

December 16, 2022

To: Office of the Secretary, Department of Transportation

Re: Airline Ticket Refunds and Consumer Protections (DOT-OST-2022-0089)

The Institute for Policy Integrity (Policy Integrity) at New York University School of Law respectfully submits the following comments to the Department of Transportation (DOT) regarding its proposal to require airlines to issue refunds or non-expiring vouchers to consumers whose flights are significantly delayed or canceled or who decide not to travel for certain health reasons (Proposed Rule).¹ Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.²

Our comments focus on the Regulatory Impact Analysis (RIA) for the Proposed Rule.³ We commend DOT for proposing a rule that will protect consumers and promote fairness, and we suggest additions and revisions to the RIA that would strengthen the reasoning and economic foundation of the final version.

DOT should consider:

- explicitly discussing fairness as a benefit in its Regulatory Impact Analysis;
- explaining that there are benefits to codifying a rule, even if it is largely reflective of existing, voluntary policies in the affected industry;
- acknowledging the benefits of potential behavioral changes, including the potential for reduced disease transmission;
- defining the term "significant government assistance" to mitigate the costs DOT attributes to the lack of a clear definition; and
- expressly concluding that the benefits of the Proposed Rule outweigh the costs.

¹ See Dep't. of Transp., Airline Ticket Refunds and Consumer Protections, 87 Fed. Reg. 51,550 (Aug. 22, 2022) [hereinafter Proposed Rule]. The Proposed Rule would protect consumers who have chosen not to travel in light of a risk of serious communicable disease in the following scenarios: (1) governmental action has restricted or prohibited travel; (2) the consumer has been advised not to travel by a medical professional or public health guidance, during a public health emergency, in order to avoid contracting a serious communicable disease; or (3) the consumer has or may have contracted a serious communicable disease and has been advised not to travel in order to protect others. *Id.* at 51,500.

² These comments do not purport to represent the views, if any, of New York University School of Law.

³ See DEP'T OF TRANSP., AIRLINE TICKET REFUNDS AND CONSUMER PROTECTIONS REGULATORY IMPACT ANALYSIS (2022) [hereinafter RIA].

I. DOT should discuss fairness as a benefit in its Regulatory Impact Analysis.

DOT should consider expressly discussing fairness as a benefit in its Regulatory Impact Analysis (RIA). Not only is fairness a cognizable benefit under *Circular A-4* and other relevant executive orders, but promoting fairness is the purpose of the statutory provision under which DOT promulgates the Proposed Rule. DOT properly acknowledges fairness as an important rationale for the Proposed Rule elsewhere in its RIA,⁴ but the agency can bolster its cost-benefit analysis by explicitly discussing fairness as a benefit.

A. Considering fairness as a regulatory benefit is consistent with relevant executive orders and related guidance.

The executive branch has long recognized fairness as a potential justification for federal regulation and a benefit that can be weighed in a cost-benefit analysis. *Circular A-4* states that social purposes, such as “redistribut[ing] resources to select groups” and “prohibit[ing] discrimination,” can justify a regulatory action.⁵ In addition, Executive Order 12,866 lists “distributive impacts” and “equity” as relevant factors in cost benefit analysis, and Executive Order 13,563 asks agencies to consider the “equity, human dignity, fairness, and distributive impacts” of proposed regulations.⁶ DOT itself has considered increased fairness as a benefit in regulatory impact analyses of past rulemakings. For example, when expanding passenger protections in 2016, DOT cited a potential decrease in unfair practices as a public benefit in its RIA.⁷

B. Considering fairness as a regulatory benefit is consistent with the Federal Aviation Act.

Fairness is a particularly relevant concern here, because DOT is acting under a statutory provision in the Federal Aviation Act that expressly authorizes the Secretary of Transportation to bar “an air carrier, foreign air carrier, or ticket agent” from engaging in “an *unfair* or deceptive practice.”⁸ But while DOT notes that concerns of fairness motivated the Proposed Rule, it does not list or discuss increased fairness as a regulatory benefit in the RIA.⁹ Instead, the agency merely observes that the number of passenger requests for refunds and non-expiring travel credits will increase during a public health emergency, which will subsequently lead to many transfers from airlines to

⁴ See RIA, *supra* note 3, at 2 (“Another goal of the proposed rule is to ensure that consumers are treated fairly when an airline cancels a flight, when an airline significantly changes an itinerary, and when consumers cannot travel due to a public health emergency or serious communicable disease.”).

