

# HOUSE BILL REPORT

## HB 2707

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**As Reported by House Committee On:**  
Commerce & Labor

**Title:** An act relating to allowing consumers to participate in the secondary market for points, miles, or other similar credits earned in frequent flier programs.

**Brief Description:** Allowing consumers to participate in the secondary market for points, miles, or other similar credits earned in frequent flier programs.

**Sponsors:** Representatives Hurst, Conway and Kirby.

**Brief History:**

**Committee Activity:**

Commerce & Labor: 1/31/08, 2/4/08 [DPS].

**Brief Summary of Substitute Bill**

- Directs a work group, staffed by the Office of the Attorney General, to study legal and policy implications of allowing consumers to participate in the secondary market for frequent flier points, miles, or other similar credits.
- Requires the work group to submit a report with recommendations to the appropriate committees of the Legislature and the Attorney General by November 15, 2008.

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### HOUSE COMMITTEE ON COMMERCE & LABOR

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Conway, Chair; Wood, Vice Chair; Green, Moeller and Williams.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Condotta, Ranking Minority Member; Chandler, Assistant Ranking Minority Member; Crouse.

**Staff:** Alison Hellberg (786-7152).

**Background:**

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

From 1938 until 1978, the Federal Civil Aeronautics Board regulated all domestic air transport like a public utility, setting fares, routes, and schedules. The Airline Deregulation Act (ADA) was enacted in 1978 and does not allow states to enact or enforce a law, regulation, or other provision having the force and effect of law related to a rate, route, or service of an air carrier. Since the passage of the ADA, Congress has not significantly increased regulation of the airline industry and has delegated most responsibility to the federal Department of Transportation. The U.S. Department of Transportation currently has regulatory authority over deceptive trade practices in aviation.

The U.S. Supreme Court (Court) has considered the scope of preemption under the ADA in two cases.

In *Morales v. TWA*, the Court considered whether the ADA preempts the states from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes. The Court held that the enforcement actions were preempted by the ADA because they had a connection to air fares, which affected the airlines' ability to set fares. *Morales v. TWA* indicated, however, that certain state actions would be allowed that were ". . . too tenuous, remote, or peripheral . . . to have preemptive effect."

*American Airlines, Inc. v. Wolens* dealt with the preemptive provision of the ADA's application to a suit brought by participants in an airline's frequent flier program. The airline's unilateral changes to the terms and conditions of the program were challenged. The Court held that the ADA's preemption bars state-imposed regulation of airlines, but allows for court enforcement of contract terms set by the airlines and consumers themselves. The Court noted that the ADA was meant to "maximize reliance on competitive market forces," so allowing for breach of contract claims would assist in achieving this goal.

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### **Summary of Substitute Bill:**

The Airline Practices and Consumer Rights Work Group (Work Group) is established to evaluate legal and policy issues related to allowing consumers to participate in the secondary market, which is the sale, barter, or exchange of points, miles, or other similar credits that occurs between an airline and someone other than a frequent flier program member, or between a frequent flier program member and someone other than the airline sponsoring the frequent flier program.

In order to consider this issue, the Work Group shall review, study, evaluate, or make recommendations on the following issues:

- the history and current state of frequent flier programs, from the original customer loyalty programs to the creation and evolution of the secondary market;
- the amount of miles, points, or similar credits that have been awarded to and redeemed by consumers;
- the current inventory of miles, points, or similar credits and how the airlines plan to address this inventory;

- consumer complaints and concerns related to the current state of these programs;
- legal and policy implications of state action to address these issues; and
- whether state action is warranted, and if it is, what state action would be appropriate.

Membership of the Work Group is as follows:

- the President of the Senate shall appoint one member from each of the two largest caucuses of the Senate;
- the Speaker of the House of Representatives shall appoint one member from each of the two largest caucuses of the House of Representatives;
- the Attorney General shall appoint six members, two of whom represent the airline industry and two of whom represent consumers; and
- the President of the Senate and the Speaker of the House of Representatives shall jointly appoint two members representing consumers.

The Office of the Attorney General staffs the Work Group. A report with recommendations must be submitted to the appropriate committees of the Legislature and the Attorney General by November 15, 2008.

This section expires on June 30, 2009.

**Substitute Bill Compared to Original Bill:**

The provisions of the bill are deleted. The Work Group is established to study the legal and policy implications of allowing consumers to participate in the secondary market for frequent flier points, miles, or other similar credits. The provisions related to the Work Group expire on June 30, 2009.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Staff Summary of Public Testimony:**

(In support) The original point of frequent flier programs was to reward customer loyalty. Both airlines and consumers were pleased with the benefits – airlines had loyal customers and made money, and consumers had the chance to earn free flights. The program worked very well. When an airline went bankrupt, courts recognized that these earned miles had a value and that consumers had been promised that they could use them. Consumers were compensated for their unredeemed miles.

Things have changed. These original loyalty programs have evolved into a mess. It is extremely complicated to use the earned miles at this point. Frequent fliers are uniformly dissatisfied with the frequent flier programs. A market, known as the secondary market, was

created for these unredeemed miles and points. Consumers are inundated with opportunities to earn and buy points. What was once a consumer loyalty program is now a rebate program. The Federal Department of Transportation was concerned that the airlines were overselling and made the airlines start to report the unredeemed miles. The discrepancy is great. The airlines have set the value for these miles at \$.025 a mile. Anyone is able to purchase these miles from the airline. The issue is that the consumers have accumulated over 14 trillion miles and if you look at the current redemption rate, it would take airlines over 16 years to get rid of this inventory. Airlines have oversold a product that consumers may not be able to redeem.

Airlines have begun to seize miles and restrict their use. Airlines are making efforts to devalue this liability to stockholders and federal regulators. So, either the airlines are lying to their stockholders and federal regulators, or they have no intention of redeeming all of the miles and points that consumers have bought and earned. Over half of the miles earned were done so on the secondary market. Customers did not create the secondary market. They should now be able to sell their points and participate in the secondary market. This bill says that you own something that you bought.

(Opposed) All airlines have frequent flier programs and these programs are regulated by the federal government. It is very difficult for states to regulate in this area. Colorado considered it, but opted not to on advice from the Attorney General. There are four main negative side effects that this bill could cause: (1) this bill would give Washington rights that residents of other states would not have, which creates an administrative nightmare for airlines; (2) airlines have developed economic models to administer these programs and this bill would upset those and result in significant reductions of program benefits to consumers; (3) the airline industry is incredibly competitive so airlines need to maintain control for pricing; and (4) Congress meant to preempt state action in this area.

This bill only benefits a small sector of the frequent flier industry. Most consumers are happy with this program and feel like it is working appropriately. This bill would punish the loyalty of consumers and dilute the program.

**Persons Testifying:** (In support) Representative Hurst, prime sponsor; Brad Carey, Carey Travel; C.D. Shepard; Bill Beisley, Beisley, Inc.; and Wade Anderson.

(Opposed) Jim Stevens, Air Transport Association; George Troukalas; and John Lisicich.

**Persons Signed In To Testify But Not Testifying:** None.