BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

In the matter of Transparency of Airline Ancillary Fees and Other Consumer Protection Issues	))))))	Docket No. OST-2014-0056

COMMENTS OF SWISS INTERNATIONAL AIR LINES LTD.

Swiss International Air Lines Ltd. (SWISS) respectfully submits the following comments in response to the proposed regulations by the United States Department of Transportation (DOT or the Department) on Transparency of Airline Ancillary Fees and Other Consumer Protection Issues. SWISS is the national carrier of Switzerland and offers service to multiple U.S. airports, including New York (JFK), Newark (EWR), Los Angeles, (LAX), Miami (MIA), Chicago (ORD), San Francisco (SFO), and Boston (BOS). In its Notice of Proposed Rulemaking, the Department advised that it is considering a possible revision to the post-purchase price increase rule (14 C.F.R. 399.88) to more fully address the issue of "mistake fares".

Through these comments SWISS respectfully urges the Department to provide clear guidance on the ability of carriers to cancel mistake fares in the situation where airlines or third party travel agents unintentionally and inadvertently issue erroneous fares (which are then published on blogs and taken advantage of by sophisticated consumers), while at the same time balancing any such protections with the needs of the innocent traveling public. SWISS believes the Department can accomplish both of these goals by evaluating the publication of mistake fares under the common law doctrine of unilateral mistake and/or allowing carriers to include protections against mistake fares in their passenger contracts of carriage. Both of these approaches have been applied successfully in other industries and SWISS believes they are well suited for the travel service industry.

As background, DOT's Enhancing Airline Passenger Protections rulemaking, which took partial effect in August 2011 and full effect in January 2012, included a prohibition against "post-purchase price increases", which DOT broadly defined in that rulemaking as an increase in the price of the seat, carriage of passenger baggage, or fuel surcharge, after the consumer has purchased the air transportation. The Department determined that a purchase occurs when the full amount due has been paid by the consumer and the consumer receives confirmation from the seller. It further determined that any attempt by the seller to increase the price to be paid after the purchase has occurred is an unfair or deceptive practice in violation of 49 U.S.C. § 41712, thereby subjecting carriers to civil penalties of up to $27,500 per incident.

While DOT has not previously specifically addressed by rulemaking the issue of mistake fares, it has issued nonbinding guidance on this topic within its "Frequently Asked Questions" document, which is available through the Aviation Consumer Protection Division's website http://www.dot.gov/airconsumer. The FAQs state that the post-purchase price increase rule applies in the case of a consumer who purchases airfare that was mistakenly offered due to a computer problem or human error. Specifically, the FAQ states "if a consumer purchases a fare and that consumer receives confirmation (such as a confirmation email and/or the purchase appears on their credit card statement or online account summary) of their purchase, then the seller of air transportation cannot increase the price of that air transportation to that consumer, even when the fare is a 'mistake.'" Relatedly the FAQs suggest that carriers are prohibited from including provisions in their passenger contracts of carriage that would allow for the cancellation or correction of mistake fare tickets. Specifically, FAQ XI(8) states that: "A contract of carriage provision that reserves the right to cancel [mistake fare tickets] or . . . to raise the fare cannot legalize the practice [of raising a fare to the correct price after purchase]." DOT advises in the FAQ that any contract of carriage provision that permits such actions would be deemed an unfair or deceptive practice in violation of 49 U.S.C. § 41712.

When it considered the post-purchase price increase rule and related FAQ, DOT did not provide for any exceptions to this "strict liability" policy based on specific circumstances, such as the scale of the error, the number of tickets sold, or whether the consumer knew or reasonably should have known that the fare amount was erroneous.