⁵ Off. Mgmt. & Budget, *Circular A-4* at 5 (2003), <https://perma.cc/E7VU-SXE8> [hereinafter *Circular A-4*].

⁶ Exec. Order No. 12,866, § 1(a), 58 Fed. Reg. 51,735 (Oct. 4, 1993).

⁷ See DEP’T OF TRANSP., FINAL REGULATORY IMPACT ANALYSIS FOR RULEMAKING REGARDING ENHANCING AIRLINE PASSENGER PROTECTIONS III 22 (2016) (explaining that collecting more information from airlines would allow DOT to more effectively identify and police unfair and deceptive practices, resulting in a public benefit).

⁸ 49 U.S.C. § 41712 (emphasis added).

⁹ Compare RIA, *supra* note 3, at 3 *with id.* at 21.

passengers.¹⁰ In the non-public health emergency scenario, DOT assumes there will be minimal changes in transfers—an assumption we question in the following sections.¹¹ For both scenarios, DOT should, in its final analysis of regulatory benefits, consider discussing why the transfers caused by the Proposed Rule will promote fairness by leading airlines, rather than affected passengers, to bear the cost of a canceled or significantly delayed trip.

C. DOT can permissibly discuss fairness in purely qualitative terms in its RIA.

DOT can properly leave any fairness benefit it discusses unquantified. Executive Order 13,563 explicitly recognizes “equity” and “fairness” as difficult-to-quantify benefits that are nevertheless important for agencies to consider.¹² And although *Circular A-4* urges agencies to quantify benefits wherever possible, it likewise recognizes that many important effects are challenging or impossible to quantify and that the most efficient regulatory alternative may not be that with the “largest quantified and monetized net-benefit estimate.”¹³ Thus, DOT’s consideration of unquantified benefits of the Proposed Rule in the RIA would be consistent both with executive guidance on regulatory review.¹⁴

II. DOT should explain that there are benefits to codifying a standard that makes existing, voluntary practices mandatory.

DOT assumes the Proposed Rule will produce minimal benefits in the absence of a public health emergency because many airlines already have refund policies in line with the provisions in the Proposed Rule.¹⁵ However, even if it were true that most airlines are voluntarily complying with these standards, codification would still provide benefits. Agencies often codify industry best practices on the theory that the codified rules help prevent backsliding and increase clarity for consumers. Furthermore, if many airlines are already complying, the costs of such codification are likely quite low. Thus, even very modest benefits from codification could be sufficient to justify

¹⁰ *Id.* at 21.

¹¹ *See id.* at 10–11; *infra* Section II, Section III.

¹² Exec. Order No. 13,563, § 1, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (explaining agencies should, “elect, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including . . . equity)” and that “Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”).

¹³ *Circular A-4*, *supra* note 5, at 2.

¹⁴ *See generally* Richard Revesz & Samantha Li, *Distributional Consequences and Regulatory Analysis*, 52 ENVTL. LAW 53 (2022) (describing the history of distributional analysis in *Circular A-4* and Executive Orders and suggesting how agencies can improve their approaches to distributional analysis).

¹⁵ *See* RIA, *supra* note 3, at 10 (“Before the COVID-19 pandemic, airlines generally provided refunds when they cancelled or made significant changes to flights, and we expect that practice would continue without the proposed rule . . . Some airlines may need to adjust their current policies to meet the requirements of the proposed rule, but we expect that the adjustments would be modest.”)

any accompanying costs. In its final analysis, DOT should explain and weigh the benefits of codifying standards that make existing, voluntary practices mandatory.

