

NOTES

The Financialization of Frequent Flyer Miles: Calling for Consumer Protection

Airlines' frequent flyer programs operate more like a monetary system, with points as a form of currency, than a typical discount or rewards plan. In fact, airlines' power over points is even more extensive than that of a central bank over currency—beyond simply determining how many points are in circulation, airlines also control the value of points at redemption, how many points consumers can accumulate, and when points expire. This financialized form of frequent flyer programs has proven to be lucrative. For the Big Four airlines, frequent flyer programs are worth markedly more than the business of providing air travel itself. Much of this profit stems from selling points to third parties, like banks, which use the promise of points to incentivize consumers' credit card spending.

The very structure of frequent flyer programs presents a problem for consumer protection. The value of these programs relies on consumers' belief in the value of points. At the same time, the value of these programs also depends on preventing consumers from efficiently redeeming their outstanding points, which would present an unsustainable cost for the airlines. In other words, the value of these programs stems from ensuring consumers believe that points are highly valuable, while limiting the points' actual value. This market structure relies on keeping consumers in the dark.

Because the structure of frequent flyer programs depends on consumer deception, regulatory action is necessary. To that end, this Note analyzes the sometimes-overlapping regulatory mandates of the Federal Trade Commission, Department of Transportation, and Consumer Financial Protection Bureau. It then proposes that the agencies act to provide much-needed transparency in the market for frequent flyer points. These proposals aim to prevent the airline industry from subsidizing the provision of air travel with profit driven by consumer mistake and misrepresentation.

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INTRODUCTION

Airlines' frequent flyer points operate more like a currency than a sandwich shop's punch card or a buy-one-get-one-free sale.¹ Airlines control the value of their frequent flyer points—determining how many points are in circulation, how many points consumers accumulate, and when points expire.² They make significant profits selling points to third parties, like banks, which then use the airline points as a means of attracting and rewarding customers who purchase the banks' products and services.³ Airlines also control the value of points at redemption by altering flights' price-in-points, ostensibly based on demand.⁴ While controlling both the accumulation and redemption of points, airlines also conceal the value of points relative to the dollar.⁵ This model has proven lucrative. For the “Big Four” airlines⁶—American, Delta, Southwest, and United—frequent flyer programs are worth markedly more than the business of providing actual air travel.⁷ In other words, thanks to their frequent flyer programs, airlines have become financial institutions that “happen to fly planes on the side.”⁸

This model poses concerns for consumer protection: How can consumers know the value of the points they purchase directly from airlines? How can they know the value of the points that banks, rental car companies, cruise lines, and restaurants promise in exchange for the purchase of goods and services? How can they know if any given flight costs more in dollars or points if the dollar-to-point conversion rate remains concealed? Moreover, concerns about this model are not limited to the individual consumers who accumulate points. As this Note addresses below, these frequent flyer programs' co-branded credit

1. See Wendover Productions, *How Airlines Quietly Became Banks*, YOUTUBE (Dec. 14, 2021), https://www.youtube.com/watch?v=ggUduBmvQ_4 [<https://perma.cc/RS8Q-Z885>].

2. See Justin Bachman, *Airlines Make More Money Selling Miles Than Seats*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2017-03-31/airlines-make-more-money-selling-miles-than-seats> (last updated Mar. 31, 2017, 10:01 AM) [<https://perma.cc/LPG4-SRQB>].

3. See *id.* This Note refers to consumers buying, earning, or obtaining points as “point accumulation.”

4. See *id.* This Note refers to points-holders using points to obtain flights as “point redemption.”

5. See *id.*

6. *Airlines & Monopoly*, OPEN MKTS. INST., <https://www.openmarketsinstitute.org/learn/airlines-monopoly> (last visited Jan. 21, 2024) [<https://perma.cc/C2JT-RFUC>] (“[A] series of mega-mergers have left the four largest U.S. airlines—American, Delta, United, and Southwest—controlling about 80 percent of total domestic passenger traffic.”).

7. *Id.*; see Bachman, *supra* note 2 (noting that airlines' frequent flyer programs are more lucrative than the provision of flight services).

8. Ganesh Sitaraman, *Airlines Are Just Banks Now*, ATLANTIC (Sept. 21, 2023), <https://www.theatlantic.com/ideas/archive/2023/09/airlines-banks-mileage-programs/675374/> [<https://perma.cc/BK39-NCM9>].

cards are likely raising the cost of consumer goods across the board, meaning that even as cardholders (ambiguously) earn rewards, noncardholders suffer.⁹ Yet, despite these concerns, frequent flyer programs remain virtually unregulated, and the value of points remains obscured.¹⁰

This Note proceeds in several steps. Part I tracks the history of airline frequent flyer programs, beginning with the historical context of the New Deal–era airline regulatory system and the subsequent Chicago School–influenced industry deregulation of 1978.¹¹ It will detail the ways that frequent flyer programs have evolved post-deregulation into their current financialized form.¹² Part II analyzes how financialized frequent flyer programs rely on—and even encourage—consumer mistake within both point accumulation and redemption. It also discusses how the courts have eliminated individual consumers’ ability to pursue fraud and breach of contract claims against frequent flyer programs, meaning federal agencies are solely positioned to take action. Part III then analyzes the regulatory mandates of the Federal Trade Commission (“FTC”), the Department of Transportation (“DOT”), and the Consumer Financial Protection Bureau (“CFPB”) with respect to financialized frequent flyer miles and consumer protection.

Finally, Part IV will argue that DOT should utilize the regulatory authority granted in 49 U.S.C. § 41712¹³ both to require that frequent flyer programs disclose their point-to-dollar conversion rate and to prevent programs from devaluing consumers’ already-purchased points. It will also propose that the CFPB use the authority granted in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)¹⁴ to issue a transparency mandate for rewards promised in exchange for co-branded credit cards. Ultimately, it will argue that regulation is necessary because the current market for frequent flyer miles does not incentivize sellers to minimize consumer

9. For a discussion on co-branded credit cards’ effects on the prices of consumer goods and the economy more broadly, see Subsection II.A.1.

10. *Frequent Flyer Programs*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/individuals/aviation-consumer-protection/frequent-flyer-programs> (last updated Mar. 4, 2020) [<https://perma.cc/NZ32-U9XA>] (“While the U.S. Department of Transportation does not have rules governing airline frequent flyer programs, DOT has the authority to investigate unfair or deceptive practices in air transportation, including complaints from consumers regarding airlines’ frequent flyer programs.”).

11. See Paul Stephen Dempsey, *The Rise and Fall of the Civil Aeronautics Board—Opening Wide the Floodgates of Entry*, 11 TRANSP. L.J. 91, 93, 104–07 (1979).

12. See MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY 620 (2022); Wendover Productions, *supra* note 1, at 4:34.

13. 49 U.S.C. § 41712.

14. 12 U.S.C. § 5531.

mistake. Instead, the profitability of frequent flyer programs relies on airlines maximizing consumer belief in the value of points while minimizing their true value to the greatest extent possible.

I. THE HISTORICAL CONTEXT OF MODERN FREQUENT FLYER PROGRAMS

A. *The Rise and Fall of U.S. Airline Regulation*

While technological innovations and investment capital made commercial air travel feasible starting in the late 1920s, the industry was also caught in a “speculative boom.”¹⁵ New carriers entered the industry rapidly and engaged in competitive bidding and cost cutting in an attempt to spur demand.¹⁶ Many of these new entrants operated at a loss, which was particularly unsustainable after the 1929 stock market crash.¹⁷ These struggling entrants eventually merged in order to survive, only to be challenged by new entrants to the market, who themselves undercut the merged airlines on prices.¹⁸ This pattern, labeled “destructive competition,” created immense instability in the market.¹⁹

Spurred on by the New Deal–era regulatory mood, Congress decided to rein in air travel’s destructive competition.²⁰ In 1938, President Roosevelt signed the Civil Aeronautics Act into law, which created a regulatory system for the airline industry.²¹ Congress drafted the Act’s regulatory scheme with two primary goals: on one hand, it aimed to mitigate the industry’s tendency toward monopoly and, on the other hand, it aimed to prevent the destructive cycle of rapid entry,

15. RICKS ET AL., *supra* note 12, at 574–75; see F. ROBERT VAN DER LINDEN, AIRLINES AND AIR MAIL: THE POST OFFICE AND THE BIRTH OF THE COMMERCIAL AVIATION INDUSTRY 97, 106–09, 112 (2002) (stating that despite the cost of airline tickets exceeding even first class train travel, airlines were unable to cover costs, much less make a profit).

16. See RICKS ET AL., *supra* note 12, at 574 (discussing the proliferation of carriers and the eventual need to cut prices).

17. See *id.* (describing this speculative boom, noting that “[c]arriers were proliferating, including some operating at a loss”); VAN DER LINDEN, *supra* note 15, at 106 (“By the end of 1929 . . . [m]ost of the airlines . . . were losing money at prodigious rates.”).

18. See VAN DER LINDEN, *supra* note 15, at 154, 215.

19. See *id.* at 256 (describing the widespread belief that “destructive competition from low-cost, independent airlines” drove market instability); Dempsey, *supra* note 11, at 104–107. *But see* RICKS ET AL., *supra* note 12, at 584 (noting that deregulatory lawmakers of the 1970s generally attributed the instability of the 1920s and 1930s to government subsidies rather than macroeconomic dynamics); SUBCOMM. ON ADMIN. PRAC. & PROC. OF THE S. COMM. ON THE JUDICIARY, 94TH CONG., REP. ON THE CIV. AERONAUTICS BD. PRACS. & PROCS. 31–32 (Comm. Print 1975) (“There was never a period in which market forces led to ‘destructive competition’ or ‘industry chaos.’”).

20. See Dempsey, *supra* note 11, at 107.

21. *Id.* at 93.

unsustainable cost cutting, and mergers that had plagued the infant industry.²² In other words, the Act aimed to facilitate a limited amount of highly regulated competition.

To this end, the Act also created a new agency, the Civil Aeronautics Board (“CAB”), and granted it broad regulatory authority over the industry.²³ Specifically, CAB held the authority to administer entry restrictions,²⁴ determine rate and route regulations,²⁵ and block industry activity that veered toward either monopoly or destructive competition.²⁶ CAB’s regulated rates blocked bigger carriers from using predatory pricing—that is, a dominant firm pricing below cost in order to drive competitors out of the market and then raise prices²⁷—to monopolize the market.²⁸ CAB’s regulated rates and routes also ensured that less profitable routes, especially in rural areas, received service at reasonable prices.²⁹ Additionally, CAB’s entry restrictions aimed to prevent cycles of destructive competition and did so by requiring all airlines to obtain “certificates of public convenience and necessity” in order to enter the market.³⁰ To receive these certificates, airlines had to demonstrate that their entry into a particular market would address underserved demand.³¹ These entry restrictions provided greater stability to the market by preventing the cycles of entrance, pricing below cost, collapse, and merger that had dominated the speculative era.³² Operating as a regulatory whole, the entry restrictions prevented unregulated entrance into the market, while the rate and route

22. *Id.* at 107–08 (naming “protect[ing] the operations of small carriers from the dangerous effects of predatory competition” and “shield[ing] the air transport industry from the hostile economic forces prevalent in an unregulated economic environment” as the Act’s primary goals); see RICKS ET AL., *supra* note 12, at 578–79.

23. See Dempsey, *supra* note 11, at 93; RICKS ET AL., *supra* note 12, at 578–79.

24. Entry restrictions allowed CAB to selectively determine which airlines were permitted to enter the market, which marked a break from the era of destructive competition. See Dempsey, *supra* note 11, at 103 (detailing CAB’s concerns in the selection process). Airlines could not enter the market without CAB’s approval. See RICKS ET AL., *supra* note 12, at 578–79.

25. CAB’s power included determining rates (setting the price that consumers paid for airfare) and determining routes (deciding which cities airlines were required to service). See RICKS ET AL., *supra* note 12, at 578.

26. See Dempsey, *supra* note 11, at 93 (describing how the CAB had the authority to disapprove of carrier transactions that were “patently” anticompetitive); RICKS ET AL., *supra* note 12, at 576–89.

27. *Predatory or Below-Cost Pricing*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost-pricing> (last visited Jan. 21, 2024) [<https://perma.cc/G4B6-VMWC>].

28. See Dempsey, *supra* note 11, at 103, 115–16.

29. *Id.* at 107–08.

30. *Id.* at 107, 109; RICKS ET AL., *supra* note 12, at 576.

31. See Dempsey, *supra* note 11, at 105 (explaining that carriers would only receive certificates if they could show that the public interest would be served).

