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A PROPOSAL TO PREVENT THE STRANDING OF AIRLINE PASSENGERS

In 1971 the unscrupulous practices of the American Union of Students and the University Students Association left 1,500 to 2,000 air travelers stranded in Europe.¹ Similarly, the business failure of a single United Kingdom air carrier caused thousands of travelers to be stranded during the summer of 1972 and, according to one source, cost the American traveling public over \$700,000 in worthless expenditures.² Statistics compiled by United States embassies indicate that roughly 4,000 United States citizens were stranded in Europe during the three-year period from 1969 to 1971.³ While these examples are indicative of the most severe consequences of the air travel industry's performance failures, they do not begin to measure the total economic impact of such failures, since they do not include the out-of-pocket losses of those who were stranded or the consequential damages suffered by those individuals as a result of the imposition of unexpected delays. Because even a relatively short international excursion may involve an outlay of hundreds of dollars per passenger and because even a single incident can affect numerous individuals, the seriousness of these performance failures has attracted attention at both the federal and state levels, where efforts have been initiated to pass corrective legislation.⁴

After surveying industry structure in terms of market condi-

¹ Both organizations sold what they claimed was round-trip charter transportation to members of the general public. Ticket purchasers were asked to sign affidavits falsely stating that they had been members for more than six months. The passengers were then given a New York-London ticket and a voucher which was to be exchanged in London for a ticket to the United States. However, the vouchers turned out to be worthless because A.U.S. and U.S.A. had paid the carriers only for one way transportation, even though the passengers had paid the round-trip fare. Insolvency has apparently shut A.U.S. doors. It appears that the operators of U.S.A. simply absconded. S. REP. No. 92-925, 92d Cong., 2d Sess., 14 (1972).

² *Id.* at 13.

³ *Hearings on S. 2577 Before the Subcomm. on Foreign Commerce and Tourism of the Senate Comm. on Commerce*, 92d Cong., 1st Sess., ser. 92-38, at 55 (1971). [hereafter cited as *Hearings on S. 2577*]. By its own terms the bill's purpose is "to amend the International Travel Act of 1961 to provide for federal regulation of the travel agency industry." Such regulation is aimed at the prevention of passenger strandings and consumer economic loss resulting from the business failures and unscrupulous practices of certain members of the air travel industry. See part IV *A infra*.

⁴ See part IV *A infra*.

tions and actual practices, this article examines the failure of the air travel industry⁵ to provide bargained-for services to passengers. It compares the current regulatory pattern with alternative regulatory proposals and scrutinizes each to determine both the validity of the assumptions upon which they are based and the relative effectiveness of each in achieving desired consumer protection. The purpose of this detailed examination is to make possible the formulation of policy recommendations capable of serving as a basis for regulatory reform.

The inquiry is limited to an investigation of breakdowns in the provision of air transportation service as opposed to fluctuations in the quality of service rendered. This limitation recognizes that breakdowns are more readily identifiable and thus more easily regulated, and that they are more serious in terms of the traveler's welfare. The provision of contingent services⁶ is discussed solely as an aid in defining the respective roles of the various industry members. This limited scope of investigation is justified both because air transportation failures pose the greatest inconvenience for the traveler and because the cost of air transport often represents the largest single element of travel expenses. Industry performance failures in the area of contingent services are of relatively minor significance. Furthermore, regulation focused on the provision of air transportation should have an effect on the standards of contingent services. Unscrupulous operators, deprived of the economic advantages they enjoy in providing illegal air transportation, will have little economic incentive to remain in the industry. To the extent that contingent service failures are traceable to such unscrupulous operators, industry performance standards should improve, notwithstanding the fact that the marketing of contingent services is not directly regulated.

I. THE FUNCTIONAL STRUCTURE OF THE AIR TRAVEL INDUSTRY

Members of the air travel industry are described, for regulatory purposes, by reference to role designation which is a function of the service the member provides and the relationship he bears to other industry members. Therefore, a working knowledge of the

⁵ For purposes of this article, a member of the air travel industry will be considered to be any person or entity who either directly or indirectly offers or undertakes, whether as principal, agent, broker, or otherwise, to arrange domestic or foreign air transportation in return for compensation. *See generally* S. 2577, 92d Cong., 2d Sess. § 203(3) (1972).

⁶ Contingent services generally include meals, accommodations, ground transportation, and any additional entertainment items provided in an air transportation package.

functional structure of the air travel industry is essential if one is to understand the scope and applicability of both current and proposed regulatory patterns. The logic of the assignment of the numerous functionally oriented role designations can best be understood if industry members are identified in relation to the two general classes of services in which they deal: regularly scheduled and charter.

A. Regularly Scheduled Services

Members of the air travel industry who provide regularly scheduled services can be divided into three broad classifications. First, the original suppliers of air transportation are the scheduled air carriers themselves. In many instances the consumer deals directly with these carriers by simply telephoning the airline for a reservation or purchasing a ticket at an airline counter. In recent years the scheduled carriers have endeavored to increase the marketability of their services by making air travel more attractive and convenient. To this end tour packages have been assembled which include air transportation and such contingent services as meals, lodging, and excursions at the point of destination. While the airline may assemble and promote its own tour package, more frequently the assembly and distribution of such service packages is undertaken by a second group of industry members commonly known as independent wholesalers. In return for a commission the wholesaler contracts with various suppliers, including the scheduled air carrier, to use their services in a package he prepares.⁷ The wholesaler does not, however, market the assembled services directly to the consumer but distributes the package to a third group of industry members, the retailers, who offer it for sale directly to the traveling public.⁸ At times the retailer, most often a travel agent, will assemble an individualized tour package for a particular customer. The time-consuming nature of such work, however, dictates that whenever possible the agent will simply resort to a package provided by a wholesaler which, given the great variety of tour offerings, can meet the consumer's demands in the majority of cases.

⁷ In accordance with common industry practice the wholesaler most often contracts to use such services on a consignment basis. Coupons are distributed to retailers which, when sold to consumers, serve as vouchers to be traded for services during the course of a trip. Upon such sale the retailer deducts his commission and forwards the remaining proceeds to the wholesaler who must make satisfactory payment arrangements with the various service suppliers so that they will honor the coupons he has issued. S. REP. NO. 92-925, *supra* note 1, at 12.

⁸ *Id.* at 11.

