

BY THE U.S. GENERAL ACCOUNTING OFFICE

Report To The Chairman, Subcommittee On Investigations And Oversight, House Committee On Public Works And Transportation

Legislation Needed To Clarify Future Of Consumer Protection And Federal Preemption After The Civil Aeronautics Board Sunsets

The 1978 Airline Deregulation Act provides for the sunset (termination) of the Civil Aeronautics Board (CAB) on January 1, 1985. At the request of the Chairman, Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation, GAO reviewed the future of CAB's consumer protection functions and regulations upon CAB's sunset

GAO found that the act leaves uncertain the disposition of CAB's consumer protection functions and regulations as some functions will lapse and others may continue to exist but without an agency with authority to enforce them. Also, the act is unclear as to whether federal preemption, the prohibition which prevents states from regulating air carrier services, continues upon CAB's sunset.

GAO believes that legislation is needed to clarify the disposition of CAB's consumer protection functions and regulations and the status of federal preemption. Legislation was passed in the House in early June 1984 which accomplishes these objectives.



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RESOURCES COMMUNITY,
AND ECONOMIC DEVELOPMENT
DIVISION

B-213889

The Honorable Elliott H. Levitas
Chairman, Subcommittee on Investigations
and Oversight
Committee on Public Works and Transportation
House of Representatives

Dear Mr. Chairman:

In response to your request of December 15, 1983, we have reviewed the future of the Civil Aeronautics Board's (CAB's) consumer protection functions and regulations. On March 13, 1984, we testified on our preliminary findings before the Subcommittee on Aviation, House Committee on Public Works and Transportation. This report summarizes the results of our review, which formed the basis for our testimony. Overall, our work focused on the following issues:

- What will the future of CAB's consumer protection functions and regulations and federal preemption¹ of state action in these areas be after CAB "sunsets" (terminates)?
- Are the plans for transferring CAB's consumer protection functions and regulations at sunset complete?
- If legislation appears necessary to ensure an orderly transition for CAB's consumer protection functions and regulations, what areas should be encompassed in that legislation?

We also briefly discuss the extent to which legislation passed by the House in early June 1984 would resolve the problems we identified.

In conducting our review, we examined the relevant provisions of the Airline Deregulation Act (ADA) of 1978, the act's legislative history, and CAB's current consumer protection functions and regulations, including oversight of unfair trade practices and rules on smoking, baggage liability, and denied boarding compensation. Furthermore, we interviewed federal, state, airline, trade association, and consumer advocate officials.

¹The prohibition which prevents states from regulating air carrier services.

Appendix I provides detailed information on the results of our work. A list of the organizations we contacted during our review is included as appendix II. A copy of your request letter is included as appendix III.

On the basis of our analysis, we found that consumer protection for airline passengers is likely to decline after CAB sunsets. ADA does not address the future disposition of most of CAB's consumer protection functions and regulations, and the status of federal preemption which precludes states from regulating air carrier services remains unclear. We also found that the current plans for transferring CAB's consumer protection functions and regulations after sunset are incomplete. As a result, we believe legislation is needed to clarify the future of CAB's consumer protection functions and regulations and the status of federal preemption after sunset.

CONSUMER PROTECTION IS LIKELY TO DECLINE AFTER CAB SUNSETS

We found that the 1978 act, which established a schedule to phase out CAB's economic regulation of domestic air transportation, does not specifically address the future of CAB's consumer protection functions and regulations or of federal preemption upon sunset. In 1980, we reported to the Chairman, CAB, that the disposition of consumer protection functions and regulations was uncertain and recommended that CAB propose legislation to resolve the uncertainty.² CAB and the Department of Transportation (DOT) proposed bills in 1981 to both clarify the future of CAB's consumer protection functions and regulations and to sunset CAB earlier than the 1985 date set forth in ADA. Legislation was not enacted.

The lack of clarity in the disposition of much of CAB's consumer protection authority and regulations and in the future of federal preemption could well lead to an increase in expensive and unnecessary litigation and a reduction in consumer protection. If CAB sunsets under the current provisions of ADA, some functions will lapse, and others might continue to exist, but without an agency having the authority to enforce them. As a result, a decline in consumer protection is likely to occur. This situation could lead to increased litigation as consumers and airlines attempt to determine their respective rights and obligations. Thus, regardless of whether the Congress intends for CAB consumer protection functions and regulations to survive or sunset, allowing CAB to sunset under provisions of ADA appears to be the least efficient means for achieving either of these ends.

²The Civil Aeronautics Board Should Expand Its Sunset Planning
(CED-80-46, Jan. 4, 1980).

ADA contains a specific federal preemption section which prohibits states from regulating air carrier services under Title IV of the Federal Aviation Administration Act. However, most of Title IV will lapse when CAB sunsets. Thus, it is unclear whether federal preemption will continue to apply after CAB sunsets. If federal preemption continues, we believe further clarification of its scope would be useful with respect to what "services" are to be covered and the extent to which federal preemption applies to state enforcement of broad consumer protection statutes regarding consumer complaints arising from air transportation services.

PLANS FOR TRANSFERRING CONSUMER
PROTECTION FUNCTIONS AND REGULATIONS
UPON SUNSET ARE INCOMPLETE

Four agencies have some part in the disposition of consumer protection functions and regulations at sunset--CAB, the Department of Justice, DOT, and the Federal Trade Commission (FTC). DOT has prepared a sunset plan outlining its position on the disposition of CAB's consumer protection functions. CAB has documented its position in a report on deregulation required by ADA and in recent testimony before the Subcommittee on Aviation, House Committee on Public Works and Transportation. FTC and Justice have addressed some aspects of the issues surrounding sunset in recent testimony.

We reviewed DOT's plan and the positions of the other agencies, where applicable, with respect to four areas. In particular, we assessed whether the plan or position: (1) analyzes the continued relevance of consumer protection functions and regulations, (2) considers the need for legislation to ensure an orderly transfer, (3) explicitly addresses the disposition of each regulation and function, and (4) promotes coordination and avoids overlap among the agencies to which the functions and regulations are assigned.

We found that the current DOT plan and agency positions on the disposition of consumer protection functions and related regulations which CAB continues to administer are incomplete. Neither CAB, DOT, nor FTC have analyzed the continued relevance of these functions and regulations in a deregulated environment. Such an analysis would provide a basis for determining how to dispose of CAB consumer protection functions and regulations upon sunset.

With respect to DOT, while its plan does not specifically address the continued relevance of CAB's consumer protection functions, DOT in 1981 suggested transferring all functions intact to DOT with the intent to review, over time, their continued relevance in a deregulated environment. Recently, FTC officials said that if the functions were transferred to FTC, the Commission would review their continued relevance at that time.

We also found that CAB and FTC believe legislation is required to ensure an orderly transfer of CAB's consumer protection functions and regulations. DOT, on the other hand, did not see the need for legislation in its plan, believing that FTC will have the authority to administer CAB's consumer protection functions under its existing statutes.

Concerning the disposition of specific consumer protection functions and regulations, on the basis of its plan and recent testimony, DOT's position is not clear on the disposition of all of CAB's functions and regulations such as those related to discrimination against the handicapped, airline fitness reviews, and precertification ticket sales. CAB's position on the disposition of its various consumer protection functions is not clear, and FTC has not taken a position.

Finally, we found that DOT's plan which calls for dispersing the functions across several agencies does not promote coordination nor avoid overlap of functions among the receiving agencies. CAB favors placing functions which are to be continued in one agency, while FTC has not addressed how functions might be disposed of and what coordination may be required.

LEGISLATION NEEDED TO CLARIFY THE
FUTURE OF CAB'S CONSUMER PROTECTION
FUNCTIONS AND REGULATIONS AND THE
SCOPE OF FEDERAL PREEMPTION

On the basis of our recent analysis of the 1978 act, its legislative history, and the varied positions of the involved agencies, we believe that (1) legislation is needed to clarify the disposition of CAB's consumer protection functions and regulations and the status of federal preemption upon sunset and (2) the Congress might consider clarifying the scope of federal preemption, for example, clarifying whether or not preemption is meant to preclude states from enforcing broad consumer protection statutes regarding consumer complaints arising from air transportation.