32. See *id.* at 107.

regulations provided some baseline for both consumer service and competition among rivals.³³

By the 1970s, the 1938 regulatory scheme became subject to immense scrutiny, and the decade's neoliberal landscape forged the political will and alignment necessary to deregulate the airlines.³⁴ The Airline Deregulation Act of 1978 attempted to usher the industry toward a free market ideal, aiming for increased competition between carriers.³⁵ The 1978 Act eliminated many of the hallmarks of the 1938 regulatory system, including rate regulation, route regulation, and entry restrictions.³⁶ Moreover, it eliminated CAB altogether.³⁷ The Act reorganized CAB's safety regulations, placing them within the jurisdiction of DOT and the Federal Aviation Administration, and eliminated the bulk of CAB's market regulations.³⁸

Airline frequent flyer programs did not emerge until the deregulation of airlines and the dissolution of CAB.³⁹ CAB's New Deal-era regulatory framework likely would not have allowed such marketing programs because they allow a dominant airline to exploit its network effect and economy of scale, which in turn allows the airline to further capture the market.⁴⁰ But with CAB's elimination, airlines were free to implement these marketing schemes. In 1981, three years after Congress deregulated the airlines, American Airlines became the

33. See RICKS ET AL., *supra* note 12, at 579 (explaining that the regulations did achieve “stability and some competition between carriers,” while also highly regulating new entrants (to the point of effectively prohibiting new entries)).

34. See Dempsey, *supra* note 11, at 125 (noting that by 1978, much of Congress viewed the airline industry as a “sophisticated demand-based system” that was fundamentally more mature than the “infant” industry that had required New Deal-era regulation); see also *id.* at 119–23 (explaining that even prior to congressional deregulation on the matter, President Carter's CAB Chairman Alfred Kahn acted to liberalize the regulatory regime through administering more permissive entry standards and allowing more “flexibility” in pricing); RICKS ET AL., *supra* note 12, at 585–87 (noting that even if Kahn's actions were contrary to the congressional intent behind the 1938 regulatory scheme, he benefited from political alignment with his contemporary Congress, as exemplified by the pro-deregulation Kennedy Report).

35. Dempsey, *supra* note 11, at 134–35.

36. See *id.* at 123–26 (discussing this transformation).

37. *Id.* at 93.

38. See RICKS ET AL., *supra* note 12, at 587 (“On January 1, 1985, licensing for fitness determinations and other responsibilities would transfer to the Department of Transportation and the CAB would dissolve.”).

39. See Melvin A. Brenner, *Airline Deregulation—A Case Study in Public Policy Failure*, 16 TRANSP. L.J. 179, 188 (1988) (explaining that prior to the deregulatory mood of the 1970s, CAB would have blocked any marketing device that favored large network systems).

40. *Id.* at 187; see RICKS ET AL., *supra* note 12, at 593–94 (explaining that frequent-flyer programs favor large network systems because consumers can redeem points for a wider array of services and airlines can more easily spread out costs).

first long hauler⁴¹ to establish a rewards program.⁴² Other airlines followed suit, with long haulers United, Delta, and Southwest establishing their own programs soon thereafter.⁴³

The post-1978 framework left frequent flyer miles virtually unregulated—which remains the case today.⁴⁴ DOT requires that airlines disclose the terms of their flyer programs but gives airlines “wide discretion” to change those terms at will, so long as the airlines adhere to “promises made” to consumers.⁴⁵ This allows airlines to publish general terms of service while stipulating that those terms do not bind their points programs.⁴⁶

B. The Emergence and Evolution of Frequent Flyer Programs

Frequent flyer programs have undergone several evolutions in the decades since 1981, as airlines adjusted their models to maximize earnings by minimizing the benefits these programs afford to consumers.⁴⁷ At first, airlines’ reward systems operated much like a generic punch card system: after twelve flights, the thirteenth flight came free.⁴⁸ During this period, the frequent flyer programs were cost centers for the airlines, at least in terms of opportunity cost; any time an individual consumer redeemed the bonus flight, the consumer occupied a seat that otherwise could have gone to a paying customer.⁴⁹ Despite these costs, the programs were successful marketing tools.⁵⁰ Encouraging consumers’ false beliefs of sunk costs, the program incentivized consumers to loyally purchase flights from the same airline

41. “Long hauler” here refers to airlines that provide national service rather than regional, though within the industry the term typically refers to flights between six and twelve hours in length. See Matt Moffitt, *What is Considered a Short-Haul, Medium-Haul and Long-Haul Flight?*, POINT HACKS, <https://www.pointhacks.com.au/differences-short-medium-long-haul-flights/> (last updated May 30, 2022) [<https://perma.cc/5PWT-QG8V>].

42. Lori Zaino, *American Airlines AAdvantage: The Ultimate Guide*, FORBES, <https://www.forbes.com/advisor/travel-rewards/american-airlines-aadvantage/> (last updated Oct. 9, 2023, 6:50 AM) [<https://perma.cc/TC9V-WFJS>]; Evert R. de Boer & Sveinn Vidar Gudmundsson, *30 Years of Frequent Flyer Programs*, 24 J. AIR TRANSP. MGMT. 18, 18–19 (2012).

43. See de Boer & Gudmundsson, *supra* note 42, at 18.

44. See U.S. DEP’T OF TRANSP., *supra* note 10 (“[T]he U.S. Department of Transportation does not have rules governing airline frequent flyer programs . . .”).

45. *Id.*

46. See *id.*

47. See de Boer & Gudmundsson, *supra* note 42, at 20.

48. See RICKS ET AL., *supra* note 12, at 620 (analogizing this system to a “punch card”); see also de Boer & Gudmundsson, *supra* note 42, at 18–19 (“The concept of the legacy program was simple: reward high-frequency customers by giving them a free ticket after they reach a certain threshold of travel.”).

49. De Boer & Gudmundsson, *supra* note 42, at 19.

50. See *id.*

in order to inch closer to their bonus flight rather than compare costs of the same flights at competing airlines.⁵¹ This punch card model kept consumers within any given airline's ecosystem, thereby limiting competition between airlines even as the industry was supposedly opening up to the free market.⁵²

American Airlines was the first airline to evolve beyond the basic punch card model.⁵³ In 1982, American partnered with Hertz and Holland America, enabling consumers to accumulate American's frequent flyer points by renting a car from Hertz or buying a cruise from Holland America.⁵⁴ American did not simply give these points away to consumers who purchased from the partnered companies.⁵⁵ Instead, American sold points to the partnered companies, and those companies then distributed the points to consumers as a reward for purchasing their services.⁵⁶ This exchange benefited both sides of the partnership as it also swayed consumers away from competing rental car companies or cruise lines.⁵⁷

Realizing this model was immensely profitable, American launched its first co-branded credit card in 1987.⁵⁸ Under this partnership, which still exists today, American sells miles to credit card company Citibank.⁵⁹ Citibank then rewards consumers who hold the co-branded credit card with the frequent flyer miles: consumers earn a lump sum of points when first opening a Citibank account and accumulate more points any time they complete a qualifying purchase with the co-branded credit card.⁶⁰ The other Big Four airlines quickly

51. See *id.* ("Once a member becomes used to the rich benefits offered, it becomes far less attractive for him or her to defect to a competitor . . ."); Richard H. Deane, *Ethical Considerations in Frequent Flier Programs*, 7 J. BUS. ETHICS 755, 758 (1988).

52. See Deane, *supra* note 51, at 757; RICKS ET AL., *supra* note 12, at 582. This anticompetitive effect of frequent-flyer programs is somewhat counterintuitive (or perhaps ironic) given that the deregulatory legislation that ushered frequent-flyer programs was aimed at *increasing* competition.

53. See de Boer & Gudmundsson, *supra* note 42, at 19.

54. *Id.*

55. See *id.*

56. See RICKS ET AL., *supra* note 12, at 620 ("Airlines create frequent flyer points, and then sell them to credit card-issuing banks . . . When people use their credit cards, the card-issuing bank awards them points for spending on certain items or services.").

57. See de Boer & Gudmundsson, *supra* note 42, at 20.

58. *Id.* at 19–20.

59. *Id.* at 20.

60. See *AAdvantage Credit Cards*, AM. AIRLINES, <https://www.aa.com/i18n/aadvantage-program/miles/partners/credit-card/aadvantage-credit-cards.jsp> (last visited Sept. 15, 2023) [<https://perma.cc/C2U2-6KEQ>] (listing AAdvantage's available co-branded credit cards and their various benefits, including a lump sum of bonus miles).

followed suit and established their own co-branded credit card programs.⁶¹

These co-branded airline credit cards are a dominant means of point accumulation for consumers today.⁶² Banks highly value these programs because the allure of free miles entices customers into selecting their credit cards over competitors' cards.⁶³ Such customers are "the closest thing to a sure bet" because, on average, holders of co-branded airline credit cards earn relatively higher incomes.⁶⁴ They spend relatively more on their cards and therefore generate greater merchant fees for the banks.⁶⁵ This population also has comparatively higher credit scores, meaning "they pay their bills on time and banks experience fewer defaults."⁶⁶ Airlines, too, have come to highly value these programs. Because of the sheer volume of points airlines can sell to banks, frequent flyer points have increasingly become "profit centers in and of themselves" for the airlines, rather than just a means of attracting customers to more flights.⁶⁷

Historically, consumers could accumulate points not only through the purchase of third-party goods and services but also any time they purchased flights from the airlines.⁶⁸ At one point, instead of rewarding consumers based on the number of flights purchased, the model rewarded consumers based on number of miles traveled, meaning longer flights yielded more points.⁶⁹ This model encouraged consumers to game the system by taking unnecessarily circuitous routes in order to maximize miles traveled, thereby maximizing points accumulated.⁷⁰

61. See de Boer & Gudmundsson, *supra* note 42, at 20 (noting that the other airlines' quick creation of their own programs demonstrated the impact of the American Airlines and Citibank co-branded card).

62. See JAY SORENSON, FREQUENT FLIER CREDIT CARDS GENERATE MORE THAN \$4 BILLION FOR MAJOR U.S. AIRLINES - A REPORT FROM IDEAWORKS, at 6 (2008), https://www.ideaworkscompany.com/wp-content/uploads/2012/05/Analysis_USAirlineCC2008.pdf [<https://perma.cc/83YM-2JJV>].

63. See Bachman, *supra* note 2.

64. *Id.*

65. *Id.*

66. *Id.*

67. Wendover Productions, *supra* note 1, at 7:27; see RICKS ET AL., *supra* note 12, at 620–21.

68. See, e.g., *Earn Miles*, AM. AIRLINES, <https://www.aa.com/i18n/aadvantage-program/miles/earn/earn-miles.jsp> (last visited Sept. 4, 2023) [<https://perma.cc/QR3E-NC4S>] (stating that customers can "watch how fast [their] miles add up" if they purchase flights on American Airlines or an American Airlines partner airline).

69. De Boer & Gudmundsson, *supra* note 42, at 19.

70. See *id.* (explaining that early mileage systems were based on the number of miles traveled during flights); Wendover Productions, *supra* note 1, at 10:20. These attempts to game the system are sometimes referred to as "mileage runs." See, e.g., Cydney Contreras, *The Points Guy Defends Jessel Taank's Husband's Vietnam Trip: "Justice for Pavit"*, BRAVOTV.COM: THE DAILY DISH (Oct. 25, 2023), <https://www.bravotv.com/the-daily-dish/rhony-why-pavits-mileage-run-to-vietnam->

Airlines then moved to minimize this loophole by structuring their programs so that they tied the points accumulated to the amount of dollars spent, rather than number of flights taken or miles traveled.⁷¹ In 2007, Virgin Airlines was the first to introduce a rewards program that was exclusively based on spending.⁷² Other rewards programs later followed in Virgin's footsteps.⁷³ In fact, in a recent move, Delta's SkyMiles program effectively eliminated any connection between its frequent flyer rewards and miles traveled.⁷⁴ Arguably, after this move, SkyMiles is no longer a frequent flyer rewards program—instead, it is a “big-spender program.”⁷⁵

Having shifted their points-accumulation market to limit consumer benefit, airlines also reformed their points-redemption market, adopting dynamic pricing that adjusted the price-in-points for flights according to demand.⁷⁶ For years, while the dollar price for any given flight would change based on demand, the price-in-points remained stable. For example, at one time, all United flights cost 12,500 points, even as the dollar price fluctuated with demand.⁷⁷ Under this model, if consumers strategically purchased a flight with points, then they could obtain an advantageous deal.⁷⁸ Eventually, airlines shifted their redemption market to a dynamic model, tying the price-in-points to demand, at least nominally.⁷⁹ As this Note explains below,⁸⁰ airlines obscure the exchange rate between points and dollars, meaning that while the price-in-points of flights may shift depending on demand, it is unclear to consumers if the price-in-points shifts more or less than the

makes-sense [<https://perma.cc/J7FA-THV7>] (explaining that consumers take unnecessary flights to gain elite status and additional miles, as did *The Real Housewives of New York's* Jessel Taank's husband, who traveled to Vietnam for only twenty-two hours on a mileage run).