B. Charter Services

The functionally oriented terminology of the regulatory agencies is made more complex in the area of charter services because of the varied nature of the services that can be offered and the relatively extensive array of specific regulatory provisions with which industry members must comply when they undertake to offer such services. While the role of the original service supplier remains essentially unchanged from that performed in the noncharter setting, that category is significantly enlarged because supplemental air carriers, whose sole business is to provide air transportation on a charter-only basis, are included in that category together with regularly scheduled air carriers who may also supply transportation for charter flights.⁹

The provision of charter services may be accomplished by two distinct means. An original service supplier, acting independently or in conjunction with its authorized retail travel agents, may offer reduced fares to members of a group if certain requirements are met as to the qualifications of members and group size. This is the so-called affinity group charter.¹⁰ Alternatively, a single industry member identified as an indirect air carrier¹¹ may combine the wholesale and retail functions. The indirect air carrier differs from the simple wholesaler in that the former assembles not only service packages but groups of passengers as well. Stringent federal regulations ordinarily apply to indirect air carriers, but exemptions may be obtained if the arrangements take the form of an inclusive or study group charter.¹²

II. CURRENT REGULATION OF THE AIR TRAVEL INDUSTRY

A. Self-Regulation

The regularly scheduled air carriers engage in substantial self-regulation. The Air Transport Association of America

⁹ Charter services may be provided by air carriers holding a certificate of public convenience and necessity. 14 C.F.R. § 207.2 (1972). Since scheduled air carriers come under the definition of air carrier established in 49 U.S.C. § 1301(3) (1970) and are required to hold such certificate pursuant to *id.* § 1371(a), they may offer charter services.

¹⁰ See notes 51-58 and accompanying text *infra*.

¹¹ An indirect air carrier has been defined by the Civil Aeronautics Board (CAB) as one who "sells transportation by aircraft to the general public other than as an authorized agent of a direct carrier in the consummation of transportation arrangements between the operator of the aircraft and the passengers." Hacienda Hotels-U.S. Aircoach, 26 C.A.B. 372, 385 (1958).

¹² See notes 59-68 and accompanying text *infra*.

(ATA)¹³ has promulgated rules by which no member airline may appoint or retain any person or business as its retail ticket agent or as an authorized agency unless the person or agency is a member in good standing of the Air Traffic Conference of America (ATC).¹⁴ Because scheduled air transportation may be obtained only from an airline or its authorized agent, once the consumer has made his purchase the carrier is bound to provide the air transportation paid for.¹⁵ Thus, association accreditation designed to protect the airlines from agent mismanagement and default indirectly insures that the consumer will receive the air transportation for which he has paid, even if the agent should fail to forward the fare to the supplier.

B. Federal Regulation

1. *The Federal Aviation Administration*—The Federal Aviation Administration (FAA) regulates scheduled, supplemental, and foreign air carriers primarily for the purpose of imposing safety and airworthiness standards. Nevertheless, its regulatory scheme, utilized in conjunction with the efforts of other federal agencies, may serve to increase the general level of economic protection offered the air travel consumer. FAA regulations prohibit scheduled and supplemental air carriers from providing scheduled or charter services without first obtaining an operating certificate.¹⁶ In order to qualify for such certification a scheduled or supplemental air carrier must demonstrate to the satisfaction of the FAA that it is properly and adequately equipped to carry on

¹³ The ATA is a trade and service organization representing virtually all of the scheduled airlines of the United States. See *Hearings on S. 2577, supra* note 3, at 170.

¹⁴ The ATC is the marketing and services division of the ATA. In order to be considered a member in good standing, the retail agent is required to maintain a bond payable to the airlines in the amount of \$10,000. Further, he must report all ticket sales to the respective airlines and remit the proceeds therefrom at ten-day intervals. *Id.* at 171-72.

¹⁵ This obligation results from the carrier's liability for the acts of its agents. See RESTATEMENT (SECOND) OF AGENCY § 12 (1958) and the Air Traffic Conference Sales Agency Agreement which authorizes the agent to "represent the Carrier for the purpose of promoting and selling air passenger transportation offered by the carrier . . ." AIR TRAFFIC CONFERENCE TRAVEL AGENTS HANDBOOK § 80.15, at 1 (4th rev., Oct. 1, 1971). Commenting on the efficacy of the carrier-agent relationship as a means by which the consumer is protected, George A. Buchanan, Vice President of ATA, has stated:

It should be emphasized that an airline passenger who purchases a ticket from an accredited travel agent for transportation on the scheduled airlines runs absolutely no risk of losing that transportation dollar even though the travel agent may ultimately not remit the proceeds to the airlines concerned. This is so because the airline is responsible for the acts of its agents, and the airline is required to perform the transportation even though it may never receive payment therefor.

Hearings on S. 2577, supra note 3, at 178-79.

¹⁶ 14 C.F.R. § 121.3 (1972).

safe flight operations¹⁷ and must obtain a certificate of public convenience and necessity from the Civil Aeronautics Board (CAB).¹⁸ To obtain the CAB certification, scheduled and supplemental air carriers must agree to maintain and allow the Board access to their financial accounts and records.¹⁹

Additionally, supplemental air carriers, and scheduled air carriers providing charter services,²⁰ must permit the Administrator of the FAA to make any financial inspection he deems necessary to insure that operations are being conducted in accordance with regulations.²¹ Thus the FAA provides an additional means for inquiring into the financial condition of those air carriers providing charter services,²² excluding foreign carriers.²³ An exercise of the combined investigatory powers of these two agencies may provide a measure of consumer protection by identifying those scheduled and supplemental carriers conducting business on a weak financial basis. In this way carrier business failures may be more readily predicted, and a variety of remedial measures might be undertaken to protect passengers from financial loss.²⁴

¹⁷ *Id.* § 121.27.

¹⁸ 49 U.S.C. § 1371(a) (1970).

¹⁹ *Id.* § 1377(e) reads:

The Board shall at all times have access to all . . . [air carrier] accounts, records and memoranda . . . and it may . . . inspect and examine any and all such . . . accounts, records, and memoranda. The provisions of this section shall apply, to the extent found by the Board to be reasonably necessary for the administration of this chapter, to persons having control over any air carrier, or affiliated with any air carrier . . .

See also note 26 *infra*.

²⁰ 14 C.F.R. § 121.5 (1972). See also note 9 *supra*.

²¹ *Id.* § 121.81 reads:

a) Each certificate holder shall allow the Administrator at any time or place to make any inspections or tests to determine its compliance with the Federal Aviation Act of 1958, the Federal Aviation Regulations, its operating certificate and operations specifications, or its eligibility to continue to hold its certificate.

b) In the case of a supplemental air carrier . . . these inspections and tests include inspections and tests of financial books and records . . .

²² The CAB is authorized to inspect the accounts and records of air carriers. See note 20 *supra*. But the definition of air carrier does not include foreign air carriers. 49 U.S.C. § 1301(3) (1970).

²³ A foreign air carrier is defined as "any person other than a citizen of the U.S. who undertakes, directly, by lease or other arrangement, to engage in air transportation." 14 C.F.R. § 1.1 (1972). Thus the FAA has no investigatory powers with respect to foreign air carriers. 14 C.F.R. pt. 129 (1972). *But see* notes 43 and 46 and accompanying text *infra*, regarding the requirement that foreign air carriers obtain a permit to engage in foreign air transportation and a statement of authorization for each charter flight.

²⁴ 49 U.S.C. § 1429 (1970) reads in part:

If, as a result of any . . . reinspection or reexamination . . . [the F.A.A. Administrator] . . . determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any . . . air carrier operating certificate . . .

