



STUDENT BORROWER
PROTECTION CENTER



Federal Aviation Administration, Department of Transportation Proposed Action Memorandum

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Invoking the DOT's UMC authority to promote competition in airline labor markets

I. Introduction

Some regional airlines are deploying traditional and de facto non-compete clauses in airline pilot contracts to restrict competitors' access to a scarce and essential group of workers—and then selectively waiving those clauses in an effort to steer pilots toward privileged partner airlines. By these airlines' own admission, the motive for doing so is to avoid having to compete in the tight labor market for airline pilots. For example, after filing several lawsuits to enforce pilot stay-or-pay agreements, Southern Airways CEO Stan Little, complaining that other airlines were luring away his pilots with signing bonuses and other benefits, explained that enforcing the stay-or-pay agreements “wouldn't be an issue at all” if “there weren't a pilot shortage.”¹

Several federal agencies have clear statutory authority to regulate the use of traditional and de facto non-compete agreements, including the Department of Transportation (“DOT”).² Under the Fair Aviation Act (FAA), the Department possesses the authority to regulate unfair methods of competition (“UMCs”) in the airline sector.³ This memorandum proposes that the DOT invoke its UMC authority to: (1) investigate airlines deploying traditional and de facto non-compete clauses in pilot contracts and order a halt to such behavior; and, subsequently, (2) promulgate, through notice and comment rulemaking, a regulation banning the use of traditional and certain de facto non-competes in all airline pilot employment arrangements.

II. Justification

Airlines frequently engage in widespread, exploitative, and unfair practices that threaten consumer protections, diminish competition, and hamper our economy and economic growth. Recognizing the danger that concentration and anticompetitive behavior pose, last year President Biden issued an executive order on Promoting Competition in the American Economy, directing the Department of Transportation to leverage its antitrust authorities to promulgate pro-competition regulations.⁴

Among those harmful practices are non-compete and de facto non-compete agreements, like stay-or-pay contracts or training repayment agreement provisions (“TRAPs”). Traditional non-compete agreements prohibit employees who leave their jobs from working elsewhere in the airline industry for a certain period of

¹ Dave Jamieson, HuffPost, *Southern Airways Express is Suing Former Pilots For Training Costs* (Aug. 3, 2023), available at: https://www.huffpost.com/entry/southern-airways-express-is-suing-former-pilots-for-training-costs_n_64cbe72ee4b01796c06b6af8?ncid=engmodushpimg00000004.

² For example, stay-or-pay contracts may be subject to the Consumer Financial Protection Act's prohibitions on unfair, deceptive, or abusive acts and practices in consumer financial products or services because of the debt obligations they create. Additionally, the Department of Health and Human Services may also have the authority to regulate such practices as part of its regulation of healthcare facilities that receive Medicare patients. 42 U.S.C. § 1395x(e)(9); *see also* 42 C.F.R. § 482.1(a)(1)(ii) (“The Secretary may impose additional requirements if they are found necessary in the interest of the health and safety of the individuals who are furnished services in hospitals.”); *see generally* American Economic Liberties Project (AELP) letter to White House Competition Council, (May 30, 2023), <http://www.economicliberties.us/wp-content/uploads/2023/05/2022-05-30-Competition-Council-Noncompetes-Letter.pdf> (outlining various authorities that agencies may have to regulation non-compete agreements).

³ 49 U.S.C. § 41712.

⁴ Executive Order on Promoting Competition in the American Economy Sec. 5(m) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

time and within a certain geographic area. As the Biden Administration and state lawmakers crack down on traditional non-compete agreements, employers are increasingly relying on new, nefarious contract provisions: stay-or-pay contracts and closely-related TRAPs.

These contracts operate as de facto non-compete agreements,⁵ and often seek to achieve the same outcome as traditional non-compete agreements through different means. Typically presented as a precondition to employment, stay-or-pay contracts require departing employees to pay their employer liquidated damages, sometimes in the tens of thousands of dollars, if they leave their job within a certain period of time, and can include a host of other financial penalties. TRAPs frame such damages as debt incurred for obligatory and standard on-the-job training.

Some airlines use traditional and de facto noncompetes to restrict pilots from leaving unsafe or under-compensated jobs. For example, pilots at Southern Airways have reported management pressuring new pilots to fly in poor weather conditions and discouraging employees from reporting maintenance and safety issues.⁶ In their counter lawsuits against Southern's TRAP enforcement action, pilots allege that Southern used the TRAPs they signed at the beginning of their employment to "intimidate" them into "staying in jobs they are desperate to leave."⁷

While traditional noncompetes are not prevalent among all airlines,⁸ certain smaller airlines, and especially regional airlines, do use them.⁹ Notably, the Teamsters, representing pilots who have flown for Republic Air and Cape Air, are currently suing over contract provisions that include a one-year non-compete clause.¹⁰

De facto non-compete clauses, including stay-or-pay contracts, are more commonplace in the airline industry, especially among smaller or regional airlines. (Regional airlines, like Republic and Cape, often operate outsourced flights branded on behalf of major U.S. airlines, such as American Eagle, Delta Connection, and United Express. Regional airlines are ubiquitous in certain routes, airports, and even regions of the country. In fact, according to the Regional Airline Association, in 2021, 67% of all U.S. airports with scheduled passenger air service received their only service from regional airlines.¹¹) For example:¹²

- This year, Southern Airways, a Florida-based commuter airline, filed at least 80 complaints against former pilots to enforce training stay-or-pay contracts of up to \$20,000 (which was reduced based on how much they worked as captains before leaving).¹³

⁵ Zoe Salzman, Liquidated Damages Clauses in Employment Agreements, https://www.americanbar.org/content/dam/aba/publications/aba_journal_of_labor_employment_law/v34/number-2/liquidated-damages-clauses.pdf (comparing liquidated damages clauses to non-compete agreements in their effects of preventing worker mobility).