71. See de Boer & Gudmundsson, *supra* note 42, at 19–20.

72. Sitaraman, *supra* note 8.

73. Tim Winship, *The New Rules of Travel Rewards Programs*, USA TODAY, <https://www.usatoday.com/story/travel/roadwarriorvoices/2016/02/25/frequent-flier-miles-points-loyalty-programs/80860962/> (last updated Feb. 25, 2016, 11:42 AM) [<https://perma.cc/LS5B-PDWA>] (detailing JetBlue's, American's, and Southwest's move to spending-based rather than travel-based rewards across the 2010s).

74. Zach Griff, *Delta SkyMile Changes: Airline Overhauls How You Can Earn Medallion Points in Biggest Change Yet*, THE POINTS GUY (Sept. 13, 2023), <https://thepointsguy.com/news/delta-sky-miles-changes/> [<https://perma.cc/BM53-JZ7J>]; Sitaraman, *supra* note 8.

75. Sitaraman, *supra* note 8.

76. See de Boer & Gudmundsson, *supra* note 42, at 20–21 (explaining this transformation of the frequent flyer program).

77. Wendover Productions, *supra* note 1, at 11:37.

78. See *id.*

79. See *id.* at 12:52; de Boer & Gudmundsson, *supra* note 42, at 20–21 (explaining the shift to this model).

80. See *infra* notes 90–96 and accompanying text.

dollar price.⁸¹ With this final evolution, airlines eliminated any advantage consumers may have had in strategic accumulation or strategic redemption of points.⁸²

C. The Financialization of Points

In their contemporary form, the Big Four airlines “have organized themselves into two distinct businesses.”⁸³ First, there is the traditional provision of flight services, including selling seats, bag fees, and in-air food and entertainment, often operating at a very narrow margin.⁸⁴ Second, there is the extremely lucrative business of selling miles, primarily to the big banks, as well as to car rental companies, hotels, restaurants, coffee shops, and even directly to consumers.⁸⁵ Though the rate at which banks and other third parties purchase points from airlines is a closely held secret, these rates appear to reap significant rewards for the airlines.⁸⁶ According to financial analysts at Stifel Financial Corporation, when an airline sells a frequent flyer mile to a bank, its sale price is about three times its cost at redemption.⁸⁷ This estimate does not even include canceled, expired, or never-redeemed miles, which present no cost to airlines.⁸⁸

Not only are airlines running two distinct businesses but there is also a sense in which airlines are operating flights at a loss in order to incentivize the much more lucrative business of selling points.⁸⁹ In 2018, American reported that it lost 0.43 cents per seat per mile flown, while still earning \$1.9 billion in pre-tax profits, largely thanks to \$2.4

81. See Wendover Productions, *supra* note 1, at 13:31. Airlines claim that the price-in-points for flight services is tied to demand, and it is evident that price-in-points does fluctuate in ways that at least somewhat parallel the fluctuation of the dollar price for flight services. *Id.* at 12:53. Yet, because airlines do not publish the value of their points, it is unclear how closely tied the price-in-points is to the dollar price. Airlines could theoretically increase or decrease the price-in-points relative to the dollar price, depending on whether they would like to incentivize consumers to spend using dollars or points at any given moment.

82. *Id.* at 13:01.

83. Bachman, *supra* note 2; see RICKS ET AL., *supra* note 12, at 610.

84. Bachman, *supra* note 2.

85. *Id.* Consumers can buy points directly on the airlines’ websites for redemption at a later point. See, e.g., *Buy, Gift, or Transfer Miles*, AM. AIRLINES, https://www.aa.com/aadvantage-program/buy-gift-transfer/en_US/home/buy (last visited Oct. 14, 2023) [<https://perma.cc/BUS4-RB2D>] (“Purchase the miles you need and get your next award sooner.”); *Buy Miles and Build Your Balance to Redeem for More of What You Love*, UNITED MILEAGEPLUS, https://buymiles.mileageplus.com/united/united_landing_page/ (last visited Oct. 12, 2023) [<https://perma.cc/KG7A-YQ3M>].

86. Bachman, *supra* note 2.

87. See *id.*

88. *Id.*

89. See Wendover Productions, *supra* note 1, at 2:23 (“[A]irlines themselves are worthless. In fact, they’re more than worthless; they have negative value. They’re loss leaders.”).

billion in revenue from selling points.⁹⁰ This dynamic remained constant throughout the COVID-19 pandemic and the associated travel restrictions. In 2020, appraisers valued Delta's frequent flyer program, SkyMiles, at \$26 billion and American Airline's frequent flyer program, AAdvantage, at somewhere between \$19.5 and \$31.5 billion.⁹¹ According to financial disclosures from the same year, United valued its own MileagePlus program at \$21.9 billion.⁹² At the same time, the airlines' market caps, or the total value of all shares as determined by the stock market, showed that United's valuation was \$10 billion, Delta's valuation was \$20 billion, and American's valuation was \$6 billion.⁹³ Based on these metrics, the value of each airline's flight operations was significantly less than the value of each of its subsidiary loyalty programs, and each airline was running its flight operations at a loss: Delta's flight services cost \$6 billion, United's cost \$11.9 billion, and American's cost at least \$13.5 billion.⁹⁴

Through their frequent flyer miles, airlines are "acting as the central banks for their own virtual currencies" as they have control over the amount and value of points in circulation, just as the Federal Reserve has control over the dollar.⁹⁵ At the same time, airlines' power over points is even *more* extensive than that of a central bank over a currency because "not only do they control the flow of the currency but they also control the availability of goods to spend it on."⁹⁶ In other words, "airlines have nearly complete, unchecked control over a currency" and are "the only entity that can convert it to cash."⁹⁷

90. American Airlines Group Inc., Annual Report (Form 10-K) 51 (June 30, 2018), <https://americanairlines.gcs-web.com/static-files/ceb67596-d59a-41e3-ad0c-b5556dd43b4a> [https://perma.cc/D5BY-4RSL]. According to this filing, the airline made 14.42 cents in revenue per seat per mile flown. With operating costs of 14.85 cents per seat per mile flown, this difference results in a loss of 0.43 cents per seat per mile flown.

91. *Id.*

92. United Airlines Holdings, Inc., Current Report (Form 8-K) (June 12, 2020), <https://ir.united.com/static-files/fe7d98cf-edbb-420e-836c-ea94398bd9fa> [https://perma.cc/7FWN-E8S7]. Much of this information about the value of the Big Four's Frequent Flyer programs only became available in the wake of the COVID-19 pandemic when airlines sought loans to keep their flight services afloat. For example, in order to obtain those loans, United used the value of its subsidiary frequent flyer programs as collateral. Consequently, as a public company, United had to report the overall value of its frequent flyer programs. Wendover Productions, *supra* note 1. Other information, including the prices that banks and other third parties pay airlines in exchange for the miles, is not publicly available.

93. See Wendover Productions, *supra* note 1 (discussing the airlines' market caps as compared to the value of the frequent flyer programs).

94. *Id.*; see Sitaraman, *supra* note 8. These values represent the difference between the market's valuation of the airlines and their frequent flyer programs.

95. See Wendover Productions, *supra* note 1; RICKS ET. AL., *supra* note 12, at 887.

96. Wendover Productions, *supra* note 1.

97. *Id.*

Another key element separates frequent flyer miles from other currencies: the true value of frequent flyer miles is entirely withheld from consumers. American, Delta, and United do not currently publish the value of their frequent flyer miles relative to the dollar. Several third-party websites have attempted to approximate the value of any given program's frequent flyer miles.⁹⁸ For example, one aggregator estimated that one AAdvantage point was worth 1.5 cents in September 2023.⁹⁹ By contrast, another third-party aggregator valued one AAdvantage mile at 1.7 cents in September 2023, up 0.2 cents from the prior year.¹⁰⁰ These estimates are well below the range of values *The Economist* published in 2002, which estimated that one mile on any given airline was worth anywhere between 2.0 and 9.0 cents.¹⁰¹ At the same time, the value of the points to banks—their biggest purchaser—lies with consumers' *perception* of points' value, meaning this lack of transparency is actually key to the business model.

Further, though airlines control the supply of miles, much like a central bank controls a currency, airlines do not share central banks' concerns about placing too much currency in circulation. Between 1995 and 2002, miles outstanding rose by an average of twenty percent per year—a rate over two times as fast as the increasing supply of dollars.¹⁰² For a typical currency, this rate may trigger concerns of excessive

98. See, e.g., Brian Kelly, Ben Smithson & Nick Ewen, *What Are Points and Miles Worth? TPG's August 2023 Monthly Valuations*, THE POINTS GUY (last updated Sept. 8, 2023), <https://thepointsguy.com/guide/monthly-valuations/> [<https://perma.cc/K7N3-N457>]; *American Airlines AAdvantage Miles Value Calculator*, THE POINT CALCULATOR, <https://www.theointcalculator.com/us/airline/aa/aadvantage-miles-value-calculator> (last visited Aug. 18, 2023) [<https://perma.cc/NG8F-LCZR>]; Sam Kemmis & Meghan Coyle, *How Much Are Travel Points and Miles Worth in 2023?*, NERDWALLET, <https://www.nerdwallet.com/article/travel/airline-miles-and-hotel-points-valuations> (last updated Sept. 13, 2023, 9:33 AM) [<https://perma.cc/V9ZR-X4WQ>].

99. *What Are Points and Miles Worth? TPG's September 2023 Monthly Valuations*, THE POINTS GUY (Sept. 8, 2023), <https://thepointsguy.com/guide/monthly-valuations/> [<https://perma.cc/W6AK-UQ7R>]. The Points Guy's model updates on a monthly basis, reflecting the fluctuations in the valuation of airline miles. This model also estimated that in September 2023, one Delta SkyMile was worth 1.2 cents and one United MileagePlus mile was worth 1.45 cents.

100. Kemmis & Coyle, *supra* note 98. This model estimated that one Delta SkyMile was worth 1.2 cents in September 2023, down from 1.5 cents in 2022. It also estimated that one United MileagePlus mile was worth 1.2 cents in September 2023, consistent with 2022 but up from 1.0 cent in 2021. This model was able to track that most major U.S. airlines increased the value of their miles during the COVID-affected years of 2020 and 2021, after having decreased or maintained the value of their miles across 2019. At the same time, other aggregators showed points losing value between 2019 and 2020. Monica Pitrelli, *Why You May Want to Use Your Airline Points Sooner Rather than Later*, CNBC, <https://www.cnbc.com/2021/06/07/what-to-do-with-airline-points-use-them-now-says-report.html> (last updated June 6, 2021, 10:52 PM) [<https://perma.cc/D3WG-YUFQ>].

101. *Frequent-Flyer Economics*, ECONOMIST (May 2, 2002), <https://www.economist.com/leaders/2002/05/02/frequent-flyer-economics> [<https://perma.cc/56J8-362Z>].

102. *Id.*

monetary growth, leading to anxieties of hyperinflation and devaluation.¹⁰³ But the small print allows airlines to “change the rules of their schemes at will,” meaning programs may restrict seat availability, adjust the value of points relative to the dollar, or even force consumers’ unused points to expire more quickly, with or without notice.¹⁰⁴ This alleviates any fears airlines may have of “overprinting” frequent flyer miles.

II. THE NEED FOR CONSUMER PROTECTION IN FREQUENT FLYER PROGRAMS

The contemporary state of frequent flyer programs calls for intervention on behalf of consumers. In assessing the need for regulatory intervention, consumer protection law asks whether the merchant is incentivized to take efficient steps to prevent consumer mistakes and whether the structure of the market relies on consumer mistake or manipulation for profit.¹⁰⁵ Deception and manipulation are embedded in the structure of frequent flyer programs, both in terms of point accumulation and point redemption.¹⁰⁶ Regulatory intervention on behalf of consumers is therefore warranted.

This Part begins by outlining the challenges for consumer protection posed by the financialized form of frequent flyer programs.