Id. § 1371(g) states:

Any regulatory pattern seeking to provide comprehensive and effective consumer protection in the air travel market must rely heavily upon existing investigatory powers to monitor closely the activities of the carrier members of the air travel industry. To the extent that the FAA might aid in this effort, it will contribute to the level of economic protection afforded the air travel consumer.

2. *The Civil Aeronautics Board*—While the FAA is primarily concerned with matters of operational safety, the CAB regulates the air travel industry so as to provide the traveling public with reliable air transportation at reasonable cost.²⁵ Carriers seeking to engage in the provision of regularly scheduled air services must meet initial qualification requirements²⁶ and thereafter must conduct their scheduled service operations in a manner that is specifically prescribed and closely supervised by the CAB.²⁷ The system of regularly scheduled air service, however, entails certain costs of inefficiency that are borne by the consumer. Because scheduled services must be provided regardless of the immediate demand for any particular flight, fares charged on such flights must take into account the likelihood that operations may be conducted at less than capacity. Thus, a portion of the air travel dollar spent is for the convenience of having flights available on a scheduled basis. The air travel demands of many consumers, however, are sufficiently flexible to allow them to plan their departures well in advance and join with other travelers to form a group

The [Civil Aeronautics] Board upon petition or complaint or upon its own initiative, after notice and hearings, may alter, amend, modify, or suspend any . . . certificate [of public convenience and necessity], in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this subchapter or any order, rule or regulation issued hereunder or any term, condition or limitation of such certificate . . .

In addition any person who violates applicable air carrier economic regulations is subject to the imposition of civil penalties. *Id.* § 1471. If such violation is done knowingly and willfully criminal sanctions may be imposed. *Id.* § 1472.

²⁵ *Id.* § 1302.

²⁶ *Id.* § 1371(a):

No [U.S.] air carrier shall engage in any air transportation unless there is in force a certificate of public convenience and necessity issued by the Board authorizing such air carrier to engage in such transportation.

Id. § 1371(d)(1):

The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity . . .

Where the carrier limits its operations to the provision of charter services, the certificate takes the form of a limited authorization to engage exclusively in the provision of supplemental air transportation. The requirements for issuance of this limited certificate are virtually identical to those imposed on the scheduled air carriers. *Id.* § 1371(d)(3).

²⁷ See generally *id.* §§ 1371-1387.

which will fill a given aircraft for a particular flight. The existence of many such consumers creates a market for charter services which may be offered relatively inexpensively since the carriers providing such supplemental services need offer only those flights warranted by immediate consumer demand.

Recognizing the demand for lower cost nonscheduled services, the CAB has authorized the controlled implementation of a variety of charter mechanisms. In deference to the scheduled air carriers who operate under a relative economic disadvantage, such authorization has been limited by strict scrutiny of the routing and frequency of supplemental operations in order to insure that charter flights do not infringe upon the established trade of the scheduled carriers. This has been accomplished in large part through the imposition of regulatory requirements specifically identifying those who may provide and use supplemental services and designating the circumstances under which such services may be provided. The wide scope of the CAB regulatory power also serves to afford the consumer a measure of protection against performance shortcomings, unscrupulous practices, and business failures of charterers and the carriers and agents with whom the charterer must deal.

a. Identification of the Providers and Users of Charter Services—CAB regulations generally provide that no United States air carrier²⁸ may perform charter services²⁹ unless it has on file with the Board a current tariff listing the services to be performed, and enumerating the eligibility requirements to be met by prospective charter groups.³⁰ These requirements limit eligible charterers to: (1) persons chartering an aircraft for their own use,³¹ in which case resale of such transportation is prohibited;³² (2) group representatives, no part of whose business is the formation of groups or the solicitation or sale of transportation services;³³ and (3) domestic or foreign study group charterers.³⁴ Further, in the solicitation of such charter business a carrier or its agent is prohibited from

²⁸ This designation does not include air carriers certified for supplemental air service. 14 C.F.R. § 207.2 (1972). See notes 39-43 and accompanying text *infra*.

²⁹ The major element of charter service is the air transportation itself. Charter flights are designated as "air transportation performed on a time, mileage or trip basis where the entire capacity of one or more aircraft has been engaged for the movement of persons and their baggage, and/or property . . ." 14 C.F.R. § 207.11(b) (1972).

³⁰ *Id.* § 207.4.

³¹ *Id.* § 207.11(b)(1).

³² An individual attempting a resale under such circumstances would be considered an indirect air carrier. 49 U.S.C. § 1301(3) (1970). As such, he would need CAB authorization in order to operate legally. *Id.* § 1371(a). See also notes 48-50 and accompanying text *infra*.

³³ 14 C.F.R. § 207.11(b)(2) (1972).

³⁴ *Id.* § 207.11(b)(5). See also notes 65-68 and accompanying text *infra*.

making payments, donations, or extending gratuities to any member of a qualified chartering organization.³⁵ Solicitation prohibitions notwithstanding, a carrier may name and pay a commission to a charter group member acting as its authorized agent.³⁶ Such an arrangement gives rise to a legal relationship which obligates the carrier to perform the services for which the agent has been paid.³⁷ A further measure of consumer protection is provided by CAB regulations requiring that the terms of service conform to those listed in the tariff and that the carrier require the charterer to pay the total charter price or post a bond in an equivalent amount prior to the commencement of air transportation.³⁸

While the general regulatory provisions applicable to supplemental air carriers closely parallel those imposed on scheduled carriers undertaking supplemental services,³⁹ the requirements pertaining to supplemental carriers differ in three important respects. First, tour operators⁴⁰ are added to the list of eligible charterers,⁴¹ thus expanding the potential market for charter services. Second, if charter flight delays are caused by supplemental air carrier error or omission the traveler may be entitled to have alternative service provided him, or at his option receive an immediate refund for services paid for but not yet performed; the supplemental carrier must also pay for those incidental expenses incurred by the consumer as a result of his unanticipated delay in departure.⁴² Finally, consumer prepayments to a supplemental carrier for air transportation must be placed in an escrow or trust account, or a carrier performance bond must be filed in an equivalent amount.⁴³ The scope of consumer protection is thus broadened by imposing requirements on the supplemental carrier to compensate passengers in the event of certain performance failures.

Both the scheduled and supplemental flight activities of foreign air carriers are subject to CAB control by virtue of the requirement that such carriers obtain a permit to engage in foreign air

³⁵ 14 C.F.R. §§ 207.15(a),(b) (1972).

³⁶ *Id.* § 207.15(c).

³⁷ *Cf.* note 15 *supra*.

³⁸ 14 C.F.R. § 207.13 (1972).

³⁹ *See generally id.* § 208.

⁴⁰ *Id.* § 208.6(b)(4). A tour operator is defined by the CAB as a person authorized to engage in the formation of groups for transportation on inclusive tours. *Id.* § 378.2(b)(5)(d).

