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December 14, 2022

Clereece Kroha  
Blane Workie  
Office of Aviation Consumer Protection  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590

RE: Airline Ticket Refunds and Consumer Protections  
Docket ID: DOT-OST-2022-0089  
RIN No. 2105-AF04

Dear Ms. Kroha and Ms. Workie:

On behalf of the American Society of Travel Advisors, Inc. (ASTA) and the more than 160,000 Americans who work at travel agencies across the country, I am writing to express ASTA's viewpoints with respect to the above-referenced Notice of Proposed Rulemaking (NPRM) on airline ticket refunds and consumer protections.<sup>1</sup>

Established in 1931, ASTA is the world's leading professional travel trade organization. Our current membership consists of over 17,000 domestic travel agencies, independent travel advisors and supplier companies varying in size from the smallest home-based businesses to traditional brick-and-mortar storefront agencies to the largest travel management companies and online travel agencies such as Expedia.

As the largest segment of air ticket sellers, travel advisors serve a critical and indispensable distribution role in the broader travel and tourism industry. In 2019, travel agencies sold nearly 830,000 airline tickets *per day*, representing 48 percent of total sales and aggregate spending of more than \$97 billion.<sup>2</sup>

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<sup>1</sup> [Airline Ticket Refunds and Consumer Protections](#), Notice of Proposed Rulemaking, Docket DOT-OST-2022-0089, 87 Fed. Reg. 51550 (August 22, 2022).

<sup>2</sup> Airlines Reporting Corporation (ARC). [Airline Sales Statistics](#).

Because travel agencies, individual travel advisors and other similarly situated third-party intermediaries are considered “ticket agents” under the relevant federal statute,<sup>3</sup> our members, like the airlines themselves, are entities regulated by the Department of Transportation (the “Department” or “DOT”) and as such have a significant and particular interest in the outcome of the present rulemaking.

As a preliminary matter, we wish to state for the record that as a longstanding advocate for our members’ clients and the traveling public as a whole, ASTA appreciates the Department’s efforts to protect consumers’ financial interests when their travel is disrupted for reasons beyond their control and to ensure that those affected are not passed back and forth between airlines and ticket agents when pursuing a refund. Accordingly, ASTA strongly supports many aspects of the NPRM whose aim is the enhancement of such consumer protections, for example, codifying what constitutes a “significant change” in a flight itinerary for refund purposes and expanding the traveler’s right to receive a refund when a flight is canceled due to government-imposed travel restrictions.

This should not be surprising insofar as advocating for the interests of travelers is central to the value proposition associated with working with a travel professional. Indeed, since 2020 travel advisors have spent countless hours “chasing refunds” for clients whose travel plans were affected by the worldwide COVID-19 pandemic, and they will continue to do so irrespective of the outcome of the current rulemaking.

However, we also have serious concerns about certain other provisions of the NPRM which would in some cases impose the same refund obligations on ticket agents as the airlines themselves, and by extension make it an unfair business practice for ticket agents to fail to do so, even when such failure is wholly attributable to reasons beyond their control. Indeed, in many circumstances holding ticket agents to the same standard as the airlines with respect to refunds will prove to be not only unworkable from a regulatory perspective but manifestly unfair as well.

As the national trade association representing the interests of travel agencies and travel advisors, ASTA is most concerned with the provisions of the NPRM that, if adopted, would be most disruptive to our members, their businesses and their clients. Not surprisingly, the majority of our comments focus on these concerns and are the result of extensive discussions with our members and others well-versed in the complexities of the airline ticket settlement process and the manner in which agent-booked tickets are refunded currently. However, we also write to express our views as to other aspects of the NPRM where we believe that ASTA

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<sup>3</sup> See [49 U.S.C. § 40102\(a\)\(45\)](#) (Definitions) (“a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation”).

can provide a valuable perspective distinct from that of the airlines, consumer advocacy groups and other key stakeholders.

#### 1. Ticket Agents' Obligation to Provide Refunds

The Department proposes to codify its longstanding interpretation that it is an unfair business practice for an airline or a ticket agent (which again includes travel agencies and individual travel advisors) to refuse to provide requested refunds to consumers when an airline has cancelled or made a significant change to a scheduled flight and consumers found the alternative transportation offered by the carrier or the ticket agent to be unacceptable.