Neither CAB, DOT, nor FTC has fully evaluated the continuing need for CAB's consumer protection functions and regulations. As such, while there are alternatives, we favor an approach where all of CAB's consumer protection functions and regulations would be transferred intact to another federal agency. And we believe that DOT may be in the best position to assume the full range of CAB's consumer protection responsibilities which ADA has left unclear. Assigning the functions and regulations to DOT would avoid fragmentation of responsibilities, which could create overlap or gaps and generally impair the effectiveness of consumer protection efforts.

We also believe legislation is necessary to continue federal preemption and avoid a proliferation of state laws affecting the airline industry. In early June 1984, a bill (H.R. 5297, 98th Cong.) was passed by the House to clarify the sunset provisions of the 1978 act. The bill would transfer all of CAB's consumer protection functions and regulations to DOT. In addition, the bill, while not addressing the scope of federal preemption, preserves the status of federal preemption as it is currently defined.

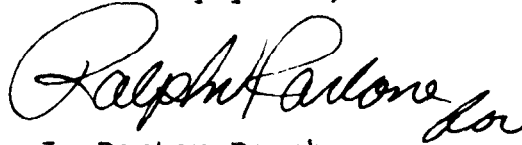
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At your request, we did not obtain agency comments on this report. However, the views of CAB, DOT, and FTC officials, which were based on our discussions with them and their recent testimony, have been incorporated.

We conducted our review in accordance with generally accepted government auditing standards, with the exception that agency comments were not obtained.

As arranged with your office, we plan no further distribution of this report until 7 days from the date of issue. At that time, copies of the report will be made available to interested parties upon request.

Sincerely yours,



J. Dexter Peach
Director



C o n t e n t s

	<u>Page</u>
APPENDIX	
I	
LEGISLATION NEEDED TO CLARIFY FUTURE OF CONSUMER PROTECTION AND FEDERAL PREEMP- TION AFTER THE CIVIL AERONAUTICS BOARD SUNSETS	
Background	1
CAB continues to administer consumer protection functions and regulations	2
Objectives, scope, and methodology	3
Consumer protection is likely to decline after CAB sunsets	4
Plans for transferring consumer protec- tion functions and regulations upon sunset are incomplete	8
Legislative action required to clarify the future of CAB's consumer protection functions and regulations and the scope of federal preemption	16
II	
ORGANIZATIONS CONTACTED BY GAO DURING THE REVIEW OF THE FUTURE OF CONSUMER PROTECTION AND FEDERAL PREEMPTION AFTER CAB SUNSETS	22
III	
LETTER DATED DECEMBER 15, 1983, FROM THE CHAIRMAN, SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT, HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION	25

ABBREVIATIONS

ADA	Airline Deregulation Act of 1978
CAB	Civil Aeronautics Board
DOT	Department of Transportation
EAS	Essential Air Service
FAA	Federal Aviation Administration
FTC	Federal Trade Commission
GAO	General Accounting Office

LEGISLATION NEEDED TO CLARIFY FUTURE OF
CONSUMER PROTECTION AND FEDERAL PREEMPTION AFTER
THE CIVIL AERONAUTICS BOARD SUNSETS

BACKGROUND

The Airline Deregulation Act (ADA) of 1978 established a schedule to phase out the Civil Aeronautics Board's (CAB's) economic regulation of domestic air transportation, concluding with the sunset, or termination, of CAB on January 1, 1985. ADA will transfer certain remaining CAB functions on that date to the Departments of Justice and Transportation (DOT). For example, DOT will receive remaining CAB authority over international aviation and administration of the Essential Air Service (EAS) program, which subsidizes air carriers serving small communities. Justice is scheduled to assume CAB authority for reviewing and approving carrier agreements and granting antitrust immunity. However, ADA does not address the disposition of CAB's consumer protection functions or regulations for domestic air transportation. Most of these regulations have been issued under sections 404(a) and 411 of the Federal Aviation Administration (FAA) Act of 1958 regarding safe and adequate service, and unfair methods of competition and deceptive practices, respectively. Furthermore, the act does not define the future of federal preemption which, at this time, precludes states from regulating airline services to protect airline passengers.

In a January 1980 letter to the Chairman, CAB, on CAB's sunset planning efforts (The Civil Aeronautics Board Should Expand Its Sunset Planning (CED-80-46, Jan. 4, 1980)), we concluded that the disposition of CAB's consumer protection functions and regulations was uncertain. At that time, we recommended that CAB extend its sunset planning to include the development of a legislative proposal to resolve this uncertainty.

Subsequently, in 1981 both CAB and DOT had bills introduced in the Congress to sunset CAB earlier than the 1985 date as set forth in ADA and also to clarify the disposition of various CAB functions not specifically provided for in the 1978 act. Both bills proposed repealing section 411 of the FAA Act, with the intent that the prohibition in the Federal Trade Commission (FTC) Act which precludes FTC from regulating aviation would be removed, allowing FTC to assume CAB's functions with respect to unfair competition and deceptive practices. Each bill also proposed retaining section 404(a) and transferring it, along with the regulations that the Civil Aeronautics Board (Board¹) had issued under the section, to DOT. However, neither bill was enacted.

¹Generally, we refer to the Board when discussing activities of the body of Board members and we refer to CAB when discussing the more general activities of the agency.

CAB CONTINUES TO ADMINISTER CONSUMER
PROTECTION FUNCTIONS AND REGULATIONS

Although much of CAB's regulatory authority was repealed by ADA, CAB continues to administer consumer protection functions under sections 404(a) and 411 of the FAA Act. Under this authority, CAB routinely oversees a broad range of industry practices, has conducted numerous investigations, and has issued a number of regulations setting national standards for the airline industry. Examples of regulations issued under both 404(a) and 411 authority include airlines' liability for lost or damaged baggage, procedures airlines must follow when they overbook a flight, and procedures which charter operators must follow. CAB also has a rule permitting airlines to incorporate the specific terms of their contract with passengers by reference on the ticket, provided the full text of these terms is available upon request. Examples of regulations issued primarily under its 404(a) authority include the requirement for a non-smoking section on aircraft and provisions that prohibit discriminating against the handicapped.

Under its general section 411 authority to prohibit deceptive practices and unfair methods of competition, CAB has conducted an investigation of possible abuses inherent in various airlines' computer reservations systems. The Board has proposed a rule to eliminate bias in these systems and to ensure fairness in the reporting of flights. In another proceeding, the Board has proposed a rule on the realistic scheduling of flights.

Under other sections of its authorizing legislation, the Board also issues regulations and performs functions which affect consumers. For example, under section 401 of the FAA Act, CAB conducts fitness testing, in conjunction with FAA's safety examination, for airlines seeking a license to operate. In conducting fitness reviews, CAB seeks to protect consumers by assuring that airlines certified to serve the public demonstrate a minimum level of financial soundness, managerial fitness, and a positive compliance disposition. The Board believes that such reviews are increasingly important in protecting consumers from unstable or unsophisticated airlines, as the major economic barriers to entry into the industry have been removed and airlines are less assured now that their operations will be profitable. Under this authority, the Board has recently issued a final rule prohibiting new airlines from collecting money or issuing tickets until they receive CAB approval to operate. The rule is designed to protect consumers from the risk of financial loss in the event the license to operate is delayed or denied.

The Board also has authority under section 412 of the FAA Act to review airline agreements and, under section 414, to grant antitrust immunity. These sections allow the Board to approve airline agreements and grant antitrust immunity when it finds that the agreements produce important transportation benefits for the public. Examples include airline agreements regarding scheduling and interlining. The Board also seeks to assure that these

agreements and grants of antitrust immunity continue to operate in the public interest. In this regard, the Board has disapproved much of the antitrust immunity that it historically afforded to exclusive agreements between airlines and the travel agent industry.

