



January 29, 2021

From: Paul Hudson, President
Andrew Appelbaum, Counsel

To: Hon. Lana T. Hurdle, Acting Secretary of Transportation
Blane Workie, Assistant General Counsel

Policy Memorandum on Covid-19 Mitigation Measures

In Response to Executive Order on Promoting COVID-19 Safety in Domestic and International Travel, January 21, 2021

Introduction

For over 9 months, the Department of Transportation (DOT) has failed to act to stop or limit the spread of Covid-19 in air travel. With daily deaths now at its highest point of the pandemic and steadily increasing, it is imperative that the DOT acts now and decisively. The 7-day rolling average for daily deaths surpassed the previous peak of late April 2020 on December 7, 2020, and has only increased in the month and a half since then. The current 7 day rolling average, 3136 daily deaths, is nearly 3 times as high as the summer peak of August 1, 2020.

A mask rule on planes and at airports that is strictly enforced on adults will be the most important measure the Biden administration can take, but it cannot be the only one. The DOT must also mandate stricter social distancing guidelines, temperature checks, rapid testing, and a temporary suspension of all change and cancellation fees. Passengers, airlines, airports, the federal government, and state and local governments all must play their parts during the pandemic.

Regulation of the airlines and air travel is a purely federal matter reserved for the DOT and the Federal Aviation Administration (FAA). Enforcement of Covid-19 mitigation measures has varied by state and locality, but the absence of federal participation undermines the best efforts of the most proactive states and localities.

The previous Administration, in two important manners, severely damaged the argument for mask wearing. First, Dr. Anthony Fauci recommended against mask-wearing early in the

pandemic in an attempt to preserve the supply of masks for healthcare workers. This caused confusion among some and skepticism by others. Both sentiments still persist today. The recommendation has caused some to believe that mask wearing is not effective or actually harmful. Some of this skepticism is genuine, while some is political. Meanwhile, others became skeptical of medical advice coming from Fauci, the Centers for Disease Control (CDC), the National Institutes of Health (NIH), and other public health officials because the recommendation and ensuing reversals countered common sense. The rationale was, if masks are necessary for healthcare workers, and if many countries in Asia have a long history of wearing masks before and during the pandemic, why would masks not help Americans?

Second, President Trump himself undermined mask-wearing very early on, and it became a political rallying point during the 2020 election season. His Administration was so committed to this point that it was unable and unwilling to issue a mask mandate in the second half of 2020, after deaths and cases had rapidly increased and air travel numbers started to recover.

Misleading information has started to enter the mainstream of air travel: (1) that few Covid-19 cases can be traced to air travel, and (2) airline filtration system makes airplanes a very safe place during the pandemic. The lack of information, tracking, and a coherent federal policy fuel the first myth. The second myth has a kernel of truth but does more harm than good, for it justifies continued inaction.

The DOT and FAA should involve the Civil Aerospace Medical Institute (CAMI), the medical certification, research, educational, and occupational health wing of the FAA. CAMI, while having a hundred professional health and medical personnel and the most extensive expertise in air travel health and medical issues in the federal government, was unfortunately excluded from the previous White House Task Force.

A robust federal response for air travel is long overdue and can produce health benefits beyond air travel and this pandemic. The measures proposed in this memo will not only save lives, but will also restore confidence in air travel.

Public Comment Period

The DOT should immediately publish a proposed rule and allow a public comment period of 7 to 14 days. Alternatively, the DOT should publish an interim final rule and incorporate public comments.

Masks

FlyersRights.org petitioned the DOT for a mandatory mask rule in August 2020.¹ The DOT rejected² the petition in October 2020, declaring that a mask rule was unnecessary because airlines had each instituted their own non-binding policies, and the Administration placed a maximum reliance on curbing unnecessary regulation. This was an inappropriate response and simply has led to more deaths.

The DOT's abdication of responsibility over the parties it is tasked with regulating led to delayed, uneven, and arbitrary enforcement. Airlines opted to implement self-serving policies when it became clear no guidance was coming from the government. Even the airlines realized that a hands-off approach would be harmful in the long run. Without a legal rule and an endorsement by the federal government, airlines had difficulty enforcing their policies when they wanted to. And airlines did not always want to enforce the policy. There were many instances of flight crews not wearing masks or not enforcing mask wearing. Photographs and videos of people not wearing masks on planes or at airports persist to this day, including photographs of members of Congress refusing to wear masks on planes

The DOT must consider a few factors when implementing a mask rule: (1) mask types, (2) exceptions for people, (3) use exceptions, and (4) enforcement.