The NPRM clarifies the scope of this proposal in the narrative accompanying the new proposed regulations (though not in the regulations themselves) as follows:

The proposed refund requirements for ticket agents applies to airfare or airfare inclusive travel package transactions in which the ticket agents' identities are shown in the consumer's financial charge statements, such as debit or credit card charge statements, indicating that, from the consumer's perspective, the ticket agent is the ultimate recipient of the funds *irrespective of whether the ticket agent is in possession of the consumer funds at the time of the refund request*.<sup>4</sup>

Before raising our significant substantive concerns with the proposal, ASTA wishes to note that which party is the "merchant of record" for purposes of the refund obligation will not be entirely clear in every circumstance. We have been advised by both the Airlines Reporting Corporation (ARC) and a number of our member agencies that some credit card issuers, namely, American Express and Capital One, and possibly others, will identify both the ticket agent and the air carrier on the consumer's monthly statement when the flight is purchased through an intermediary. This is done to assist the consumer in identifying the transaction, thereby reducing the likelihood that a chargeback will be mistakenly initiated on a legitimate charge the consumer does not recognize. In addition, where the ticket agent charges the consumer a consultation or service fee in connection with the booking, the identity of the ticket agent, and the amount of the fee assessed, will nearly always be shown on the consumer's credit card statement, albeit separately from the charge for the air ticket itself.<sup>5</sup> Moreover, the NPRM does not address how the merchant of record is identified when the consumer chooses to purchase air tickets by means other than a credit or debit card. So, while we appreciate the

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<sup>4</sup> [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51562 (emphasis added).

<sup>5</sup> Given the prevalence of this situation, should the Department adopt a final rule substantially the same as that proposed, we would ask that DOT make clear that only the identified party *associated with the charge for the air ticket*, and not any service fee assessed contemporaneously with it, be deemed the party responsible to provide a refund.

Department's desire to devise a simple means for the consumer to identify which party – the airline or the ticket agent – is responsible for furnishing the refund, this may not be possible in every case.

As a proportion of all credit card air ticket transactions facilitated by intermediaries, the number in which travel agencies appear as the merchant of record is comparatively low. Based on discussions with a diverse cross-section of its membership, ASTA estimates that between five and eight percent of all such transactions fall into that category. The majority of these involve either group bookings<sup>6</sup> or the sale of travel packages which include an air ticket component.<sup>7</sup> Another relatively common scenario in which a travel agency will be the merchant of record is where the agency has negotiated a net fare from a consolidator and then marks up the price to be paid by the consumer.<sup>8</sup>

Despite the small percentage of all air ticket transactions for which the ticket agent is the merchant of record, and by extension the relatively limited reach of the NPRM's impact on travel advisors, given the volume of airline tickets sold through intermediaries, ASTA believes the effects of DOT's proposal, if adopted, would nonetheless prove to be extraordinarily disruptive to the agency distribution channel and the industry as a whole. And while minimizing uncertainty and consumer confusion as to which entity is responsible for the refund<sup>9</sup> is certainly a worthy objective, we respectfully submit that given the predictable disruptive effects that would result, the Department's proposal is neither reasonable nor equitable from the perspective of a ticket agent not in possession of the consumer's funds at the time the refund request is made.

We reach this conclusion for several compelling reasons. First, in air ticket transactions – even those made under the merchant model – it is quite rare for agencies to retain possession of client funds for any meaningful period of time. Indeed, according to online travel agency Hopper, collection of payment from the consumer and settlement with the airline, though two

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<sup>6</sup> An airline group booking is typically defined as a booking for ten or more travelers occupying seats booked together, and with all travelling on the same route, date and flight in a single booking.

<sup>7</sup> It follows then that agencies that specialize in arranging group travel and/or tour packages will be the merchant of record for a substantially greater percentage of its transactions, and as such would stand to be disproportionately burdened by the Department's proposal. Indeed, some of ASTA's members report that the agent is the merchant of record in 40 percent of their consumer air ticket transactions.

<sup>8</sup> ASTA members also reported several less-common scenarios in which the agency will appear as the merchant of record, such as "split payment" purchases, i.e., where two or more credit cards are used to purchase a single ticket, as well as certain bookings made through one of the global distribution systems (GDSs), even though in the latter case the agency did not charge the consumer's card.

<sup>9</sup> 87 Fed. Reg. at 51562 ("The Department has considered placing the obligation... on the entity that is in possession of the consumer funds at the time the refund request is made, but does not propose this approach because which entity is in possession of the funds would not necessarily be clear to the consumer... [s]uch uncertainty would result in additional costs, delay, and confusion to consumers").

separate transactions, occur concurrently.<sup>10</sup> As such, in the vast majority of cases, the funds will be in the hands of the airline almost immediately and plainly before any cancellation or significant change in the flight itinerary occurs. Recall too that, particularly with respect to leisure travel, flights are typically booked weeks or even months in advance of the anticipated travel date.