A. Regulations that codify existing practices prevent backsliding.

Regulations that codify existing practices are important risk-management tools. They hedge against potentially unlikely but plausible future scenarios in which some industry participants might otherwise deviate from current best practices. Here, it is reasonable to believe that absent the Proposed Rule, airlines could make different choices in the future with regard to refunds and vouchers in light of the significant industry shifts and economic downturn that resulted from the COVID-19 pandemic.¹⁶ Thus, DOT should consider how the Proposed Rule will perform in light of the flight cancellations,¹⁷ labor shortages,¹⁸ low business travel demand,¹⁹ and changes in consumer behavior²⁰ that are present today. To the extent that these circumstances suggest that airlines will have less generous refund policies in the future and that the Proposed Rule would prevent backsliding, there may be more transfers to consumers than DOT projects in its current analysis.²¹

B. Regulations that codify existing industry practices increase clarity.

As other federal agencies have recognized, codifying existing industry practices can also increase clarity and reduce transaction costs for industry, consumers, and agencies themselves.²² By clearly defining “canceled flights” and “significant changes of flight itinerary,”²³ for example, the Proposed Rule would spare passengers the hassle of researching an individual airline’s refunds policies, as they will know when they are entitled to a refund. In fact, the Proposed Rule would *require* airlines to tell consumers when they are entitled to a refund due to a cancellation or significant delay, which may increase passenger access to refunds.²⁴ Accordingly, even if the

¹⁶ Chris Bryant, *Flying Was Already Hellish. Now It’s Worse.*, BLOOMBERG (Jun. 3, 2022, 12:00 AM), <https://www.bloomberg.com/opinion/articles/2022-06-03/air-travel-was-already-hellish-now-it-s-worse?leadSource=verify%20wall>.

¹⁷ Rajesh Kumar Singh, *Analysis: Flight Delays, Cancellations Mar U.S. Summer Travel*, REUTERS (Jun. 29, 2022 1:59 PM), <https://www.reuters.com/business/aerospace-defense/flight-delays-cancellations-mar-us-summer-travel-2022-06-29/>.

¹⁸ Derek Thompson, *Air Travel Is a Disaster Right Now. Here’s Why.*, THE ATLANTIC (Jun. 26, 2022), <https://www.theatlantic.com/newsletters/archive/2022/06/summer-air-travel-flights-cancelled/661385/>.

¹⁹ *Id.*

²⁰ Jacques Bulchand-Gidumal & Santiago Melián-González, *Post-COVID-19 Behavior Change in Purchase of Air Tickets*, 87 ANNALS OF TOURISM RESEARCH 2-3 (2021).

²¹ See RIA, *supra* note 3, at iii.

²² See Dep’t of Def., Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,207 (Nov. 14, 1986) (stating “In order to provide clarity to the public, we have added a provision to codify existing practice”).

²³ Proposed Rule, *supra* note 1, at 51,578.

²⁴ Proposed Rule, *supra* note 1, at 51,576, 51,580.

Proposed Rule does not increase the generosity of airline policies on paper, it may do so in practice.²⁵ Airlines may also save resources, as they will avoid negotiating refunds and vouchers with customers in scenarios contemplated by the Proposed Rule.

C. Agencies commonly issue rules that codify existing practices.

There are many examples of agencies codifying rules that formalized industry practices. The Federal Aviation Administration under the Bush Administration, for example, issued a final rule updating its regulations of amateur rocket activities in 2008.²⁶ The notice of proposed rulemaking explained that the Federal Aviation Administration historically relied on “voluntary self-regulation” (along with “state and local regulation” and the agency’s “own analysis”) to oversee amateur rocket launching, but that the increasing power of model rockets and the activity’s increasing popularity meant that “the once remote possibility of an accident or incident resulting from amateur rocket activities has become more likely.”²⁷ The agency’s final rule aimed “to preserve the level of safety associated with amateur rocketry” and to “reflect current industry practice.”²⁸ Therefore, many of the agency’s requirements, such as standards for distance between the launch site and spectators, reflected norms that amateur rocket enthusiasts already followed. The agency nevertheless maintained that, “it is important to codify the best practices to ensure they are preserved.”²⁹