⁴¹ *See* notes 31-34 and accompanying text *supra*.

⁴² The exact form of the remedy is dependent upon the nature, time, and place of performance failure. *See* 14 C.F.R. §§ 208.32a-.33 (1972). A discussion of the complex formulas prescribing remedy form is beyond the scope of this article.

⁴³ *Id.* §§ 208.40-.41. Additionally, the carrier must require that the charterer pay the total charter price, or post an equivalent payment bond prior to the commencement of air transportation, *Id.* § 208.32(e).

transportation before undertaking to provide services between the United States and other nations.⁴⁴ The Board may, without hearing, issue an order, subject only to a stay by the President, amending or discontinuing a permit authorizing scheduled service by a foreign air carrier if it finds that operations of that carrier violate applicable law or adversely affect the public interest.⁴⁵ While limitations on permits authorizing foreign carriers to engage in the provision of supplemental services closely parallel those generally applied to supplemental carriers, conspicuously absent are those consumer protection measures designed to insure that the carrier will make recompense in the event of service breakdowns.⁴⁶ Foreign air carriers providing supplemental services are, however, more closely scrutinized than their American counterparts in that a separate statement of authorization is required for each charter performed.⁴⁷ The CAB thus exercises a measure of control over foreign air carriers by limiting their entry into the United States market and closely regulating their charter activities. In this way the Board seeks to provide the consumer with an adequate degree of economic protection in his dealings with such carriers in spite of the practical and political difficulties involved in regulating a foreign national.

Indirect air carriers⁴⁸ comprise the final group of industry members providing charter services. To function in such capacity one must obtain an air carrier operating certificate⁴⁹ or be exempted from such obligation by virtue of the nature of the charter service performed. Such exemptions for passenger transportation are granted only to study group charterers and tour operators providing inclusive group charters.⁵⁰ Enforcement of the prohibitions on unauthorized indirect air carrier operations should insure that the consumer deals only with legitimate, reputable carrier members of the air travel industry.

b. The Circumstances Under Which Charter Services May Be Performed—In order to obtain supplemental services, charter par-

⁴⁴ The requirements for the issuance of such permits are virtually identical to those imposed upon United States air carriers seeking a certificate of public convenience and necessity. 49 U.S.C. § 1372 (1970).

⁴⁵ 14 C.F.R. § 213.3 (1972).

⁴⁶ See generally *id.* § 214.

⁴⁷ An application for authorization must identify the charterer, describe the nature of the operation to be performed, and indicate whether the nation of foreign carrier registry would grant a similar privilege to United States carriers. *Id.* § 212.5. The Board will grant the authorization if it determines that the nation of registry would treat United States carriers in a like manner and that the operation proposed will not have an adverse impact on American air carriers. *Id.* § 212.6.

⁴⁸ See note 11 *supra*.

⁴⁹ See note 16 and accompanying text *supra*.

⁵⁰ See notes 59 and 65 and accompanying text *infra*.

ticipants must meet qualifications established by the CAB under one of three alternative charter schemes. The first of these deals with affinity group charters, whose participants are generally required to have been members of the chartering organization for a minimum of six months prior to the departure date and must not have joined merely to participate in the charter program.⁵¹ There are three subcategories of affinity group charters, the first of which is the pro-rata plan⁵² under which the total cost of the charter is divided equally among the affinity group members actually transported.⁵³ In the event that the original cost estimated, charged, and collected exceeds the actual cost, a refund must be made to each participant on a pro-rata basis.⁵⁴ A second type of affinity group arrangement is the mixed charter, so named because the cost of the tour is borne partly by the charter participants and partly by the chartering organization.⁵⁵ Functionally, the regulatory requirements imposed on both the group and the carrier are identical to those applicable to the pro-rata plan.⁵⁶ Under what is known as the single entity charter plan,⁵⁷ the chartering organization bears the entire cost of the excursion. Under this last plan the charterer is exempted from the general regulatory provisions requiring him to make advance payment or post a payment bond.⁵⁸

The CAB recognizes two situations in which the requirements applicable to affinity groups are relaxed so that charter flights may be offered to members of the general public. Inclusive group tours⁵⁹ may be offered publicly if forty or more participants are carried as a single unit in a round-trip excursion of more than seven days.⁶⁰ Further, accommodations and land transportation at

⁵¹ 14 C.F.R. § 207.41 (1972). The eligibility of a given group for charter services is judged by the air carrier on the basis of a statement of the facts surrounding the origin and membership of the organization that is required to be submitted prior to the closing of any contract for services. *Id.* § 207.22(a). In those cases where the statement reveals that a previous contract involving the group has been refused, the carrier is obligated to conduct an independent inquiry into the eligibility of the group. *Id.* § 207.22(6). Once the charter has been accepted the carrier must be supplied with and retain a passenger flight list giving the name and address of each passenger and his affiliation with the chartering organization. *Id.* § 207.45(a).

⁵² See generally *id.* § 208.200.

⁵³ Cost is defined as the actual transportation expense plus a reasonable charge attributable to administrative expenses. *Id.* § 208.213(c).

⁵⁴ *Id.* § 208.213(b).

⁵⁵ *Id.* § 208.3(j).

⁵⁶ See generally *id.* § 208.400.

⁵⁷ *Id.* § 208.3(i).

⁵⁸ *Id.* § 208.301. See also note 43 *supra*.

⁵⁹ See generally 14 C.F.R. § 378 (1972).

⁶⁰ *Id.* §§ 378.2(b),(b)(1). If the tour operator conducts his operations in accordance with the regulations governing the provision of inclusive group tours, he is exempted from the requirements of 49 U.S.C. § 1371 (1970), requiring that he have a certificate of public convenience and necessity. 14 C.F.R. § 378.3 (1972).

three points other than the point of origin must be included in the package price.⁶¹ The Board regulates air transportation charges for all inclusive group tours⁶² and requires that a tour prospectus⁶³ and surety bond or its equivalent⁶⁴ be filed with the CAB prior to the flight's commencement.

Charter flight privileges may be offered to study groups composed of students of a bona fide educational institution who are to participate in a formal academic course of study abroad.⁶⁵ To qualify in this category, the group must consist of a minimum of forty students who are to spend at least four weeks abroad, and the charter price must include at least two meals per day, accommodations, and ground transportation.⁶⁶ As in the case of the inclusive tour, a prospectus, here termed a study group statement, describing the nature of the program⁶⁷ and a surety bond or its

⁶¹ 14 C.F.R. §§ 378.2(b)(2)-(3) (1972).

⁶² *Id.* § 378.15 reads:

No supplemental air carrier shall perform any charter trips for inclusive tours unless such air carrier shall have on file with the Board a currently effective tariff showing all rates, fares, and charges for such charter trips and showing the rules, regulations, practices, and services in connection with such transportation.