Second, it is the airlines, and not ticket agents, that cancel or significantly change flight itineraries, and this is done without any involvement by, or knowledge of, the intermediary. No central database maintaining flight change or cancellation information currently exists, and the airlines are not presently obligated to disseminate such information to intermediaries. Even if they were, that would still be insufficient to ascertain a consumer's refund rights, as the ticket agent would not know whether the affected traveler accepted the alternative flight offered or, alternatively, agreed to accept a credit in lieu of a refund. Similarly, intermediaries have no say in or control over the alternative transportation options offered to the consumer.

Third, unlike the airlines, because ticket agents will rarely be in possession of the client's funds when a refund request is received, their ability to issue a prompt refund will, in most cases, be outside of their control. Recall that for regulatory and enforcement purposes, the DOT considers a "prompt" refund to be one that is made within seven days of receipt of a refund request for credit card purchases, and within twenty days after receiving the request for purchases made with cash, check or other form of payment.<sup>11</sup>

Given how air ticket refunds are typically processed it will in the majority of cases be impossible for a merchant of record ticket agent to issue a refund within the stated timeframes. A brief explanation of the basic procedure may be helpful. According to ARC, agents generally process refunds through their global distribution system (GDS) or ARC's primary tool, Interactive Agent Reporting. Both means are dependent on the receipt of an Electronic Settlement Authorization Code (ESAC) directly from the airline, without which the refund cannot be processed. The ESAC, issued by the refunding airline, confirms that the flight coupons have changed to a refunded status, which helps minimize duplicate refunding and the potential for fraud.<sup>12</sup>

The above-described process, from start to finish, typically takes approximately 14 days. ASTA members recently surveyed appear to confirm that estimate, as nearly half of the respondents with an opinion – 49 percent – stated that refund time frames for agency merchant model

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<sup>10</sup> Hopper. Letter describing the general payment flow in merchant of record air ticket transactions. Received by the American Society of Travel Advisors. Undated.

<sup>11</sup> [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51579, *citing* 12 CFR Part 1026.

<sup>12</sup> Airlines Reporting Corporation. Letter describing the air ticket refund process. Received by the American Society of Travel Advisors. October 19, 2022.

transactions are “substantially longer” (defined in the survey question as seven or more days longer) as compared with transactions for which the airline is the merchant of record.<sup>13</sup>

Given the time needed to secure the refund from the airline, if, as proposed, the refund requirement applies to ticket agents irrespective of whether they are in possession of the consumer’s funds, issuing a prompt refund will in most cases be practically impossible for the merchant of record travel agency unless it actually advances the funds out of pocket in anticipation of receiving the refund from the airline sometime thereafter. Recall too that for group bookings, one of the most common merchant of record scenarios, the ticket agent would be responsible to advance refunds for not one but many passengers, in most cases ten or more, all at the same time.

In our view, it is absurd to require a travel advisor to take such drastic action to address a situation that it played no part whatsoever in creating. We find it inconceivable that imposing such a financial burden on an innocent party was either foreseen or intended when the Department drafted the NPRM. The absurdity of the situation is only compounded when one considers that travel agencies are, overwhelmingly, small businesses. Indeed, according to ASTA data, fully 98 percent of travel agencies qualify as such under the Small Business Administration (SBA) size standards.<sup>14</sup> These enterprises, characterized by a very limited cash flow, are the ones *least* equipped to assume such a significant financial risk as the NPRM threatens to impose.

The prospect of ticket agents being “on the hook” for issuing refunds regardless of whether they possess the consumer funds in question also threatens major disruption to an air ticket distribution system that is heavily reliant on intermediaries. Many agencies, particularly the smaller ones that now predominate the industry, will quite rationally view the refund obligation as an unacceptable financial risk and determine to eliminate that risk by no longer selling air tickets at all. Indeed, given the volume of air tickets transacted through the agency channel, the disruption could be quite severe even if only a small percentage of travel agencies elected to do so.<sup>15</sup>

Nor does it appear that ASTA’s concern in this regard is overstated. To the contrary, our research substantiates both the validity and the gravity of the concern. When asked in a survey how likely it was that they would continue booking air tickets should the DOT’s final rule

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<sup>13</sup> 2022 Member Survey – DOT Refunds NPRM, American Society of Travel Advisors, October 18 – November 8, 2022.