In support of all these functions and the specific regulations, CAB operates an Office of Congressional, Community, and Consumer Affairs. While the Office's receipt of consumer complaints has dropped dramatically since 1978, it still received over 8,000 consumer complaints in 1983 regarding matters such as baggage handling, flight problems, refunds, and smoking. Through an automated system, the CAB Office responds to all the complaints, and when appropriate, seeks to resolve problems by serving as an informal arbitrator between the consumer and the airline. The Office also may notify the rulemaking section when a pattern of violations occurs and when a new or revised rule may appear necessary. In addition, the Office may notify the enforcement section when one or several complaints reveal violations of federal laws or regulations which justify legal action against an airline. Upon referral by the consumer affairs office, on the basis of investigations undertaken on its own initiative, CAB's enforcement section may take legal action against air carriers for violations of their statutory obligations or of specific consumer protection regulations.

OBJECTIVES, SCOPE, AND METHODOLOGY

On December 15, 1983, the Chairman, Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation, requested that we assess the future of the consumer protection functions and regulations of CAB. (See app. III.) On the basis of subsequent discussions with Subcommittee staff, we agreed to focus on the following issues related to the future of CAB's consumer protection functions and regulations:

- What will the future of CAB's consumer protection functions and regulations and federal preemption of state action in these areas be after CAB sunsets?
- Are the plans for transferring CAB's consumer protection functions and regulations at sunset complete?
- If legislation appears necessary to ensure an orderly transition for CAB's consumer protection functions and regulations, what areas should be encompassed in that legislation?

We examined the relevant provisions of ADA, its legislative history, and the prescribed roles of CAB, the Department of Justice, DOT, FAA, and FTC at sunset. We identified CAB's current consumer protection functions and selectively reviewed the rulemaking records of CAB's consumer protection regulations. We also reviewed the current provisions of federal preemption which prohibit states from regulating airlines, and the case law

which has set precedents for consumer recourse through both federal and state laws.

As they became available, we reviewed the plans and recent testimony of the various agencies for implementing the sunset provisions of ADA. We identified four components of a complete plan, and we assessed whether the plans (1) analyzed the continued relevance of consumer protection functions and regulations, (2) considered the need for legislation to ensure an orderly transfer, (3) explicitly addressed the disposition of each consumer protection function and regulation, and (4) promoted coordination and avoided overlap of functions dispersed among agencies. We also reviewed the bills proposed by CAB and DOT in 1981 to sunset CAB earlier than provided for in ADA and to clarify the future of certain remaining CAB functions.

We interviewed officials at CAB, FTC, and Justice. Policy officials at DOT declined to meet with us, indicating they were still in the process of formulating their position on CAB's sunset. As a result, we relied primarily on information provided by DOT's Office of the General Counsel to understand its position on the future of CAB's consumer protection functions and regulations. In order to understand the views of various industry officials on the matters under review, we visited a small sample of airlines which included interstate, intrastate, commuter, and charter airlines. Furthermore, we interviewed state regulatory and enforcement officials in California, Florida, and Texas who had previously had active roles in regulating consumer protection practices of inter- and intrastate airlines. Finally, we interviewed officials of a number of relevant trade associations and consumer advocate groups such as the Air Transport Association, the American Society for Travel Agents, the Aviation Consumer Action Project, and the Regional Airline Association. A list of the organizations we contacted is included as appendix II.

Our review was performed in accordance with generally accepted government auditing standards with the exception that, at the Subcommittee's request, agency comments were not obtained.

CONSUMER PROTECTION IS LIKELY TO DECLINE AFTER CAB SUNSETS

If CAB sunsets under ADA's current provisions, we believe the future of most of CAB's consumer protection functions and regulations will be uncertain.² Some functions will lapse, and others might continue to exist but without an agency having the authority to enforce them. As a result, a decline in consumer

²One exception which was clearly provided for by ADA is CAB's authority to oversee carrier agreements and grant antitrust immunity. ADA provides for these functions to be transferred to Justice when CAB sunsets.

protection is likely to occur with a potential for increased litigation. In addition, we believe the permissible range of state actions to regulate the airline industry is questionable since the future and scope of federal preemption is unclear. This too could lead to an increase in costly litigation and a decrease in consumer protection.

The future of most of CAB's
consumer protection functions
and regulations is uncertain

The sunset provisions of ADA, including the legislative history, provide neither for the survival nor transfer of CAB's consumer protection functions and regulations³ and, as such, it is unclear whether they survive or terminate. The survival of administrative regulations upon termination of the issuing agency has rarely been addressed in U.S. law. Thus, in the absence of clarifying legislation, we would anticipate that this issue would have to be resolved by the federal courts.

As previously mentioned, the principal sources authorizing CAB to adopt consumer protection regulations and perform related functions are sections 404(a) and 411 of the FAA Act. Although the sunset provisions of ADA cover the transfer of these authorities as they relate to the EAS program and international aviation to DOT, they do not transfer these authorities to any federal agency with regard to all other domestic air transportation. Since section 411 is directly tied to CAB's existence, we believe that this provision will lapse when CAB sunsets. On the other hand, section 404(a)'s requirement that air carriers provide safe and adequate service does not rely on CAB's existence and thus, in our view, will continue to be effective after sunset. However, because the function in section 404(a) has not been transferred, no federal agency will have authority to enforce it or enact regulations under it. Faced with the anomaly of section 404(a)'s being unenforceable by any federal agency, consumers could argue for and federal courts could sustain a private right of action under section 404(a), a result which does not appear to have been intended by the Congress.

Another consumer protection-related function not specifically provided for in ADA is the section 401 reviews for financial and managerial fitness of new airlines. Although FAA has authority to conduct operational fitness reviews and could expand that

³Section 47 of the act states that all rules and regulations of the Board ". . . shall continue in effect . . . until modified, terminated, superseded, set aside, or repealed by the Board . . . or by operation of law." Consistent with its legislative history, however, we regard this section merely as a technical one that does not preserve CAB's regulations after sunset. CAB, DOT, and FTC also believe that this provision applies only as long as the Board continues to operate.

Process to consider financial or managerial fitness as related to safety, the scope of the reviews would necessarily be less inclusive than the current CAB process. Current CAB regulations regarding EAS and international carriers under section 401 would be transferred to DOT in the same manner as the CAB regulations under sections 404(a) and 411.

In summary, we found that the future of most of CAB's consumer protection functions and regulations is uncertain. Sunset provisions of the 1978 ADA, including its legislative history, do not provide for the survival nor transfer of CAB's consumer protection regulations. Moreover, the legal authorities for issuing most of these regulations as they relate to domestic air service--sections 401, 404(a), and 411--are not clearly transferred to any agency. Thus, it is unclear, in our view, whether the regulations survive. Even if they do survive, it is questionable whether any federal agency will be able to enforce them. Litigation will be necessary for consumers and airlines to determine their respective rights and obligations.

The future of federal preemption is unclear

ADA includes a specific federal preemption section (105(a)(1) of the FAA Act of 1958) which prohibits states from enacting and enforcing state laws and regulations covering services provided by air carriers having authority under title IV of the FAA Act. This generally includes all interstate air carriers as well as intrastate carriers which operate under title IV. Although the Congress intended to prohibit state regulation of air carrier services, it is unclear that the prohibition will continue to apply⁴ after CAB sunsets since most of title IV will lapse at that time. We were told by Air Transport Association officials that many states have statutes which exclude air carriers from state regulations, but the exclusion is usually based on carriers being licensed to operate under title IV. On the basis of the mixed responses we received from officials in three states, airlines, and the Air Transport Association, little agreement exists on states' future role in regulating air carriers.

If the preemption section lapses when CAB sunsets, states could enact their own consumer protection laws and regulations covering the airline industry. This would appear to be in direct conflict with Congress' intention to deregulate the industry. Neither airlines nor consumers are likely to be well served if this occurs. Officials of the Air Transport Association expressed concern that state regulation would lead to overlapping and burdensome regulation and taxation. We agree and believe, on the basis of our analysis, that a proliferation of state laws

⁴Several courts have already taken different views as to whether the preemption section applies to air carriers exempted from title IV's requirements.

and regulations could well lead to extensive and costly litigation, as well as confusion among consumers and airlines about which laws apply to them.

