

Airline Rules May Fall Short For Consumers, Attys Warn

By **Linda Chiem**

Law360, New York (October 24, 2016, 6:01 PM EDT) -- The Obama administration's push to regulate how airlines market their flights online and reimburse passengers for service lapses is raising questions about government overreach and whether the proposed regulations might actually make things worse, not better, for the consumers they're intended to protect.

The White House and the U.S. Department of Transportation last week announced a series of new rules and proposals aimed at giving consumers more upfront information on how airlines are actually performing, ensuring that customers don't have to pay for services they don't receive, and requiring more neutral online search and booking options so that consumers have more airfare choices at their fingertips.

Officials say pushing the airline industry to be more transparent — particularly in the way they control how their airfares show up on online travel websites and metasearch engines — will benefit consumers and promote competition among airlines. But experts say they may trigger backlash from airlines that for decades have relished the flexibility afforded them by the Airline Deregulation Act of 1978 to switch up their prices, routes and services, and that might now argue that the government is overreaching with meddlesome new mandates that run afoul of federal law.

The DOT on Oct. 18 released new final rules extending passenger protections and implementing new reporting requirements for airlines. It also issued an advance notice of proposed rulemaking that would require airlines to refund baggage fees when passengers' luggage is "substantially delayed" — a follow-up to previous efforts the DOT has made requiring airlines to reimburse passengers' bag fees when bags are lost.

"This administration has been forward-leaning on enhancing consumer protections for traveling by air — it started with [Ray] LaHood and continued with [Anthony] Foxx — so these things have been in the works for a long time, aren't new and aren't particularly controversial," said Katie Thomson, chairwoman of Morrison & Foerster LLP's transportation industry group and the former senior counsel at both the DOT and the Federal Aviation Administration.

But the purported benefits the proposals are expected to provide to consumers are still a ways off, given the public comment period that comes with the rulemaking process before any regulations are ultimately finalized.

Kenneth P. Quinn, a partner and head of Pillsbury Winthrop Shaw Pittman LLP's aviation, aerospace and transportation practice, told Law360 that it's a "mixed bag" of proposals that puts off for some time any resolution of some of the more hot-button issues, such as airlines' inclusion of ancillary fees, withholding fare data from online travel agents and others, and treating metasearch engines as ticket agents subject to DOT authority.

And with President Barack Obama leaving office next year, it will be up to the next administration to determine whether market forces or having the government intervene with regulation or enforcement are necessary to protect consumers, Quinn explained.

"This battle is far from over and will fall in a heap on the next administration's lap," he said. "We're left with a bunch of late-bag rules with fines that pose an undue burden on airlines and are unnecessary. Consumers who are mistreated can simply vote with a click to fly on another airline."

For the most part, there's a lot of self-discipline in the industry to adjust prices, routes and services in a manner that doesn't go too far and would turn off air travelers, according to Quinn.

"The customer service standards mandated by heavy-handed government regulation, [that] is a bit of an anomaly and could have unintended consequences of making them less competitive and causing higher fares," he said.

The DOT also will be conducting a rulemaking to explore whether airlines should be required to share with ticket agents the fee information for services or products that have been previously included in the price of a ticket, such as checked baggage, advance seat assignments and priority boarding. The idea is to give customers an all-in-one price when they shop online, officials said.

But the proposal that's likely to set off the biggest battle, according to experts, will be the DOT's request for information into whether airlines are unfairly restricting access to schedule and fare information.

The department said in its request for information that it is "considering whether carriers should be prohibited from restricting the information provided by ticket agents when those ticket agents do not sell air transportation directly to consumers but rather provide consumers with different airlines' flight information for comparison-shopping."

Airlines typically negotiate their own agreements with online travel agents or metasearch sites such as Expedia, Travelocity and Kayak, stipulating how their airfares should be displayed on the other sites. Those other search options are in addition to airfares marketed on the airlines' own websites. Meanwhile, some airlines, such as low-cost carrier Southwest Airlines Co., prefer to directly market to consumers on their own website.