In addition, EPA codified current industry practices in a rule prohibiting oil and gas extractors that use hydraulic fracturing from sending their wastewater to municipal sewage treatment plants.³⁰ EPA noted that no such extractors were at the time sending their wastewater to municipal sewage treatment plants, and, therefore, “the final rule is not projected to affect current industry practice or to result in incremental compliance costs or monetized benefits.”³¹ However, EPA pointed out that the rule served “as a backstop measure because onshore unconventional oil and gas extraction facilities have discharged to [municipal sewage treatment plants] in the past and because the potential remains that some facilities may consider discharging to [municipal sewage treatment plants] in the future.”³² In other words, even though the rule would have benefits only in unlikely scenarios, it was justified to avoid costs that would result from a deviation from the status quo.

²⁵ See *infra* Section III.

²⁶ See Requirements for Amateur Rocket Activities, 73 Fed. Reg. 73,768 (Dec. 4, 2008).

²⁷ Requirements for Amateur Rocket Activities, 72 Fed. Reg. 32,816, 32,817 (proposed June 14, 2007).

²⁸ Requirements for Amateur Rocket Activities, 73 Fed. Reg. at 73,768.

²⁹ Requirements for Amateur Rocket Activities, 72 Fed. Reg. at 32,822.

³⁰ See Effluent Limitations Guidelines and Standards for the Oil and Gas Extraction Point Source Category, 81 Fed. Reg. 41,845 (June 28, 2016).

³¹ *Id.* at 41,848.

³² *Id.*

Numerous other rules codify industry best practices in similar ways and discuss the value and importance of preserving such practices.³³ By promulgating such regulations, a regulatory agency ensures a minimum level of security in the face of unpredictable and fast-changing economic or regulatory circumstances.

III. DOT should also consider—and quantify, where possible with available data—the benefits of potential behavioral changes resulting from the Proposed Rule.

DOT could strengthen its analysis by also discussing how the Proposed Rule can induce beneficial behavioral changes in airlines and consumers. DOT correctly characterizes refunds and flight credits as transfers, rather than as a cost or benefit. Transfers are “monetary payments from one group to another that do not affect total resources available to society.”³⁴ That does not mean, however, that these transfers do not result in costs and benefits. For example, as discussed above, transfers may further fairness by requiring airlines to bear a greater share of the cost of delays and cancellations.³⁵ This burden-shifting may, in turn, motivate some airlines to adopt welfare-enhancing changes that decrease delays and cancellations.

Similarly, by reducing the cost to passengers of skipping a flight for health reasons, the Proposed Rule may reduce the number of sick passengers aboard planes. This decrease might, in turn, produce health and psychological benefits by decreasing disease transmission and passenger anxiety. DOT can improve its analysis by considering these potential benefits. Notably, even if DOT is correct that the differences between status quo airline policies and the Proposed Rule are small, the Proposed Rule could prompt behavioral changes by increasing passenger awareness of their existing rights and/or by preventing future reductions in the generosity of airlines’ policies.

A. DOT should consider how the Proposed Rule could prompt beneficial changes in airline behavior.

DOT should consider how the Proposed Rule may affect airline behaviors in ways that increase social welfare. The Proposed Rule will impose a more stringent requirement for refunds and travel credits than the current policies of at least some airlines.³⁶ While this requirement will result in

³³ See, e.g., Double Hull Tanker Escorts on the Waters of Prince William Sound, Alaska, 79 Fed. Reg. 33,864, 33,865 (June 13, 2014) (Coast Guard “codifying the established industry practice” of using two tugboats to guide double-hulled oil tankers through Prince William Sound); Design Standards for Airplane Jacking and Tie-Down Provisions, 59 Fed. Reg. 22,100, 22,100 (Apr. 28, 1994) (Federal Aviation Administration codifying standards for jacking and tying down airplanes that are “consistent with current industry practice”); Margarine or Oleomargarine; Standards Revision, 48 Fed. Reg. 52,692, 52,692 (Nov. 22, 1983) (Food and Drug Administration stating that “the final rule only formalizes existing industry-wide practices”).