<sup>14</sup> The SBA assigns a size standard based on NAICS codes assigned to each industry. For travel agencies, NAICS code 561510, the current size limit for small businesses is \$22,000,000 in annual revenue.

<sup>15</sup> As of July 2022, ARC reported travel agencies were responsible for the sale of over 640,000 air tickets *per day* in the United States.

require them to refund consumers for cancelled or significantly changed flights even where they were not in possession of the consumer's funds, 83 percent of travel advisors – nearly five out of six – said they were “much less likely” to continue booking air tickets.<sup>16</sup> Likewise, only 6.7 percent of respondents, about one in fifteen, stated that adoption of a final rule imposing the refund obligation as proposed would *not* affect the likelihood that the respondent would continue booking air tickets.<sup>17</sup>

Beyond the predictable disastrous impact on a vital distribution channel, one which would surely be felt by the airlines, an election by any meaningful number of travel agencies to exit the air ticket booking business would, ironically, also represent a significant loss for consumers, the very group the Department seeks to protect in proposing the rule. Travel advisors are true professionals skilled in guiding their clients through the often-complex logistics of trip planning and stand ready to assist them with any unexpected issues that may arise during travel. The value of working with an advisor was never more evident than during the COVID-19 pandemic, when flights were cancelled and travel restrictions and entry requirements changed on a scale never seen before. And, as previously noted, travel advisors were staunch advocates for passengers seeking refunds in connection with travel affected by these disruptions. In short, fewer travel agencies booking air tickets would mean fewer consumers having access to the valuable consultative and support services advisors routinely provide.

Fourth, holding merchant of record ticket agents responsible to provide consumer refunds in all circumstances runs counter to longstanding common law principles governing agency relationships, *i.e.*, arrangements between parties where one delegates some decision-making authority to the other. Historically, an agent's liability to third parties has been based upon the agent's own conduct, and not the conduct of the principal or other agents.<sup>18</sup> More specifically, an entity that discloses that it is acting as agent for an identified principal is not liable for the principal's acts, omissions or other failure to perform.<sup>19</sup> The application of this rule to the situation under consideration here is as follows: the travel advisor books an airline ticket for her client and in the process provides the client with the name of the air carrier on which the client is booked. The airline later cancels the flight. The airline's failure to perform, *i.e.*, not operating the flight as scheduled, does not result in any liability to the agent, and any economic or non-economic damages the client incurs as a consequence of the airline's action, including but not limited to the loss of the price of the ticket, are the sole responsibility of the airline.

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<sup>16</sup> 2022 Member Survey – DOT Refunds NPRM, American Society of Travel Advisors, October 18 – November 8, 2022.

<sup>17</sup> *Id.*

<sup>18</sup> Restatement 3d of Agency, § 7.01.

<sup>19</sup> ASTA Agency Relationships and the Law Handbook, p. 7 (2017).

While a common law rule can, of course, be modified by statute or regulation,<sup>20</sup> as DOT proposes to do in this rulemaking, we respectfully submit that departure from the common law is not warranted here. Recall that it is the airlines, and solely the airlines, that determine whether to cancel or significantly change a flight, and again it is the airlines that determine what alternative transportation will be offered to the affected passenger. Ticket agents play no role whatsoever in any of these decisions and, as noted, more often than not are not even aware of the circumstances giving rise to the refund obligation until well after the fact, if at all.

Moreover, the rationale for the proposal cited by the Department, namely, the minimization of the consumer's burden in securing a refund,<sup>21</sup> is in our view, substantially outweighed by the prospect of a disproportionately greater burden being placed on predominantly small businesses whose services are demonstrably integral to air ticket distribution in the United States. Indeed, the DOT acknowledges in the NPRM that ticket agents are responsible for the sale of roughly half of all airline tickets sold.<sup>22</sup> Jeopardizing the viability of an entire distribution channel, one the Department recognizes is indispensable, to minimize *potential* confusion as to which entity is responsible for a refund in between five and eight percent of all intermediated air ticket transactions does not seem to be a sensible trade-off.

Fifth, in addition to running counter to centuries of common law and the clear negative impact its adoption would have on a vital distribution channel, the proposal also conflicts with the Department's own longstanding interpretation of existing regulations, expressed most recently in a May 2020 enforcement notice. In that notice, the Department stated that ticket agents must provide a refund only when all of the following conditions are met: (i) an airline cancels or significantly changes a flight; (ii) an airline acknowledges that a consumer is entitled to a refund; and (iii) *passenger funds are possessed by a ticket agent*.<sup>23</sup> Moreover, according to the information maintained on the Department's website, no enforcement action against ticket agents related to refunds has been taken since at least 2003.<sup>24</sup> Therefore, ASTA respectfully submits that there is no compelling reason to depart from the current common-sense interpretation.

