

November 28, 2018

The Honorable Elaine Chao
Secretary
United States Department of Transportation
1200 New Jersey Ave, SE
Washington D.C. 20590

Re: appointments of Frances Smith and Pete K. Rahn to Aviation Consumer Protection Advisory Committee

Dear Secretary Chao:

The undersigned consumer protection organizations are deeply concerned that the Department of Transportation's ("DOT") Aviation Consumer Protection Advisory Committee ("ACPAC"),¹ as it would now be constituted, appears to violate the Federal Advisory Committee Act (FACA) requirement that membership be "fairly balanced in terms of the points of view represented and the functions to be performed" by the advisory committee.²

This "fairly balanced" test would seem to require members whose varied backgrounds will ensure that the advisory committee's record will air the full range of relevant viewpoints associated with issues under the committee's consideration, which does not appear likely given the backgrounds of the two members appointed to fill the positions designated for representatives with expertise in consumer protection: specifically, Frances Smith, adjunct fellow at the Competitive Enterprise Institute ("CEI"), and Maryland Department of

¹ United States Department of Transportation. "U.S. Department of Transportation Announces Aviation Consumer Protection Advisory Committee and National In-Flight Sexual Misconduct Task Force." Press release. November 15, 2018. Accessed November 16, 2018. Online: <https://www.transportation.gov/briefing-room/dot7318>

²US Code. *Responsibilities of Congressional committees; review; guidelines*, § Title 5-A (Cornell University Law School: Legal Information Institute). Online: <https://www.law.cornell.edu/uscode/text/5a/5>

Transportation Secretary Pete K. Rahn to be, respectively, the “consumer representative” and “state or local government representative” on the committee.

The FAA Modernization and Reform Act of 2012 (“2012 Act”),³ which originally created the ACPAC (as the “Advisory Committee on Aviation Consumer Protection”), requires that one of the four members be a representative of “nonprofit public interest groups with expertise in consumer protection matters.” To our knowledge, none of Ms. Smith’s extensive career experience has involved consumer protection matters pertaining to aviation.

Ms. Smith has spent the past twelve years with the Competitive Enterprise Institute (CEI), a well-known think tank with deep ties to industry. There is no mention of the public interest, consumer welfare, or even the word “consumer” in CEI’s mission statement.⁴ In our review of her blog postings, op-eds, and other public statements over her years with CEI, we were unable to find a single instance in which she wrote about consumer interests as they pertain to airline travel.

And previously, from 1994-2005, Ms. Smith served as the executive director for an apparently now-defunct non-profit organization called Consumer Alert.⁵ In 2004 (the last year for which tax records could be found on file for the organization), Consumer Alert described its tax-exempt purpose as “[disseminating] information directed to the public on consumer issues through educational, charitable and scientific means.”⁶ In spite of its name, the organization’s activities appear to have primarily been directed at promoting the

³ H.R. 685, *FAA Modernization and Reform Act of 2012*. 112th Cong., Congress.gov. (2012) (enacted). Online: <https://www.congress.gov/bill/112th-congress/house-bill/658/text>.

⁴ Competitive Enterprise Institute. “About.” Accessed November 16, 2018. Online: <https://cei.org/about-cei>.

⁵ Competitive Enterprise Institute. “Fran Smith Adjunct Fellow.” Accessed November 16, 2018. Online: <https://cei.org/adjunct-scholar/fran-smith>.

⁶ Foundation Center. August 2005. Consumer Alert. Department of the Treasury, Internal Revenue Service Form 990. Online: http://990s.foundationcenter.org/990_pdf_archive/060/060961299/060961299_200412_990.pdf.

deregulatory interests of businesses, rather than the interests of consumers. Indeed, as recently as 2003, Consumer Alert listed an identical business address as CEI.⁷

The consumer representative position on ACPAC should be filled by someone who has subject matter expertise and is an experienced and committed advocate for aviation consumers.

Similarly, we believe that the appointment of a state Secretary of Transportation to the ACPAC is also at odds with the 2012 Act's requirement that one member be a representative of "State or local governments with expertise in consumer protection matters." The advisory committee's state or local government representative has heretofore been a state attorney general, whose office has jurisdiction over consumer protection matters.⁸ In contrast, the Maryland Department of Transportation has little if any involvement in aviation consumer protection matters; its authority as pertains to aviation is primarily based on its management of Baltimore/Washington International Thurgood Marshall and Martin State airports.⁹ As the Airline Deregulation Act of 1978 generally preempts state departments of transportation from investigating or enforcing consumer protection laws as they pertain to airline operations,¹⁰ state Secretaries of Transportation have no significant role in consumer protection that is relevant to the advisory committee's work.

The ACPAC's appointed membership already includes a member associated with the airline industry, Patricia Vercelli of Airlines for America, and a member associated with airport operations, Mario Rodriguez of the Indianapolis Airports Authority. As an airport manager, Secretary Rahn's perspective is essentially duplicative of Mr. Rodriguez's. Neither his

⁷ Foundation Center. May 5, 2004. Consumer Alert. Department of the Treasury, Internal Revenue Service Form 990.

Online: http://990s.foundationcenter.org/990_pdf_archive/060/060961299/060961299_200312_990.pdf.

⁸ For one recent period, during which the advisory committee never met, the representative for state and local governments was a mayor, whose official responsibilities included consumer protection matters.

⁹ Maryland Department of Transportation. "Maryland Aviation Administration's Mission." Accessed November 19, 2018. Online: <http://www.marylandaviation.com/content/aboutthema/mission.html#>

¹⁰ 49 USC 41713.



appointment, nor that of Ms. Smith, given her and Consumer Alert's close and long-time affiliation with CEI, would appear to be consistent with FACA's "fairly balanced" test or with the criteria set forth for their positions in the 2012 Act.

In light of these concerns, we urge you to reconsider the appointments of Frances Smith and Pete K. Rahn, and instead appoint individuals who will better ensure an appropriate balance of perspectives, as Congress intended.

Sincerely,

National Consumers League

Business Travel Coalition

Consumer Action

Consumer Federation of America

Consumer Reports

EdOnTravel.com

Public Citizen

Travelers United

U.S. PIRG