Section II.A discusses why frequent flyer programs require regulatory intervention on behalf of consumers, addressing both point

103. *See id.*

104. *Id.*; *accord AAdvantage Terms and Conditions*, AM. AIRLINES, <https://www.aa.com/i18n/aadvantage-program/aadvantage-terms-and-conditions.jsp> (last updated Sept. 16, 2023) [<https://perma.cc/CEH5-PVCE>] (“American Airlines offers the AAdvantage® program at its discretion and has the right to . . . change or amend [the program] . . . even if the changes affect the value of AAdvantage® Rewards and Benefits already accumulated.”); *MileagePlus Rules*, UNITED AIRLINES, <https://www.united.com/ual/en/us/fly/mileageplus/rules.html> (last visited Oct. 12, 2023) [<https://perma.cc/5FWU-N7F5>] (“United has the right to terminate the Program . . . or to change the Rules, benefits, conditions of participation, . . . qualification criteria or mileage levels, in whole or in part, at any time, with or without notice, even though changes may affect the value of . . . status levels, benefits, mileage or certificates already accumulated.”); *Membership Guide & Program Rules*, DELTA AIRLINES, <https://www.delta.com/us/en/skymiles/program-resources/program-rules> (last visited Oct. 12, 2023) [<https://perma.cc/U2SR-CYL7>] (“Delta and its program partners reserve the right to change program rules, benefits, mileage regulations, Award Travel, Medallion qualification requirements and levels, fees, Award prices, Pay with Miles terms and conditions, and special offers at any time without notice.”).

105. Robert B. Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 4 (1979). Reich contrasts his “new” approach of consumer protection, which focuses on market structure, incentives, and opportunities to deceive consumers, with the “old” paternalistic approach to consumer protection, which focused on weighing the harm of the specific product or service against the benefit. *See id.* This Note borrows from Reich’s approach to the extent that it looks at the ways the structure of frequent flyer programs relies on consumer deception to maximize profitability.

106. *See* discussion *infra* Section II.A.

accumulation and point redemption. In doing so, it identifies the ways that consumers interface with frequent flyer programs, including through the direct purchase of points and through co-branded credit cards, and will analyze how these mechanisms rely on fraud and misrepresentation. Section II.A also identifies how such fraud and misrepresentation harms not only co-branded cardholders but also noncardholders due to points programs' regressive distributional effects.

Section II.B then discusses how the Supreme Court's interpretation of the 1978 Act foreclosed state intervention and private causes of action as related to fraudulent frequent flyer programs and how, as a result, federal regulatory authorities hold consumers' only means of redress.

A. Fraud and Misrepresentation in the Points Market

1. Point Accumulation

Beyond simply accumulating points with every flight purchase, which yields relatively few points,¹⁰⁷ consumers can accumulate points through several other mechanisms. For instance, they can purchase points directly from the airlines' websites.¹⁰⁸ The cost of these points fluctuates depending on the number of points purchased, the time of year, and *where on the website* the points were purchased.

AAdvantage, for example, provides consumers with two avenues for directly purchasing miles: the "Buy, Gift, or Trade" page, which is accessible from the AAdvantage home page,¹⁰⁹ and the "Mileage Multiplier" tool, which is available only to those consumers who are in the process of purchasing a flight and have already provided their credit card information.¹¹⁰ The Mileage Multiplier brands itself as a deal, providing consumers with the ability to purchase points at a superior rate as compared to the Buy, Gift, or Trade page.¹¹¹ Despite this marketing, the Mileage Multiplier does not typically provide any sort of superior or "multiplied" rate—in fact, it often provides a worse rate than what AAdvantage offers elsewhere. On September 25, 2023, a consumer

107. Or none at all—see Delta's recent shift. Griff, *supra* note 74; Sitaraman, *supra* note 8.

108. See, e.g., *Buy, Gift and Transfer Miles*, AM. AIRLINES, <https://www.aa.com/i18n/aadvantage-program/miles/buy-gift-and-share-miles.jsp> (last visited Oct. 14, 2023) [<https://perma.cc/VR2A-8BM8>].

109. *Id.*

110. *Mileage Multiplier*, AM. AIRLINES, <https://www.aa.com/i18n/aadvantage-program/miles/earn/mileage-multiplier.jsp> (last visited Oct. 14, 2023) [<https://perma.cc/W4RC-224M>].

111. See *id.* ("Reach your travel awards faster by purchasing AAdvantage® bonus miles with Mileage Multiplier."); AM. AIRLINES, *supra* note 108.

attempting to purchase 5,000 miles on the Buy, Gift or Trade page would have paid 3.01 cents per mile;¹¹² the same consumer purchasing 5,000 miles through the Mileage Multiplier would have paid 3.22 cents per mile.¹¹³

The Buy, Gift, or Trade page also incentivizes the bulk purchase of large amounts of miles. A consumer cannot purchase fewer than 2,000 miles, meaning a consumer just a few hundred points away from a free upgrade would have to purchase more points than necessary to reach the requisite threshold.¹¹⁴ And consumers receive a discounted rate the more points they purchase beyond that threshold: on November 8, 2023, 5,000 points cost 3.01 cents per point; 55,000 points cost 2.82 cents per point; and 150,000 points cost 2.45 cents per point.¹¹⁵

Notably, none of these prices approach the approximated value of AAdvantage miles at redemption, which third-party aggregators suggest reached only 1.5 cents per mile in September 2023.¹¹⁶ Assuming these third-party aggregators are correct, the cost of directly buying points from AAdvantage is at least twice their value at redemption. Indeed, these third-party aggregator sites generally caution against consumers directly purchasing miles from airlines due to the disadvantageous cost of accumulation relative to the value at redemption.¹¹⁷ Even ostensibly good rates for direct purchases rely on

112. This value was calculated using AAdvantage's "Buy, Gift or Transfer" page, which allows users to purchase miles in increments of one thousand. While AAdvantage does not publish the cost per mile, obscuring their value, the process of purchasing these points does allow for the arithmetic necessary to determine cost per mile. AM. AIRLINES, *supra* note 108. The following link includes an attachment documenting the cost of purchasing five thousand points on September 25, 2023: [https://perma.cc/ABV3-LUPL].

113. This value was calculated using AAdvantage's Mileage Multiplier tool, which allows users who are in the process of purchasing a flight to purchase an additional two thousand or five thousand miles. While AAdvantage does not publish the cost per mile, obscuring their value, the process of purchasing these points does allow for the arithmetic necessary to determine cost per mile. AM. AIRLINES, *supra* note 110. The following link include an attachment documenting the cost of purchasing five thousand points using this tool on September 25, 2023: [https://perma.cc/8H5H-WHH7].

114. AM. AIRLINES, *supra* note 108 (showing the minimum purchase of 2,000 miles).

115. This value was tracked and calculated using AAdvantage's "Buy, Gift or Transfer" page. While AAdvantage does not publish the cost per mile, obscuring their value, the process of purchasing these points does allow for the arithmetic necessary to determine cost per mile. *Id.* The following links include attachments documenting the cost of purchasing various increments of points on November 8, 2023: 5,000 points [https://perma.cc/5BE8-X6B3]; 55,000 points [https://perma.cc/8UUS-Y2WM]; and 150,000 points [https://perma.cc/CTT4-PXB3].

116. THE POINTS GUY, *supra* note 98 (approximating the value of AAdvantage points at 1.5 cents per mile for September 2023); THE POINT CALCULATOR, *supra* note 98 (approximating the value of AAdvantage points at 1.4 cents per mile for September 2023).

117. See, e.g., Ben Smithson, *When Does It Make Sense to Buy Points and Miles?*, THE POINTS GUY (Mar. 5, 2022), <https://thepointsguy.com/guide/when-to-buy-points-miles/> [https://perma.cc/S84J-4P4H]; Elina Geller, *4 Times it Makes Sense to Buy Airline Miles*, NERDWALLET, <https://www.nerdwallet.com/article/travel/times-it-actually-makes-sense-to-buy-miles> (last updated Aug. 25, 2023, 6:01 AM) [https://perma.cc/5LKU-HKKP].

the assumption that points are readily redeemable, which, as addressed below, is not always the case.

In addition to directly purchasing points, consumers can also accumulate points through purchasing goods and services from third-party sellers that themselves are in partnership with the frequent flyer programs. This includes obtaining and utilizing co-branded credit cards, booking hotel stays, reserving car rentals, and shopping through frequent flyer programs' portals.¹¹⁸ These third-party sellers offer points to incentivize consumers to purchase their goods and services.¹¹⁹

This incentive structure affects not only cardholders but also consumers more broadly. First, incentives like co-branded credit cards can lead consumers to obtain more credit cards and spend more on those cards, which can negatively impact credit scores and increase debt.¹²⁰ Second, the money that credit card companies spend obtaining points to attract "golden goose" cardholders likely has regressive distributional effects.¹²¹ Credit card companies generally pass on the costs of purchasing these points to retailers through swipe fees—a percentage fee that a credit card network charges a retailer any time a consumer purchases from the retailer using the credit card.¹²² The retailers, in turn, compensate for these fees by raising prices across the board because they typically do not discriminate based on payment

118. AM. AIRLINES, *supra* note 68.

119. *Id.*

120. *Credit Scores*, FED. TRADE COMM'N (May 2021), <https://consumer.ftc.gov/articles/credit-scores> [<https://perma.cc/D3FC-D78R>].

121. *See* Bachman, *supra* note 2 (detailing that co-branded cardholders have particular value to banks because, on the whole, these consumers are relatively wealthier and make credit card payments on time); Aaron Klein, *How Credit Card Companies Reward the Rich and Punish the Rest of Us*, BROOKINGS INST. (Dec. 23, 2019), <https://www.brookings.edu/articles/how-credit-card-companies-reward-the-rich-and-punish-the-rest-of-us/> [<https://perma.cc/MNR8-XK6C>] (noting that "[h]ow you pay and how much you make is strongly correlated," meaning the half of Americans who have subprime credit also more frequently rely on debit cards, which generate no rewards).

122. Klein, *supra* note 121 (noting that the bulk of luxury card-issuers' profits comes not from cardholders' personally incurred fees, but rather from merchants' swipe fees, which range from three to five percent on every transaction); *see New Rules on Electronic Payments Lower Costs for Retailers*, FED. TRADE COMM'N (Sept. 2011), <https://www.ftc.gov/business-guidance/resources/new-rules-electronic-payments-lower-costs-retailers> [<https://perma.cc/3YEV-RWJY>] (defining interchange transaction fees, also known as swipe fees, as fees that are "established, charged, or received by a credit card network and paid by a merchant or an acquirer to compensate an issuer for its involvement in an electronic debit transaction").

methods,¹²³ harming cardholders and noncardholders equally.¹²⁴ As a result, the reward points gifted to co-branded cardholders are cross-subsidized by lower-cost debit and cash payments, which themselves are generally utilized by lower-income consumers.¹²⁵ Though all consumers face the same increased prices, the co-branded cardholders (theoretically) benefit by acquiring points, while the generally lower-income noncardholders reap no benefit.¹²⁶

All this consumer behavior—the direct purchasing of miles, the purchase and use of co-branded credit card accounts, and the purchase of partnered companies’ goods and services—relies on consumers’ *perception* of the value of points. It is unlikely that airlines would be able to sell points to credit card companies and other third parties at such a high margin if not for consumers’ *belief* in the value of points. These third-party purchases demonstrate that, at the very least, the third parties believe that points are enticing to consumers.¹²⁷ At the same time, the value of the point system to airlines relies on limiting consumers’ ability to spend their outstanding points because, if consumers successfully redeemed these points en masse, it would present a huge cost for the airlines.¹²⁸ In other words, the value of the points system lies in ensuring consumers *believe* that points are valuable, while limiting points’ *actual* value. And because the very structure of the frequent flyer market depends on this consumer deception for profit, intervention on behalf of consumers is necessary.¹²⁹

123. Merchants do not charge consumers differential prices based on payment method both because of consumers’ expectations that merchants charge everyone the same price and because of contracts between credit card networks and merchants. These contracts between credit card networks and merchants prevent merchants who accept high-reward cards from steering consumers toward using lower-fee cards. Klein, *supra* note 121. In a 5–4 decision, the Supreme Court rejected claims that such contractual anti-steering provisions violate § 1 of the Sherman Antitrust Act’s prohibition of unreasonable restraints on trade. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

124. See Marie-Hélène Felt, Fumiko Hayashi, Joanna Stavins & Angelika Welte, *Distributional Effects of Payment Card Pricing and Merchant Cost Pass-through in the United States and Canada* 1 (FED. RSRV. BANK OF BOS., Working Paper No. 20–13, 2020), <https://www.bostonfed.org/publications/research-department-working-paper/2020/distributional-effects-payment-card-pricing-merchant-cost-pass-through-united-states-canada.aspx> [<https://perma.cc/TBB7-ACKS>].

125. *Id.*

126. *Id.*

127. See Bachman, *supra* note 2 (noting that while the true amount that banks and other third parties spend buying miles is not publicly disclosed, financial services organizations, like the Stifel Corporation, predict that airlines are selling points at three times their cost at redemption).