³⁴ Off. of Info. & Reg. Aff., Regulatory Impact Analysis: A Primer 8 (2011), available at <https://perma.cc/F68H-CDHB>; see also *Circular A-4*, *supra* note 5, at 38.

³⁵ See *supra* Section I.

³⁶ RIA, *supra* note 3, at 10. See *supra* Section II for a discussion of why codification offers independent benefits, even where airlines are already voluntarily complying with more stringent standards.

more refunds to consumers,³⁷ it may also induce behavioral changes in airlines. Evidence shows that air carriers themselves contribute to more than forty percent of flight delays.³⁸ A stricter refund standard may increase the operational costs of canceled or significantly changed flights for certain airlines and may prompt these carriers to adopt changes that reduce the number of flight delays and cancellations.

For example, whether by shifting the burden of risk from passengers to airlines, or by making passengers more aware of their rights, the Proposed Rule may cause some airlines to increase the frequency with which they perform certain maintenance tasks on their aircraft fleets. This change could reduce the number of mechanical problems and the number of flight delays and cancellations. Flights of these air carriers may subsequently become more reliable.³⁹ Due to existing rates of flight delay and cancellation in air travel, passengers are currently advised to schedule long layovers, book a backup flight, fly earlier in the day, or leave a day or two early for important events.⁴⁰ More reliable flights could reduce the number of passengers who resort to these inefficient behaviors and increase consumer welfare and social benefits as a result.

B. DOT should consider how the Proposed Rule could prompt beneficial changes in consumer behavior.

DOT should also consider how the Proposed Rule could affect consumer behavior in ways that increase social benefits. For example, the Proposed Rule could prompt changes that lead to reductions of disease transmission and psychological benefits. Consumers may be more likely to fly—even when they are ill—if they are unable to receive a refund or non-expiring voucher. One result of passengers being more likely to fly when they are sick is an increased risk of disease transmission. The availability of refunds and non-expiring vouchers, therefore, could lead to benefits in the form of reduced disease transmission, and, as a result, decreased travel anxiety for all passengers.

³⁷ See *id.*

³⁸ *Understanding the Reporting of Causes of Flight Delays and Cancellations*, Bureau of Transportation Statistics (Jan. 10, 2022), <https://www.bts.gov/topics/airlines-and-airports/understanding-reporting-causes-flight-delays-and-cancellations>.

³⁹ DOT could consider conducting additional research into whether the European Union’s Passenger Bill of Rights resulted in improvement to flight reliability. 2004 O.J. (L 046) 1–8 (“Regulation (EC) No 261/2005 . . . establish[es] common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.”).

⁴⁰ See Michelle Baran, *Air Travel is Chaos Right Now-You Can Salvage Your Summer Flight Plans With These Pro Tips*, AFAR (June 30, 2022), <https://www.afar.com/magazine/expert-tips-on-dealing-with-flight-delays-and-cancellations> (travel media AFAR advises travelers to schedule long layovers, book the earliest flight that the passenger can find, fly in a day or two early etc.); see also Laurie Baratti, *How Holiday Travelers Can Avoid Flight Delays and Cancellations*, Travel Pulse (Oct. 24, 2022), <https://www.travelpulse.com/news/airlines/how-holiday-travelers-can-avoid-flight-delays-and-cancellations.html> (travel media Travel Pulse recommends passengers to book flights with departure time earlier than 3 p.m. and to opt for long layovers).

Passengers may be more likely to fly—even if they have a serious communicable disease or there is a public health emergency—if they believe that they will not receive a refund or non-expiring voucher for their plane ticket. This expectation for consumer behavior is consistent with behavioral economics research, which shows that people will continue to pursue a particular endeavor if they have invested resources in the pursuit of that endeavor, even if continuing the endeavor brings negative utility.⁴¹ This is also known as the sunk cost fallacy.⁴² In the context of DOT’s Proposed Rule, consumers who have invested time, money, and resources into buying a plane ticket will be more likely to follow through with a flight, even if they have compelling reasons not to, such as a serious communicable disease or a public health emergency. This is true even if the customer is entitled to a refund, if the customer is unaware of this entitlement. By providing uniform and clear refund and voucher requirements, the Proposed Rule reduces sunk costs and thus decreases the likelihood that travelers at high risk of transmitting or contracting a serious communicable disease will still choose to fly.