⁶ Dave Jamieson, *These Pilots Were Sued For Quitting. They Say It Was Dangerous To Stay*, Huffington Post (Oct. 6, 2023), available at: https://www.huffpost.com/entry/southern-airways-express-pilots_n_651ee853e4b0bfc227bf9b9d?jle.

⁷ *Id.*

⁸ AELP Letter, *supra* note 2, *2–3.

⁹ For example PSA Airlines, a subsidiary of American Airlines, has included a non-compete provision in a pilot employment contract that barred PSA pilots from working at competing commercial airlines, stipulating that "it would be impossible for [the employee] to perform services for another commercial air carrier which [sic] competes with PSA without accessing, using, or disclosing PSA's Confidential Information. Available at: https://www.reddit.com/r/flying/comments/nnzhhx/airline_cjo_with_noncompete_clause/.

¹⁰ Joe Kunzler, Simple Flying, *Teamsters File Legal Action Against Republic Airways & Cape Air* (June 13, 2023), available at: <https://simpleflying.com/teamsters-legal-action-republic-airways-cape-air/#:~:text=The%20Teamsters%20union%20representing%20pilots,first%20three%20years%20of%20employment>

¹¹ RAA Annual Report (2021), <https://www.raa.org/content-hub/raa-annual-reports/raa-2022-annual-report/> *14.

¹² Student Borrower Protection Center, DOT TRAP Letter (January 30, 2023), <https://protectborrowers.org/wp-content/uploads/2023/01/1.30.2023-DOT-TRAP-Letter.pdf>.

¹³ Jamieson, *supra* note 1; *see also Southern Airways v. Ryan*, Case No. 50-2023-sc-01947-xxxx-mb (County Court of the 15th Cir. Palm Beach County, Florida) (counterclaim) (filed September 8, 2023); Jamieson, *supra* note 6.

- In May, Republic Airways announced new pilot contracts requiring pilots to pay a \$100,000 penalty if they leave the airline within three years,¹⁴ a provision which the Teamsters are challenging in court.¹⁵
- Ameriflight required its pilots to sign stay-or-pay agreements that could result in penalties of up to \$30,000 for training debts, depending on the training package offered.¹⁶ In one particular case, Ameriflight attempted to enforce a stay-or-pay contract which resulted in a \$20,000 training debt for a pilot who left before completing 12 months of “revenue flying” with the airline.¹⁷ The training debt would decrease by \$10,000 after 12 months and be discharged after 18 months.¹⁸
- Boutique Air, a commuter airline that offers charter services, has pursued a suit against a former pilot to enforce a stay-or-pay agreement requiring the pilot to pay \$13,500 for the required training offered by the airline after he resigned about 3 months into his contract.¹⁹ The contract the pilot signed puts pilots on the hook for up to \$14,000 in training costs if they leave within 180 days of employment, and that amount incrementally decreases until it is excused after 24 months.²⁰
- Executive Fliteways, a New York-based charter flight company, has defended its stay-or-pay contract which, in one instance, included a penalty of \$18,000 plus interest.²¹
- Pilots sued Mesa Airlines, a regional airline based in Phoenix, Arizona, in 2017 over its stay-or-pay contract provision and pay scheme. Mesa Airlines required pilots to complete training and enter into a promissory note with the employer that required employees to pay the employer back for the required training if the employee quit or was fired from the company within 12 months. In one suit, a pilot purportedly owed Mesa Airlines \$12,712 for the required training, \$2,112 of which was outstanding when he left the company after 10 months. Because of this, the plaintiff pilot alleged, Mesa Airlines did not pay the pilot any wages for his final pay period, withholding about \$1,000 in wages earned.²²

Airlines appear to be imposing these clauses to avoid competing on even footing in the labor market for pilots. As noted above, Southern Airways CEO Little has admitted that his company’s use of stay-or-pay agreements stemmed from concerns that competitors were attempting to attract Southern pilots with higher salaries and larger bonuses.²³ Tellingly, in recent pre-employment contracts Republic Airways has promised to waive its non-compete clause when pilots take a new job at one of three specific major airlines: American, Delta, or United—all partners that supply all of Republic Airlines’ routes.²⁴ Because entry and mid-career pilots often must complete a certain number of training hours on smaller craft, more prevalent among regional airlines, before becoming eligible to fly at major carriers, the effect of Republic’s non-compete and waiver scheme is to artificially deprive American, Delta, and United competitors of accessing a vital labor market on equal terms. Similarly, according to a recent complaint, Southern Airlines, pursuant to an

¹⁴ Channing Reid, Simple Flying, *Republic Airways To Issue \$100,000 Fine If Pilots Quit Within First Three Years* (May 9, 2023), available at: <https://simpleflying.com/republic-airways-100000-fine-pilots-quit/>.

¹⁵ See Kunzler, *supra* note 10.

¹⁶ *Id.*, *2.

¹⁷ *Id.*, see also Ameriflight TRAP (2021), available at <https://protectborrowers.org/wp-content/uploads/2022/12/Ameriflight-TRAP.pdf>.

¹⁸ *Id.*

¹⁹ *Boutique Air, Inc. v. Sticka*, Case No. CGC-20-585536 (S.F. Sup. Ct. May 22, 2020), Complaint, 3. The case has since been dismissed, since Boutique failed to properly serve the pilot-defendant. Request for Dismissal Case No. CGC-20-585536 (S.F. Sup. Ct. Dec. 3, 2020).

²⁰ *Id.*

²¹ *Executive Fliteways, Inc. v. Caballero*, 2007 N.Y. Slip Op. 32579 (N.Y. Sup. Ct. 2007).

²² *Schipor v. Mesa Airlines, Inc.*, Case No. 2:17-cv-04044-JJT (D. Arizona), Complaint, available at: <https://storage.courtlistener.com/recap/gov.uscourts.azd.1062825/gov.uscourts.azd.1062825.1.0.pdf>

²³ See Jamieson, *supra* note 1.