While SWISS appreciates the Department's focus on protecting consumers from price increases after air transportation has been purchased, SWISS notes that a typical mistake fare situation likely falls far outside the circumstances DOT was considering when it originally implemented the post-purchase price increase rule. An attempt by an airline to cancel or correct an inadvertently published mistake fare is not analogous to increasing the price of a ticket after purchase to, for example, cover an increase in the cost of fuel. Given this, and the significant and sometimes extremely detrimental financial impact a mistake fare can have on individual airlines (up to and including possible bankruptcy), SWISS urges the Department to fairly balance the interests of airlines with those of consumers in a mistake fare situation.

The issue of mistake fares is of particular importance to SWISS because it, like many airlines in the industry, was significantly impacted by a mistake fare in September 2012. In that case, an erroneous one-way first class fare was inadvertently made available for sale to the general public. Because of the mistake, the fare was sold for as little as $115 (excluding taxes and fees) when the correct fare in most cases exceeded $15,000 (again, excluding taxes and fees). Shortly after the fare was inadvertently made available for purchase, a popular online passenger blog, BoardingArea™, learned of the mistake fare and published a posting entitled "Mistake Fare – One Way First Class Originating in Myanmar is Back!"[1] Once the mistake fare's existence was publicized, thousands of tickets were purchased before the affected airlines removed the fare, which happened less than 24 hours after the blog posting was published. Similarly, visitors of another frequent flyer blog, Flyertalk™, were informed of the mistake fare and encouraged to book tickets as soon as possible (i.e. blog post instructing interested parties to "GOGOGO!"[2]), strategize for protection (i.e. blog posting advising other passengers to "have one US leg in the itinerary to get DOT protection"[3]), to not call airlines (i.e. blog posting advising fellow bloggers "DO NOT CALL THE AIRLINES!"[4]) and were assisted in booking sophisticated multi-segment itineraries by other passengers who had already booked the fare.[5]

The impact on the industry, and on SWISS in particular, was potentially financially devastating. Had it honored the approximately 736 tickets that were booked on its ticket stock by third party travel agents, the mistake fare tickets sold would have filled SWISS' first-class cabin for approximately 30% of annual travel on certain routes and resulted in millions of dollars in lost revenue. While SWISS ultimately chose to cancel the affected tickets and immediately issued full refunds to each passenger, other carriers decided to honor the fare likely because they were fearful of being accused of violating the post-purchase price increase rule.

More recently, United Air Lines inadvertently filed fares for zero dollars in September 2013. According to CNN, in the fifteen minutes the mistake fares were available "word quickly

[1] *Mistake Fare – One Way First Class Originating in Myanmar is Back!*, BOARDING AREA (Sept. 27, 2012), http://boardingarea.com/blogs/viewfromthewing/2012/09/27/mistake-fare-one-way-first-class-originating-in-myanmar-is-back/.
[2] *[FARE GONE] RGN First class comes back again!!!!*, FLYERTALK.COM (Thread started Sept. 27, 2012), http://www.flyertalk.com/forum/mileage-run-discussion/1392131-fare-gone-rgn-first-class-comes-back-again.html.
[3] *Id.* Post by Jaimito Cartero, Sept. 27, 2012.
[4] *Id.* Post by yerffej201, June 17, 2013.
[5] *Id.*

spread around the internet and savvy buyers scooped up untold numbers of the dream tickets before United spotted the error".[6] Similarly, just after Christmas, Delta Airlines accidently published a mistake fare that led to thousands of tickets being booked at very low prices, for as little as $20 for a round-trip ticket.[7] In both instances, the fares were honored, again likely due to fear of DOT enforcement action even though honoring the fares was costly to the airline and its shareholders and in derogation of clear contract law principles.

None of the above fares were published intentionally by airlines with the purpose of misleading passengers. Rather, the mistake fare was published unintentionally, discovered by passengers, and posted on the internet, thereby enabling scores of other fare-savvy passengers to unfairly take advantage of the airlines. Unfortunately, with the ever-increasing use of the internet and social media in advertising and pricing, additional instances of mistake fares are certain to occur, as they do in all other industries. If the Department's "strict liability" approach to regulating mistake fares continues, airlines will have no choice but to increase fares across the board to hedge against future losses due to the inadvertent publication of mistake fares.