So having the government digging into whether airlines are putting too many restrictions on what gets displayed to consumers to determine whether future regulations need to be put in place to curb those practices won't sit too well with airlines, experts say.

"There's no question of would it be in consumers' interests to have readily available information on all sites, but is it unfair for industry to choose who it wants to do business with and is it unfair trade practices to not do something," Thomson said. "That's the thorniest issue of all the actions that were taken [by the White House and DOT]."

And after the government eased its tight grip on the industry following the Airline Deregulation Act, carriers won't want reregulation in the areas of prices, routes and service in what they might characterize as the government's overreach.

Airlines for America, the lead lobbying group for the major U.S. airlines, cautioned that parts of the Obama administration's proposals would end up hurting customers by reregulating how airlines sell their products, driving up the cost of air travel.

"It would be difficult to find an industry that is more transparent than the airline industry; customers always know exactly what they are paying for before they buy," A4A President and CEO Nicholas E. Calio said in a statement. "Further, the fact that a record number of people are flying underscores that customers are benefiting every day from affordable fares and the ability to choose among carriers, amenities and service options that best meet their needs. Dictating to the airline industry distribution and commercial practices would only benefit those third parties who distribute tickets, not the flying public."

The administration's proposals are solutions in search of a problem because competition already is alive and well in the airline industry, and all pricing information is available to consumers at the click of a button, according to Calio.

The DOT has said it's publishing the request for information simply to solicit feedback from consumer groups, the industry and other stakeholders to advance its understanding of these market dynamics and help it determine whether any regulatory or enforcement action is actually warranted.

The department has already beat back at cries of government overreach, explaining it's mandated to encourage and enhance consumer welfare through the benefits of a deregulated, competitive air transportation industry under the Airline Deregulation Act. As a general rule, the DOT says it does not intervene in private contractual agreements between airlines and third parties unless there is a market failure.

"However, to the extent commercial arrangements constitute or further an unfair or deceptive practice or unfair method of competition, resulting in harm to consumers, it would be within the department's authority to prohibit parties from implementing such agreements or place restrictions on such agreements," the DOT said. "As a part of any review of potentially unfair or deceptive practices or anti-competitive behavior by an airline or ticket agent, the department considers legal precedent to make sure that any action taken is within the boundaries of departmental authority."

But immediately after the proposals were put out last week, some stakeholders and lawmakers suggested that they don't go far enough to actually benefit consumers.

U.S. Travel Association President and CEO Roger Dow said in a statement that while the travel community was grateful that the administration continues to shine a light on many of the more frustrating issues affecting the air travel experience in the U.S., there's still more to be done.

"We hope that post-election, the discussion broadens to policy options that treat the root cause rather than just the symptoms — namely, the lack of choices and air service for far too many flyers," Dow said. "Executive rulemaking is one thing, but Congress must do its part to bring air travel in the U.S. back on par with the rest of the world, and we certainly look forward to continuing that dialogue with leaders across the political spectrum."

U.S. Sens. Richard Blumenthal, D-Conn., and Edward J. Markey, D-Mass., both of whom have previously grilled the airlines on their practices and have pushed for enhanced passenger protections, emphasized the need for further action before consumers actually reap benefits.

"Passengers who have seen basic consumer rights checked at the gate are looking to federal regulators to ensure that those rights are protected when they fly," they said in a joint statement. "While we appreciate Department of Transportation's continued commitment to tackling this issue, this set of actions, in the final months of this administration, punts real reform and allows airlines to continue hiding the true cost of flying under a shroud of secrecy."

The senators said they're looking forward to continue pressing for more robust reforms that rewards consumers with real competition.

"We need immediate action to ensure customers get an all-in price when shopping and full access to airline flights and schedules so they can comparison-shop — not just promises of further review of these well-known problems," they said.

--Editing by Katherine Rautenberg and Catherine Sum.