Even if one assumes that the federal preemption section survives as is, we believe that uncertainties exist regarding the scope of the section which could cause problems for airlines and consumers. One problem relates to the absence of any definition of the term "services" as used in section 105 in ADA. CAB has by regulation defined it as including, but not limited to, "tariff filing, certification, regulations governing flight frequency, mode of operation, in-flight amenities, liability, insurance, bonding, and capitalization."

In response to our inquiries, both DOT and FTC officials indicated they believe the term covers overbooking, baggage loss and damage, charters, notice of terms of contract, smoking, unfair competition, and deceptive practices. However, CAB officials indicated that in addition to the areas included in its regulation, they believe the term "services" might only cover, in part, unfair competition, baggage loss, and overbooking in the context of carrier limitations of liability for torts or contract obligations and would not cover notice of terms of contract and advertising. Such a divergence of views could signal a problem in future interpretations of the scope of preemption which, in turn, could increase the difficulties of consumers and air carriers seeking to establish their respective rights and obligations.

A second problem pertains to the kinds of state statutes that are to be preempted. The federal preemption section currently prohibits states from regulating air carrier services. However, it is unclear whether the Congress intended preemption to extend to enforcement of broad consumer protection statutes regarding consumer complaints arising from air transportation services. CAB suggests that such enforcement would not be preempted. Nevertheless, the few court cases that have been decided on this issue are in conflict.⁵ A related problem concerns a possible conflict between section 105, which was enacted in 1978, and section 1106 of the FAA Act, which was enacted in 1958. Section 1106 preserves private remedies under common law or state statute regarding matters covered by the FAA Act, including consumer protection. Also, several courts have held that section 1106 preserves a private remedy under broad consumer protection statutes. In spite of these rulings, since section

⁵Brunwasser v. Trans World Airlines, Inc., 541 F. Supp. 1338, 1345-46 (W. D. Pa. 1982). (Federal preemption does not apply to Pennsylvania Unfair Trade Practices and Consumer Protection Law.) Contra, California v. Western Airlines, Inc., No. 494202 (Sup. Ct. Apr. 1, 1983). (Federal preemption applies to California Consumer Protection Statute generally prohibiting untrue or deceptive advertising.)

105 prohibits states from enacting or enforcing laws and regulations covering services provided by air carriers, questions arise over the extent to which the part of section 1106 preserving remedies under state law remains. This lack of clarity could both impair the efforts of states to take action to protect its citizens against possible fraudulent or other illegal acts of airlines under state consumer protection statutes and also make it harder for consumers to know their rights and seek remedies in state courts.

We believe that the lack of clarity in the disposition of much of CAB's consumer protection authority and regulations and the future of federal preemption could well lead to an increase in expensive and unnecessary litigation and a reduction in consumer protection. Regardless of whether the Congress intends for CAB consumer protection functions and regulations to survive or sunset, allowing CAB to sunset under provisions of the 1978 act appears to be the least efficient means for achieving that end. We believe that some form of clarification of Congress' intent is needed to ensure an orderly sunset of CAB with no unnecessary disruption in the protections the Board has historically provided to consumers.

PLANS FOR TRANSFERRING CONSUMER
PROTECTION FUNCTIONS AND REGULATIONS
UPON SUNSET ARE INCOMPLETE

We believe the plans for transferring CAB's consumer protection functions upon sunset are incomplete. DOT has prepared a formal sunset plan, while the other agencies have documented their positions in either reports or testimony. We reviewed the plan and positions of the involved agencies relative to the four criteria we believe are essential components of a plan which would provide for an orderly transition of CAB's consumer protection functions and regulations. In particular, we assessed whether the plan or position: (1) analyzed the continued relevance of consumer protection functions and regulations, (2) considered the need for legislation to ensure an orderly transfer, (3) explicitly addressed the disposition of each regulation and function, and (4) promoted coordination and avoided overlap among the agencies to which the functions and regulations are assigned.

A description of DOT's plan and the positions of the other agencies involved in the transfer of consumer protection functions and regulations are discussed below. Our analysis of the DOT plan and, where appropriate, other agencies' positions follows, and is organized around the four criteria noted above.

Current plans for the future of CAB's
consumer protection functions and
regulations

Four agencies have some part in planning for the future of CAB's consumer protection functions--CAB, DOT, FTC, and Justice.

In 1984, CAB issued a report on deregulation⁶ which had been mandated in ADA and was to include recommendations to resolve any problems related to sunset. In the report, the Board takes a general position on what would be required to ensure an orderly transition of the functions. In recent congressional testimony, CAB indicated that it favors placing authority to regulate all air transportation--including consumer protection regulations--in DOT. The report does not recommend clarifying legislation, although its position appears to be that without further legislation to explicitly transfer the regulations, no agency will have the authority to enforce them after sunset.

DOT, in its plan,⁷ concludes that no further legislation is required to continue CAB's consumer protection functions. DOT's plan suggests that DOT and FTC will have the authority to administer most of these functions under their existing statutes and concludes that FTC will be able to regulate domestic air carriers in all areas currently regulated by CAB under section 411. DOT, according to its plan, would have authority as provided for in ADA over international and EAS carriers, and would assume the Board's functions and regulations under sections 404(a) and 411 as they relate to these areas. DOT suggests that while the FTC Act exempts air carriers from FTC jurisdiction, that exemption will no longer apply when CAB sunsets. DOT's plan further calls for establishing a consumer affairs office within DOT to handle airline consumer complaints.

FTC officials have taken the position that FTC would continue to be precluded from regulating aviation matters after CAB sunsets. FTC officials further indicate that FTC would be constrained in any effort to revise existing CAB regulations or issue new rules because of FTC's formal, time-consuming rulemaking procedures. These procedures contrast with the more expeditious informal rulemaking process available to CAB.

A Justice Antitrust Division official indicated that Justice did not prepare a legislative plan for sunseting CAB because ADA specifically provides for the transfer of CAB's authority over carrier agreements (section 412) and grants of antitrust immunity (section 414) to Justice.

Plans do not analyze the continued
relevance of consumer protection
functions and regulations

In reviewing DOT's plan and the positions of the other involved agencies, we found that neither CAB, DOT, nor FTC had

⁶Civil Aeronautics Board Report to Congress, Implementation of the Provisions of the Airline Deregulation Act of 1978, January 31, 1984.

⁷Civil Aeronautics Board Sunset, DOT Plan, February 1984.

formally analyzed or tested the continued relevance of CAB's consumer protection functions or regulations. Such an analysis would address the need for federal regulation in these areas in a deregulated environment, and thus provide a basis for determining how to dispose of the remnant CAB consumer protection functions and regulations upon sunset.

The Civil Aeronautics Board

Since ADA's enactment in 1978, CAB has continued to issue and revise consumer protection regulations. By doing so, the Board shows that, while it still exists, it supports federal regulation of the airline industry in these areas. What it does not show, however, is its position on the regulations' relevance following sunset. By not addressing what, if any, legislative action would be required to ensure the continuation of the regulations following sunset, and having recognized that no agency will have the authority to enforce the regulations at that time, the Board has left its position unclear.

Although CAB has not formally analyzed the continued relevance of consumer protection regulations in a deregulated environment, an action it took surfaced information which could be used to test whether certain regulations are still needed. This action involved the Board's granting one new airline an exemption from the rules regarding compensation for denied boarding and baggage liability between 1981 and 1983, after the airline had petitioned the Board, claiming its operations and passengers were unique because it operated short flights for business travelers primarily.

During the exemption period, the airline continued to provide consumers with some protections in each of these areas. Complaint data collected by CAB indicated that total complaints per 100,000 passengers registered against the airline during this period declined and were comparable to the industry's average. While other factors, such as the closing of CAB's field offices and the rerouting of complaints directly to airlines, also contributed to the decline, this action provides information for an argument that some consumer protection regulations may not be necessary and that marketplace incentives may be sufficient to induce airlines to adequately serve their passengers in these areas.

In summary, we believe CAB has not fully assessed the continued relevance of individual consumer protection regulations on the basis of two factors: the lack of a clear position by CAB to ensure the future of their regulations following sunset and the apparent incompleteness of an assessment of the extent to which competitive incentives might be sufficient to protect consumers in some areas which are currently regulated.