²⁴ *International Brotherhood of Teamsters, et. al. v. Republic Airways Inc., et. al.*, Case No.: 1:2023cv00995 (S. D. Indiana June 8, 2023), Complaint, Exhibit 3, at *5.

agreement with North America’s largest regional airline, SkyWest Airlines, leverages TRAPs to encourage pilots to seek subsequent employment at SkyWest rather than competitors.²⁵

Traditional and de facto noncompetes not only harm competition, but they also pose safety risks for both employees and travelers. When pilots are forced to stay in dangerous working conditions because of restraints on their employment, they are discouraged from reporting safety concerns or seeking employment elsewhere. In the Southern Airways complaint, pilots allege that Southern “require[s] pilots to fly planes with obvious mechanical issues, fail[s] to invest appropriate resources in repairs, pressure[s] pilots to fly in dangerous weather conditions, schedule[s] pilots to work long days with little sleep, and seek[s] to implement policies that punish pilots who are too fatigued to fly.”²⁶ And as the FAA has recognized, safety and adequate pilot training in regional airlines — where stay-or-pay contracts, TRAPs, and noncompetes are most prevalent — has been a concern in recent years.²⁷

The FTC recently proposed a rule that would ban many non-compete clauses in employment contracts; however, the rule does not reach airline workers. The FTC Act exempts certain employers from its authority, including common carriers and air carriers.²⁸ Unionization efforts have given many airline employees the bargaining power to eliminate traditional and de facto noncompetes. But not all airline employees are unionized,²⁹ and even those that are, like at Republic Airways, sometimes still confront traditional and de facto non-compete clauses.

III. Current State

The DOT’s unfair or deceptive practices (“UDP”) and UMC investigative and rulemaking authority originate from Section 411 of the Federal Aviation Act of 1958, which granted the nation’s original airline regulator, the Civil Aeronautics Board (“CAB”), authority to:

“upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, ... investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof.”³⁰

In 1984, Congress transferred the CAB’s competition authority to the DOT,³¹ which as a result now possesses the authority at 49 U.S.C. § 41712 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 transportation.”³² Under the DOT’s investigative UMC authority, the air carrier or other regulated entity has a right to notice and an opportunity for a hearing before the Secretary orders the air carrier to stop the practice or method.³³ Courts have held that the DOT can start such an investigation on its own motion or through complaints.³⁴ The Department also possesses the authority to

²⁵ *Southern Airways v. Ryan*, *supra* note 13, at *17–18.

²⁶ *Id.*, at * 9.

²⁷ See, e.g., Pete Muntean, CNN, *Exclusive: American Airlines’ largest regional carrier gets FAA warning* (May 19, 2021), available at: <https://www.cnn.com/2021/05/19/business/american-airlines-envoy-air/index.html>.

²⁸ 15 U.S.C.A. § 45 (a)(2).

²⁹ Michael Sainato, Guardian, *Delta flights attendants race to unionize: ‘We’re the people behind the profits’* (2022), available at: <https://www.theguardian.com/business/2022/aug/03/delta-flights-attendants-union-push> (“Only about 20% of the workforce at Delta is represented by a labor union, consisting of pilots and dispatchers, compared with 86% of the workforce at American Airlines, 85% at United, 82% at Southwest, 86% at Alaska and 48% at JetBlue.”)

³⁰ Section 411, Public Law 85-726.

³¹ Civil Aeronautics Board Sunset Act of 1984, H.R.5297 (98th Congress).

³² 49 U.S.C.A. § 41712(a).

³³ *Id.*

³⁴ *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc.*, C.A.2 (N.Y.1968), 393 F.2d 441, *certiorari denied* 393 U.S. 846.

“take action...[it] considers necessary to carry out this part . . . including . . . prescribing regulations.”³⁵ Taken together, these statutory provisions therefore also grant the Department the ability to regulate UDPs and UMCs through notice-and-comment rulemaking.

On the adjudicative front, as a 2020 GAO report specified, the DOT (and before it, the CAB) has long relied on a variety of cooperative and enforcement actions, including warning letters and consent orders (in the case of systemic or egregious violations).³⁶ Before issuing its 1965 overbooking and oversales rulemaking (see below), the CAB first launched investigations to assess the issue of “no-show” passengers but found that the problem arose out of airlines’ overbooking behaviors and, upon concluding such practices harmed consumers, ordered airlines to submit documentation of their overbooking compensation and notification policies.³⁷ More recently, the DOT has relied on violations of specific rules to order airlines to stop UMC violations. For example, in 2016, citing both UDP and UMC authority, the DOT ordered Lufthansa to cease and desist from violating 14 CFR 382.155(d), which requires carriers to advise passengers of their right to enforcement action with the Department, assessing a \$200,000 civil penalty.³⁸ In 2012, the DOT issued a consent order against Allegiant Air partly for violating 14 CFR 399.84 (the full-fare advertisement requirements) and the statutory prohibition of UDPs and UMCs under 49 U.S.C. 41712.³⁹

Under its Section 411 rulemaking authority, the CAB promulgated several rules during its existence on both UDP and UMC grounds. For example, the CAB promulgated a 1965 rule that regulated airlines’ use of oversales, including consumer notification requirements.⁴⁰ The CAB also introduced many rules regulating computer reservation systems, which airlines used to gain market power by hiding fees or excluding other airlines.⁴¹ Since inheriting the CAB’s UDP and UMC authority, the DOT has promulgated several rules under Section 41712, including the tarmac delay rule,⁴² the full-fare advertising rule,⁴³ and the prohibition on

³⁵ 49 U.S.C. § 40113(a) (“this part” references Part A of Title 49, Subtitle VII—DOT’s UDP and UMC authority resides under Part A as well).