Type of masks

The mask mandate must require the use of an N95, KN95 mask or a surgical mask or other masks approved by the CDC until the supply of N95/KN95 reaches a sufficient level.

The filterless KN95 respirator masks are the most effective masks. The next most effective masks, as recommended by the CDC are multi-layered masks, followed by surgical masks. Given the threat posed by recently discovered highly transmissible coronavirus variants, many public health experts now are recommending that people double mask by donning a fabric mask on top of a surgical mask.³

A number of European countries, including France, Germany, and Austria, require use of N95, KN95, FFP2, FFP3, or surgical masks in public.⁴

Limited exceptions based on age, health, and disability

¹ <https://flyersrights.org/facemasks/petition-for-emergency-rulemaking-facemasks/>

² <https://flyersrights.org/wp-content/uploads/2020/10/DOT-Denial-of-Mask-Rulemaking-Petition.pdf>

³ <https://www.washingtonpost.com/health/2021/01/27/double-mask-variants-guidance/>

⁴ <https://www.thelocal.de/20210119/germany-extends-and-tightens-partial-lockdown-to-mid-february>

Consistent with CDC recommendations, the DOT, the Department of Homeland Security, and the Department of Health and Human Services recommend that everyone, with limited exceptions, correctly wear a mask covering their nose and mouth *at all times* in the passenger air transportation system.⁵ These recommendations should be made mandatory. A rule should allow for limited exceptions.

The limited exceptions include young children and anyone who has a documented medical condition that causes trouble breathing. Reasonable accommodations should also be made for persons with disabilities or ailments who cannot wear masks. As a comparison, the European Union’s mask rule carves out an exception for children who are six years old or younger.⁶ Canada’s rule requires children over the age of two to wear a mask.⁷

One possible method for enabling people with disabilities or health conditions that prevent mask wearing to be able to fly would be those currently used by Delta Air Lines⁸ and Hawaiian Airlines.⁹ Delta Air Lines requires the passenger to undergo a “virtual consultation process facilitated by a Delta agent with a third-party medical professional” that could take up to an hour.¹⁰ Hawaiian Airlines mandates an “assessment with a medical professional via phone at the airport” which may also take up to an hour.¹¹

The DOT should consider applying a mask rule to pilots if it deems that aircraft safety is not threatened. Some pilots have had concerns for their safety and believe that they would be unable to quickly put on an oxygen mask in case of emergency.¹²

Use exceptions such as eating and drinking, and efforts to circumvent the exception

The only use exception that seems to have widespread support is the exception for eating and drinking. For passenger health, passengers must be allowed to drink water and eat, especially on longer flights. But removing a mask to eat or drink poses the biggest danger on airplanes.

⁵ https://www.transportation.gov/sites/dot.gov/files/2020-12/Runway_to_Recovery_1.1_DEC2020_Final.pdf

⁶ <https://www.easa.europa.eu/the-agency/faqs/passenger-health-safety-covid-19>

⁷ <https://tc.canada.ca/en/initiatives/covid-19-measures-updates-guidance-issued-transport-canada/covid-19-guidance-material-air-operators-managing-air-travellers-flights-departing-aerodrome-canada>

⁸ <https://news.delta.com/deltas-mask-exemption-process-its-rigorous-everyones-safety#:~:text=Starting%20July%202020%2C%20customers%20who%20indicate%20they%20have%20an%20underlying,to%20travel%2C%20for%20everyone's%20safety.>

⁹ <https://www.hawaiianairlines.com/coronavirus/kys>

¹⁰ <https://news.delta.com/deltas-mask-exemption-process-its-rigorous-everyones-safety#:~:text=Starting%20July%202020%2C%20customers%20who%20indicate%20they%20have%20an%20underlying,to%20travel%2C%20for%20everyone's%20safety.>

¹¹ <https://www.hawaiianairlines.com/coronavirus/kys>

¹² <http://www.alpa.org/-/media/ALPA/Files/pdfs/news-events/press-release-content/2020/airline-noncompliance-covid-19.pdf?la=en>

Some people have used this well-intentioned exception to justify not wearing a mask out of convenience, political, or comfort reasons.

Flight attendants should be empowered to prevent excessive circumvention of this rule. Under a “yellow card system”, a passenger violating the rules is given a written warning and explanation of the rule. The passenger is given the opportunity to come into compliance with the rule.

Enforcement

Airlines and airports must effectively enforce mask rules or face enforcement actions of their own. DOT must resume and increase the number of airport inspections as well as increase its monitoring of social media and passenger submitted evidence of non-compliance.

