment breaks down or flight crews are unavailable, flights are canceled or seriously delayed. This situation is aggravated by the fact that airlines are operating at record capacity of over 80%, so that a canceled flight means that passengers may have to wait many hours or even several days to get on another flight to their destination. Cancelation rates can now go over 5%, on time performance can be under 75%, and there has been a major increase in delays over one hour.

6. Set minimum fines of $1,000 per passenger with ½ paid to affected passengers for flight cancellations based on false claims of force majeure (e.g. weather or air traffic control restrictions when the real reason is lack of equipment or personnel or for economic reasons such as too few passengers).

Current situation: Studies and statistics show a very high rate of false or fraudulent reporting by airlines, but they are rarely if ever fined and passengers receive no

compensation for this misbehavior which is profitable for airlines, since they avoid expenses that honest reporting would otherwise entail.

7. Require cancellation for economic reasons to be made at least 3 hours before flight time, and provide passengers with alternate transportation plus a ticket refund, or breach of contract consequential damages up to $5,000. Presumption that flight was canceled for economic reasons if no ground hold and flight less than 30% booked.

Current situation: While airlines are required by contract and by conditions of their FAA certificate to provide safe and convenient air transportation to the general public and economic flight cancelations amount to a breach of contract or civil fraud and/or violation of their certificate, enforcement is virtually nonexistent, thereby rewarding bad practices and penalizing honest ones.

8. Require passengers to be informed both verbally and in writing of their rights to compensation for flight delays under US law for domestic flights, under the Montreal Convention of 1999 for international flights (with compensation up to $7,000), and under EU regulations for flights flying to, from or within EU countries.

Current situation: Neither the airlines or DOT inform passengers of their rights to compensation for flight except in situations involving bumping or oversales.

9. Require where delays and cancelations result in stranding passengers overnight away from their home cities that passengers receive meals, lodging and ground transportation.

Current situation: This was once provided as a matter of course, but now many airlines decline to do so except for high paying or frequent travelers. Such expense avoidance provides another incentive for bad service and penalizing airlines that provide good service. It also discriminates against and burdens coach and occasional travelers while providing unstated extra benefits to premium fare travelers.

<u>Lost, Damaged and Mishandled Baggage</u>

10. Require airlines follow the standards of the Uniform Abandoned Property Act providing for efforts to lost unclaimed baggage to its rightful owner, and if that fails after 90 days selling property at auction with proceeds going to a Lost Baggage Fund, to be used to satisfy lost/stolen property claims, fund consumer protection services by nonprofit organizations and for arbitration services for disputed lost baggage claims.

Current situation: Airlines are the only large private holder of other persons' property exempt from the Uniform Abandoned Property Law used by nearly all states. At common law abandoned property was forfeited to the state and airlines would have unlimited strict liability for lost or damaged property placed in their custody. Airlines by law have had their liability capped at $3,000 for domestic flights and $1650 for international

flights with short claim periods. Airlines now sell unclaimed baggage after a short holding period and keep the proceeds. They are not required to use readily available methods to return property to its rightful owner, generally dispute the great majority of lost baggage claims, and passengers have no practical means of redress.

11. Require airlines to offer excess value insurance for lost or damaged baggage for premiums not in excess of those commonly charged by other common carriers.

Current situation: Airlines generally do not sell baggage insurance, and do not allow passengers to declare higher value than their liability limits. Common carriers like the USPS, UPS or Federal Express charge 1% of excess declared value for insurance.

Lack of insurance, low liability limits and low claim payment rates make for low quality checked baggage services and little or no security against theft, even though most airlines now charge $25 to over $100 per bag for checked luggage.

Airline Rights Enforcement, Remedies, Complaint Handling and Adjudication

12. A 24 hour complaint hotline provided for in 2012 law and a passenger claims arbitration service should be funded up to $10 million per year by a set aside of 10% of fines paid by airlines to the US Government for violation of DOT or FAA regulations, plus up to 1/1000 of the ticket taxes and facility charges paid by airline passengers. No funding is currently provided for the passenger hotline and it has not been established by DOT.

Current situation: Only 10% of complaints to DOT result in a referral for additional investigation, 90% are merely logged for statistical purposes. Airlines are not required to do more than respond and acknowledge complaints.

Unlike consumer claims in other fields, no arbitration is provided for, and airlines have the right to remove any lawsuit filed in local or state courts to US District Court where litigation expenses far exceed any recovery. Airlines are one of the only industries serving the general public exempt from all state and local consumer protection laws, based on judicial interpretations of the Airline Deregulation Act of 1978's federal preemption clause.

13. Complaints to the DOT against airlines and to TSA about security screening at airports or against airports by airline passengers shall be acknowledged within 24 hours, and responded by the party against who the complaint was filed within 30 days, and with the reply by the complaining passenger within another 30 days. The DOT shall rule on whether or not it finds probable cause to investigate a complaint as a possible DOT regulation or other unlawful conduct within 100 days of receiving a complaint, and shall so inform the complaining party and

the party against the complaint was made.