³⁶ GAO-21-109, Aviation Consumer Protection, *12, <https://www.gao.gov/assets/gao-21-109.pdf>.

³⁷ See Domestic Trunkline No-Show Compensation/Denied Boarding Plan & Overbooking Practices of Trunkline Carriers, Order E-20859, CAB (May 25, 1964) (“Evaluation of the statistics compiled from carrier reports, during the period the plan was in effect, indicates that a substantial portion of the no-show problem is internal rather than passenger-created.” *Id.* at *2. “We do not propose, at this time, to take further procedural steps in the Overbooking Practices of Trunkline Carriers Investigation, Docket 11683, but we shall consider, in a separate rule making proceeding, the issuance of a rule prescribing the minimum obligation of the carriers to give notice to passengers of an overbooked condition at a reasonably practicable time prior to scheduled flight departure... Additionally, we expect all carrier parties to adopt, in the immediate future, appropriate procedures designed to fully inform the traveling public of the provisions of the denied boarding compensation tariff...” *Id.* at *3). ; see also 30 FR 13236 (Oct. 16, 1965) (“Evidence submitted by the carriers in the Overbooking Practices of Trunkline Carriers’ investigation, Docket 11683, and information received thereafter indicate that in each of the years 1963 and 1964 approximately 50,000 passengers with tickets for confirmed reserved space have been denied boarding... As announced in the Overbooking case, Order E-20859, May 25, 1964, a rule making proceeding will be instituted to prescribe minimum obligations of carriers to provide the notice...”).

³⁸ *Lufthansa German Airlines*, 2016 WL 11543292.

³⁹ *Allegiant Air, LLC* Violations of 14 CFR Parts 382 and 399, and 49 U.S.C. Sections 41705, 41702 and 41712, 2012 WL 1048405, at *3.

⁴⁰ Passenger Priorities and Overbooked Flights NPRM, 30 FR 13236 (Oct. 16, 1965).

⁴¹ Jonathan Edelman, *Reviving Antitrust Enforcement in Airline Industry*, 120 Mich. L. Rev. 125, 142, available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=7838&context=mlr> (2021). The CAB concluded that, computer reservation system “providers have the power to force competitors to abandon their competitive marketing strategy for reasons unrelated to its merits.” 49 FR 63, 12675 (March 30, 1984). Many of the rules have since been allowed to expire after pressure from industry groups, changing ownership of CRS’s and the expansion of the internet as a main conduit for ticket sales, Edelman, *id.* at 143.

⁴² 86 FR 83, 23260 (May 3, 2021) (partly relying on DOT’s UDP authority), codified in 14 C. FR 259.4.

⁴³ 76 FR 79, 23110 (April 25, 2011) (partly relying on DOT’s UDP authority and partly relying on DOT’s UMC authority to explicitly extend the price advertising rule to ticket agents, *id.* at 23143), codified at 14 C. FR 399.84(a).

post-purchase price increases.⁴⁴ It has also issued sub-regulatory guidance predicated on its UMC authority, for example, concerning its enforcement priorities regarding predatory pricing in the 1990s.⁴⁵

During the Trump Administration, the DOT sought to put in place new administrative hurdles to UDP rulemaking,⁴⁶ including adding an opportunity for interested parties to request hearings.⁴⁷ The Biden Administration has since simplified these administrative procedures, including limiting hearings to specific issues.⁴⁸ However, the procedural requirements apply only to UDP rules under 49 U.S.C. § 41712(a), not the DOT's authority to regulate or restrict UMCs (the subject of this memo).

IV. Proposed Action

The DOT should first launch an investigation under its UMC authority to consider whether to prohibit the specific airlines imposing traditional and de facto non-compete clauses on pilots from doing so; subsequently, the agency should promulgate notice-and-comment rulemaking banning noncompetes and certain de facto noncompetes in pilot contracts at all airlines.

A. Scope of UMC Authority

Under Section 41712, the DOT is charged with “investigat[ing] and decid[ing] whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in... an unfair method of competition in air transportation or the sale of air transportation.”⁴⁹ As explained above, Section 41712 is modeled after the FTC Act and therefore covers at least the scope of behaviors found to be UMCs under the FTC framework, if not more.⁵⁰

The text of both FTCA Section 5 and Section 41712 are nearly identical in their prohibition of unfair methods of competition.⁵¹ In its recent 2023 proposed rulemaking on non-compete clauses, the FTC has described its section 5 UMC authority as encompassing not only “all practices that violate either the Sherman or Clayton Acts[.]” but also “incipient violations of the antitrust laws—conduct that, if left unrestrained, would

⁴⁴ *Id.* (partly relying on DOT's UDP authority), codified at 14 CFR 399.88(a).

⁴⁵ Enforcement Policy Regarding Unfair Exclusionary Conduct in the Air Transportation Industry, 63 FR 17919 (1998). While that policy guidance was subsequently rescinded, that was due to political controversy—not doubt about the agency's UMC authority. Edelman, *supra* note 41, at 145.

⁴⁶ The 2020 rule defined “unfair” and “deceptive” adopting the FTC definitions and underscoring the DOT's exclusive authority to prohibit these practices of air carriers. 85 FR 78707, 78717 (December 7, 2020). The rule defined a practice to be unfair if it “causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition. *Id.* The rule defined a practice as being deceptive if it “is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service.” *Id.*

⁴⁷ *Id.*

⁴⁸ 87 FR 22, 5655 (Feb. 2, 2022).

⁴⁹ 49 U.S.C.A. §41712.

⁵⁰ See e.g., Edelman, *supra* note 41, at 140, citing *United Air Lines*, at 1109-10. (“Posner's 1985 opinion approving the broader reach of section 411 predated the 1994 amendment to the FTC Act, and the breadth of section 411 has not been litigated since. But general statutory-interpretation principles suggest that section 411 is broader than the amended section 5. The textual canon of *in pari materia* (statutes addressing the same subject should be interpreted together) applies: because Congress included express limits on the conduct captured by section 5, the lack of express limits on section 411 should mean that those limits do not apply. Further, the fact that Congress passed legislation limiting section 5 without corresponding legislation to limit section 411 could reflect intent to keep the DOT's section 411 powers broad.”)