In its Notice of Proposed Rulemaking, the Department correctly expresses concern with how mistake fares are increasingly being discovered and posted on frequent-flyer community blogs and travel-deal sites, such as BoardingArea™, and how savvy consumers are purchasing these tickets in bad faith, as opposed to the mistaken belief that a good deal was legitimately available. DOT has specifically asked for comments on how it can best address the problem of individual bad actors while still ensuring that airlines and other sellers of air transportation are required to honor mistaken fares that were reasonably relied upon by consumers.

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[6] "*United Airlines sells 'free' tickets on website*," CNN.COM (September 13, 2013), http://www.cnn.com/2013/09/12/travel/united-free-tickets/.
[7] Genevieve Shaw Brown and Michael Orr, *"Delta to Honor Super-Low Mistake Fares,"* ABCNEWS.GO.COM (December 26, 2013), http://abcnews.go.com/Travel/delta-glitch-posts-super-low-mistake-fares/story?id=21340372.

SWISS urges the Department to consider how other industries address the sale of erroneously priced goods and services. In virtually every other industry, the relationship between a business and its customer is governed by general contract law principles and the terms of the parties' agreement.

The mistake doctrine is a central tenet of contract law.[8] It is well settled that where a unilateral mistake is made as to a basic assumption of the contract and that mistake has a material effect on the agreed exchange of performances, the contract is voidable by the party that made the mistake if the effect of the mistake makes enforcement of the contract unconscionable or the other party had reason to know of the mistake.[9] As a result, courts have allowed unilateral recession when contracts are based on pricing mistakes.[10] Any mistake fare that is unintentionally or inadvertently published by an airline or third party agent of an airline and is subsequently purchased by "bad actor" consumers should be governed by these well-established contract principles and thus voidable under the doctrine of unilateral mistake. This approach is consistent with that taken by other industries and also has been followed by other international aviation regulators.

For instance, in 2006, Holland America Line, a vacation cruise line located in Seattle, sold cabins aboard the Noordam for $849.00 when the correct price of such tickets was over

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[8] Restatement Second of Law, Contracts defines "mistake" as: "[...]an erroneous belief. A party's erroneous belief is therefore said to be a "mistake" of that party. . . The erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a "mistake" as that word is defined here. An erroneous belief as to the contents or effect of a writing that expresses the agreement is, however, a mistake [. . .]." Restatement 2d of Contracts, § 151 (1981).

[9] Restatement, *supra* note 23, § 151. The comment following this section recognizes "a growing willingness to allow avoidance where the consequences of the mistake are so grave that enforcement of the contract would be unconscionable."

[10] *See Donovan v. RRL Corp.*, 26 Cal. 4th 261 (2001) (in which the court found that rescission was warranted when the advertised price of an automobile was approximately 32% of the price the seller intended due to a typographical error committed by a local newspaper); *see also O'Keefe v. Lee Callan Imports, Inc.*, 128 Ill. App. 2d 410 (1970) ("in the absence of special circumstances, a newspaper advertisement which contains an erroneous purchase price through no fault of the defendant advertiser and which contains no other terms, is not an offer which can be accepted as to form a contract.")

$1,300. Relying on its "cruise contract" and general principles of contract law, Holland America required passengers who booked the mistake fares to pay the difference in order to join the cruise. Passengers who did not pay the difference were denied boarding. Other cruise lines, such as Carnival, have protections from pricing mistakes built directly into the contract that is entered into between the cruise line and its passengers at the time a ticket is purchased.