⁶³ *Id.* § 378.10:

No inclusive tour or series of tours shall be operated, nor shall any tour operator sell or offer to sell, solicit, or advertise such tour or tours unless there is on file with the Board a Tour Prospectus

Id. § 378.13:

The prospectus shall include copies of the charter contract, the contract between the tour operator or foreign tour operator and tour participants, [and] the tour operator's or foreign tour operator's surety bond

⁶⁴ *Id.* § 378.16:

(a) [T]he tour operator or foreign tour operator shall furnish a surety bond

(b) The supplemental air carrier and the prospective tour operator or foreign tour operator may elect, in lieu of furnishing a surety bond as provided under paragraph (a) . . . to comply with the requirements [that]:

(1) The tour operator or foreign tour operator . . . furnish a surety bond in a minimum amount of \$10,000 per flight up to a maximum amount of \$200,000 for a series of 20 or more flights . . . the bond to continue in effect until completion of the tour or series of tours

(2) The supplemental air carrier and tour operator or foreign tour operator shall enter into an agreement with a designated bank, the terms of which shall provide that all deposits by tour participants paid to tour operators or foreign tour operators and their retail travel agents shall be deposited with and maintained by the bank

⁶⁵ *Id.* § 373.2.

⁶⁶ *Id.* If the group qualifies, the charterer is exempted from the requirement of 49 U.S.C. § 1371 (1970) that he have a certificate of public convenience and necessity. 14 C.F.R. § 373.3 (1972).

⁶⁷ 14 C.F.R. § 373.10(c) (1972) reads:

The statement shall include copies of the charter contract, the contract between the study group charterer and the student participants, the study group charterer's surety bond . . . and where applicable, a copy of the depositary agreement with a bank

equivalent⁶⁸ must be filed with the CAB prior to the beginning of the trip.

3. *The Federal Trade Commission*—Although not directly charged with regulation of the air travel industry, the Federal Trade Commission (FTC) possesses regulatory powers over certain industry members should they engage in deceptive acts or practices in their dealings with the public, either personally or through media advertising.⁶⁹ When the Commission has reason to believe that a deceptive act has occurred it may serve a complaint upon the alleged offender and conduct a hearing, after which time a cease and desist order may be issued.⁷⁰ In this way members are made to conform to FTC standards regulating their commercial contact with the consumer. Thus, the Federal Trade Commission is in a position, as are the Civil Aeronautics Board, the Federal Aviation Administration, and the air travel industry itself, to aid and in some measure to protect the consumer when he seeks to procure air travel services.

III. THE COMPREHENSIVENESS AND UTILITY OF PRESENT REGULATIONS

That air passengers continue to be stranded indicates that the present regulatory efforts of federal agencies and the air travel industry are producing less than optimal results. An examination of these regulatory requirements seems to indicate that the problem does not arise from a lack of rulemaking authority. Rather it is a product of the practical difficulties involved in identifying, monitoring, and controlling the activities of certain industry members engaged in unscrupulous or financially irresponsible practices.

Industry self-regulation governing the retail sale of scheduled services has proven to be reasonably comprehensive and offers an adequate degree of consumer protection.⁷¹ Although agent

⁶⁸ The surety bond requirements imposed on study group charterers are virtually identical to those imposed upon tour operators. *Id.* § 373.15. See also note 64 *supra*.

⁶⁹ 15 U.S.C. § 45 (1970). The Commissioner, however, enjoys no such regulatory powers over air carriers. *Id.* § 45(a)(6).

⁷⁰ *Id.* § 45(b). The responsibility for the enforcement of Commission orders and additional civil penalties, if any, is placed in the hands of the Attorney General. *Id.* § 56. Additionally, Chapter 63 of the Federal Criminal Code provides for the fining and imprisonment of any individual who makes use of the postal service, wire, radio, or television in an attempt to defraud or obtain money or property by means of fraudulent representations or promises. To the extent that members of the air travel industry solicit business in such a manner they would fall within the scope of these sanctions. 18 U.S.C. §§ 1341-1343 (1970).

⁷¹ See notes 13-15 and accompanying text *supra*.

defaults do occur, the resulting losses represent but a small proportion of the total dollar value of services⁷² sold by agents and such losses are borne exclusively by the respective air carriers.⁷³ Self-regulation in the charter area has been less effective primarily because of the fact that, in accordance with customary industry practice, the original suppliers of air transportation frequently deal with indirect air carriers who are acting independently and not as agents of the original suppliers.⁷⁴ As such the institutionalized principal-agent relationship, which works so effectively to provide consumer protection with respect to the purchase of scheduled services, has found no counterpart in the charter area.⁷⁵

Unfortunately, existing federal regulations, the bulk of which are aimed specifically at those engaged in the provision of supplemental services, have proved only partially successful as a substitute for effective self-regulation. Because of the high demand for inexpensive air transportation and the strict regulatory limitations imposed on legitimate industry members who offer charter transportation, a lucrative black market has been created in the provision of low-cost charter flights. A common ploy used by unscrupulous operators is to form bogus study group charters, or affinity groups composed of participants solicited from the general public.⁷⁶ Such activities are clearly detrimental to legitimate industry members and the scheduled air system, and the participant in the illegal charter very often suffers as well. The illegal operator can realize a substantial profit by charging the traveler for a "bargain" round-trip air transportation and contingent service package while actually engaging a carrier for one-way transportation only. The charterer simply pockets the difference and departs the scene.

While CAB regulations require that a charterer make full cash payment or its equivalent to the carrier before the commencement of air transportation,⁷⁷ there are no requirements in the case of an affinity group or study group charter that the passage be round-trip.⁷⁸ Thus the operator is free to contract with and pay

⁷² During 1970 net loss incurred by air carriers as a result of agent default amounted to \$911,800. During that same year, total sales by authorized agents amounted to \$2.25 billion. See *Hearings on S. 2577*, *supra* note 3, at 179.

⁷³ See note 15 *supra*.

⁷⁴ See note 11 and accompanying text *supra*.

⁷⁵ See notes 13-15 and accompanying text *supra*. However, the National Air Carrier Association, which is composed of the eight leading United States supplemental air carriers, is considering the implementation of a program of agent designation. See *Hearings on S. 2577*, *supra* note 3, at 202.

⁷⁶ See S. REP. NO. 92-925, *supra* note 1, at 12. See also note 1 and accompanying text *supra*.

⁷⁷ See note 43 *supra*.

⁷⁸ Requirements as to round-trip transportation are imposed in the case of affinity groups only where four or more round-trip flights are performed on behalf of a single chartering organization in one calendar year. 14 C.F.R. § 207.13(c) (1972). There are no regulations

the carrier for one-way transportation only. The operator will issue the passenger a voucher for the return ticket,⁷⁹ but if the charterer has not paid the carrier for the return flight, the passenger's voucher will be worthless. He will be forced to secure whatever alternative return transportation he is able to afford.⁸⁰

An individual offering charter services on such a basis is operating as an indirect air carrier without required authorization.⁸¹ As such he is subject to civil and criminal sanctions which may be imposed by the CAB,⁸² as well as to private remedies initiated against him by those he has stranded. The greatest problem in initiating and applying such remedies lies in locating the guilty parties. The illegal operation is typically of an ephemeral nature, requiring nothing more permanent than a rented office and a telephone. Large amounts of money can be made in a single charter transaction after which the entire operation can be dismantled and moved or simply abandoned. Even if the individual could be found, as would most likely be the case where a legitimate business failure rather than chicanery is involved, the imposition of federal sanctions would not serve to compensate the consumer and private civil remedies would be of little value against a judgment-proof defendant.