128. Wendover Productions, *supra* note 1.

129. See Reich, *supra* note 105.

2. Point Redemption

Intervention is also necessary with respect to point accumulation. Frequent flyer programs rely on a low percentage of consumers redeeming their points because it would be a significant cost for airlines to honor the immense number of points that are outstanding at any given time.¹³⁰ The design infrastructure of airlines' websites, which makes it challenging for consumers to redeem their points effectively and efficiently, reflects this drive to limit the redeemability of points.

Specifically, it is challenging for consumers to directly compare a flight's dollar price with its price-in-points. For example, if a consumer wishes to see the cost of a flight in points on American Airlines' website, the consumer must start an independent search after checking the "redeem miles" box.¹³¹ While this retrieves the price-in-points, it removes the dollar price from the search results.¹³² This design serves as a barrier to consumer information, making it difficult for consumers to directly compare the dollar price with the price-in-points. It requires additional steps for a consumer to reconcile, for instance, that while two flights may cost the same price-in-points, one flight is less expensive in dollars. Thus, airlines can use this design infrastructure to incentivize or disincentivize the use of points for any given flight. Further, it is within airlines' power, per their terms of service, to alter the price-in-points at will, as the price-in-points need not be tied to the dollar price or demand whatsoever.¹³³ This flexibility again allows airlines to alter the price-in-points to manipulate consumer choices, perhaps to disincentivize point accumulation or ensure a low overall redemption rate.

Despite these consumer vulnerabilities, not a single state or federal agency regulates frequent flyer programs.¹³⁴ In the wake of CAB's 1985 elimination, no agency retains the authority to regulate

130. Peter Greenberg, *In Some Airline Loyalty Programs, Only 8% of Frequent Flyer Miles Are Redeemed. Here's Why It Might Be Getting Harder to Score a Free Ticket*, CBS NEWS (June 20, 2022, 6:56 AM), <https://www.cbsnews.com/news/airline-loyalty-programs-getting-harder-to-redeem-frequent-flyer-miles/> [<https://perma.cc/TVT4-TSF4>] (noting both the sheer number of outstanding points in circulation and that airlines celebrate the extremely low point redemption rate).

131. *Book Flights*, AM. AIRLINES, <https://www.aa.com/booking/find-flights> (last visited Oct. 12, 2023) [<https://perma.cc/ANT7-DC74>].

132. *Id.*

133. AM. AIRLINES, *supra* note 104; UNITED AIRLINES, *supra* note 104; DELTA AIRLINES, *supra* note 104.

134. U.S. DEP'T OF TRANSP., *supra* note 10 (stating that DOT does not have any rules or regulations governing frequent flyer programs); *infra* Section III.B (discussing DOT's clear jurisdiction over frequent flyer miles).

airline rates and routes or to mandate the filing of tariffs.¹³⁵ While the old system reasonably could have expanded to include the regulation of frequent flyer mile programs as part of tariff filing and rate regulation, the old system no longer exists.¹³⁶

B. The Lack of Avenues for Private Intervention

The Supreme Court has interpreted the 1978 Act to foreclose private causes of action that challenge frequent flyer programs. In *Northwest, Inc. v. Ginsberg*, the Court considered whether the elimination of accumulated miles constituted a violation of the covenant of good faith and fair dealing.¹³⁷ In this case, the Plaintiff had accumulated a significant number of miles with an airline, only for the airline to remove him from the system entirely, claiming he had “abused” the program; the Plaintiff then sued for breach of contract.¹³⁸ The Court rejected his claim, holding that the 1978 Act preempts all state-law claims related to price, route, and service of an airline and that this preemption foreclosed private citizens’ claims related to frequent flyer miles.¹³⁹ In doing so, *Northwest* narrowed plaintiffs’ avenues for bringing claims related to frequent flyer miles and breach of contract. And because frequent flyer programs’ terms of service stipulate the right to alter terms at any time, there does not appear to be a viable route for consumers to challenge these programs through private litigation.¹⁴⁰

In sum, the value of the points system lies in ensuring consumers *believe* that points are valuable, while limiting points’ value by preventing consumers from efficiently redeeming points.¹⁴¹ At the same time, existing avenues to address this deception are limited: the 1978 Act foreclosed the avenue of commission-style regulation of frequent flyer miles by eliminating CAB¹⁴² and preempted states’ attempts to regulate the industry. It also eliminated opportunities for individuals to pursue fraud and breach-of-contract claims through private litigation, at least under the Supreme Court’s interpretation of

135. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, *repealed by* Act of 1994, Pub. L. No. 103-272, 108 Stat. 745 (establishing the transfer of any remaining non-safety related regulatory authority of CAB to DOT by 1985).

136. *See id.*

137. 572 U.S. 273, 278 (2014).

138. *Id.*

139. *Id.* at 278, 289–90.

140. *Id.*

141. *See supra* Section II.A.

142. 49 U.S.C. § 1301.

the Act in *Northwest*.¹⁴³ Accordingly, regulatory intervention is required to address concerns related to the deceptive nature of frequent flyer programs. Specifically, consumer protection regulation is appropriate because it would allow an agency to address the deception structurally embedded within the profitability of frequent flyer programs.¹⁴⁴

III. SOURCES OF AUTHORITY FOR FEDERAL AGENCY ACTION

Determining which agency is best equipped to regulate frequent flyer miles requires navigating the sometimes-overlapping authorities of relevant agencies. Accordingly, this Part discusses the jurisdictions of the FTC, DOT, and CFPB and analyzes the extent to which each agency has the authority to regulate frequent flyer miles in the name of consumer protection.

A. The Regulatory Authority of the Federal Trade Commission

Originally enacted in 1914, section 5 of the Federal Trade Commission Act (“FTC Act”) supplemented then-existing antitrust and competition law by granting the FTC the authority to regulate “unfair methods of competition.”¹⁴⁵ In 1938, Congress amended section 5 to ensure that its protections included not just competitors and competition but also consumers.¹⁴⁶ The amendment granted the FTC broad enforcement authority to address unfair and deceptive acts across a wide range of industries.¹⁴⁷ Despite broadening the FTC’s enforcement authority, however, the amendment did not grant the Commission the authority to regulate the common carrier activities of air carriers.¹⁴⁸ In other words, consumer protection in the provision of air transportation was not within the Commission’s jurisdiction.¹⁴⁹ In

143. 572 U.S. at 276.

144. See Reich, *supra* note 105.

145. 15 U.S.C. § 45; see also 15 U.S.C. §§ 1-38 (detailing the Sherman Act, which was enacted several decades prior to the FTC Act).

146. Notice of Proposed Rulemaking: Defining Unfair or Deceptive Practices, 85 Fed. Reg. 11881 (Feb. 28, 2020) (to be codified at 14 C.F.R. pt. 399), <https://www.federalregister.gov/documents/2020/02/28/2020-03836/defining-unfair-or-deceptive-practices> [<https://perma.cc/VYW8-UW6B>] (explaining that between 1914 and 1938, the Supreme Court interpreted the FTC Act to require a showing of harm to competitors and competition, minimizing the Act’s consumer protection-related authority, and further explaining that the 1938 Amendment was Congress’s direct response to this judicial interpretation, making the FTC’s consumer protection authority explicit—regardless of a showing of harm to competitors and competition).

147. 15 U.S.C. § 45.

148. *Id.*

149. See *id.* (“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except . . . air carriers and foreign air carriers . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce.”).

the same year that Congress amended section 5 to bolster the Commission's consumer protection authority, it also granted the Civil Aeronautics Authority¹⁵⁰ the exclusive power to prohibit unfair and deceptive practices in air transportation.¹⁵¹ Further, in 1952, Congress expanded CAB's authority beyond just air transportation—CAB gained the authority to regulate unfair or deceptive practices in both air transportation and the sale of air transportation.¹⁵²

As it stands today, section 5 of the FTC Act explicitly carves out “common carriers” and “air carriers” from the FTC's otherwise-sweeping authority to regulate unfair or deceptive practices.¹⁵³ This carve-out, however, does not necessarily extend to *all* sales of air travel—there is a distinction between airlines in their capacity as common carriers and the complicated commercial world that has sprung up around airlines' provision of transportation.¹⁵⁴ When airlines are operating outside of their common carrier capacity, as is the case for frequent flyer rewards programs, they arguably still fall within the FTC's jurisdiction.¹⁵⁵

In fact, in other contexts, the FTC has asserted that it “has jurisdiction over non-carrier, third-parties” that may relate to the sale of air travel.¹⁵⁶ For example, the Children's Online Privacy Protection Act (“COPPA”) granted the FTC broad authority to promulgate rules governing the collection of children's data online.¹⁵⁷ Just like section 5,

150. The predecessor to CAB.

151. See Civil Aeronautics Act of 1938 § 411 (1938) (empowering the Authority to investigate unfair and deceptive practices by air carriers, and issue cease and desist orders against air carriers where appropriate); 49 U.S.C. § 41712; Notice of Proposed Rulemaking: Defining Unfair or Deceptive Practices, *supra* note 146. Note that § 41712 was previously codified as section 411 but in 1994, section 411 was re-codified as § 41712 as part of a comprehensive, non-substantive reorganization of the Transportation Code.

152. See Notice of Proposed Rulemaking: Defining Unfair or Deceptive Practices, *supra* note 146.

153. 15 U.S.C. § 45(a)(2):

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks . . . common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49 . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

154. “A carrier becomes a common carrier when it ‘holds itself out’ to the public, or to a segment of the public, as willing to furnish transportation within the limits of its facilities to any person who wants it.” U.S. DEPT OF TRANSP., FED. AVIATION ADMIN., A.C. NO. 120-12A (1986). When an airline is operating outside of its capacity as a common carrier, the “air carrier” or “common carrier” carve out arguably does not apply.

155. See *id.* (defining common carrier in the context of air transportation).

156. FED. TRADE COMM'N, THE GREEN GUIDES: STATEMENT OF BASIS AND PURPOSE 21 (2012).

157. Children's Online Privacy Protection Act, 15 U.S.C. § 6505(c); see James C. Cooper, *The Costs of Regulatory Redundancy: Consumer Protection Oversight of Online Travel Agents and the Advantages of Sole FTC Jurisdiction*, 17 N.C. J.L. & TECH. 179, 192 n.51 (2015) (“That Congress

COPPA's grant of authority explicitly carved "air carriers" out of the FTC's jurisdiction while remaining silent on airlines' noncarrier activities.¹⁵⁸ Congress enacted COPPA over half a century after it enacted section 5,¹⁵⁹ its adoption of identical carve-out language—and silence on noncarrier activities—perhaps indicates an acceptance of the FTC's jurisdiction over airlines' noncarrier activities. This interpretation highlights the distinction between the regulation of airlines in their common carrier capacity, which is clearly outside of the FTC's jurisdiction, and the regulation of services that sell and advertise tickets on behalf of airlines, like travel agents.¹⁶⁰ This distinction has only become murkier as the sale of air travel has moved almost exclusively to e-commerce, a traditional forum for FTC regulation.¹⁶¹

This resulted in the FTC and CAB sharing the authority to enforce consumer protection laws against the non-common carrier sale of air travel: the FTC, through an interpretation of section 5's carve-out, and CAB, through its clear grant of regulatory authority in the 1952 amendments.¹⁶² Because Congress reassigned CAB's authority to DOT following CAB's elimination,¹⁶³ the authority is now jointly held by the FTC and DOT.

DOT has occasionally asserted this concurrent authority. For example, in 2020, DOT enacted a Final Rule ("2020 Rule") entitled "Defining Unfair or Deceptive Practices."¹⁶⁴ By way of background, the Department explained that "DOT and FTC share the authority to prohibit unfair or deceptive practices *by ticket agents* in the *sale* of air transportation."¹⁶⁵ This statement, however, is not entirely precise. While DOT's governing statute grants authority over sales "by ticket agents in the sale of air transportation," section 5 contains no such limiting language; as outlined above, the FTC's power in this space is

assigned jurisdiction over only airlines, and not ticket agents, in COPPA also suggests that FTC and DOJ enjoy concurrent jurisdiction over ticket agents.").

158. 15 U.S.C. § 6505(c).

159. Congress enacted COPPA in 1998 and the relevant amendment to section 5 of the FTC Act in 1938. Pub. L. 105-277, 112 Stat. 2681 (1998); Wheeler-Lea Act, ch. 49, sec. 3, 52 Stat. 111 (1938).

160. *See* Cooper, *supra* note 157, at 191–92 (asserting that section 5's common carrier exception clearly does not include online travel agents that sell tickets on behalf of airlines, meaning FTC retains the authority to regulate online travel agents' unfair or deceptive acts).

161. *Id.* at 182 ("With the exception of some carve-outs, Section 5 gives the FTC jurisdiction over almost all of the Internet economy.").