Department of Transportation and the
Federal Trade Commission

DOT and FTC have neither performed an analysis of nor taken a formal position on the continued need for CAB's individual consumer protection regulations. As stated in DOT's plan, CAB's domestic consumer protection functions regarding unfair trade practices, safe and adequate service, and carrier fitness certification will lapse and will not transfer to any agency upon sunset. The plan concludes, however, that FTC will be able to regulate domestic air carriers in all areas currently under CAB's section 411 authority, including those jointly authorized under sections 404(a) and 411, such as unfair advertising, oversales, baggage liability, and charter rules. DOT's plan also concludes that FAA can review air carrier fitness in a manner similar to CAB under section 401. Although these functions, according to DOT's plan, will be performed by other agencies upon CAB's sunset, DOT believes that the regulations and procedures relating to them will lapse. Because DOT policy officials would not discuss this matter with us, we do not know whether this legal opinion is also a programmatic judgment that the regulations are no longer relevant and therefore should expire. In this regard, DOT's plan contrasts with DOT's position in 1981 where it supported the transfer of all of CAB's consumer protection regulations to DOT intact, with the intent to review, over time, their continued relevance in a deregulated environment.

FTC officials have also conducted no review of the regulations' continued relevance. The officials stated that should CAB's consumer protection regulations be transferred to their agency, they would review the regulations' continued relevance and revise them accordingly at that time.

DOT plan does not consider the need
for legislation to ensure an orderly
transfer

In our 1980 report on CAB's sunset planning efforts, we recommended that CAB propose legislation to resolve the uncertainty surrounding the future of consumer protection functions after sunset. Although CAB and DOT supported legislation in 1981 that would have resolved the uncertainty, legislation was not enacted. Because of the disruption in consumer protection which we believe will occur if CAB sunsets under ADA's provision, we reviewed DOT's plan and the positions of the other agencies to assess whether they considered the need for legislation or otherwise provided for an orderly transfer. On the basis of our analysis, we continue to believe that legislation is necessary to clarify congressional intent regarding the future of CAB's consumer protection functions and regulations.

Although they have not prepared sunset plans, CAB and FTC have concluded that legislation is required to ensure an orderly transfer of CAB's consumer protection functions and regulations

at sunset. DOT, on the other hand, suggests no further legislation is required since it believes FTC will have authority to administer CAB's consumer protection functions under their existing statutes. DOT maintains that the prohibition exempting air carriers from FTC jurisdiction will no longer apply when CAB sunsets. CAB, however, questions FTC's authority to perform consumer protection functions without removing the prohibition and believes legislation is needed to do so.

FTC officials believe that without further legislation, FTC would be unable to exercise any authority over air carriers which are conducting unfair methods of competition or deceptive practices. In contrast with DOT's plan, FTC believes the prohibition under section 5(a) of the FTC Act would continue to preclude FTC from acting upon aviation matters unless the prohibition was removed by legislation.

FTC's Chairman expressed concern that even if the prohibition was removed, CAB's consumer protection regulations would not survive after sunset without being legislatively transferred. If not legislatively transferred, each regulation would need to be reissued, causing an interim period of confusion and uncertainty regarding required industry practices. FTC would further be constrained from issuing or revising regulations on a timely basis since it would be generally required to use formal and time-consuming rulemaking procedures. CAB's Chairman noted that not only would consumers be inconvenienced while waiting for new or revised regulations to be developed by FTC, but airlines would also have problems if FTC were not free to act quickly in granting certain exceptions to the rules.

We believe DOT's plan for the disposition of CAB's consumer protection functions is not likely to provide for an orderly transfer of those functions. We concur with FTC that DOT is incorrect in presuming that FTC can assume the functions without legislative action. We believe specific legislation will be needed if the Congress intends FTC to assume and enforce the existing CAB consumer protection regulations. Specific legislative action would also be needed to authorize FTC to assume CAB's regulations which fall outside the scope of deceptive practices or unfair methods of competition, such as CAB's regulations regarding smoking, discrimination against the handicapped, and precertification ticket sales.

We also reviewed the plan and positions of the agencies to assess whether they consider the likely problems associated with the future of federal preemption if CAB sunsets under ADA's provisions. DOT's plan does not address the possible change in the status of federal preemption with CAB's sunset. In their positions on CAB sunset, CAB, FTC, and Justice also do not consider possible problems associated with the linkage of federal preemption of state regulation with an expiring CAB function (i.e., certification of carriers). However, considerable concern about this potential problem was expressed to us by the Air Transport Association, several airlines, and some state officials.

On the basis of our legal analysis of the 1978 ADA, we believe that legislative action is needed to ensure the continuation of federal preemption and to preclude state regulation of airlines. Without such action, the future of consumer protection will be uncertain, and unnecessary litigation will likely occur.

Plans do not explicitly address
the disposition of each consumer
protection function and regulation

CAB has performed consumer protection functions under varied provisions of its act. The disposition of functions and regulations under three of these provisions--sections 401, 404(a), and 411--was not provided for in ADA. We believe a complete sunset plan should explicitly address the proposed disposition of each distinct function and its attendant regulations.

DOT, in its plan and recent testimony, and CAB and FTC in their public positions, have not explicitly addressed the disposition of the range of consumer protection functions and regulations currently performed by CAB.

DOT's plan does not directly address the future of the full range of CAB's consumer protection functions and regulations. Although DOT officials in recent testimony have further expanded their position on the disposition of consumer protection functions and regulations at sunset, we believe the issue is still not resolved. DOT contends that FTC will be able to regulate domestic air carriers in all areas currently regulated by CAB under section 411 of the FAA Act. However, while section 411 encompasses most of CAB's consumer protection activities, it does not include consumer protection activities administered under sections 404(a) and 401, related to discrimination against the handicapped, fitness reviews, and precertification ticket sales.

While DOT's plan does not address the future of CAB's regulations protecting the handicapped, DOT's Deputy Secretary recently testified that handicapped discrimination regulations would lapse after sunset. He noted that this function could be assumed by airports, which receive federal subsidies, and as such, are bound to comply with handicapped discrimination laws. He further noted that these laws might apply to activities in airports and during boarding and deboarding the aircraft, but not during the actual flight. Although he does not believe that government regulation is needed during the flight, he said DOT is reviewing the situation.

DOT suggested in its plan and in recent testimony that FAA procedures for certifying air carriers for safety and engineering fitness can be expanded to include a financial and managerial review as currently performed by CAB pursuant to section 401, but only to the extent that the reviews have a bearing on aviation safety. DOT believes that, beyond this safety review, entry into

the domestic airline industry does not justify a separate economic fitness test. As a result, DOT's plan does not address the responsibilities previously performed by CAB in determining a carrier's financial and managerial fitness in areas which are not specifically related to safety. Also, because of the linkage of the precertification ticket sales rule to fitness reviews, the future of this rule under DOT's plan is uncertain.

CAB, in its 1984 report, discusses each of its consumer protection functions, but does not take a position on their disposition after sunset. FTC also has not taken a position on the disposition of the varied CAB consumer protection functions.

DOT plan does not promote
coordination nor avoid overlap
of functions among agencies

CAB's consumer protection functions encompass a range of activities including regulations, enforcement, and consumer assistance. The Board, in its 1984 report, points out how closely related these functions are. State officials we interviewed observed that the effectiveness of CAB's consumer protection activities could be attributed to the close coordination of these interrelated consumer protection functions within CAB.

CAB's sunset and the plans for the disposition of the remaining functions raise the potential for the dispersion of related functions. As such, we reviewed DOT's plan and the positions of the other agencies to assess how they would disperse the remaining CAB consumer protection functions. We further postulated that to the extent a plan dispersed the functions across more than one agency, the plan would be considered complete only if it was structured to promote coordination and avoid any unnecessary overlap of functions.