⁵¹ Compare Section 41712, which allows the DOT Secretary to investigate and stop “an unfair or deceptive practice or unfair method of competition,” and Section 5 of the FTCA, which allows the FTC Commission to prevent regulated entities “. . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” 49 U.S.C.A. § 41712, 15 U.S.C.A. § 45.

grow into an antitrust violation in the foreseeable future.”⁵² Similarly, the DOT has defined its UMC rulemaking authority as encompassing practices: (1) that violate the antitrust laws; (2) that are not yet serious enough to violate the antitrust laws but may well do so if left unchecked; or (3) that violate antitrust principles even if they do not violate the letter of the antitrust laws.⁵³ Finally, if the FTC can prohibit conventional non-compete agreements (and presumably close cousin arrangements like stay-or-pay contracts), then so must the DOT. After all, the DOT’s UMC authority was intended to, at minimum, reach the same methods of unfair competition.⁵⁴

Judge Posner reached a similar conclusion in the leading judicial opinion concerning the scope of Section 411’s UMC authority, *United Air Lines, Inc. v. C.A.B.*⁵⁵ There, he upheld three Computer Reservation System (“CRS”) rules, two of which — rules prohibiting price discrimination and the delisting of certain connecting flights by competitors — the CAB exclusively justified on competition grounds. Posner concluded that despite no evidence of monopolization, the airlines’ “substantial market power” in the CRS market and the fact their behavior closely tracked “traditional” kinds of unlawfully anticompetitive activity justified the CAB’s rules under what he characterized as Section 411’s “broad reach.”⁵⁶ Importantly, Posner’s opinion underscored that Section 411 does not require a showing of “monopoly market share[,]” but merely “monopolistic behavior” that resembles conduct that has previously been regarded as anticompetitive.⁵⁷

The DOT relied solely on its UMC authority in its 1997 CRS Rule regulating so-called “parity clauses.” At the time, computer reservation systems operated on a tiered service system.⁵⁸ When airlines subscribed to higher, and more expensive, tiers on a system, ticket agents using that system would see more information about the airline’s flight offerings, increasing the likelihood of a booking.⁵⁹ Because ticket agencies typically only used one of the four existing reservation systems (all owned by a major airline or an affiliate), airlines effectively had to subscribe to every agency to ensure their flight information reached the maximum number of

⁵² 88 FR 12, 3499 (Jan. 19, 2023), citing *Fed. Trade Comm’n v. Cement Inst.*, 333 U.S. 683, 693 (1948) (holding practices that violate the Sherman Act are unfair methods of competition); *Fashion Originators’ Guild of Am. v. Fed. Trade Comm’n*, 312 U.S. 457, 464 (1941) (holding practices that violate the Clayton Act are unfair methods of competition); *Fed. Trade Comm’n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) (“The ‘Unfair methods of competition’, which are condemned by [Section] 5(a) of the [FTC] Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.”) (internal citations omitted); and *Cement Inst.*, 333 U.S. at 708 (“A major purpose of [the FTC] Act was to enable the Commission to restrain practices as ‘unfair’ which, although not yet having grown into Sherman Act dimensions would most likely do so if left unrestrained.”); *Fashion Originators’ Guild*, 312 U.S. at 466; *Triangle Conduit & Cable Co. v. Fed. Trade Comm’n*, 168 F.2d 175, 176 (7th Cir. 1948).

⁵³ *Delta Air Lines, Inc.*, Order No. 2004-6-17, DOT-OST-1998-4776-0009 (U.S. Dep’t of Transp. June 21, 2004), <https://www.transportation.gov/sites/dot.gov/files/docs/2004-617.pdf> [perma.cc/G3MR-YAL5].

⁵⁴ See generally *supra* note 50.

⁵⁵ 766 F.2d 1107 (7th Cir. 1985).

⁵⁶ *United Air Lines* at 1113–14.

⁵⁷ *Id.* at 1114. *United Air Lines* seems to imply that practices prohibited by UMC rulemaking must be exercised by entities that enjoy some modicum of market power, although it also suggests that it was appropriate to assess market power at fairly specific units of analysis, for example individual cities or even city pair routes. *Id.* at 1115 (“The record shows that in cities like Denver, where United accounts for a very large fraction of departing and arriving flights, United is able to persuade most travel agents (72 percent, weighted by revenue) to subscribe to its computerized reservation system. This in turn makes a listing in that system a must for airlines that want to compete in Denver, and so enables United to charge a high price for a listing, thereby impeding (no one knows by how much) the growth of competing airlines in the Denver market”). However, the oblique nature of market power language in the opinion, the conspicuous dearth of similar assertions from the current FTC or (as far as we are aware) the DOT, and of course the total absence of an express market share requirement in the statutory text, leave open questions about whether or to what degree a market power showing is required for the DOT to properly invoke its UMC powers. In this case, as noted below, see *infra* at IV. C(b), even if such a showing is required, the airlines deploying traditional and de facto noncompetes enjoy a sizable share of the labor market for entry level and mid-career pilots.

⁵⁸ 62 Fed. Reg. 59784, 59785 (Nov. 5, 1997).