162. *See id.* ("Although the FTC is barred by statute from regulating airlines directly, it has asserted jurisdiction over [online ticket agents]. DOT also has consumer protection authority under . . . the Airline Deregulation Act . . .").

163. 49 U.S.C. § 1301.

164. Defining Unfair or Deceptive Practices, 85 Fed. Reg. 78707, 78708 (Dec. 7, 2020).

165. *Id.*

defined by what remains from a specific carve-out from FTC's otherwise-sweeping authority over industry. As DOT's governing statute is later in time than section 5, there is no reason that its language would impact an interpretation of FTC authority. In other words, the FTC can regulate the non-common carrier sale of airfare, regardless of whether those sales are conducted by "ticket agents"—however that term may be defined. Though the Department's reference to concurrent FTC-DOT authority is correct, its suggestion that the FTC and DOT are *both* governed by this "ticket agent" language is misleading.

Accordingly, the FTC's authority to regulate unfair or deceptive practices by frequent flyer programs depends on three factors: (1) whether frequent flyer programs are unfair, (2) whether frequent flyer programs are deceptive, and (3) whether frequent flyer programs that allow consumers to purchase flights constitute non-common carrier sales of airfare.¹⁶⁶

Frequent flyer programs likely fall within the meaning of "unfair" in the context of the FTC's consumer protection authority. While section 5 of the FTC Act grants the FTC the authority to regulate "unfair or deceptive acts or practices," it does not itself define unfair practices.¹⁶⁷ In response to congressional inquiry into the meaning of unfairness, the FTC issued a policy statement defining the term, borrowing language that the Supreme Court had quoted approvingly in *Sperry & Hutchinson*.¹⁶⁸ The policy statement defined unfairness as an inquiry into three criteria: "(1) whether the practice injures consumers; (2) whether it violates established public policy; [and] (3) whether it is unethical or unscrupulous."¹⁶⁹ According to the FTC, these three criteria reflect the congressional intent behind section 5's provisions, which was to "[make] the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."¹⁷⁰

In determining unfairness, the FTC's policy statement highlighted the *Sperry & Hutchinson* test's first prong as the most important, noting that a finding of consumer injury alone can justify a

166. 15 U.S.C. § 45.

167. *Id.*

168. FED. TRADE COMM'N, FTC POLICY STATEMENT ON UNFAIRNESS (Dec. 17, 1980), <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness> [<https://perma.cc/CUC2-R6P9>]; *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

169. FED. TRADE COMM'N, *supra* note 168.

170. 1183 CONG. REC. 3255 (1938) (remarks of Sen. Wheeler); *see also* FED. TRADE COMM'N, *supra* note 167 ("Unjustified consumer injury is the primary focus of the FTC Act, and the most important of the three . . . criteria.").

finding of unfairness.¹⁷¹ Despite this prong's importance, the FTC's policy statement stipulates:

The independent nature of the consumer injury criterion does not mean that every consumer injury is legally "unfair," however. To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.¹⁷²

Further, it is unlikely that either of the other two *Sperry & Hutchinson* criterion function as a standalone justification for finding illegal unfairness absent the finding of consumer injury.¹⁷³ The second prong asks whether a practice has violated statute or common law, which may serve as a proxy for strength of evidence of consumer injury.¹⁷⁴ And while the third prong assesses the unscrupulous or unethical nature of the practice, the policy statement notes that "conduct that is truly unethical or unscrupulous will almost always injure consumers or violate public policy as well" and emphasizes that in the future the FTC will act only on the basis of the first two prongs.¹⁷⁵ Nearly fifteen years following the publication of this policy statement, Congress effectively codified this policy paper's interpretation of the *Sperry & Hutchinson* unfairness criteria into law.¹⁷⁶

Many practices within frequent flyer programs likely reach section 5's unfairness standard. These programs injure consumers who often cannot reasonably avoid those injuries.¹⁷⁷ In particular, frequent flyer programs that allow consumers to purchase points directly from the program's website are especially injurious as consumers purchase points under the mistaken understanding that the points are sold at

171. FED. TRADE COMM'N, *supra* note 168.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* ("The Commission has therefore never relied on the third element of [*Sperry & Hutchinson*] as an independent basis for a finding of unfairness, and it will act in the future only on the basis of the first two.")

176. See 15 U.S.C. § 45(n). Congress codified this emphasis on the first two prongs in the *Sperry & Hutchinson* "unfairness" definition and the rejection of the third:

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

177. See *id.* (recognizing that certain trade practices may be likely to cause substantial injury to consumers); FED. TRADE COMM'N, *supra* note 168 (framing consumer injury as the "primary focus" of the FTC Act).

advantageous rates and can be readily redeemed at an advantageous value.¹⁷⁸ Consumers cannot reasonably avoid these injuries because frequent flyer miles conceal the value of points relative to the dollar both at the point of purchase and at the point of redemption.¹⁷⁹ And finally, these practices do not present countervailing benefits to the consumer or to competition.¹⁸⁰ First, if the consumer cannot redeem points for flights at reasonable or beneficial rates, there can be no countervailing benefit to the practice. And second, if anything, frequent flyer programs *discourage* competition; the core functionality of these programs relies on consumers' perceptions of sunk costs to incentivize the consumers to remain with the same airline, rather than compare the cost of competing flights.

Arguably, there is an even clearer violation of section 5's prohibition on deceptive practices. Like "unfair" practices, section 5 of the FTC Act does not define a particular standard for "deceptive" products or practices.¹⁸¹ In response to this omission, the FTC issued a policy paper defining an act or practice as deceptive where "(1) [a] representation, omission, or practice misleads or is likely to mislead the consumer; (2) a consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and (3) the misleading representation, omission, or practice is material."¹⁸² The first prong commonly includes "false oral or written representations, misleading price claims, [and] the use of bait and switch techniques."¹⁸³ As to whether a customer's interpretation is

178. See *supra* Section II.A (discussing the limited value of points in terms of redemption for flights).

179. For example, in order to determine the value of points on AAdvantage, a consumer would have to divide the cost of purchase by the number of miles purchased. Then, the consumer would have to seek out a particular flight, check the box for "redeem miles," and note how much a particular flight costs in points. Because there is no functionality on AAdvantage's website that allows a consumer to see the same flight's cost in both dollars and points within the same search, the consumer would have to leave the current search results, create a new search while unchecking the "redeem miles" function, and note how much the same flight costs in dollars. Then, the consumer would have to compare the exchange rate between dollars and points for that given flight to the rate at which the consumer purchased the points. Only then could the consumer determine if the rate of accumulation was an advantageous "deal" relative to the rate at redemption. See *AAdvantage® Program*, AM. AIRLINES, <https://www.aa.com/i18n/aadvantage-program/aadvantage-program.jsp> (last visited Oct. 14, 2023) [<https://perma.cc/UDK2-V7JA>]. This level of calculation and comparison is not "reasonably avoidable" for a consumer.

180. See 15 U.S.C. § 45(n); FED. TRADE COMM'N, *supra* note 168.

181. 15 U.S.C. § 45.

182. FED. TRADE COMM'N, FTC POLICY STATEMENT ON DECEPTION (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [<https://perma.cc/72YH-J8PP>]. Unlike the FTC's 1980 policy statement defining "unfair," this definition of deceptive has never been codified into law; however, it has been utilized regularly in adjudication. See, e.g., *In re Clifdale Assocs., Inc.*, 103 F.T.C. 110 app. at 176 (1984).

183. FED. TRADE COMM'N, *supra* note 182.

reasonable under the circumstances, the FTC will ask how a typical consumer is likely to respond given the totality of the product or advertisement.¹⁸⁴ Notably, written disclosures delineated in accompanying text do not negate the existence of a misleading misrepresentation.¹⁸⁵ And finally, materiality hinges on whether the advertisement or practice is likely to impact the consumer's behavior; information regarding the cost of a good or service is presumptively material.¹⁸⁶

Many aspects of both point accumulation and point redemption fit this definition of deceptive practices. For example, the fact that airlines allow consumers to directly purchase points from their websites¹⁸⁷ at prices significantly higher than the redemptive value of the points, all while refusing to publish the true value of the points, certainly misleads reasonable consumers with respect to a material circumstance. AAdvantage's Mileage Multiplier functionality,¹⁸⁸ a point-of-purchase offering that impliedly provides an even superior rate for mile purchase, is also deceptive. It targets consumers who are actively in the process of purchasing a flight; if a consumer wanted to compare the supposedly multiplied rate to the typical rate for purchasing points, the consumer would have to fully exit the process of buying a ticket and return to the main page, as the website's design does not allow direct comparison. Given the inconvenience of exiting the ticket-purchasing process, the consumer's subsequent failure to ascertain the offer's relative value is perfectly reasonable.

Because frequent flyer programs fall within section 5's prohibition of unfair or deceptive practices, the FTC's jurisdiction over frequent flyer programs hinges on whether section 5's jurisdictional carve-out for air carriers also includes these programs.¹⁸⁹ There is little case law interrogating this question with respect to frequent flyer programs. It is fairly well-established that online travel agencies' sale

184. *Id.*

185. *Id.*:

Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline. Written disclosures or fine print may be insufficient to correct a misleading representation. . . . Pro forma statements or disclaimers may not cure otherwise deceptive messages or practices.

186. *Id.*

187. AM. AIRLINES, *supra* note 108.

188. AM. AIRLINES, *supra* note 110.

189. *See* 15 U.S.C. § 45.

and marketing of flights *are* within the FTC’s section 5 jurisdiction;¹⁹⁰ while these travel agencies sell tickets on behalf of common carriers, they are not common carriers and therefore do not fall within the jurisdictional exception.¹⁹¹ Following the same logic, it is likely that frequent flyer programs also fall within the FTC’s section 5 jurisdiction. They are not a part of airlines’ common carrier operations. Rather, frequent flyer programs are promotional tools that enable the purchase of flight tickets on behalf of common carriers. Despite the fact that airlines own their frequent flyer programs, these programs are more analogous to online travel agencies than the provision of transportation.

B. The Regulatory Authority of the Department of Transportation

With the 1978 Act’s industry-wide deregulation and the 1985 abolition of CAB, Congress steadily dissolved much of the non-safety-related regulations of the airline industry.¹⁹² These Acts wholly eliminated CAB’s New Deal–style ability to regulate rates and mandate the publishing of tariffs in the public interest, an authority that regulators theoretically could have utilized to oversee frequent flyer programs.¹⁹³ Congress then transferred what little remained of CAB’s non-safety-related regulatory authority to DOT.¹⁹⁴

Included in this transfer of regulatory authority is a provision now codified at 49 U.S.C. § 41712, which grants DOT the authority to enforce consumer-protection regulations against airlines.¹⁹⁵ The relevant section grants the Secretary of Transportation the authority to “investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air

190. See Cooper, *supra* note 157, at 191–92 (noting that the lack of inter-agency conflict over the regulation of online travel agencies is attributable to the FTC historically ceding ground to DOT, rather than the FTC’s lack of authority).

191. *Id.* at 192 n.54 (citing a joint meeting between the FTC and DOT where regulators acknowledged that the FTC’s authority over these online ticket agents created a regulatory overlap); CENTRA TECH., INC., FOURTH MEETING OF THE ADVISORY COMMITTEE ON AVIATION CONSUMER PROTECTION (May 21, 2013), <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/286186/acacp-4th-meeting-record.pdf> [<https://perma.cc/9C56-PFZJ>].

192. See RICKS ET AL., *supra* note 12, at 587 (discussing CAB’s actions and ultimate dissolution).

193. See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

194. See RICKS ET AL., *supra* note 12, at 587 (delineating some of CAB’s responsibilities that transferred to DOT).

195. 49 U.S.C. § 41712(a).

transportation.”¹⁹⁶ The remaining subparts of § 41712 list more specific requirements for airlines.¹⁹⁷

While its “unfair or deceptive” language is modeled after section 5 of the FTC Act, § 41712 did not undergo the same degree of judicial interpretation and post hoc congressional specification. Consequently, unlike section 5, § 41712 retained a fairly broad, open-ended definition of “unfair or deceptive practice” for many years. In December 2020, however, the Trump Administration DOT issued a final rule giving § 41712’s “unfair or deceptive practices” the same meaning as is attached to its sister provision in section 5.¹⁹⁸ According to the 2020 Rule, the Department must rely on definitions of “unfair” and “deceptive” constructed by the FTC.¹⁹⁹ Accordingly, DOT adopted the same constraints on these words’ definitions as outlined in Section III.A.