Amtrak, which is publicly funded, enjoys similar protections. Amtrak's "Terms of Transportation" provide:

> "Amtrak will exercise reasonable efforts to ensure that all fares it publishes are accurate and available for sale, but Amtrak reserves the right to correct any erroneously published fare that Amtrak did not intend to offer for sale. In the event that an erroneous fare is inadvertently published for sale and a ticket is issued at the erroneous fare before it has been corrected, Amtrak reserves the right to cancel the ticket purchase and refund all amounts paid by the purchaser or, at the purchaser's option, to reissue the ticket for the correct fare."[11]

Other, non-transportation sector entities also have successfully relied on mistake fare contract provisions like those mentioned above, coupled with general principles of contract law, to protect themselves from the consequences of an erroneous publication of a mistake price. For instance, in 2010, an online "pricing error" resulted in the sale by Ticketmaster of an undisclosed number of Kenny Chesney concert tickets for $25, which was approximately 25% of the correct price. Ticketmaster cancelled all of the erroneously priced tickets and notified consumers of the mistake almost two weeks after the tickets' sale. In its correspondence with each affected consumer, Ticketmaster apologized for the mistake and allowed fans to choose between a full

[11] Amtrak, *Terms of Transportation*, http://www.amtrak.com/servlet/ContentServer?c=Page&pagename=am%2FLayout&cid=1241337896134.

refund or re-purchase at the correct price of $99.50.[12] By virtue of these protections, companies are able to safeguard themselves from bad actors who become aware of an innocent mistake by the entity (or an unrelated third party intermediary) and attempt to take unfair advantage of the company by disseminating the error on blogs and the internet.

Recently, the Canadian Transportation Agency (CTA) voided over 80 tickets issued under an erroneous fare, concluding in two separate cases "there was no meeting of the minds and, as such, there was no valid contract of carriage [between the parties]".[13] In these decisions, the CTA set forth what actions it expects a carrier to take in the event a mistake fare is published, purchased by consumers, and subsequently cancelled by the carrier. CTA takes the position that carriers should notify the passenger "no later than 72 hours after the carrier becomes aware of the publishing of a fare, that all or any portion of their ticketed itinerary has been cancelled"; or "at least 24 hours prior to the passenger's scheduled departure from the point of origin issued on the ticket, that all or any portion of their ticketed itinerary has been cancelled, if the ticket was purchased less than 72 hours before their scheduled departure;" and "provide a refund of the total cost of the ticket".[14] SWISS believes this is a sound policy for addressing mistake fares in the United States.

Even if the Department takes the position that a contract exists between an airline and a consumer who has purchased a mistake fare, carriers should nevertheless be permitted to protect themselves through the terms of the agreement they have with the passenger. This is standard

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[12] *See* Alfred Branch Jr., *Ticketmaster claims 'pricing error' in listing of $25 Kenny Chesney tickets*, WWW.TICKETNEWS.COM (November 22, 2010), www.ticketnews.com/news/Ticketmaster-claims-pricing-error-in-listing-of-twenty-five-dollar-Kenny-Chesney-tickets111022852.

[13] *See* CTA Decision No. 177-C-A-2014, May 9, 2014; *see also* CTA Decision No. 202-C-A-2014, May 27, 2014 (stating that because the complainants knew or ought to have known the fare was a mistake, no valid contract was entered into between the parties as there was no meeting of the minds).

[14] *Id.* Interline itineraries raise unique issues in the context of mistake fares. The CTA pointed this out in the relevant decisions and advised that participating carriers should coordinate with each other to device which carrier will make the required notification and refund in the event that the passenger's ticketed itinerary is cancelled.

procedure in other industries and, as noted by the U.S. Federal Trade Commission (FTC), there is no federal statute requiring merchants (in other industries) to honor erroneous pricing unless it is misleading or deceptive.[15] Thus, absent any federal or state law prohibiting them from doing so, other industries routinely are able to withdraw offers involving mistaken prices, even after credit card payments are made.[16]