Accordingly, reduced disease transmission may be a benefit of DOT’s Proposed Rule. Research shows that disease transmission can take place between passengers on an aircraft. For example, studies conducted during 2020 and 2021 on the transmission of COVID-19 found that disease transmission occurred on flights and that passengers located in front of the COVID-19 positive travelers were most likely to become infected.⁴³ Allowing passengers to recoup their costs, with certainty, when they cancel a ticket due to a serious communicable disease or a public health emergency will likely reduce the number of contagious passengers on board, in turn reducing in-flight transmission.

While DOT recognizes the potential for reduced disease transmission, it dismisses the benefits as “de minimis” during a non-public health emergency scenario and as “uncertain” during a public health emergency.⁴⁴ In part, DOT anticipates that passenger diversions due to illness would be rare because, “CDC regulations already restrict air travel for passengers who have or are suspected of having a serious communicable disease.”⁴⁵ While it is appropriate to consider compliance with existing governmental regulations in comparing a proposal to a baseline scenario, it is unlikely that all travelers would comply with CDC regulations under baseline conditions.⁴⁶ Even a small increase in compliance resulting from the Proposed Rule could yield significant health benefits. Although it is unlikely that changes in plane travel attributable to the Proposed Rule would meaningfully change the country’s total disease burden, the impact is also unlikely to be zero. In

⁴¹ H. R. Arkes & C. Blumer, *The Psychology of Sunk Costs*, 35 ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 124-140 (1985).

⁴² *Id.*

⁴³ Qiangqiang Guo, et al., Risk of COVID-19 Transmission Aboard Aircraft: An Epidemiological Analysis Based on the National Health Information Platform, 118 INTERNATIONAL JOURNAL OF INFECTIOUS DISEASES 270 (2022).

⁴⁴ RIA, *supra* note 3, at iii.

⁴⁵ *Id.* at 11.

⁴⁶ See, e.g., Hugo Martin, *Coughing, Sneezing, Vomiting: Visibly Ill People Are Not Being Kept Off Planes*, L.A. TIMES (Jan 1, 2021), <https://www.latimes.com/business/story/2021-01-01/covid-19-airplane-sick-on-plane-cdc>.

its public health emergency scenario, DOT considers an example where 5.5 million passengers change their flights.⁴⁷ As an example, if we assume for illustrative purposes that only one in a hundred of the 5.5 million passengers estimated by DOT would be avoiding travel due to personal illness (rather than general concern about the public health emergency), and even if we assume only half of those cases result in another passenger being infected, that would still result in 27,500 avoided cases. DOT should use its own expert judgment in assessing any likely decreases in transmission, but this example illustrates how even small changes in disease transmission could result in meaningful absolute numbers of avoided cases.

In addition to generating health benefits by potentially reducing the actual spread of disease, DOT should also consider that the Proposed Rule might generate psychological benefits by reducing consumer stress about the possibility of spreading or catching a disease on a plane. Reduced passenger discomfort and stress has been considered a benefit in other rulemakings. In a D.C. Circuit decision upholding a ban on in-flight e-cigarette use, the court held that the perception of harm is itself a harm and found that reducing that perception was a valid benefit of the rule in question.⁴⁸ In a public health emergency, passengers may feel safer and more comfortable on a flight if they perceive their risk of contracting disease to be lower. This could be because there are actually fewer ill passengers on the flight, meaning fewer passengers are exhibiting apparent symptoms of illness (e.g. coughing). It could also be the case that the existence of a universal policy for passengers who are sick with a serious communicable disease would put other passengers on notice that that their fellow passengers are less likely to feel compelled to travel while sick.