Though the Trump Administration’s 2020 Rule narrowed the definition of § 41712 to fit within the scope of section 5, DOT’s jurisdiction over frequent flyer programs is comparably more clear-cut than that of the FTC. Because the FTC and DOT now utilize the same definitions of “unfair or deceptive,” frequent flyer programs fall within § 41712’s meaning for the same reasons as articulated in Section III.A. Importantly, however, DOT has jurisdiction over all airlines as common carriers and ticket agents.²⁰⁰ As a result, unlike FTC staffers, DOT staffers seeking to regulate frequent flyer programs need not engage in the messy interpretative work of determining whether such programs are part of the airlines’ common carrier functionality.²⁰¹ Regardless of

196. *Id.* In full, § 41712(a) reads:

In general.—On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, air ambulance consumer (as defined by the Secretary of Transportation), or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.

197. *Id.* § 41712(b)-(c). Subsection (b) notes that carriers’ failure to notify consumers of e-ticket expiration constitutes an unfair or deceptive practice. Subsection (c) details disclosure requirements for airlines, dictating that it is unfair or deceptive for airline tickets to fail to disclose the name of the airline providing the service or intermediary connections throughout the route.

198. 14 C.F.R. § 399.75 (2023).

199. *See, e.g.*, Edelman v. Am. Airlines, Inc., DOT-OST-2017-0037, at 3 n.2 (May 22, 2018), <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/310976/edelman-v-aa-order-2018-5-32.pdf> [<https://perma.cc/5NSR-W98S>]. *See generally* FED. TRADE COMM’N, *supra* note 168.

200. 49 U.S.C. § 41712.

201. *See* discussion *supra* Section III.A.

whether frequent flyer programs are “ticket agents” or part of the airlines’ common carrier capacities, DOT can unambiguously take action.

Not only does § 41712 grant DOT the authority to issue regulation with respect to frequent flyer programs but the Department has also publicly considered utilizing it.²⁰² In 2014, the Department announced an audit with respect to its oversight of frequent flyer miles, noting that while the Department does not regulate frequent flyer programs outside of requiring airlines to publish their terms and conditions, insufficient transparency could “constitute an unfair and deceptive practice in which enforcement actions can be pursued.”²⁰³ Further, the Trump Administration also acknowledged that § 41712 grants authority to regulate frequent flyer programs: in February 2020, DOT issued a Notice of Proposed Rulemaking noting that the Department had “solicited comment on whether the general definitions of ‘unfair’ or ‘deceptive’ were sufficient to give notice to stakeholders of what constitutes unfair or deceptive practices with respect to . . . frequent flyer programs.”²⁰⁴

While DOT has the authority to enforce provisions against frequent flyer programs under the Trump Administration’s more constrained interpretation of § 41712, it is notable that the Biden Administration has subsequently issued guidance signaling a broader reading of the 2020 Rule.²⁰⁵ The Biden Administration’s guidance (“2022 Guidance”) acknowledged that the 2020 Rule requires DOT to employ its specific, narrower definitions of “unfair” and “deceptive” when issuing future rulemaking or taking future enforcement actions.²⁰⁶ Still, the 2022 Guidance also acknowledged that the 2020 Rule “provided . . . that if Congress directs DOT by statute to issue regulations specifically declaring a practice to be unfair or deceptive, then DOT may do so without reference to the general definitions.”²⁰⁷ The 2022 Guidance then pointed to Executive Order 14,036, issued by President Biden in July 2021, which “directed the Department to take

202. See U.S. DEP’T OF TRANSP., AUDIT ANNOUNCEMENT – REVIEW OF DOT’S OVERSIGHT OF AIRLINES’ FREQUENT FLYER PROGRAMS (2014), <https://www.oig.dot.gov/sites/default/files/Frequent%20Flyer%20Program%20Announcement%20Letter%209-11-14.pdf> [<https://perma.cc/GZ7F-GCFK>].

203. *Id.*

204. See Defining Unfair or Deceptive Practices, 85 Fed. Reg. 78707, 78713 (Dec. 7, 2020) (noting that while DOT solicited comments related to frequent flyer programs as part of the February audit, it did not receive comments on the matter).

205. Guidance Regarding Interpretation of Unfair and Deceptive Practices, 87 Fed. Reg. 52677 (Aug. 29, 2022).

206. *Id.* at 52678.

207. *Id.*

a number of actions to protect aviation consumers, including that the Department start developing proposed amendments for its definitions of the terms ‘unfair’ and ‘deceptive’ in § 41712.”²⁰⁸ The 2022 Guidance further explained that Executive Order 14,036 required the Department to develop definitions of these terms without reference to the general definitions issued in the 2020 Rule.²⁰⁹

In doing so, the 2022 Guidance interpreted the 2020 Rule broadly, issuing more flexible understandings of the key terms. For example, it clarified that an injury may “not [be] reasonably avoidable” even if the consumer purchased a nonrefundable ticket.²¹⁰ Additionally, the 2022 Guidance found that “advertising a fare that is no longer available, or failing to have a reasonable number of seats available at the advertised fare, is deceptive.”²¹¹ This is particularly relevant to the purchase of frequent flyer miles, as they are advertised as a means of obtaining “free” seats on flights that may not be readily available for redemption.²¹² Again, while the 2022 Guidance’s interpretation of “unfair” and “deceptive” is broader and more flexible than that of the 2020 Rule, DOT has jurisdiction over frequent flyer programs under either interpretation of § 41712 and should exercise it accordingly.

C. The Regulatory Authority of the Consumer Financial Protection Bureau

Dodd-Frank, enacted in 2010, prohibits covered persons and service providers from engaging in deceptive or abusive acts and practices.²¹³ Section 1031 of Dodd-Frank, codified at 12 U.S.C. § 5531, grants the CFPB the authority to regulate any consumer financial product or offering of a consumer financial product that “is unfair, deceptive, or abusive.”²¹⁴ Like DOT’s § 41712, § 5531 borrows from the FTC Act’s definition of “unfair” and “deceptive.”²¹⁵ For an offering of a consumer financial product to be “deceptive” under § 5531, (1) it must

208. *Id.*; Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 14, 2021).

209. Guidance Regarding Interpretation of Unfair and Deceptive Practices, 87 Fed. Reg. 52677, 52678 (Aug. 29, 2022).

210. *Id.* at 52679.

211. *Id.* at 52680.

212. *See id.* at 52680 (“A failure to provide services as promised (whether by contract or otherwise) can also be deceptive.”).

213. 12 U.S.C. § 5531.

214. *Id.*

215. CONSUMER FIN. PROT. BUREAU, CFPB BULLETIN 2014-02: MARKETING OF CREDIT CARD PROMOTIONAL APR OFFERS 2 n.4 (2014), https://files.consumerfinance.gov/f/201409_cfpb_bulletin_marketing-credit-card-promotional-apr-offers.pdf [<https://perma.cc/E3K7-86P3>] (“The standard for ‘deceptive’ practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act.”).

include a representation, omission, act, or practice that “misleads or is likely to mislead the consumer; (2) [t]he consumer’s interpretation of the representation, omission, act, or practice is reasonable under the circumstances; and (3) [t]he misleading representation, omission, act, or practice is material.”²¹⁶

In the years since its creation, the CFPB has used this authority to rein in deceptive advertising of consumer credit cards and to issue transparency mandates. For example, utilizing the authority granted under § 5531, the CFPB issued Regulation Z, which mandated certain information disclosures regarding promotional annual percentage rates.²¹⁷ Under Regulation Z, credit card providers must issue disclosures to consumers at the time of solicitation or application to open a credit card account, at account opening, on periodic statements, and with checks that can be used to access a credit card account.²¹⁸

The CFPB can use the same authority to corral deceptive practices of co-branded frequent flyer credit cards, as these credit cards fall within the CFPB’s regulatory mandate.²¹⁹ These cards grant cardholders a lump sum of points when they first open the account, as well as any time they spend money on the card; however, when these points are increasingly devalued and unredeemable, the promise of points is relatively empty.²²⁰ This action would fall under the CFPB’s definition of “deceptive”: it is likely to mislead the consumer about the value of points, the consumer’s belief in the value of those points is reasonable under the circumstances, and the advertisement is material to the consumer’s decision to create and utilize a particular credit card account. The regulation of these co-branded credit cards is therefore within the CFPB’s jurisdiction.

IV. CONSUMER PROTECTION IN FREQUENT FLYER MILES: A FRAMEWORK TO MINIMIZE CONSUMER MISTAKE AND MANIPULATION

In order to tackle the deceptive nature of frequent flyer miles and better protect consumer interest, this Part recommends several regulatory solutions that implicate different administrative agencies. Specifically, it calls for agency action in the form of three final rules: First, DOT should issue a transparency mandate requiring that airlines

216. *Id.* at 2.

217. *See* 12 C.F.R. § 1026.5 (2022) (describing the general disclosure requirements).

218. *Id.* § 1026.12.

219. *See* 12 U.S.C. § 5531 (granting the CFPB authority to monitor unfair or deceptive acts concerning financial products and consumers); 12 C.F.R. § 1026.60 (2022) (interpreting this authority to include the ability to mandate credit card disclosures).

220. *See* discussion *supra* Section II.A.

publish the value of their points with respect to the dollar so that consumers can better understand the value of their points.²²¹ This mandate should aim to increase consumer information, with an emphasis on user-friendly website infrastructure. To that end, the disclosure should be publicized any time points are redeemed or purchased. Second, DOT should prohibit frequent flyer programs from devaluing already-acquired points. Finally, CFPB should issue a rule mandating increased transparency as to the value of the points tied to co-branded credit cards.

In addition to detailing these proposals, this Part will also discuss potential costs that airlines may incur as a result of reform. It will then address weaknesses of these relatively piecemeal, consumer protection-oriented regulations, as compared to a more structural reform akin to the New Deal-era framework. Despite these potential costs and weaknesses, this Part will argue that intervention on behalf of consumers is necessary and that the proposed regulations allow for swift action in a time where congressional gridlock forestalls statutory solutions.²²²

A. A Proposal for the Department of Transportation

To prevent frequent flyer programs from relying on consumer mistake or manipulation for profit, regulatory action is required. As a preliminary matter, it is necessary to address why DOT is better situated to issue these regulations despite the FTC's comparative expertise in consumer protection.²²³ First, and most importantly, DOT has jurisdiction over the entire airline industry, whereas the FTC only has jurisdiction over what remains after section 5's carve-out for air travel common carriers.²²⁴ This could present problems for FTC regulators, who would have to argue that frequent flyer programs are not part of airlines in their common carrier capacity. This argument is not unreasonable—frequent flyer programs are promotional

221. See discussion *supra* Section II.A.

222. See Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739, 1742 (2015) (“Although agencies are clearly affected by the hyperpartisanship that dominates the political branches, they are still able to act. Agencies possess broad grants of preexisting authority that they can use to reshape governing policy and law, often at presidential instigation, thereby putting pressure on Congress to respond.”).

223. The FTC has an entire bureau dedicated to consumer protection (called, logically, the Bureau of Consumer Protection) and centers consumer protection as one of its twin aims, alongside the regulation of competition. *Bureau of Consumer Protection*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection> (last visited Jan. 21, 2024) [<https://perma.cc/4ZFH-YHP6>].

224. See Sections II.B and II.C for a discussion on the meaning of the “ticket agent” provision of section 5 and the way that it limits FTC jurisdiction over frequent flyer miles.

apparatuses (or, if you buy this Note's premise, financial instruments) that are entirely distinct from airlines' provision of travel services. There is, however, a colorable argument that frequent flyer programs are so closely intertwined with the provision of air travel that it is impossible to disentangle them from airlines in their common carrier capacity. This could threaten the legitimacy of any FTC-issued regulation of frequent flyer programs, making it vulnerable to potential challenges.

Second, DOT is not so closely bound to strict definitions of "unfair" and "deceptive."²²⁵ Though frequent flyer programs do fall within the FTC's somewhat narrower definitions of the terms, DOT's more flexible definitions would provide regulators with helpful leeway in determining which practices are harmful to consumers.²²⁶ The 2021 Biden Administration executive order²²⁷ and accompanying 2022 Guidance only increased this regulatory flexibility.²²⁸ These two factors, in addition to DOT's industry expertise, place DOT in a superior position to regulate frequent flyer programs.

DOT should therefore exercise its little-utilized consumer protection authority, as granted by 49 U.S.C. § 41712, to issue a transparency mandate through rulemaking (interpretive guidance is inappropriate here because the mandate would legally bind frequent flyer programs).²²⁹ This transparency mandate would affect both the point accumulation and redemption markets. Specifically, DOT should mandate that frequent flyer programs disclose their average point-to-dollar conversion rate any time that consumers are prompted to either purchase or redeem points. From a design perspective, this summary disclosure²³⁰ should prioritize conveying actionable information to

225. See Section III.B for a discussion on the statutory interpretation of § 41712.

226. See Section III.B for a discussion on the statutory interpretation of § 41712. *See also* Cooper, *supra* note 157, at 196 (acknowledging the shared DOT-FTC regulatory authority over online travel agencies but advocating for FTC's exclusive authority, citing the benefits of FTC's more constrained definitions of "unfair" and "deceptive.").

227. Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 14, 2021).

228. *See* Guidance Regarding Interpretation of Unfair and Deceptive Practices, 87 Fed. Reg. 52677 (Aug. 29, 2022).

229. *See* 5 U.S.C. § 553 (establishing the requirements for rulemaking, including adequate notice, a statement of basis and purpose for the rule, and opportunity for public comment); *Gen. Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002) (striking down interpretive guidance that mandates particular industry action as a violation of the Administrative Procedure Act because all agency action that binds with the force of law must follow the procedural requirements for notice-and-comment rulemaking).

230. Memorandum from Cass R. Sunstein, Adm'r of the Off. of Info. and Regul. Affs. to the Heads of Exec. Dep'ts and Agencies 3 (June 18, 2010), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/assets/inforeg/disclosure_principles.pdf [<https://perma.cc/WK8Y-LGGM>] (defining summary disclosure as attempts "to provide people with clear, salient information at or near the time that relevant decisions are made" as opposed to full

consumers in a simple format. It should list the value in dollars, avoid undue detail, and be available to consumers at points of comparison shopping and purchase.²³¹

Practically, this would mean that any consumer purchasing points in bulk would have the points' value at redemption readily available—displayed next to the points' cost—preventing consumers from accidentally purchasing points at rates wholly disconnected from their value at redemption. There could still be reason, of course, for consumers to purchase points at rates steeper than their redemptive value. As miles-obsessed strategists have done for years, consumers may knowingly purchase flights at unfavorable rates if that purchase means inching over a threshold that results in a free trip or upgraded status.²³² But these summary disclosures would prevent frequent flyer programs from relying on consumer mistake as a means of driving the purchase of points.

This transparency mandate would also affect the redemption market, as any consumer attempting to purchase a flight would have access to not only the flight's dollar price and its price-in-points but also to the average point-to-dollar conversion rate—all on the same page. Under this regulation, a consumer could still opt to redeem points at a disadvantageous rate: Perhaps the consumer acquired points as a reward for credit card spending and is thus less concerned about the points' poor redemptive value relative to their cost. Perhaps the consumer could not afford to purchase the flight in dollars and still wants or needs to travel, regardless of a flight's high price-in-points. But the mandate would ensure that consumers do not unwittingly redeem points at a more costly rate than the dollar price.

Ultimately, these transparency rules are necessary because, as it currently stands, much of the profitability of frequent flyer miles relies on deceiving consumers by making effective redemption and accumulation as difficult as possible.²³³ The mandate would enhance

disclosure, which requires the release of all relevant information, generally including underlying data, to a regulatory body).

231. See *id.* at 3–6 (listing several principles that underpin successful summary disclosure, including ensuring the information is clear and well-timed, and acknowledging that consumers have limited time and resources to seek out information); *id.* at 3 (pointing to nutritional labels on food products and fuel efficiency notices on vehicles as successful implementations of summary disclosure).

232. See Smithson, *supra* note 117 (noting that despite the adverse rates, buying miles can make sense when “you are a few thousand points or miles short of a big redemption, such as first-class flights for your honeymoon”).

233. See Reich, *supra* note 105, at 4 (defining the aims of consumer protection law). Notably, DOT itself has very recently begun to recognize the significance of this problem for consumer protection—mere weeks prior to this Note's publication, the Department announced that regulators planned to “step up oversight of the airline industry” with regard to deceptive or unfair

market transparency, thereby allowing “sophisticated consumers, advocates, and journalists to police the marketplace in tandem with regulators.”²³⁴ It would also “empower informed consumers to make better choices among competing products, promote better consumer usage of their policies, and prompt more effective enforcement of substantive rules.”²³⁵

While these transparency mandates mitigate frequent flyer programs’ ability to obfuscate the value of points, they do not address the programs’ ability to manipulate the value of points *after* accumulation. A consumer could purchase points at an advantageous rate, only for the airline to devalue points over time; a consumer could obtain a credit card promising a large lump sum of points, only for a frequent flyer program to subsequently strip those points of their worth. Accordingly, DOT should also regulate the programs’ ability to alter the point-to-dollar conversion rate. While the regulation should allow frequent flyer programs to alter the point-to-dollar conversion rate, it should mandate that programs recalculate the already-purchased points relative to the new rate, so that the already-purchased points retain their original value. This would ensure that all points—be they accrued through spending, awarded in a lump sum, or purchased online—are more than just a fraudulent promise.

B. A Proposal for the Consumer Financial Protection Bureau

Additionally, regulators should act to prevent manipulative advertising of co-branded credit cards. To that end, the CFPB should utilize the authority granted by § 5531 of Dodd-Frank to issue a transparency mandate regarding the value of the lump sum of points that co-branded credit cards award to consumers in exchange for opening accounts. This transparency mandate should publish the average value of the points at redemption so that consumers determining whether to obtain a co-branded credit card can properly ascertain the alleged value of the card’s promotional offer.

Once again, this regulation is justified under a theory of consumer protection that calls for intervention when a market’s

practices in frequent flyer programs. David Shepardson, *Exclusive: US Scrutinizing Airline Frequent Flyer Programs*, REUTERS, Dec. 21, 2023, <https://www.reuters.com/business/aerospace-defense/us-scrutinizing-airline-frequent-flyer-programs-2023-12-21/> [https://perma.cc/AW8P-8P4V].

234. Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 398–99 (2014).

235. *Id.* at 399.

structure does not incentivize preventing consumer mistakes.²³⁶ Here, from the perspective of the third-party banks, the value of co-branded credit cards is rooted in consumers' *belief* in the value of points, which the banks capitalize upon in order to entice future card owners.²³⁷ From the perspective of the frequent flyer programs, the value of such programs lies in minimizing consumers' ability to efficiently redeem these vast numbers of points.²³⁸ Rather than incentivizing consumer protection, this market structure incentivizes maximizing consumer mistake.²³⁹ This justifies a transparency mandate, which would create a more informed market and thus help to dismantle structural fraud in frequent flyer programs.

C. Costs to Airlines

Given the immense profit that frequent flyer programs generate for airlines,²⁴⁰ these regulations could impose significant losses on the industry. Determining the precise or even approximate costs of these changes would require the industry to disclose information that it currently withholds from the public.

Despite limited public information, it is clear that the value of these frequent flyer programs is based on consumer perception—or misperception. Banks and other third parties buy points from airlines at inordinate rates because they have determined that promising points in exchange for purchases attracts customers. If these transparency mandates cause consumers to determine that points have relatively less value, third parties may be less interested in using the promise of points as part of their marketing schemes.²⁴¹ Assuming this leads third parties to refuse to purchase points from airlines at such steep rates, or to refuse to purchase points altogether, it would harm airlines' bottom lines.

236. See Reich, *supra* note 105, at 4 (“The need for consumer protection lies not in the existence of ‘bad’ products, but in market relationships which make it unlikely that sellers will take efficient steps to prevent consumer mistakes.”).

237. For discussion on the value of financialized airline points programs, see Section I.C.

238. For discussion on the value of financialized airline points programs, see Section I.C.

239. See Reich, *supra* note 105, at 4.

240. For discussion on the value of financialized airline points programs, see Section I.C.

241. There is good evidence that airlines are threatened by this degree of transparency in frequent flyer miles—beyond the fact that airlines' websites make the direct comparison of points at accumulation and redemption as confounding as possible. For example, American Airlines recently sued a third-party travel website over an app that would have allowed consumers to directly compare the value of different frequent flyer programs' points. Kim Lyons, *American Airlines Suing the Points Guy Over App That Syncs Frequent Flyer Data*, THE VERGE (Jan. 21, 2022), <https://www.theverge.com/2022/1/21/22895317/american-airlines-the-points-guy-app-frequent-flyer-copyright> [https://perma.cc/2FPC-KYPA].

This threat to frequent flyer programs' profitability is especially significant considering that airlines already operate the provision of air travel at such a narrow margin—or even at a loss—and arguably rely on frequent flyer programs to generate any profit whatsoever.²⁴² Ultimately, however, many aspects of frequent flyer programs are inherently deceptive, relying on consumer manipulation as a means of attaining profit. This degree of deception necessitates regulatory intervention, regardless of its harm to airlines' profit margins. Even considering the airline industry's importance to the larger economy, it is unreasonable for regulators to allow consumer deception to subsidize airlines' operations; if airlines cannot operate at a profit and serve the public without employing deceptive frequent flyer practices, this raises larger questions about the broader free-market-lite organization of the airline industry.²⁴³

D. Limitations of Consumer Protection–Based Solutions

The very fact that airlines must rely on frequent flyer programs—including the elements of these programs that structurally deceive consumers—in order to drive profit and compensate for the costly business of air travel reveals a larger dynamic. If the oligopolistic Big Four carriers cannot make a profit on air travel alone, and instead must rely on deceptive marketing schemes, it is conceivable that the current industrial organization of airfare is not sustainable.²⁴⁴ Though it is beyond the scope of this Note, the fact that airlines rely on deceptive marketing schemes to drive profit indicates that the free market approach to airline regulation, as ushered in by the 1978 Act, may have been a failed experiment. Perhaps structural, sectoral-scale regulation, rather than a plethora of piecemeal measures, is necessary.²⁴⁵

Instituting transparency mandates and eliminating some particularly deceptive means of selling points would not solve the deeper, more structural issues with the airline industry, such as steep ticket prices and limited route availability. But in the absence of

242. For discussion on the value of financialized airline points programs, see Section I.C.

243. See discussion *supra* Section I.C.

244. The instability of the market goes beyond simply selling seats at a loss. Prices remain high. See RICKS ET AL., *supra* note 12, at 595–98 (discussing findings that airline deregulation did not bring the reliable decrease in prices that regulators promised). Further, in the years since deregulation, the American taxpayers have had to bail out the airline industry three times. *Id.* at 607–13.

245. It is worth noting that as compared to bans, transparency mandates are a constrained solution, somewhat libertarian in nature. They function as “nudges,” which aim to preserve consumer choice while pointing consumers in a particular direction. Cass R. Sunstein, *Nudging: A Very Short Guide*, 37 J. CONSUMER POL'Y 583, 583 (2014).

sectoral regulation addressing the overall industry organization, airlines should not be permitted to freely reap massive profits through consumer deception. The DOT and CFPB should therefore exercise their regulatory mandates to protect consumers from deceptive practices in frequent flyer programs.

CONCLUSION

Airlines' frequent flyer programs are financialized, operating more like a monetary system than a typical discount or rewards plan. Beyond controlling the value of points at redemption, airlines also determine how many points are in circulation, how many points consumers accumulate, and when points expire.²⁴⁶ The financialized form of frequent flyer programs is very lucrative—for the Big Four airlines, frequent flyer points programs are worth markedly more than the business of providing actual air travel.²⁴⁷

The very structure of frequent flyer programs presents a problem for consumer protection. Specifically, the profitability of frequent flyer programs relies on consumers' *perception* of the value of points. This is true both of the points that consumers purchase directly from airlines and of the points that third parties purchase from airlines in order to attract consumers through promotional deals.²⁴⁸ At the same time, the value of the point system to airlines also depends on limiting consumers' ability to spend their outstanding points because, if consumers successfully redeemed these points en masse, it would present an unsustainable cost for the airlines.²⁴⁹ Accordingly, the value of the points system stems from ensuring consumers *believe* that points are highly valued, while limiting the points' true value.

Because the structure of frequent flyer programs depends on consumer deception, regulatory action is necessary. DOT and the CFPB should act in line with their regulatory mandates by enforcing provisions against the frequent flyer programs. The agencies should enforce transparency mandates, requiring that airlines inform consumers about the true value of their so-called deals, and ensure that airlines cannot devalue consumers' already-acquired points. Doing so

246. See Wendover Productions, *supra* note 1 (describing how frequent flyer programs function); Bachman, *supra* note 2.

247. OPEN MKTS. INST., *supra* note 6; see Bachman, *supra* note 2 (detailing how airlines' frequent flyer programs are significantly more lucrative than the provision of flight services).

248. See Bachman, *supra* note 2 (noting that while the true amount that banks and other third parties spend buying miles is not publicly disclosed, financial services organizations, like the Stifel Corporation, predict that airlines are selling points at three times their cost at redemption).

249. Wendover Productions, *supra* note 1.

will prevent the airline industry from subsidizing the provision of air travel with consumer deception.

*Ari Goldfine**

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