Under the current regulatory scheme, and DOT's interpretation of 14 C.F.R. 399.88, airlines are at a distinct disadvantage to all other industries. In fact, any attempt by an airline to protect itself from mistake fares would likely be considered by the Department to be an unfair and deceptive practice, thereby subjecting the carrier to the possibility of monetary penalties if it cancels tickets that were sold at an erroneous price. As noted, a single mistake fare, discovered by a bad actor, disseminated on blogs, and purchased by thousands of consumers in a matter of hours, all without the knowledge or consent of the airline itself, has the potential to bankrupt an airline. Unfortunately, with computer technology and social media becoming ever more pervasive in daily airline operations, mistake fares will continue to occur and may even become more common as pricing and sale functions continue to automate. Airlines (and particularly those airlines that are small or have a limited in-house IT staff) do not have the capability to screen all fares before they are published in order to prevent mistake fares. And, moreover, even if such a capability was possible, many mistake fares are caused by third parties without the airline's knowledge. Under the current regulatory scheme airlines must

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[15] Scott McCartney, "When Airline Fares Are Too Good to be True," Wall St. J., Mar. 25, 2010, quoting FTC Spokesman Mitch Katz, http://online.wsj.com/article/SB10001424052748704266504575141644282587882.html.
[16] *Id.* ("Most state laws accommodate mistakes in a merchant's favor. In New York, for example, if the purchaser 'either knew or should have known such a mistake was being made,' the seller can cancel a contract."). The Courts have taken a similar approach in many jurisdictions, allowing recession of a contract if a pricing mistake has occurred. *See Donovan v. RRL Corp.*, 26 Cal. 4th 261 (2001). ("A significant error in the price term of a contract constitutes a mistake regarding a basic assumption upon which the contract is made, and such a mistake ordinarily has a material effect adverse to the mistaken party.") *See also Elsinore, Union etc. Sch. Dist. v. Katstroff*, 54 Cal. 2d 380, 389 (1960); *O'Keefe v. Lee Callan Imports, Inc.*, 128 Ill. App. 2d 410 (1970).

therefore choose between honoring mistake fares and the significant losses in revenue that accompany them to protect innocent consumers or, alternatively, cancel the tickets to protect shareholders and risk DOT enforcement action along with public criticism.

In the unique case of mistake fares, DOT must balance the interests of consumers and the airlines that serve them. SWISS believes that the correction of mistake fares is not a "post-purchase price increase" as DOT initially intended that term to be defined and should be subject to a different regulatory and/or enforcement standard.

To protect themselves from the risk of lost revenues associated with a mistake fare, SWISS believes airlines should be permitted to add protections to their contracts of carriage[17] allowing for the cancellation (at no charge to the consumer) or correction of mistake fares. SWISS also notes that because of the significant cost mistake fares have on the industry, absent a change in DOT's policy, airlines will likely be forced to raise ticket prices to hedge against future losses from pricing errors. Allowing those bad actors who seek to take advantage of airlines via the unintentional and unfortunate pricing errors that occur in any industry to continue their current practices will, in the end, only serve to raise the price of air travel to the detriment of the broader class of consumers DOT seeks to protect.

SWISS appreciates the opportunity to share its views with the Department and is available to answer any questions DOT may have with respect to this issue.

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[17] In the field of aviation law, the "contract of carriage" between the airline and its passengers governs the parties' legal relationship. The contract of carriage is made up of the passenger's ticket, the carrier's Conditions of Carriage, and the carrier's tariff. *See St. Paul Ins. Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1547 (11th Cir. 1987); *Edem v. Ethiopian Airlines Enter.*, 2009 U.S. Dist. LEXIS 118951, (E.D.N.Y. Sept. 30, 2009), *Seisay v. Compagnie Nationale Air France*, 1997 U.S. Dist. LEXIS 11009, 1997 WL 431084 (S.D.N.Y. July 30, 1997), *Clemente v. Philippine Airlines*, 614 F. Supp. 1196 (S.D.N.Y. 1985).