The Proposed Rule may also relieve travel anxiety for passengers who worry about transmitting a disease that they may be carrying to other passengers if they themselves know they can more easily avoid traveling while sick or during a public health emergency by seeking a refund or non-expiring voucher, rather than risk losing the value of their ticket. Flight anxiety due to the possibility of in-flight transmission is a documented phenomenon and was common during the height of the COVID-19 pandemic.⁴⁹ By reducing even just the perception of the risk of in-flight transmission, the Proposed Rule could generate psychological benefits for consumers.

⁴⁷ RIA, *supra* note 3, at 17.

⁴⁸ *Competitive Enterprise Institute v. Dep't of Transportation*, 863 F.3d 911, 919 (D.C. Cir. 2017) (“Department noted that prohibiting e-cigarette use would avoid passenger perception of harm—itsself a harm. In short, some passengers are not comfortable inhaling the visible mist produced by e-cigarettes. Passengers ‘may reasonably be concerned,’ the Department explained, ‘that they are inhaling unknown quantities of harmful chemicals.’ ... Commenters on the rule expressed these concerns, and this fear alone could cause ‘discomfort’ and ‘stress’ for passengers.”).

⁴⁹ See e.g. Jessica Poitevien, *What Does Travel Anxiety Look Like In 2021?*, CONDÉ NAST TRAVELER (Jan. 19, 2021), <https://www.enrtraveler.com/story/what-does-travel-anxiety-look-like-in-2021>.

IV. DOT should reconsider its estimate of documentation costs resulting from the Proposed Rule

DOT assumes that, under a public health emergency scenario, airlines will require additional documentation from passengers to receive refunds or non-expiring credits; this assumption drives most of the costs in DOT's analysis.⁵⁰ At the same time, however, DOT points out that many airlines adopted flexible change and cancellation policies during the height of the Covid-19 pandemic—without requiring additional documentation—many of which are still in place today.⁵¹ Given that additional documentation would create processing costs for airlines,⁵² DOT should reconsider whether it is reasonable to assume airlines would voluntarily take on the cost of reviewing additional documentation, especially when recent history indicates airlines have not done so.

V. DOT should consider defining the term "significant government assistance" to mitigate the costs it attributes to the lack of a clear definition.

DOT's Proposed Rule would require airlines that have received "significant financial assistance" from the government as a result of a public health emergency to provide refunds, rather than non-expiring vouchers, in situations where the rule otherwise requires non-expiring vouchers. In its RIA, DOT finds that this provision "is likely to increase transaction and documentation costs during a public health emergency . . . mainly due to the uncertainty in the definition of 'significant government assistance' and the additional administrative burdens for receiving government funds."⁵³ The anticipated costs of this provision account for a large share of the total estimated costs of the Proposed Rule.

DOT also explains, however, that it plans to define "significant government assistance . . . in a separate administrative process."⁵⁴ As a result, DOT should consider whether it might significantly mitigate the costs of the Proposed Rule by instead defining this term in the current rulemaking. Alternatively, DOT could make clear that the costs it currently attributes to the lack of definition are unlikely to persist, given its plan to provide a definition in the future.

VI. DOT should consider expressly concluding that the benefits of the Proposed Rule outweigh the costs.

DOT's current RIA underestimates or elides many critical benefits of the Proposed Rule—including increased fairness, the informational and anti-backsliding benefits of codification, and potential behavioral changes among airlines and their passengers. Many of these benefits are

⁵⁰ RIA, *supra* note 3, at 17–18.

⁵¹ *Id.* at 12–13.

⁵² *See id.* at 17–18.

⁵³ *Id.* at ii.

⁵⁴ *Id.*

challenging to quantify but may nonetheless be large in magnitude. Meanwhile, the primary costs associated with the Proposed Rule are possible increases in documentation costs that may have been overstated, and confusion from a lack of clarity in the term “significant governmental assistance,” which DOT intends to define.⁵⁵ After weighing the above considerations, DOT should consider expressly concluding that, taking into account both the status quo and public health emergency scenarios, the expected benefits of the Proposed Rule outweigh its expected costs.

Respectfully,

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⁵⁵ See *supra* Section IV; Section V.