⁵⁹ *Ibid.*

consumers.⁶⁰ But the tiered model at least allowed an airline to decide how much to invest in each system. Three of the four CRSs began imposing parity clauses to instead require that airlines match, on their own system, whatever the highest tier of service they subscribed to on any other platform.⁶¹

Noting that each reservation system enjoyed significant market power, the Rule concluded that the parity clauses resembled traditional antitrust violations — including tying arrangements and violations of the essential facilities doctrine — and constituted attempts to monopolize the electronic distribution of airline services to travel agencies.⁶² In describing the competitive harms it sought to curb, the DOT pointed to its finding that parity clauses diminished competition among CRS systems, stymying the CRS systems from meeting airline service needs and creating other inefficiencies.⁶³ Finally, the DOT referenced *Eastman Kodak Co. v Image Technical Services*, 504 U.S. 451 (1992) to define market power, finding that market power is the power to “force a purchaser to do something that he would not do in a competitive market.”⁶⁴ The DOT reasoned that CRS systems’ market power was analogous because “there [was] no evidence that an airline would accept an obligation like the parity clause in a competitive market.”⁶⁵

B. *The DOT should investigate and prohibit traditional and de facto noncompetes as UMC violations*

The DOT should first launch an investigation into the use of de facto and traditional noncompetes in airline pilot contracts. Doing so would comfortably fall within the “broad reach” of the Department’s UMC authority.⁶⁶ Like the adjudicative and investigatory history of the overbooking and oversales rules described above, the DOT can first launch an investigation into traditional and de facto noncompetes before issuing rulemaking. Both traditional and de facto non-compete agreements violate longstanding antitrust principles, and so are appropriate objects of UMC attention according both to the Department’s own articulation of its UMC powers and Judge Posner’s in *United Air Lines*.

Traditional and de facto non-compete agreements effectively function as restraints on trade within the labor market. As the 7th Circuit recognized in a 1985 case, “[a] covenant not to compete following employment does not operate any differently from a horizontal market division among competitors—not at the time the covenant has its bite, anyway.”⁶⁷ The FTC, the nation’s foremost antitrust authority, has a lengthy history of policing agreements not to compete between would-be competitors,⁶⁸ including agreements that require enforcing non-compete agreements.⁶⁹

⁶⁰ *Id.* at 59784.

⁶¹ *Ibid.*

⁶² *Id.* at 59793.

⁶³ “Because of the parity clauses, the systems need not compete on price and service quality to obtain higher-level participation by airlines... [in contrast] In a competitive market, each system would compete to obtain higher levels of participation by airlines, in order to make the system more attractive to the travel agencies doing business in regions where those airlines have a significant market share.” *Id.* at 59790; “In addition, the Justice Department states that the parity clauses have kept the systems from working with airlines to create levels of service that will meet their needs.” *Id.*

⁶⁴ 62 FR 59789.

⁶⁵ *Id.*

⁶⁶ *United Air Lines* at 1114.

⁶⁷ *Polk Bros. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985)

⁶⁸ See e.g. *In the Matter of FMC Corporation and Asahi Chemical Industry Co., Ltd.*, FTC (June 21, 2002), available at: <https://www.ftc.gov/legal-library/browse/cases-proceedings/981-0237-fmc-corporation-asahi-chemical-industry-co-ltd>.

⁶⁹ *In the Matter of American Renal Associates, Inc., a corporation, and Fresenius Medical Care Holdings, Inc., a corporation*, FTC (October 23, 2007), available at: <https://www.ftc.gov/legal-library/browse/cases-proceedings/0510234-american-renal-associates-inc-corporation-fresenius-medical-care-holdings-inc-corporation>. (The FTC settled charges involving two dialysis clinic operators, wherein operator A would buy out operator B’s clinics in operator A’s regional market and force some of operator B’s clinics in the market to close. The agreement also required operator B would enforce its non-compete clauses with its medical directors at the closing clinics to prevent them from joining any new entrants to the market. The anticompetitive effects cited in the FTC’s complaint included “eliminating actual, direct, and substantial competition between [operator A] and

Non-compete and stay-or-pay agreements also resemble exclusive dealing contracts, another type of suspect trade restraint under the antitrust statutes. For example, in a landmark 1953 decision, the Supreme Court upheld the FTC’s decision to invalidate exclusive dealing agreements between movie theaters and Motion Picture Advertising Services (“MPAS”).⁷⁰ MPAS produced commercials for clients, which it then paid individual movie theaters to advertise to patrons. MPAS arranged exclusive dealing agreements with theaters, preventing these theaters from selling advertising space to any MPAS competitor.⁷¹ In all, “MPAS and the three other major companies . . . foreclosed to competitors 75 percent of all available outlets (theaters) for this business throughout the United States.”⁷² This unfairly foreclosed the market of motion picture theaters for any newcomers or competitors in the industry, thereby “unreasonably restraining competition and tend[ing] to monopoly.”⁷³ The exclusive dealing arrangement, the Court explained, “sewed up a market so tightly for the benefit of a few,” thereby constraining competitors’ and start-ups’ ability to enter and constituting an “unfair method of competition.”⁷⁴ The opinion followed earlier circuit court decisions reaching similar conclusions in other exclusive dealing cases.⁷⁵

As the FTC demonstrated in proposing its own prohibition on noncompetes,⁷⁶ the harmful effects of non-compete agreements, which reduce competitors’ access to talent, closely track those of exclusive dealing arrangements described above, by: reducing new business formation (in this case, airlines) by depriving new entrants of essential start-up talent (here, pilots);⁷⁷ reducing innovation;⁷⁸ artificially depressing wages;⁷⁹ and reducing workplace productivity due to job-employee mismatch.⁸⁰ Further, because of the airline industry’s stark concentration,⁸¹ non-compete and stay-or-pay agreements — like CRSs, an essential and scarce requirement for the business of flying — may have heightened anticompetitive effects.

An investigation will likely demonstrate that a fear of competition appears to be motivating the inclusion of traditional and de facto non-compete agreements in pilot contracts. In justifying his airline’s lawsuits against departing pilots to collect on stay-or-pay damages, Southern Airways Express CEO Stan Little explained that signing bonuses and other competitive offers had lured away his pilots.⁸² Little noted, “if there weren’t a pilot shortage, this wouldn’t be an issue at all.”⁸³ Note that even in Little’s own description of the practice, stay-or-pay contracts function as a restraint on competition. And as noted above, Little’s airline appears to be using its restrictive agreements to subsequently funnel pilots to a privileged partner.⁸⁴ Similarly, Republic

[operator B]; . . . increasing the ability of [operator A] to unilaterally raise prices; and . . . reducing [operator A’s] incentives to improve service or quality.”)