DOT's plan calls for the division of CAB's consumer protection functions between DOT and FTC, and would not alter the transfer of the authority to review agreements and grant anti-trust immunity to Justice as provided for in ADA. Despite the distribution of clearly related functions between DOT and FTC, DOT's plan does not address what measures may be needed to ensure coordination and prevent overlap. In addition, it does not consider the possible decrease in effectiveness by fragmenting the functions as opposed to keeping all of the them consolidated in one agency.

DOT's plan provides little justification for its proposed disposition of CAB's enforcement functions. For example, it does not evaluate the relative merits of DOT's and FTC's assuming the functions or what type of coordination might be required by dispersing the functions across the two agencies. In recent testimony, DOT and airline officials who favor FTC involvement noted that regulation of unfair methods of competition and deceptive trade practices--the statutory basis for much of CAB's consumer

protection activities--is FTC's prime responsibility. They emphasize that by placing this function in FTC, it is in the hands of experts already experienced in this area. Another rationale for preferring FTC appears to be DOT's assumption that FTC could absorb consumer protection functions without legislation.

DOT's plan does not deal with the inconsistencies resulting from its above proposal, whereby DOT would continue to administer consumer protection regulations for international aviation and EAS carriers while no regulations would remain for all other domestic carriers. As a result, a carrier could be subjected to one set of requirements while operating on EAS or international routes and a different set of requirements while operating on all other domestic routes. We believe such a situation would also create confusion for the passenger who would be protected on certain flights and not protected on others.

In an effort to provide a single forum for consumer complaints, DOT's plan would establish a consumer affairs office within DOT to handle all aviation consumer complaints. DOT would process consumer complaints of all kinds, even in those areas which would be related to functions transferred to FTC.⁸ During congressional hearings, DOT officials stated that the consumer affairs office would refer any enforcement actions to FTC as appropriate and would issue memoranda of understanding whenever necessary. These statements, however, do not, in our view, reflect an assessment of how the dispersion of functions might create overlap or gaps or otherwise impair the effectiveness of the consumer protection effort as a whole.

In recent testimony, DOT officials offered an alternative disposition of CAB's consumer protection responsibilities if the problems of overlap and coordination are perceived as insurmountable. They suggested putting all consumer protection functions in FTC. This would require assigning consumer protection functions of international aviation and the EAS program also to FTC. Although this would achieve consolidation of all consumer protection activities in one agency, it could give rise to a new coordination problem since DOT would continue to be responsible for administering international aviation and the EAS program.

The Chairman, CAB, recently testified that the Board favors placing the authority to govern all air transportation, both domestic and foreign, including consumer protection functions, in

⁸It is evident that DOT has broad authority over transportation matters, including the collection of information. Nevertheless, as the sunset provisions did not transfer to DOT any specific authority for handling consumer complaints involving domestic air transportation, it is possible that DOT's authority to process consumer complaints lying outside its jurisdiction may be more limited than the role projected in DOT's plan.

one agency. He stated that keeping all regulations as a single integrated unit within an agency is the most efficient and effective way to handle continuing regulation of aviation matters. FTC officials did not address the issue of coordination.

We believe the need for coordination and the relative merit regarding assignment of CAB's functions to different agencies would be part of a complete plan for CAB's sunset. We find the DOT plan to be incomplete in neither evaluating the relative merits of alternative arrangements for the functions in ensuring coordination nor in ensuring that its proposed disposition of the functions avoids unnecessary overlap.

LEGISLATIVE ACTION REQUIRED TO CLARIFY
THE FUTURE OF CAB'S CONSUMER PROTECTION
FUNCTIONS AND REGULATIONS AND THE
SCOPE OF FEDERAL PREEMPTION

On the basis of our recent analysis of the 1978 ADA, its legislative history, and the positions of the involved agencies, we believe that legislation is needed to clarify the disposition of CAB's consumer protection functions and regulations, and the status of federal preemption upon sunset. Specifically, we identified four issues associated with the future of consumer protection which would have to be addressed through legislation:

- Whether to repeal or continue CAB's consumer protection functions and regulations.
- If these consumer protection functions and regulations are to continue, what agency should assume them.
- The future and scope of federal preemption.
- The proper jurisdiction for the oversight of antitrust immunity and joint air carrier agreements.

We discuss each of these issues in turn, and where appropriate, include our conclusions regarding how the issue might be resolved.

CAB's consumer protection functions and
regulations should continue following sunset

We believe CAB's current and proposed consumer protection functions and regulations should continue following sunset. We found that many of the functions and current regulations are supported by the airlines, trade associations, state agencies, and consumer advocate organizations and seem to have continuing merit in a deregulated environment. Nevertheless, some airline and government officials are concerned that some regulations might be unnecessarily restrictive and could potentially impede the achievement of the full benefits of a competitive market. Because neither CAB, DOT, nor FTC has fully evaluated the

continuing need for the various consumer protection functions and regulations of CAB, we favor an approach where all CAB consumer protection functions and existing and proposed regulations under sections 401, 404(a), and 411 would be transferred intact to another federal agency.

Airline officials we met with have suggested that some consumer protection functions and regulations should continue while others should be repealed. In general, the officials who favor repeal of specific functions and regulations argue that true deregulation requires that the government not dictate the terms of a contract between airlines and passengers. They point out that under deregulation, airlines are highly competitive and have an incentive to please their customers because they rely so heavily on repeat business.

The absence of federal standards may lead to some disparity in the practices of various airlines, but the airline officials we met do not foresee this to be a problem. They believe consumers will benefit by allowing airlines to "unbundle" the services currently included in a ticket price. This would permit airlines to set the price of separate aspects of service such as baggage handling and inflight amenities and allow consumers to choose whether or not to purchase those services.

In contrast, officials who favor the continuation of CAB's consumer protection functions and regulations following sunset express concern that without regulations, the marketplace will not adequately handle most areas of consumer rights. The existence of CAB's general consumer protection regulations, they note, acts as a deterrent against unethical and deceptive practices, and that without regulation, the relationship between airlines and passengers is such that consumer protection would decrease without a commensurate gain to consumers. Furthermore, consumer advocate group officials cite the difficulty of comparison shopping and the limited incentive for carriers to conduct negative advertising such as ". . . we pay you more when we lose your bag." These factors would diminish the information available to consumers and eliminate a necessary condition for an effectively competitive market.

One function for which officials we met with expressed particular support is section 411--relating to the prohibition of unfair methods of competition and deceptive practices. This requirement is similar to that which pertains to all industries covered by the FTC Act and is consistent with deregulation in that its purpose is to enhance competition. Regulations issued under section 411 which have broad support among industry, consumer groups, and government agencies include CAB's recently proposed rule to assure unbiased computer reservation systems and the rule which regulates charter operations. Those interviewed disagreed on the continuing need for CAB's rules on baggage liability limits and denied boarding compensation.

The consensus was not as great, however, on continuing the section 404(a) duty of air carriers to provide safe and adequate service. CAB's oversight in this area, and the regulations issued primarily under this section differ from CAB's oversight and the regulations issued under section 411 in that they are based on a social determination of "adequacy" and are not focused on enhancing competition. Officials we met with expressed varying views about the importance of retaining regulations that relate to rights of the handicapped and smoking.

The consumer protection-related functions of CAB performed under section 401 relating to financial certification and fitness also have generated mixed views. CAB and many airline officials expressed concern about the rules relating to fitness testing which they believe have become more important as entry into the market has been eased. Concern has also been expressed that the industry depends on consumer confidence and that the whole industry will suffer if unstable airlines are permitted to enter and misuse customer funds. Officials in California supported the continuation of CAB's recently proposed rule to limit the advertising and sales of tickets by new airlines before they receive CAB's approval to operate. DOT, on the other hand, states that section 401 is no longer relevant and that its continuation would be inconsistent with ADA's objective of deregulating the airlines.

The final CAB consumer protection functions relate to CAB's authority to oversee carrier agreements (section 412) and grant immunity from antitrust prosecution (section 414). Many airline officials expressed strong support for these functions, while Justice officials question their continued necessity.