In the area of charter flights it is evident that while the existing regulatory pattern provides some degree of consumer protection, it has failed to prevent the recurrence of passenger strandings and consequent economic loss. This is a result in large measure of the system's inability in certain instances to deter or detect regulatory violations and to predict potential insolvencies. Significantly, while both preventive and remedial sanctions are employed, in the event of a service failure none of the existing federal or private programs can offer the stranded passenger any form of immediate relief. Until a regulatory scheme can be devised which directly aids the stranded passenger while he is stranded, the consumer will be denied an adequate measure of economic protection in his dealings with the members of the air travel industry.

requiring that study group tours be round-trip. See notes 65-68 and accompanying text *supra*. All inclusive group tours must be round-trip. See notes 59-64 and accompanying text *supra*.

⁷⁹ It is common industry practice to issue vouchers to trip participants, which vouchers are to be exchanged for a return flight ticket at the carrier's counter at the airport where the return flight originates. See note 7 *supra*.

⁸⁰ Any air carrier seeking to provide alternative air transportation could do so only in accordance with CAB regulations unless a specific exemption were issued by the CAB. See *Hearings on S. 2577, supra* note 3, at 54-55. Thus an altruistic carrier could not provide free or reduced cost return transportation without Board approval. 49 U.S.C. § 1386(b)(1) (1970).

⁸¹ See text accompanying notes 48-50 *supra*.

⁸² 49 U.S.C. §§ 1471-1472 (1970).

IV. PROPOSALS FOR REFORM

A. Senate Bill 2577⁸³

At the close of the last session of Congress, there was pending proposed legislation of a preventive nature that was intended to bring about an improvement in the performance record of the travel industry through the imposition of industry-wide membership standards.⁸⁴ Under the bill, members of the industry,⁸⁵ with the exception of carriers,⁸⁶ would be required to obtain a registration certificate.⁸⁷ Because carriers would be prohibited from entering into travel service contracts with unregistered agents,⁸⁸ the possession of a certificate of registration would become a practical necessity if one were to participate in the travel industry.⁸⁹

⁸³ S. 2577, 92d Cong., 2d Sess. (1971). The bill was passed by the Senate on June 29, 1972, and was referred to the House Committee on Interstate and Foreign Commerce on June 30, 1972. Letter from John D. Dingell, Member of Congress, to the *University of Michigan Journal of Law Reform*, Sept. 11, 1972, on file with the *University of Michigan Journal of Law Reform*. The bill, designated H. R. 17223, was introduced in the House and was assigned to that committee on October 18, 1972. 118 CONG. REC. H10,409 (daily ed. Oct. 18, 1972). As of January 31, 1973 the bill had not been introduced into the 93d Congress.

⁸⁴ Several states have proposed legislation calling for the licensing of travel agents. See, e.g., H.B. 1707, 77th Ill. Gen. Ass. (1971); S.B. 1157, Reg. Sess. 76th Mich. Legis. (1972). The proposed state measures differ only slightly from the federal bill and would be rendered moot in the event of its final enactment. S. 2577, 92d Cong., 2d Sess. § 212 (1971). Given the international scope of the activity which is sought to be regulated and the dilemma in which travel industry members would find themselves in trying to comply with a variety of state laws, regulation on a state-by-state basis would seem to be less desirable and potentially less effective than federal legislation.

⁸⁵ An industry member is one who engages in the business of conducting a travel agency, which means the

holding out by any person . . . to any other person, directly or indirectly, as being able or offering or undertaking, by any means or method whether acting as principal, agent, broker, or otherwise to acquire for a fee, commission, or other valuable consideration, of any sort, travel reservations or accommodations, tickets for domestic or foreign travel by air, rail, ship, bus, or other medium of transportation, hotel, or other lodging reservations or accommodations.

S. 2577, 92d Cong., 2d Sess. § 203(3)(D) (1970).

⁸⁶ *Id.* § 203(3)(A). The rationale for such exclusion is that carriers are adequately regulated by existing federal agency programs. See S. REP. NO. 92-985, *supra* note 1, at 11. While indirect air carriers are arguably exempted from the registration requirements under the language of the bill, such an exemption would not seem warranted in view of the numerous instances of regulatory violations involving just such industry members.

⁸⁷ S. 2577, 92d Cong., 2d Sess. § 204(a) (1970).

⁸⁸ *Id.* § 204(b).

⁸⁹ Because the various carriers have an economic interest in maintaining a good industry image in the eyes of the consumer, it is reasonable to believe that they would exercise the minimal efforts required to serve as an enforcement mechanism by not dealing with unregistered agents. If such efforts are not forthcoming, appropriate sanctions may be employed. *Id.* § 211 provides:

(a) Any person who knowingly and willfully violates any provision of this title or any order, rule or regulation issued under any such provision, shall, if it is the first such offense, be fined not more than \$500 or imprisoned not

The requirements for agent registration would be established by the Secretary of Transportation,⁹⁰ while the rules and regulations governing the conduct of registered agents would be promulgated by the Travel Agents Registration Board.⁹¹ Once obtained, registration would be subject to revocation if a review of the agent's activities disclosed that the registrant had engaged in prohibited practices.⁹² Further, civil and criminal penalties would be established for noncompliance with the provisions of the act or the rules and orders promulgated thereunder.⁹³

In setting up a regulatory scheme which relies upon responsible industry members to monitor and in some measure control the activities of the industry which they head,⁹⁴ the sponsors of the bill had identified and attempted to correct the major shortcomings of the present regulatory system. However, while the prohibition against carriers' contracting with nonregistered agents would undoubtedly improve the current situation, problems inherent in the scope and nature of the bill's regulatory pattern render it a less than adequate consumer protection device. While a carrier may be subject to fine or imprisonment for contracting with an unregistered agent, if a service failure results the stranded passengers would still be left without an immediate remedy by which to extricate themselves from their predicament.⁹⁵ Further, even if the carrier should comply with the provisions of the bill, to the extent that the sheer number of current certificate holders and new applicants may be more than the Travel Agents Registration Board could adequately review,⁹⁶ the possession of such certificates may little reflect the quality of the agent. Thus, while the carrier may avoid statutory liability by dealing only with registered agents, the bill is potentially ineffective in providing the airlines with a better method to choose reliable agents. A great deal

more than six months, or both, and for any subsequent such offense, shall be fined not more than \$2,000 or imprisoned not more than two years or both. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

⁹⁰ *Id.* § 206.