⁷⁰ *Fed. Trade Comm’n v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392 (1953).

⁷¹ *Id.* at 393.

⁷² *Id.* at 394.

⁷³ *Id.* at 395.

⁷⁴ *Id.*

⁷⁵ *See, e.g.*, the 8th Circuit upheld an FTC decision invalidating exclusive dealing arrangements between a carburetor producing company and service stations because it foreclosed a competing carburetor company from accessing the market of service stations, thereby preventing competition from new and existing producer entrants to the carburetor market. *Carter Carburetor Corp. v. Fed. Trade Comm’n*, 112 F.2d 722, 735 (8th Cir. 1940); 1925: The 2nd Circuit upheld an FTC decision invalidating a clothing manufacturer’s arrangement with distributors that required both exclusive dealing and RPM (see below). *Butterick Co. v. Fed. Trade Comm’n*, 4 F.2d 910, 911 (2d Cir. 1925).

⁷⁶ 88 FR 3490.

⁷⁷ 88 FR 3491.

⁷⁸ 88 FR 3492.

⁷⁹ 88 FR 3485.

⁸⁰ 88 FR 3485.

⁸¹ *See generally* Edelman, *supra* note 41, 131–135.

⁸² Jamieson, *supra* note 1.

⁸³ *Id.*

⁸⁴ *See* note 25.

Airlines has included a waiver provision in its non-compete clause for pilots that effectively hoards scarce pilot talent for United, Delta, and American at the expense of their competitors.⁸⁵

Assuming the fact-finding record mirrors the data included in this memo, the DOT could use the above legal analysis to justify an order prohibiting the airlines from using traditional and certain de facto non-compete agreements in pilot agreements from doing so. The information gathered as part of this process would also bolster the record for eventually banning the practice through rulemaking.

C. *The DOT should promulgate a ban on traditional and certain de facto noncompetes through notice-and-comment rulemaking*

a. The DOT's power to issue notice-and-comment UMC rules

Whether the Department can exercise its UMC or UDP authority using notice-and-comment rulemaking, as opposed to merely via adjudication, is no longer in doubt. Under Section 40113(a), the Secretary of Transportation has the authority to “take action...as appropriate, [if it] considers [it] necessary to *carry out this part*, including conducting investigations, *prescribing regulations*, standards, and procedures, and issuing orders.”⁸⁶ The Department's UMC and UDP authority, located at 49 U.S.C. § 41712(a) (originally, Section 411 of the FAA), falls under that relevant part within the U.S. Code—Part A of Title 49, Subtitle VII.

Suggestions that Section 41712's delineation of investigatory procedures somehow implicitly disclaims agency UMC or UDP rulemaking were rebuffed by Judge Posner in *United Air Lines*. There, he found that the Board was authorized to promulgate rules addressing unfair methods of competition practices which violated Section 411:

“[T]he Board can make only rules designed to carry out policies set forth elsewhere in the Act—in section 411, for example. Section 411 announces a policy against unfair or deceptive practices and unfair methods of competition, and while at the same time it creates an adjudicative procedure for enforcing that policy, nothing in the Act indicates that it is the exclusive procedure.”⁸⁷

Further, and as Judge Posner also notes in his opinion,⁸⁸ the legislative history demonstrates that Congress consciously intended to transfer UMC and UDP rulemaking power from the CAB to the DOT.⁸⁹

⁸⁵ See note 24.

⁸⁶ Emphasis added.

⁸⁷ *United Air Lines, Inc. v. C.A.B.*, 766 F.2d 1107, 1111 (7th Cir. 1985).

⁸⁸ *Id.*

⁸⁹ The CAB Sunset Act of 1984 was preceded by a period of deregulation in the airline industry, culminating in the termination of the CAB and transfer of certain competition and consumer protection functions to the DOT. See Edelman, *supra* note 41, at 130. And this transfer of authority was intentional. During the hearings on the Sunset Act, some argued that UDP and UMC rulemaking authority should be diverted to the FTC. Legislators instead opted to retain UDP and UMC authority within DOT in part to avoid some of the procedural hurdles involved in FTC rulemaking: “Some of the witnesses at the hearing suggested the problems of split jurisdiction could be avoided by giving all consumer protection and unfair competitive practice authority to FTC, rather than DOT. However, this solution would raise other problems, such as FTC's lack of familiarity with the subject matter, and the prolonged [UDP] rulemaking procedures which FTC is required to undertake under the Magnuson-Moss Act.” Civil Aeronautics Board Sunset Act of 1984, Comm. Rep. (May 1984), <https://babel.hathitrust.org/cgi/pt?id=ien.35556021349907&view=1up&seq=6>. In passing the Sunset Act, legislators emphasized the importance of the DOT retaining CAB's Section 411 rulemaking authority: “[t]he committee believes that after CAB Sunset there should continue to be authority in the federal government to protect consumers against unfair and deceptive practices. Although these regulations touch relatively limited areas of airline operations they furnish important protections for consumers and we do not wish to see these regulations end precipitously when CAB sunsets.” H.R. REP. 98-793, 4, 1984 U.S.C.A.N. 2857, 2860. Additionally, the committee found that there was also a “strong need to preserve the Board's authority under Section 411 to ensure fair competition in air transportation[.]” *Id.* at