In summary, many of the officials of states, airlines, trade associations, and federal agencies we interviewed support continuation of some or all of CAB's consumer protection functions and regulations. On the other hand, DOT questions testing airlines for fitness beyond safety issues, and many airline officials question the necessity of certain specific regulations. We believe that absent a consensus or a full assessment of the continuing need for each of the varied functions and regulations, all of CAB's consumer protection functions and regulations related to sections 401, 404(a), and 411 should be transferred intact to another agency. Under this approach, that agency would have the flexibility to revise, amend, or even rescind the regulations. In addition, this approach would avoid the delay and uncertainty that would occur if only the functions were to transfer and the agency had to repropose every regulation it considered relevant. The receiving agency should be directed to carefully evaluate the continued need for the existing spectrum of functions and regulations and ensure they are no more intrusive than necessary to achieve specific public purposes. If the receiving agency should implement any major changes from CAB's current consumer protection functions and regulations, we believe the agency should carefully assess the impact of such changes and

retain the right to act quickly if some reforms fail to yield overall public benefits.

A case can be made for transferring
CAB's consumer protection functions
and regulations to DOT

Should the Congress desire to continue CAB's consumer protection functions and regulations, we believe a strong case can be made for transferring CAB's consumer protection functions and regulations to one agency and believe DOT may be in a better position than FTC to assume the full range of those responsibilities left unclear by ADA. We believe the division of consumer protection functions between DOT and FTC, as recommended in the DOT plan, would create fragmentation and limit the efficiency of consumer protection activities due to possible problems with coordination and unnecessary overlap.

It appears to us that one advantage of using a single agency to administer all consumer protection matters is that the oversight, investigative, enforcement, rulemaking, and consumer assistance functions for all consumer protection issues would be together rather than fragmented. By keeping all the functions consolidated, the agency performing consumer assistance functions would have the authority to initiate appropriate enforcement action, and would therefore be more likely to have a deterrent effect. In addition, we believe consumers and airlines would not be confused by having to deal with two agencies in order to resolve complaints, and the probability of overlapping or redundant regulations would be minimized. If assignment of the functions to a single agency appears to be the best alternative, the question becomes "which one?"

DOT has recently proposed that if the Congress did not approve of its plan for allocating CAB's consumer protection functions, all of the functions should be transferred to FTC. DOT notes that FTC's strength is its general expertise in unfair methods of competition and deceptive practices. However, FTC has less experience performing some of the other aspects of CAB's current consumer protection role. For example, FTC could not use informal rulemaking procedures to regulate airline practices. FTC would need to use Magnuson-Moss rulemaking procedures, which require more steps than informal rulemaking. These procedures are cumbersome and time-consuming; without a legislative amendment to their procedures, FTC could not issue emergency regulations as CAB has been able to do. Also, FTC has no experience in regulating other than section 411 issues such as smoking and discrimination against the handicapped.

Another option for keeping all the functions together would be to retain CAB. While not advocating reversal of the economic deregulation accomplished by the 1978 Act, a few state officials expressed interest in continuing CAB's role in providing a single forum for nonsafety aviation matters. Because these officials

recognize this may not be a viable option, they alternatively suggest transferring CAB's consumer protection functions and regulations to DOT.

Some of the airlines, trade associations, state agencies, and consumer organizations we met with favored transferring all of CAB's consumer protection functions and regulations to DOT. While the views of these officials varied, one of their reasons for favoring DOT as the sole recipient agency was to avoid fragmentation of responsibilities across several agencies and to capitalize on DOT's transportation expertise. Some of these officials prefer DOT because they believe DOT would be more forceful in overseeing unfair trade practices and enforcing consumer protection regulations. DOT also has experience in regulating areas covered by section 404(a) (e.g., handicapped). DOT does not, however, have expertise in overseeing unfair trade practices.

DOT would also appear to be in a better position to act more expeditiously using informal rulemaking procedures, with which it has experience, and to issue emergency regulations as necessary. In addition, assigning all the functions to DOT would assure that administration of the international and EAS functions, as well as the consumer protection functions related to these areas would not be fragmented. In summary, we believe DOT appears to be in the best position to administer and evaluate the continued relevance of the full range of consumer protection regulations currently administered by CAB under sections 401, 404(a), and 411.

Federal preemption should continue,
but its scope could be clarified

We believe legislation is necessary to continue federal preemption, given the uncertainty associated with section 105 of ADA. The language predicating preemption on airlines having authority under title IV to provide interstate air transportation needs to be amended. The Congress could also consider clarifying the scope of federal preemption by defining the services and state statutes that are subject to preemption. In addition, we believe the Congress could consider amending section 1106 of the FAA Act to conform to the preemption section of ADA.

Views differ on whether to transfer
the authority to review carrier agree-
ments and grant antitrust immunity to DOT

Views differ on whether to transfer CAB's authority to review carrier agreements and grant antitrust immunity to DOT. ADA explicitly transfers sections 412 and 414, which authorize CAB's responsibility over carrier agreements and antitrust immunity, to Justice. However, officials we interviewed from trade associations and airlines frequently expressed concern that Justice would be less sensitive to the benefits of varied airline agreements and would not continue to grant antitrust immunity.

Justice and DOT officials, on the other hand, view Justice as the most appropriate receiving agency for CAB's authority under sections 412 and 414.

Although Justice officials have questioned the continued necessity for these functions, they recently testified in favor of retaining the provisions of ADA which transfer the authority to grant antitrust immunity to Justice, since they have primary expertise in antitrust matters. They also informed us that after sunset, CAB staff will be transferred to Justice, thereby providing the Department with staff experienced in antitrust matters as they relate to air transportation. DOT's plan also supports the transfer of this authority to Justice.

Those who favor the transfer of authority over agreements and antitrust immunity to DOT believe such a move will avoid fragmentation of federal oversight of the airline industry. They note that such an arrangement would consolidate authority over all airline agreements in one agency, since DOT is already slated to assume responsibility for reviewing and overseeing international agreements. Air Transport Association and other airline officials testified that as a result of DOT's responsibilities and expertise over national transportation policy, DOT would be in a better position to evaluate, monitor, and collect information necessary to oversee agreements and grant antitrust immunity.

We take no position on this matter. We include it in the list of items requiring legislative attention because if the Congress finds merit in the views preferring CAB's section 412 and 414 authorities being given to DOT, legislative action would be required.

ORGANIZATIONS CONTACTED BY GAO DURING THE
REVIEW OF THE FUTURE OF CONSUMER PROTECTION
AND FEDERAL PREEMPTION AFTER CAB SUNSETS

FEDERAL AGENCIES

Civil Aeronautics Board

Chairman
Bureau of Domestic Aviation
Office of Congressional, Community and Consumer Affairs
Office of Economic Analysis
Office of the General Counsel
Office of the Managing Director

Department of Transportation

Federal Aviation Administration
Office of the Secretary

Department of Justice

Antitrust Division, Transportation Section

Federal Trade Commission

Bureau of Competition
Bureau of Consumer Protection
Office of Congressional Relations

STATE AND LOCAL GOVERNMENTS

California, State of

Office of the State Attorney General
Department of Consumer Affairs
Department of Transportation
Public Utilities Commission

Florida, State of

Department of Agriculture and Consumer Services
Department of Consumer Affairs
Department of Transportation
Public Service Commission

Los Angeles, City of

City Attorney's Office

Los Angeles, County of

Department of Consumer Affairs

Texas, State ofAttorney General's Office, State of Texas
Texas Aeronautics CommissionAIRLINES

Air California
American Airlines, Inc.
Arrow Air, Inc.
Braniff, Inc.
Chaparral Airlines, Inc.
Colgan Airways Corp.
Dash Air Corp.
Delta Air Lines, Inc.
Desert Sun Airlines
Eastern Air Lines, Inc.
FinAir, Inc.
Jet Charter Services, Inc.
National Commuter Airlines, Inc.
Pacific Coast Airlines
PBA--Provincetown-Boston Airlines
People Express Airlines, Inc.
Piedmont Aviation, Inc.
PSA--Pacific Southwest Airlines
Rio Airlines, Inc.
Southwest Airlines
United Airlines, Inc.
Western Airlines, Inc.
Wise Airlines
World Airways, Inc.