14. All contracts of carriage shall provide that passengers have the right to have any claim under $10,000 adjudicated by an arbitrator approved by state or federal attorneys general or state consumer protection agency or in small claims court in the jurisdiction where the passenger resides within the US, or otherwise where the airline does business.

15. In the event court or arbitration awards an amount in excess of the amount offered by the airline, the passenger shall be entitled to an additional amount for litigation expenses including time spent on the claim at $100 per hour, for expert witness fees, plus reasonable attorney fees up to $250 per hour.

16. Common law doctrines voiding unconscionable provisions in consumer contracts and for contract interpretation based on contracts of adhesion shall apply to airline contracts of carriage.

17. All airline passenger claims under $80,000 against airlines shall be adjudicated in state or local courts or before arbitrators in the county where the passenger resides, unless the passenger consents to adjudication in a US District Court or other jurisdiction.

Definitions of Airline Fees, Service, Airfare, Seat and Space Standards

18. "Airfare" means the price including all taxes and fees for air transportation and ticket and boarding pass issuance from a originating airport to a final destination airport and includes a seat (at least 18 inches in width with leg room and other specifications and aisle width certified for comfort, safety and health by the FAA), one carry on piece of baggage that will fit in an overhead container not exceeding 40 pounds and one personal item that will fit under a seat, plus one piece of checked baggage under 50 pounds, water, adequate food nutrition on flights lasting over 2 hours, plus toilet and hand washing facilities.

Current situation: The lack of a statutory definition of airfare and the unbundling of airline charges and addition of dozens of fees has allowed airlines to define down the term airfare to an increasingly meaningless base price, which in turn leads to deceptive advertising. Seat size and passenger space is generally unregulated and has resulted in aggressive reduction in size, leg room, aisle width, recliner pitch by airlines to increase revenue by squeezing in more passengers and adding new seat fees.

Bank interest rates, gasoline prices and octane ratings, hotel room rates and most other prices charged and advertised to the traveling public must meet defined disclosure standards. This enables consumers to price shop and prevents deceptive price advertising, price confusion, and unfair competition.

19. Fees not included in the airfare must be disclosed in advance of ticket purchase
And shall be published and delivered in conventional machine readable form to all third party ticket sellers the same as airfares.

Current situation: Airlines have resisted disclosing their frequently changing fees in timely machine readable form to third party ticket sellers making price shopping by consumers increasingly difficult, as the lowest airfare from one airline when necessary fees are included will often cost more than a competing airline.

20. Fees not included in airfare shall not be exorbitant, defined as in excess of 200% over the cost to the airline of the service or benefit or feature.

Current situation: The DOT has the authority and duty to prohibit "unfair or deceptive" airline practices but has never done so to rein in airline fees such as baggage fees over $100 or more per checked bag, change or cancellation fees of $200, and other fees far in excess of airline cost. The DOT authority is ambiguous without statutory clarification in light of the Airline Deregulation Act of 1978.

21. Fees totaling over $50 per passenger shall be subject to ticket taxes the same as airfares.

Current situation: Airline fees are not subject to airline ticket taxes which fund federal air safety, air traffic control, and subsidize airports. This tax loophole for airline fees if not closed will drain the aviation transportation trust fund. Such fees in the past 5 years have increased exponentially and now represent about 20% of airline revenue. One airline, Spirit, has 74 listed passenger fees in addition to its airfares.

22. "Service" in the Airline Deregulation Act of 1978 preemption clause means the air transportation from point A to point B on a published schedule, and does not include other things that an airline does or fails to do in the course of its operations which may violate state common law torts such as fraud, false imprisonment, deceit, intentional inflictions of emotional distress, negligence, or breach of contract, or state or local consumer, civil rights, health and safety regulations not in conflict with federal regulations or laws.

Current situation: The presumed legislative intent of the Airline Deregulation Act of 1978 was to deregulate airfares and most scheduling and route decisions and to prevent states from re-regulating the airlines economically, not to exempt airlines from all state tort and consumer protection laws and common law.

However, airlines, by judicial decisions broadly interpreting the term service in the Airline Deregulation Act of 1978 to include all things an airline does in the course of its operations to or for a passenger, have been effectively exempted and given immunity for violation of all state and local consumer protection and contract law doctrines and laws, health and safety statutes, and all common law torts, excepting only negligence resulting in physical injury or death and certain criminal and civil rights statutes. All such laws protecting consumers and fair competition apply to other entities providing services to the traveling public such as hotels, restaurants, ground transportation, tour operators, travel agencies, bars, stores, and places of public entertainment.