For all of the foregoing reasons, we urge the Department to decline to impose in the final rule any requirement that ticket agents provide consumers with refunds in connection with

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<sup>20</sup> Restatement 3d of Agency, § 7.01.

<sup>21</sup> [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51562.

<sup>22</sup> *Id.* ("Approximately 50% of tickets are sold by airlines directly to consumers, and the remainder are sold through ticket agents").

<sup>23</sup> <https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds%20-%20Second%20Enforcement%20Notice%20%28May%2012%202020%29.pdf> (emphasis added).

<sup>24</sup> U.S. Department of Transportation. [Ticket Refunds: A Compilation of Rules, Guidance, Enforcement Orders and Other Related Information Regarding Aviation Ticket Refunds](#).

cancelled or significantly changed flights. Instead, irrespective of which party is the merchant of record of the transaction in question, the ticket agent's regulatory obligation should be limited to making reasonable efforts to assist the affected consumer in securing the refund from the carrier. Interestingly, the Department itself appears to acknowledge that providing assistance to the consumer *alone* should be sufficient for a ticket agent to avoid unfair practices liability.<sup>25</sup> Of course, where, based on the nature of the original transaction or other circumstance, the ticket agent is in possession of the consumer's funds, it would then be expected to forward the refund to the consumer within a reasonable time.

On this point, it is noteworthy that ASTA already imposes this obligation on its member agencies and advisors. Specifically, the association's Code of Ethics ("Code") includes an expectation that "members will remit [to the client] any undisputed funds under their control" and within any applicable time limit.<sup>26</sup> The Code further provides that "[r]easons for any unavoidable delay in providing [refunds] will be given to the claimant promptly," a clause which recognizes that in most situations the timeliness of a travel refund will depend largely on how promptly the airline or other responsible supplier acts in processing it.<sup>27</sup> Enforcement powers are vested in the ASTA Board of Directors and violations of the Code can result – and have resulted – in expulsion from the Society.<sup>28</sup>

ASTA firmly believes that its recommendation represents the best balance of the interests of all parties involved and respects the traditional role of an agent (in the legal sense of the term) in an intermediated transaction. If, however, the Department should conclude otherwise, we respectfully request that the final rule expressly limit a ticket agent's obligation to issue a consumer refund only in circumstances where the ticket agent: i) is the merchant of record of the transaction; ii) has received notice from the airline that the passenger is entitled to receive a refund; and iii) is in possession of the consumer's funds.

If such a framework were to be adopted, we further request the final rule reflect that for purposes of determining whether a ticket agent has satisfied the prompt refund requirement of 12 CFR 1026, the seven-day or twenty-day timeframe, for credit and cash, check or other form of payment transactions, respectively, as applicable, not begin to run until the ticket agent has received notice from the airline that the passenger is entitled to, and should receive, a refund and the ticket agent is in possession of the full amount of the price of the consumer's air ticket.

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<sup>25</sup> "[A] ticket agent selling a ticket for the flight listed by the carrier is offering a specific service and is similarly engaging in an unfair practice if it does not provide a refund *or* assist the consumer in obtaining a refund from the carrier." [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51558 (emphasis added).

<sup>26</sup> *ASTA Code of Ethics* (December 15, 2020).

<sup>27</sup> *Id.*

<sup>28</sup> ASTA Bylaws, Article II, Section 11(a) ("Enforcement of Member Responsibilities") (August 24, 2022).

Because travel agencies do not have ready access to flight cancellation and/or itinerary change information and should not, under any circumstances, be required to pay a consumer refund out of pocket, it is imperative that the final rule require both of these conditions to be present.

## 2. Definition of Significant Change of Flight Itinerary

The Department proposes to define “significant change of flight itinerary” as a change made by a carrier where, for domestic itineraries, the passenger is scheduled to depart from the origination airport three hours or more earlier than the original departure time or three hours or more later than the original scheduled arrival time.<sup>29</sup> For international itineraries, a significant change would be one where the passenger is scheduled to depart from the origination airport six hours or more earlier than the original departure time or six hours or more later than the original scheduled arrival time.<sup>30</sup> As stated in the NPRM, because what constitutes a “significant change” for purposes of the refund obligation is not currently defined in the regulations, the Department’s Office of Aviation Consumer Protection has stated that the airlines are free to develop reasonable interpretations of those terms.<sup>31</sup>

As advocates for the interests of air travelers as well as its member companies, ASTA agrees with the rationale advanced by DOT that adoption of a regulatory definition of “significant change” as proposed is desirable. We believe all industry stakeholders, but particularly consumers, stand to benefit from the adoption of a simple bright line standard (albeit one for domestic travel and another for international) setting forth the circumstances under which an airline is obligated to offer a refund to a passenger affected by a flight change itinerary.