⁹¹ The Travel Agents Registration Board is established by the bill and consists of eight members appointed by the Secretary of Transportation. *Id.* § 205(d).

⁹² *Id.* § 208.

⁹³ A civil penalty not in excess of \$1,000 may be applied. *Id.* § 208. In addition, the penalties listed under § 211 would also be applicable. *See* note 89 *supra*.

⁹⁴ *See* note 89 *supra*.

⁹⁵ *See* note 80 *supra*.

⁹⁶ In 1971 there were 7,400 travel agency locations accredited by the Air Transport Association of America. *See Hearings on S. 2577, supra* note 3, at 170. But by the terms of the bill many more industry members would have to be registered since the bill's requirements include not only travel agencies, but wholesalers, charterers, and tour operators as well. *See* note 86 *supra*. While registration certificates would come up for renewal at two year intervals, it is intended that such renewal be perfunctory unless a prior suspension or revocation has been imposed. S. 2577. 92d Cong., 2d Sess. § 207(d) (1971).

of the consumer protection ostensibly afforded by the preventive thrust of the bill may be largely illusory. As a practical matter, most regulatory power under the new bill would be exercised in a remedial capacity resulting in enforcement problems identical to those experienced under existing regulatory programs.⁹⁷

The additional costs that the bill would impose do not seem to be justified by the marginal benefits that would accrue to the traveling public. Beyond the tax cost of funding an additional federal program,⁹⁸ there is the danger that barriers to entry in the form of registration requirements may reduce reputable as well as illegitimate competition in the travel industry. To the extent that the bill thus works to curtail the supply of honest services available, the consumer may ultimately suffer. Furthermore, the proposal would necessitate the outlay of funds to achieve an end that duplicates, at least in part, the efforts of existing regulatory bodies. The single greatest shortcoming of the bill, however, is that it fails to provide the stranded passenger with any immediately available remedy.

B. An Alternative Proposal

The purpose of the proposal which follows is to demonstrate that the adoption of a number of significant regulatory reforms, requiring little in the way of increased federal expenditures or control, would produce a sufficient level of consumer protection. The basic tenet of this alternative proposal is that self-regulation should be utilized to the maximum extent possible and can best be spurred by placing the ultimate responsibility for the prevention and remedy of service failures on the air carriers themselves. Air carriers, being the original suppliers of the service in question and perhaps the air travel industry's most stable members, are in the best position to supervise the industry and will adequately do so if federal regulations require. Furthermore, the reforms needed to induce such carrier action are well within the power of existing federal agencies and will require neither new legislation nor the creation of additional administrative bodies.

In order to establish an adequate scheme of self-regulation with which air carriers can comply at a minimum of inconvenience and expense, the CAB should require that no air carrier transport any charter group member from his original point of departure unless

⁹⁷ See generally part III *supra*.

⁹⁸ The Senate Committee on Commerce estimates that the additional cost to the Department of Transportation in order for it to discharge its responsibilities under S. 2577 would be \$600,000 per annum. See S. REP. NO. 92-925, *supra* note 1, at 27.

it has made inquiry as to the provision by the charterer for the passenger's return transportation. The air carrier would have to establish to its satisfaction either that return passage has been reserved and paid for through itself or another air carrier, or that no return air passage has yet been provided, in which case the carrier would be required to notify each charter passenger of that fact prior to the commencement of the flight. Such notification could be evidenced by an affidavit signed by each passenger whose return air passage has not been secured stating that he has been apprised of the situation prior to departure. If an air carrier has not complied with these regulations and passengers are subsequently stranded as a result of the charterer's failure to pay for return air service, the air carrier originally transporting the passenger would be required to provide return air transportation to the original departure point. The production of an executed passenger affidavit would serve to release the original carrier from liability for the provision of return air transportation should a stranding occur.

In practice the air carrier would probably initially inquire of the charterer as to the provisions that had been made for the charter group's return passage. If the airline doubted the integrity of the charterer or chose to pursue a conservative charter policy, it might independently investigate to determine whether adequate return transportation had been reserved and paid for.⁹⁹ Departing passengers would be notified in the event that the investigation revealed that arrangements for return air transportation had not yet been finalized and the carrier could demand that the passenger sign the affidavit before he enplanes. Should he refuse, the air carrier would be justified in refunding the ticket price and air transportation could be denied. In the event that passengers allowed to embark without having signed affidavits were stranded, the carrier would be required to provide alternative return transportation, employing either its own facilities or those of scheduled or supplemental carriers servicing the stranded passengers' location. In determining the form such alternative transportation should take, and the speed with which it must be provided, the inconvenience to the stranded passenger must be weighed against the carrier's increased costs. The carrier would also have to pay any necessary incidental expenses of the passengers as under current regulations.¹⁰⁰ If the carrier failed to provide alternative transportation, strict sanctions would be imposed. Given the past

⁹⁹ See note 102 *infra*.

¹⁰⁰ See note 42 and accompanying text *supra*.

record of the air carriers in assisting stranded individuals, such sanctions might never need to be applied.¹⁰¹

While the burden placed upon the air carrier under such a scheme might appear to be great, close examination reveals that it is actually quite manageable. The verification procedure employed before departure is easily and inexpensively administered. If the carrier is dealing with a charterer whom it knows to be reputable from past experience, it may decide that the risk involved in not making the inquiry is small and thus forego it altogether. In the case where return passage is by way of the same carrier, verification is easily accomplished since the departing and return arrangements would be finalized in the same transaction. Even where return passage is arranged through an alternative source, the established network of communication among air carriers should make verification of confirmed bookings a relatively simple matter.¹⁰²

If, despite the preflight investigation, the carrier is still uncertain as to the likelihood of his incurring liability for return passage, there are several courses of action he may follow. In the short run, it may decide to risk incurring liability and rely upon civil remedies against the charterer or second carrier if they misrepresent as to the verification of return transportation. Should the risk still appear too great, the carrier may simply refuse to deal with what it suspects are unscrupulous operators. In the long run, if liability is incurred by even the most meticulous carrier, the carriers are in a much stronger position than the individual consumer to pursue and obtain a remedy or to absorb a specific loss. Furthermore, because the carriers face this hazard on a continuing basis, it may be possible to secure insurance to protect against such liability. In either event, the cost of premiums or losses may be passed on by the carrier and borne equally by all air travelers in the form of higher fares. Additionally, the imposition of such liability may induce the air carriers to construct an authorized agent system for the marketing of charter services along the

¹⁰¹ American scheduled and supplemental air carriers during 1971 returned 4,278 stranded individuals to the United States. Such passage was afforded at reduced fare or no charge. See *Hearings on S. 2577*, *supra* note 3, at 54-55. While such efforts are laudatory, they do not always suffice as an immediate remedy. Thus consumer inconvenience, delay, and economic loss continue even though their effect on the consumer is mitigated in some instances.