Past agency practice affirms this interpretation. Both the CAB and the DOT have invoked their rulemaking powers under Section 41712 on numerous occasions since 1960.⁹⁰ In 1967, the CAB finalized an overbooking rule, then codified at 14 C.F.R. part 250, which guaranteed compensation to passengers who were denied boarding when they had confirmed reservations, relying, in part, on Section 411.⁹¹ In another example, in 1984, the CAB finalized a rule under Section 411 targeting the use of Carrier-Owned Computer Reservations Systems (CRS),⁹² which defined some CRS practices that the Board classified as “unfair methods of competition[.]”⁹³ The DOT has also promulgated several competition regulations, often relying on joint UDP and UMC authority. In 1997, the DOT added additional regulations on CRSs, using Section 411’s UMC and UDP authority: “We may adopt rules regulating CRS displays under both parts of the authority granted by 49 U.S.C. 41712, that is, in order to eliminate practices that prejudice airline competition and practices that are likely to mislead consumers and their travel agents.”⁹⁴ In 2016, the DOT promulgated a third “Enhancing Airline Passenger Protections” rule, which expanded the reporting carrier pool and required performance data for code-share flights marketed by reporting carriers, utilizing Section 41712’s “unfair and deceptive practices and unfair methods of competition” authority.⁹⁵ In 2018, the DOT promulgated a rule defining additional “unfair or deceptive practices or unfair methods of competition” for air charter brokers.⁹⁶

b. The DOT should begin rulemaking that bans the use of traditional and certain de facto noncompetes as unfair methods of competition

The DOT should invoke its UMC rulemaking authority to promulgate a rule prohibiting traditional and certain defacto noncompetes in pilot contracts at all airlines. The legal justification for doing so largely tracks the reasoning laid out in Section IV.B.⁹⁷

Finally, to the extent a showing of market power must precede any use of UMC rulemaking,⁹⁸ *United Air Lines* and past agency practice both underscore that market share assessments can be conducted at varying levels of specificity.⁹⁹ In the labor market for pilots, a proper unit of analysis may differentiate between pilot

2860–61. One of the Sunset Act’s primary objectives was to preserve the agency’s authority to regulate UDPs and UMCs. *Id.*

⁹⁰ See, e.g., *National Airlines, Inc., Enforcement Proceeding*, 31 C.A.B. 390, 392 (1960) (overbooking); 32 F.R. 160, 11921, 11939, Part 250–Priority Rules, Denied Boarding Compensation Tariffs and Reports of Unaccommodated Passengers (Aug. 18, 1967); 14 C.F.R. Part 253 (notice of passenger contract terms); 14 C.F.R. Part 254 (liability for lost luggage) 766 F.2d 1107, 1111.

⁹¹ 32 F.R. 160, at 11940.

⁹² CRSs are now superseded by the term Global Distribution Systems (GDS).

⁹³ 49 Fed. Reg. 60, 11644 (March 27, 1984).

⁹⁴ 62 FR 232, 63838 (Dec. 3, 1997).

⁹⁵ 81 FR 213, 76800 (Nov. 3, 2016).

⁹⁶ Increasing Charter Air Transportation Options, 83 FR 180, 46867 (September 17, 2018).

⁹⁷ See generally Section IV.B, *supra*.

⁹⁸ This remains unclear. See *supra* note 57.

⁹⁹ See *United Air Lines* at 1115; 49 FR 159, 32545 (“Because carrier demand for CRS services is essentially regional in nature, and because individual CRS’s are in many ways complements, rather than substitutes for one another, CRS competition in some areas has not worked to benefit of air carrier purchasers or CRS services. A carrier with a substantial number of flights serving an area has little choice but to purchase access to each CRS to which a major share of the travel agents in the region subscribe.”); 49 FR 32541-42 (“...Our judgment of what is unfair must be informed not only by general antitrust principles, but also by the policy considerations underlying the [FAA].”); 57 FR 184, 43783 (Sep. 22, 1992) (“Participation in each system is also important because, despite the low national market shares of the smaller systems, each system dominates some regional CRS markets...for example, a carrier seeking travelers at Chicago will be severely handicapped if it does not participate in Apollo and Sabre, since their subscribers make over 80 percent of the CRS bookings in that area.”); 67 FR 221, 69366 (Nov. 15, 2002) (CRS Proposed Rule) (“Other possible airline practices that would be covered...involve the use of an airline’s dominant position in some local markets either to maintain or increase that dominance or to distort competition in the area’s CRS market...Airlines can

certification ratings. For example, many entry-level to mid-career pilots join regional airlines to log the requisite flight hours that will qualify (or “rate”) them for more lucrative jobs at major airlines flying larger craft. Locking this segment of pilots into jobs at regional airlines through traditional and de facto noncompetes deprives other regional airlines of access to talent and deprives major airlines of accessing the traditional labor pipeline. These anticompetitive harms are compounded when regional airlines, like Republic and Southern,¹⁰⁰ selectively release pilots from the terms of their de facto non-compete clauses when pilots agree to take a job at a privileged partner airline. Given overall pilot shortages, it does not take many regional airlines deploying noncompetes to meaningfully interfere with the competitive dynamics of the airline industry. After all, planes cannot fly without pilots.

V. Conclusion

Regional airlines are deploying traditional and de facto non-compete clauses in airline pilot contracts to lock up access to a scarce and vital labor resource—and then selectively waiving those clauses in an effort to steer pilots toward privileged partner airlines. The DOT should use its UMC authority to investigate offender airlines and order a halt to these practices; ultimately, the agency should promulgate regulations prohibiting traditional and certain de facto noncompetes in pilot contracts at all airlines.

obtain a dominant position in some metropolitan area airline markets due to hub-and-spoke system used by all network airlines...The hubbing airline’s dominance of the local airline market, however, also enables it to force travel agencies to comply with its wishes.” Id at 69387-88.) (Final rule allowed many of the rules to sunset because it found that “...market forces are beginning to discipline business practice in the CRS industry.” 69 FR 4, 978 (Jan. 2, 2004).).

¹⁰⁰ See *supra* notes 24 and 25.