Consistency among the airlines will enhance consumer confidence and predictability as to what they can expect with respect to the carriers’ refund obligations when their air travel plans are significantly disrupted. It is reasonable to expect that uniformity and the resultant greater clarity as to the conditions under which consumers are entitled to receive a refund – regardless of which airline the passenger is booked on – will reduce confusion when flight itineraries change unexpectedly. This in turn should minimize unnecessary refund-related contacts with airlines, ticket agents and the Office of Aviation Consumer Protection, reducing the current burden on all stakeholders.

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<sup>29</sup> [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51559. While we decline to specifically comment here, ASTA is in general agreement with DOT’s view that other circumstances in addition to departure and arrival times ought to be considered in defining what constitutes a “significant change of flight itinerary,” including a change in the departure or arrival airport, an increase in the number of connection points, a downgrade in class of service, or a change in aircraft type resulting in a downgrade of available amenities.

<sup>30</sup> *Id.*

<sup>31</sup> [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51557.

In our view, the second approach DOT considered, maintaining the *status quo* in which airlines have the latitude to interpret “significant change” as they see fit and, by extension, the circumstances that give rise to the right to receive a refund, does nothing to abate the confusion that currently exists when the consumer is affected by a change in a flight itinerary. The resulting lack of predictability as to the consumer’s refund rights in a particular situation on a particular airline result in diminished passenger confidence in the air transport system as a whole, leading to complaints against air carriers and ticket agents, as well as a continued burden on the regulatory and enforcement assets of the Department. Moreover, this is the case even where the interpretation adopted by the carrier is not in any sense “unfair” when viewed from the perspective of the consumer.

With respect to the third approach considered by the Department, namely, a “tiered structure” based on a number of objective factors bearing on the degree of consumer inconvenience,<sup>32</sup> ASTA believes that the benefits of such a scheme are outweighed by its potential for confusion. Because the length of a permissible delay, *i.e.*, one that does *not* trigger the refund obligation, will vary based upon the total travel time as the itinerary was originally ticketed, measured from departure time of the first flight segment to arrival time of the last segment,<sup>33</sup> we are of the opinion that typical airline passengers will have substantial difficulty ascertaining the circumstances under which they are entitled to receive a refund. In such cases, it is reasonable to expect that the affected consumer will require explanation from either the airline or the ticket agent, and dissemination of correct information from these parties will require them to fully understand the structure as well, placing an additional training and communication burden on these stakeholders.

### 3. Providing Non-Expiring Travel Credits or Vouchers

The Department proposes to require air carriers and ticket agents to provide non-expiring travel vouchers or credits to consumers in circumstances where they are “restricted or prohibited from traveling by a governmental entity for reasons related to a serious communicable disease.”<sup>34</sup> The proposal contemplates air travel restrictions attributable to “stay at home,” “shelter in place” or quarantine orders, border closures, and the like, imposed by either a foreign government or any level of the U.S. government.<sup>35</sup>

ASTA is in agreement with the Department’s view that it is “fundamentally unfair” for airlines to not issue a travel voucher or credit in “these types of circumstances, which are out of the

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<sup>32</sup> *Id.* at 51560.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 51566.

<sup>35</sup> *Id.*

consumer’s control.”<sup>36</sup> Pursuant to DOT’s final rule implementing 49 U.S.C. 41712, a practice is unfair if “it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.”<sup>37</sup>

We believe that consumers rendered unable to travel through no fault of their own, but rather due to imposition of governmental mandates, satisfy the foregoing standard. That being said, it is important to note that in the contemplated circumstances the airline is likewise prevented, through no fault of its own, from operating the flight as scheduled. Accordingly, ASTA believes that the proposal to require the carrier to issue a non-expiring voucher or credit, rather than a cash refund, strikes the right balance and is the appropriate remedy given the lack of culpability on the part of the airline for the passenger’s inconvenience.<sup>38</sup> Moreover, we wish to add that it is not appropriate to place the burden of providing the travel credit or voucher to the consumer on ticket agents. Rather, as we stressed in connection with air ticket refunds, the ticket agent’s regulatory obligation should be limited to making reasonable efforts to assist the affected consumer in securing the credit or voucher.