The DOT Office of Aviation Consumer Protection already conducts unannounced inspections to ensure airlines are complying with consumer protections. A surge in these inspections, monitoring primarily coronavirus protocols but also other consumer protections, will be the most efficient use of resources to ensure long term compliance with new coronavirus mitigation regulations.

Passenger fines should be in the \$1,000 to \$5,000 range, provided that the airline gives the passenger a warning and opportunity to correct their behavior. Fines against airlines and airports should be in line with other DOT regulations, such as tarmac delay rule violations.¹³

Social Distancing

A mask mandate must be coupled with sensible social distancing regulations on planes and at airports.

Former CDC Director Dr. Robert Redfield strongly criticized American Airlines’ decision to fill middle seats.¹⁴ National Institute for Allergy and Infectious Diseases Director Dr. Anthony Fauci echoed the sentiment and called the lack of social distancing “worrisome.”¹⁵

Currently, Delta is the only U.S. airline blocking middle seats. Their policy is scheduled to expire at the end of March. Alaska, JetBlue, and Hawaiian had middle-seat-blocking policies

¹³ \$25,000 per passenger, 49 U.S.C. § 46301.

¹⁴ <https://www.usatoday.com/story/travel/airline-news/2020/06/30/cdc-chief-redfield-fauci-criticizes-american-airlines-selling-all-seats-during-pandemic/5349380002/>

¹⁵ Id.

that expired within the past two months. United, Spirit, Frontier, Allegiant, and Sun Country never had a policy of blocking middle seats.

United Airlines called the middle-seat-blocking policy a “PR strategy”,¹⁶ while RyanAir called it “idiotic.”¹⁷ The International Air Transport Association (IATA) published a study in October 2020 finding only 44 confirmed cases of coronavirus transmission on airplanes¹⁸. This obviously flawed study was quickly boosted by Boeing and Airbus, whose own studies informed the IATA study.¹⁹ Importantly, not all airplanes have HEPA filters, particularly older models. Recent reports indicate 4,000 flights in the United States and 3,000 flights in Canada had Covid-19 exposure.²⁰

Dr. Arnold Barnett at the Massachusetts Institute of Technology found that the risk of Covid-19 transmission during a two-hour flight increases by a factor of 1.8 when the middle seat is occupied.²¹ It stands to reason that the risk would increase for longer flights, for the risk “[is] simply additive.”²²

The airlines have received \$25 billion in federal bailout money dedicated to payroll and another \$25 billion in loans.²³ They are in line to receive even more money in future legislation. Accordingly, they should be able to handle social distancing and safer air travel by increasing the number of flights operated and using pilots that are unemployed or furloughed. According to FlightGlobal’s Pilot Survey, almost half of commercial pilots around the world are not working as pilots.²⁴ Of those surveyed, 30% of pilots are unemployed, 17% are furloughed by their airline, 6% are in non-piloting aviation jobs, and 4% are employed in other industries.²⁵ These numbers are lower for North America, but the survey still found that 20% of North American pilots are unemployed. Increasing flights to maintain social distancing would preserve the skills and infrastructure of the air travel industry, a vital national asset which would otherwise significantly decay as the pandemic enters its second year. Pilots and maintenance workers are

¹⁶ <https://www.cnbc.com/2020/07/01/blocking-middle-seats-on-planes-is-a-pr-strategy-not-a-safety-strategy-united-says.html>

¹⁷ <https://www.bbc.com/news/business-52394433#:~:text=The%20boss%20of%20Ryanair%20says,calling%20the%20idea%20%22idiotic%22.&text=He%20added%20that%20if%20the,we%20won't%20fly%22>

¹⁸ <https://www.iata.org/en/pressroom/pr/2020-10-08-02/>

¹⁹ <https://airlines.iata.org/analysis/extremely-low-risk-of-viral-transmission-inflight>

²⁰ <https://www.usatoday.com/story/travel/airline-news/2021/01/15/covid-flight-information-airline-passengers-exposed-coronavirus/3905053001/>

²¹ <https://www.medrxiv.org/content/10.1101/2020.07.02.20143826v3>

²² <https://www.reuters.com/article/health-coronavirus-airlines-risks/bad-math-airlines-covid-safety-analysis-challenged-by-expert-idUSKBN27411O>

²³ <https://www.forbes.com/sites/willhorton1/2020/04/15/how-the-us-is-distributing-airline-bailout-funds-in-covid-19-relief-deal/?sh=565dafc963a1>

²⁴ <https://www.flightglobal.com/jobs/most-commercial-pilots-no-longer-flying/142026.article>

²⁵ Id.

losing opportunities to stay current on their licenses, and small businesses are failing without government support.