TRADE ASSOCIATIONS

Air Transport Association
National Air Carriers Association
Regional Airline Association

CONSUMER ADVOCACY ORGANIZATIONS

Aviation Consumer Action Project
Better Business Bureau, State of California
International Airline Passengers Association, Inc.

CHARTER ORGANIZATIONS

National Indirect Air Carriers Association

FLIGHT ATTENDANT ORGANIZATIONS

Association for Flight Attendants
Association of Professional Flight Attendants

TRAVEL AGENT ORGANIZATION

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 TOM J VANDERGRIFF TEX
 J ROY ROWLAND GA
 JAMES McCLURE CLARKE N C
 ROBERT E WISE, JR. W VA

GENE SNYDER KY
 JOHN PAUL HAMMERSCHMIDT ARK
 BUD SHUSTER PA
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U.S. House of Representatives

Room 2105, Rayburn House Office Building

Washington, D.C. 20515

TELEPHONE AREA CODE 202, 225-4472

B-376 Rayburn Building
 Washington, D.C. 20515

December 15, 1983

Mr. Charles A. Bowsher
 Comptroller General of the United States
 United States General Accounting Office
 441 G Street NW
 Washington, D.C. 20548

Dear Mr. Bowsher:

In 1978, the Congress passed the Airline Deregulation Act which, among other things, provided for the Civil Aeronautics Board (CAB) to sunset on January 1, 1985. In a January 1980 letter report, GAO pointed out that the act was silent on some residual functions of CAB, particularly those involving consumer protection, which were not scheduled for transfer to other government agencies. On December 9, 1983, my subcommittee staff was briefed by GAO on ongoing follow-up work on the future of CAB's consumer protection functions. We believe the importance of this work is heightened as it appears that the disposition of these functions following CAB's sunset is still unclear. The subcommittee is concerned that if this issue is not resolved by the time CAB sunsets there may be considerable and unnecessary disruption in the basic protections air travellers are provided--whether due to a failure to provide for some perpetuation of current regulatory requirements or possible alternative mechanisms.

We would like the General Accounting Office to continue its present work on this matter with an aim toward providing the subcommittee with the following information:

- (1) Identification of the current consumer protection regulations administered by the CAB.

Mr. Charles A. Bowsher
December 15, 1983
Page Two

- (2) A review of the relevant directions or lack thereof for transfer of these functions in the 1978 Airline Deregulation Act.
- (3) A review of the extent to which CAB and the possible receiving agencies (DOT, FTC, DOJ) have evaluated the continued relevance of these functions in a deregulated environment.
- (4) An assessment of the adequacy of CAB and the receiving agencies' plans (either administrative or legislative) for assuring the orderly transfer of these functions upon sunset.
- (5) A review of the potential changes in the protections airline passengers have generally been afforded should no further legislation be enacted.
- (6) An assessment of the alternatives to government regulations, including the potential for consumers to seek common law solutions and the possibility and effect of state and local authorities regulating airlines should federal pre-emption be removed.

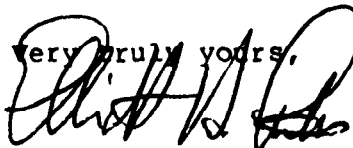
We recognize that the review is concentrating on the explicit consumer protection functions of the CAB (e.g., baggage, notice of contract terms). While we understand your capacity to broaden the focus is limited, we believe that there are important consumer protection issues related to the regulatory treatment of airline agreements (e.g., interlining, scheduling, relationships with travel agents). Some attention to the future of these functions thus may be appropriate.

As we discussed with your staff, we believe your approach of canvassing the relevant agencies, trade associations, airlines and sunset reports or legislative proposals is appropriate. In addition, we believe your effort to inquire into the fate of consumer protection functions in the deregulated environment of California, Texas and Florida should be informative and useful.

Mr. Charles A. Bowsher
December 15, 1983
Page Three

Because this issue is certain to be a focal point before the Congress this spring, it is essential that GAO conclude its work by that time so that the information obtained can be of use. The subcommittee is planning to conduct hearings on this issue during April 1984 and would like GAO to testify at that time. In addition, we would like to have a briefing on your findings and recommendations during the latter part of March 1984 to help ensure that we are able to incorporate the results of your work into the legislative process.

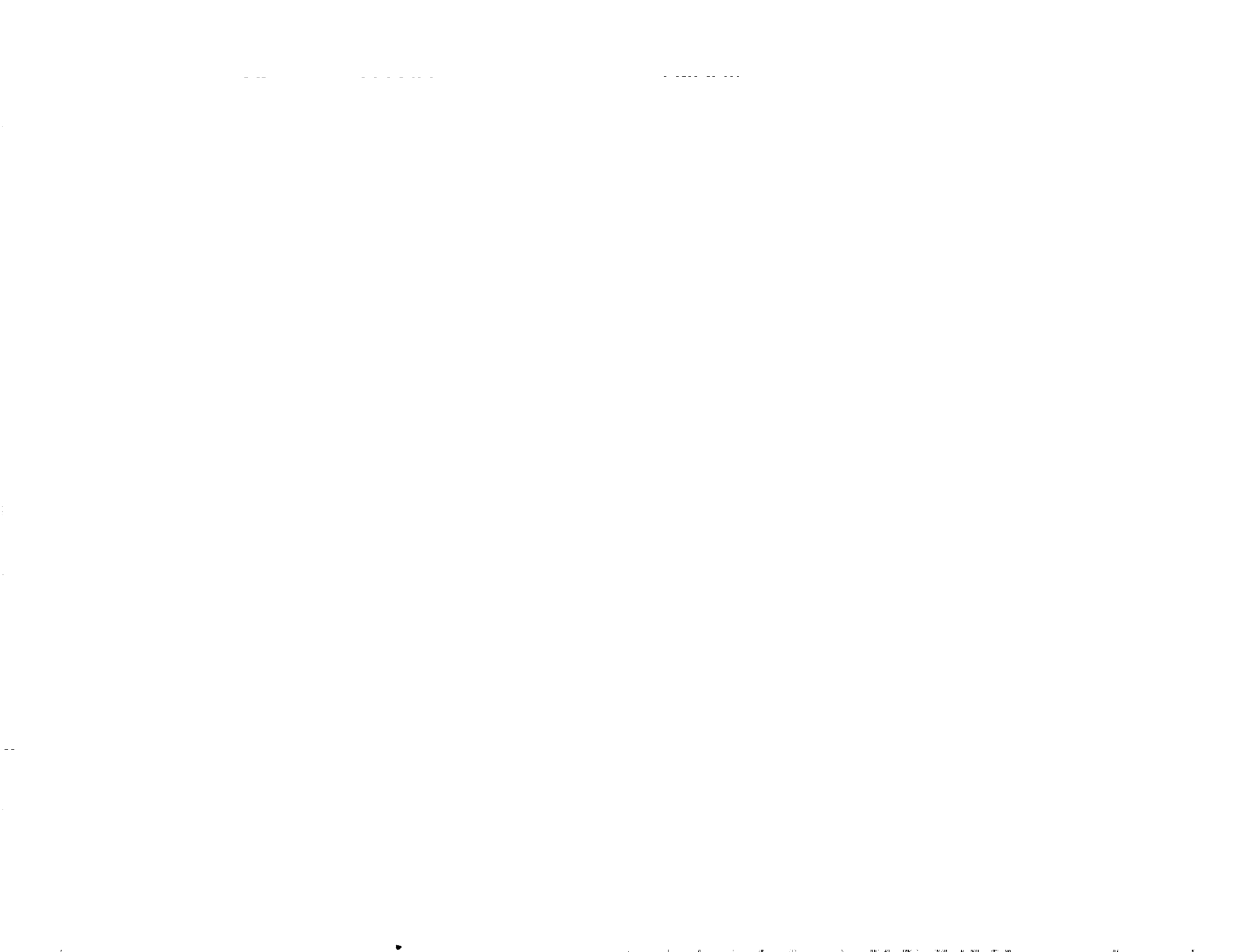
With best wishes, I am

Very truly yours,


Elliott H. Levitas
Chairman
Subcommittee on
Investigations and Oversight

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