The NPRM further proposes that “when there is a public health emergency, airlines and ticket agents must provide non-expiring travel credits or vouchers to non-refundable ticket holders who are advised by a medical professional or determine consistent with public health guidance issued by the CDC, comparable agencies, or WHO not to travel by air to protect themselves from a serious communicable disease.”<sup>39</sup>

The Department asserts that its statutory mandate to ensure that air carriers “provide safe and adequate interstate air transportation”<sup>40</sup> would be advanced by “reducing incentives for individuals who have been advised against traveling” to travel rather than forfeit the value of the ticket.<sup>41</sup> Therefore, consumers “particularly vulnerable to a serious communicable disease [could] receive a travel credit and postpone travel during a public health emergency.”<sup>42</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 51551.

<sup>38</sup> While we do not propose it here, one can plausibly argue that an even better balance would be struck if the governmental entities whose mandates restrict or prohibit travel were responsible for making the consumer whole. If nothing else, the adoption of such a rule would result in greater consideration being given to the economic and other costs associated with responses to future public health crises.

<sup>39</sup> *Id.* at 51566.

<sup>40</sup> 49 U.S.C. § 41702.

<sup>41</sup> [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51552.

<sup>42</sup> *Id.*

DOT contends that the failure of an airline or ticket agent to issue a travel credit or voucher under these circumstances constitutes an unfair practice because the “loss of the value of [the consumers’] tickets is a substantial harm that is not reasonably avoidable because the only way to avoid it is to disregard direction from governmental entities or medical professionals not to travel and risk inflicting serious health consequences on themselves or others.”<sup>43</sup>

ASTA does not support this proposal because we disagree with the Department’s view that the consumer’s loss is not reasonably avoidable in these situations. To the contrary, the loss can be avoided in at least two ways. First, consumers who have legitimate concerns that they may be unable to travel due to a serious health condition - or for any other reason - have the option of purchasing a fully refundable ticket. In such a case, the consumer who decides not to travel will, consistent with the terms of the class of ticket purchased, be made whole. And while it is true that refundable tickets cost more than non-refundable tickets, the price differential merely reflects that the airline, rather than the passenger, has agreed to assume the risk of loss should he or she elect not to travel.

Second, the proposal fails to consider the widespread availability of travel insurance,<sup>44</sup> which exists precisely to protect consumers against financial losses and a variety of other risks that can occur when travel plans change or are interrupted unexpectedly. Depending on the type of policy purchased and subject to any coverage limitations or exclusions, the cost of air tickets can be reimbursed in whole or in part when the insured is unable or elects not to travel.

Travel insurance is also an affordable option for consumers seeking to protect against financial losses. The premiums are based primarily on the length of trip, destination, and age of the insured, and generally will add only between 4 percent and 8 percent to the total cost of the trip.<sup>45</sup> For these reasons, among others, ASTA views the recommendation of travel insurance to every client as an advisor best practice.<sup>46</sup>

To summarize our viewpoint, the market already provides at least two viable options to the consumer seeking to avoid a prospective financial loss in connection with his or her own election not to travel as ticketed. Because either option may be taken to mitigate or avoid altogether a financial loss, it should not constitute an unfair practice for an airline to decline to issue a travel credit or voucher under these circumstances.

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<sup>43</sup> *Id.* at 51551.

<sup>44</sup> According to a recent survey of ASTA members, 89.2 percent of respondents said that they offer and/or disseminate travel insurance information to their clients. *July 2022 Benchmarking Survey*, American Society of Travel Advisors, July 2022.

<sup>45</sup> *U.S. Travel Insurance Association*. <https://www.ustia.org/faqs.html> (accessed November 17, 2022).

<sup>46</sup> *ASTA Bankruptcy Basics*, p. 41 (2020) (“[R]egardless of the cause of the travel disruption, travel insurance provides the client with a measure of assurance that he or she will be made whole”).