Temperature Checks

Temperature checks are a cost-effective way to limit the spread of coronavirus during air travel. While some individuals will be asymptomatic carriers, temperature checks will decrease the number of infected people on airplanes. Airlines for America, the U.S. airline trade and lobbying group, supports temperature checking done by the Transportation Security Administration during the security checkpoint process.²⁶ While temperature checks have limitations, it will deter travelers from travelling when ill. Temperature checks must be implemented as a supplement to rapid Covid-19 testing.

Frontier Airlines required temperature checks starting in May 2020.²⁷ Few passengers have been turned away. It is reasonable that passengers, when presented with financially non-punitive options to cancel or change a flight when ill, can contribute to stop the spread of Covid-19 by staying home until they have recovered.

Covid-19 Tests

Some U.S. airlines offer on-site rapid Covid-19 testing to enable passengers to comply with certain state or country testing requirements. These tests are expensive, running around \$130. If the federal government wants to provide financial support to the airline industry, outside of granting payroll funds and then immediately laying off employees, the DOT and the federal government should implement a rapid testing system for airline passengers.

Suspension of Change and Cancellation Fees

Masks and social distancing are not 100% effective in stopping the spread of the coronavirus. Temperature checks and rapid testing likewise will not guarantee stopping the spread. The first line of defense remains and always has been ensuring sick passengers do not fly. Even as most airlines waive most change fees, passengers must pay fare differentials, only receive travel credits instead of refunds for passenger-initiated cancellations, and struggle to compel airlines to pay them legally-required refunds for airline-initiated cancellations. As a result, financial incentives are still causing coronavirus-infected people to fly.

Before the pandemic, nearly every U.S. airline charged exorbitant change or cancellation fees, not commensurate with the cost to the airline. During the pandemic, however, airlines

²⁶ <https://www.airlines.org/news/u-s-airlines-endorse-temperature-screenings-conducted-by-tsa/>

²⁷ <https://www.washingtonpost.com/travel/2020/12/28/passenger-covid-flight-airlines-positive/>

started relaxing these policies, not because it was the right thing to do, but because people would simply not fly with so much uncertainty. While airlines seemed to have voluntarily enacted a reasonable policy, they resisted paying out legally-required refunds for cancelled flights and still do not grant refunds for passenger-initiated cancellations.

Under the current airline policy, if you change a flight, even if you are sick or are following local travel restrictions, the airlines will not waive fare differentials. As a result, if you wait two weeks to recover and fly again, your ticket will likely be more expensive so close to your flight date than it was when you originally booked. If you cancel your flight, you will not receive a refund. Instead, passengers will receive travel credits that will expire.

Conclusion

President Biden's January 21, 2021 Executive Order is a much-needed call to action for protecting public health and air travel. This memorandum outlines important considerations for the forthcoming mask rule. As the DOT, FAA, and other government agencies explore additional Covid-19 mitigation methods as directed by the Executive Order, FlyersRights.org believes there are numerous solutions that can all be implemented to slow the spread of Covid-19 in commercial air transportation.

Organizational Statement

FlyersRights.org has been a leading consumer organization in air travel safety and Covid-19 mitigation efforts. Its President, Paul Hudson, is a longtime safety and consumer advocate and has served on the FAA Aviation Rulemaking Advisory Committee since 1993. FlyersRights.org filed a rulemaking petition in August 2020 to mandate mask wearing on airplanes and at airports. A March 2020 survey of FlyersRights.org members found that 80.6% of respondents wanted Covid-19 testing done both prior to departure and after arrival.²⁸ An additional 10.4% of respondents wanted testing to take place after departure.

Contact Information

We would welcome a meeting to explore these areas further. We can be reached at 800-662-1859, paul@flyersrights.org, or andrew@flyersrights.org.

Cc: Dr. Melchor J. Antuñano, Director, Civil Aerospace Medical Institute
Jeff Zients, White House Coronavirus Coordinator

²⁸ <https://flyersrights.org/uncategorized/flyerrights-org-calls-for-increased-protection-of-air-travelers-against-spread-of-covid-19/>

Kimberly Graber, Deputy Assistant General Counsel, DOT
Jessica Ilich, Director of Consumer Advocacy, DOT
Vinh Nguyen, Senior Attorney, Office of General Counsel, DOT
Robert Gorman, Attorney, Office of General Counsel, DOT