23. “Force Majeure” or “Acts of God” as used in airline contracts of carriage includes severe weather, and other serious natural and manmade disasters and occurrences, but does not include lack of airline personnel or aircraft in airworthy condition, supplies or other conditions reasonably within the control of an airline certified to provide air transportation service to the general public.

Current situation: Airlines are unilaterally redefining force majeure in contracts of carriage to include things not normally within the common meaning of the term in order to relieve themselves of normal breach of contract liability for matters that are within their control such as maintenance and crew availability.

24. The FAA shall issue minimum standards and specifications for seat width, padding, reclining, size, pitch, leg room, aisle width for passenger comfort, safety and health within 180 days of enactment, in consultation with an advisory committee to be composed of representatives from airline passenger advocacy organizations, Occupational Health and Safety Administration (OSHA), and the Center for Disease Control (CDC). Until such standards are adopted, there shall be a moratorium on reductions in seat size, width, padding, pitch, and aisle width.

Current situation: Except for aisle width to emergency exits and strength, there are no seat or passenger space regulations. Airlines are now aggressively reducing seat and passenger space on both new and existing airliners to squeeze more revenue out by adding more seats, charging extra for what had previously been standard seat space, to the point that passengers are loudly complaining and health and safety is threatened. The World Health Organization has reported a major increase in life threatening blood clots caused by lengthy immobility in cramped spaces. Narrow aisle widths make timely emergency evacuation difficult and increase normal loading and unloading times. Even Airbus, the only airliner maker other than Boeing has called for international standards for passenger comfort, especially on long haul flights. Passengers have grown heavier and older in the past 50 years, while seat sizes have shrunk and without standards will shrink even more.

<u>Frequent Flier Programs Standards, Disclosure and Reporting</u>

25. Require airlines to report basic statistics on their frequent flier programs to enable consumers to objectively evaluate each airline program, including the number of miles expired, used and accumulated unused each quarter, the number of award tickets granted, especially to popular vacation destinations, restrictions on transfer or used by persons or entities other than the frequent flyer account holder.

26. Require notice of 12 months to materially reduce or devalue benefits to existing frequent flier account holder members of over one year.

Current situation: Frequent flier programs have become an integral part of air transportation services used by air travelers for vacation travel. They are also a source of revenue for airlines which sell miles to credit card, car rental, hotel and other businesses that seek to provide customers with a low cost inducement to buy customer loyalty.

The US Supreme Court has ruled that states may not regulate these programs as they do other consumer contracts, and the DOT or Congress has not yet done so.

For accounting purposes frequent flier miles represent a potential liability for the airlines. Airlines, however, take the position that these are not binding contractual obligations but merely marketing programs that can be altered or eliminated at will. As miles accumulate on the books of an airline, there is an enormous incentive for the airline to devalue them by program changes (most recently United Airlines announced program changes that devalue its frequent flier miles by at least 40%).

Most consumers however view frequent flyer programs as an important benefit, with the miles they accumulate for future travel being an obligation of the airline and an asset of theirs.

Studies show that there are radical differences in airline frequent flyer programs, with some airlines allowing as little as 5% of miles to be redeemed for travel and others nearly 100%.

Airport Governance and Consumer Protection

27. FAA airport certificates shall require that the governing board or authority management of all airports with over 100,000 but under 1 million annual passenger enplanements shall contain at least one person representing airline passengers who has not received any significant compensation from the airport, its vendors, employee unions, contractors or creditors in the previous five years and who does not reside within 5 miles of the airport, and at least two airline passenger representatives for airports with over 1 million annual passenger enplanements, at least one of whom shall be a frequent passenger using said airport.

Current situation: Airports in the US are owned and operated by cities, counties and state or regional government entities, and generally contain little or no passenger interest representation. This often result in policies that tend to increase airport revenue at the expense of passengers and unnecessarily increase passenger inconvenience and travel times. The FAA under 14 USC Part 139 regulates and issues operating certifications for all airports served by airlines.

28. Within 180 days, the GAO and DOT Inspector General shall review airport antitrust exemptions, identify practices that increase passenger expense, inconvenience, travel times,

negatively impact national air transportation efficiency and report to Congress with recommendations.

Current situation: Airports generally operate as government monopolies exempt from antitrust laws. This has led to higher air transportation costs, increase travel times, poorer services for passengers, and preventing competing private enterprises from providing lower cost and higher quality services to the traveling public. Examples include monopoly concessions to taxi, shuttle and bus companies, relocation of rental car facilities to remote locations to free up high cost parking spaces near terminals (parking fees being the #1 source of airport revenue), preventing regional airport competition or additional airports to maximize revenue, favoring airline mergers and consolidation to increase gate lease and landing fees, use of airports for political patronage and to reward donors to political campaigns of elected officials, imposing high and ever increasing fees and charges on passengers, lobbying against needed additional airports to relieve congestion, and covenants in airport bond indentures restricting competition.