#### 4. Service and Processing Fees

The Department proposes to clarify that “ticket agents are permitted to charge a service fee for booking travel or issuing refunds and to deduct those amounts from the refund provided to consumers, as long as the amount of the fee is on a per-passenger basis and the existence of the fee was clearly and prominently disclosed to consumers at the time they purchased the airfare.”<sup>47</sup>

ASTA wholeheartedly agrees with the rationale cited in the NPRM for permitting ticket agents to charge and retain professional service fees, specifically, its recognition that advisors provide consumers with valuable information and services distinct from the airfare itself. These include, but are not limited to, the advisor’s provision of “specialized knowledge, access to limited availability fares, or tools to comparison shop across various airlines to find the best value for the consumer.”<sup>48</sup> And, as the Department notes, because the “fee for booking travel represents the cost of service *already provided*,”<sup>49</sup> it follows that an advisor assessing a fee should be permitted to retain it, irrespective of whether the consumer travels thereafter.

We also wish to note that it has become increasingly common in recent years for travel agencies and individual travel advisors to receive professional service fees from their clients. ASTA has long endorsed the charging of such fees, not only in recognition of the value of the advice they provide, but also to lessen to a degree dependence on commissions paid by suppliers, which traditionally had been the sole source of income for travel agencies. As of 2022, nearly 64 percent of advisors charged professional service fees, up from just 56 percent a year earlier.<sup>50</sup> Given the growing importance of these fees to the economic viability of the travel agency distribution channel, we appreciate the Department’s intention to clarify that advisors are entitled to retain them once earned.

Similarly, the Department tentatively proposes to clarify that “ticket agents may charge a fee [to consumers] for processing refunds or a non-expiring credit or voucher” provided that “the fee is on a per passenger basis and the existence and amount of the fee is clearly and prominently disclosed to consumers at the time they purchased the airfare.”<sup>51</sup>

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<sup>47</sup> [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51563.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> *Host Agency Reviews 2022 Travel Agent Survey*, p.3.

<sup>51</sup> [Airline Ticket Refunds and Consumer Protections](#), 87 Fed. Reg. at 51563.

Again, we agree with the rationale advanced by the Department that assessing a fee is reasonable and appropriate because the ticket agent did not initiate the change that results in the need for issuance of the refund, credit or voucher.<sup>52</sup> Furthermore, as noted previously, securing refunds or credits for consumers is invariably a time-consuming process, and the time spent assisting clients in that regard no longer available to the advisor to engage in other income-generating activities.

While most travel advisors do not assess service fees to process client refunds or credits currently, we believe they should retain the right to do so provided, of course, that the existence of the fee is adequately disclosed to the consumer in advance. On that note, ASTA is of the opinion that the final rule need not prescribe use of any particular language so long as a reasonable consumer would find the disclosure to be plain and unambiguous with respect to the fee sought to be charged.

#### 5. Effective Date

The Department proposes that any final rule resulting from this rulemaking take effect 90 days after its publication in the Federal Register and seeks comments as to whether that timeframe is appropriate should the rule be adopted as proposed.<sup>53</sup>

Because, as detailed above, certain aspects of the NPRM if adopted as proposed would be highly disruptive to travel advisors and other ticket agent intermediaries, ASTA believes a longer interval between the publication date and the effective date is warranted here. In particular, we envision that many ticket agents will need additional time to assess whether the financial risk associated with the prospect of being responsible to issue consumer refunds in merchant of record transactions is too great to permit their continued sale of airline tickets. This likely will require, among other things, a careful analysis of the number and value of such transactions in light of the agency's current and expected cash flows and reserves. And where agencies conclude that the continued sale of air tickets is no longer viable, as we suspect many will, time will be needed to make the necessary adjustments to their business models to account for that.

Finally, regardless of what time interval the Department ultimately adopts, to avoid widespread confusion on the part of all stakeholders, we believe it is imperative that the final rule make clear how DOT intends to interpret the effective date in relation to the date the ticket is purchased and the scheduled date of the consumer's flight. For example, if a ticket is purchased before the effective date of the rule but the flight is cancelled and a refund is requested after

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<sup>52</sup> *Id.* at 51570.

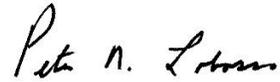
<sup>53</sup> *Id.* at 51573.

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the effective date, does the rule apply? For the greatest degree of simplicity in this regard, ASTA recommends that any prospective new rule expressly state that it will apply only to air tickets *purchased* on or after the effective date.

We thank you for taking the time to consider ASTA's views on these critically important issues. If you or your staff have any questions regarding the role of travel agencies in the industry, the air ticket settlement process, or any of our specific recommendations, please do not hesitate to contact me at (703) 739-6854 or [plobasso@asta.org](mailto:plobasso@asta.org).

Sincerely,



Peter N. Lobasso  
Senior Vice President & General Counsel  
American Society of Travel Advisors, Inc. (ASTA)