¹⁰² The apparent ease with which the scheduled carriers communicate with each other is demonstrated by their ability to confirm immediately the time, routes, and availability of passenger space on other scheduled carriers. If such a system of instantaneous communication and verification is economically viable in the scheduled area, there is little reason to believe that it could not be expanded to accommodate both scheduled and supplemental carriers providing charter services.

lines of the Air Transport Association-Air Traffic Conference model.¹⁰³ This would provide a further measure of protection to the carriers and the consumer as well.

Because of the increased financial and regulatory responsibilities placed upon the carriers themselves, existing federal agencies would be warranted in intensifying their examinations of the financial standing of the respective air carriers. The CAB, in conjunction with the FAA, currently possesses the power to examine the books and records of United States air carriers.¹⁰⁴ Intensified scrutiny would serve to identify carriers operating on a financially insecure basis. Particular care could then be exercised by the CAB to insure that supplemental carriers falling within this category strictly comply with existing bonding requirements.¹⁰⁵ In addition the existing bonding requirement could be extended to cover all air carriers undertaking to provide charter services. In the case of foreign air carriers the fulfillment of this requirement could be made a condition for obtaining a statement of authorization for supplemental services.¹⁰⁶ Since such statements must be obtained for a specifically proposed trip or trips, intense operational scrutiny could be maintained notwithstanding the lack of a practical ability to examine books and records. Finally, the economically troubled carrier could be required to make the confirmed reservation check which is usually made at the carrier's option.

Thus with a minimum of alteration in the current regulatory structure, the major shortcomings of the existing system could be significantly mitigated if not finally resolved. Passengers would not be stranded as a result of the failure of charterers to make payments in advance of the rendering of service since the initial air carrier would be required to provide for return transportation within a reasonable time. Though ineligible groups might still secure air transportation, to the extent that the ability of unscrupulous operators to make a quick profit is impaired, the incidence of violations of charter provision requirements should be significantly curtailed. Finally, although service failures resulting from the financial collapse of an air carrier will always present a potential problem, rigorous financial scrutiny by federal agencies should make for greater predictive abilities which in turn should reduce the danger that an individual will be left without an immediate remedy in the event he is stranded.

¹⁰³ See notes 13-15 and accompanying text *supra*.

¹⁰⁴ See notes 19 and 21 and accompanying text *supra*.

¹⁰⁵ See note 43 and accompanying text *supra*.

¹⁰⁶ See note 47 and accompanying text *supra*.

It should be made clear that the adoption of this proposal would not guarantee the actual provision of air travel that has been paid for prior to the date of departure, nor would it guarantee that bargained-for services other than air transportation would be adequately provided during the course of a trip. There will still be no substitute for the exercise of sound discretion by the consumer in his choice of those with whom he deals in the air travel industry. Yet if the proposal is successful in making it nearly impossible for unscrupulous operators to make quick illegal profits by not providing the full amount of air service for which the consumer has paid, participation in the industry by such operators should be significantly diminished. To the extent that unscrupulous operators are driven out of the market, the consumer should be better able to choose a reputable industry member who will provide him with adequate service in all areas of his travel needs.

No matter how carefully a regulatory system may be devised or how effectively it may operate, if a market exists within which sizeable illegal profit may be made, the total elimination of illegal practices may well be an impossibility. The charter service area of the air travel industry, in competition with the protected scheduled air system, presents just such a lucrative market.¹⁰⁷ A recent CAB proposal for an adjustment in the rules governing charter flights may significantly reduce black market operations by cutting market demand for illegal services. The new nonaffinity charter¹⁰⁸ proposal would alter the rules governing charter flights such that any group of individuals numbering forty or more could secure air transportation at charter rates, provided that the group notifies the carrier at least ninety days in advance and makes a nonrefundable deposit of 25 percent of the total air fare.¹⁰⁹ Both supplemental and scheduled air carriers could offer this newly proposed service. The Board stated,

There is an irresistible and understandable public demand for low-cost air transportation, much of it on charter services; this demand has heretofore been met all too often by flouting existing charter rules; . . . it is therefore in the public's interest to promulgate new rules which will enable the consumers' needs to be satisfied in a lawful manner.¹¹⁰

This statement by the CAB evinces recognition that illegal oper-

¹⁰⁷ See part II B 2 *supra*.

¹⁰⁸ 37 Fed. Reg. 20808 (1972).

¹⁰⁹ In addition, the charter must be for round-trip transportation and requirements are imposed as to the minimum duration of the trip. *Id.* at 20809.

¹¹⁰ *Id.*

ations can perhaps best be curtailed by legalizing that which is prohibited and placing the provision of such service in the hands of reputable industry members. Implicit in the Board's statement is the realization that scheduled carriers may not need the amount of regulatory protection that was once deemed necessary and that to the extent that the scheduled carriers may engage in nonaffinity charter operations it would allow them to defray a portion of the cost of running scheduled flights.

The CAB's experiment with the nonaffinity charter appears to be a viable reform which may reduce the incidence of illegal activities, thus lightening the regulatory burden faced by all federal agencies concerned with the protection of the air traveler. This liberalization of the restraints on the provision of charter services, coupled with a plan employing air carriers as the principal regulatory enforcement mechanism, could constitute an economical yet efficient regulatory system which would secure the desired consumer protection only inadequately provided under the current system of regulation.

V. CONCLUSION

The continued maintenance of an efficiently run, smoothly functioning air travel industry is of major importance to the consumers of travel services and the entire United States economy. Federal regulatory efforts are designed to shape industry service offerings and performance standards in conformance with the perceived national need, while providing the consumer with an adequate degree of economic protection in his dealings with the members of that industry. The multifaceted nature of the air travel industry makes it difficult for federal policy to make adequate adjustments among the variety of interests competing for acceptance or reflect the legitimate needs and desires of each interested consumer or industry sector. Under the existing hierarchy of values the provision of charter services is clearly held subordinate to the maintenance of the scheduled air system. Thus, existing consumer abuse in the air travel market is in one sense the result of the inability of legitimate industry members to meet the increased consumer demand for low-cost charter services. This inability results from the imposition of those restraints on the provision of charter services deemed both necessary and reasonable in light of federal policies prescribing the form the air travel industry is to take. Without questioning the validity of the assumptions upon which this restrictive policy is based, it is evident that consumer abuse is occurring under the present regulatory

system, resulting in service failures and monetary expenditures for which inadequate service is provided.

With the increased demand for and use of charter services the potential for abuse will be greatly enhanced unless current policies are reevaluated and regulatory practices amended so as to conform with market and enforcement realities. However, while policy-makers should not remain intransigent in the face of changed conditions, there is a danger of overreaction. This article has argued that adequate levels of consumer protection may in fact be achieved through the imposition of relatively minor regulatory changes which would give air carriers a strong economic interest in monitoring the activities of their fellow industry members. Consumer protection measures can be shaped to meet specific problems by relying on existing self-regulatory efforts when these efforts are adequate and by inducing the industry to undertake equally efficient and effective self-regulation where it is presently lacking.

— *Richard J. Gray*