

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

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<b>In the matter of:</b>	:	
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<b>Notice of Proposed Rulemaking</b>	:	<b>DOT-OST-2022-0109</b>
<b>Enhancing Transparency of Airline</b>	:	
<b>Ancillary Service Fees</b>	:	

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**REQUEST TO EXTEND THE PUBLIC COMMENT  
PERIOD**

The members of Airlines for America (“A4A”) and the International Air Transportation Association (“IATA”) annually sell tickets to and transport hundreds of millions of passengers to, from and within the United States in a safe, affordable and transparent manner.<sup>1</sup> Therefore, A4A and IATA have strong interests in the U.S. Department of Transportation’s (“DOT” or “Department”) Notice of Proposed Rulemaking, Enhancing Transparency of Airline Ancillary Service Fees, which intends to significantly change airline ancillary fee transparency regulations (hereinafter “Ancillary NPRM” or “NPRM”).<sup>2</sup> The DOT provided a 60-day comment period, that closes on December 19, 2022. On behalf of our members, we request that the Department extend the comment period by 60 days because it is not practicable to comment within the existing comment period given the expansive scope of the NPRM.

The Department proposes dramatically new regulations applicable to U.S. and foreign carriers, ticket agents and metasearch engines that would, if adopted as proposed, fundamentally change how a complex marketplace provides ancillary fee information to consumers. Airlines and ticket agents must carefully analyze whether it is even feasible for such data to be displayed in a manner that is consumer friendly and, most importantly, transparent to the consumer. For example, if the Department requires carriers, ticket agents and metasearch engines to provide comprehensive ancillary fee information in limited online and mobile website displays, essential fare and flight information will be crowded out. In addition, privacy and other issues must be examined to determine which personal and financial information may be included and shared in light of applicable laws and regulations in the U.S. and abroad. These are just a few examples, but there are many. This is a very complex topic, and we urge the Department to grant this extension request and to take the time necessary to

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<sup>1</sup> A4A’s members are Alaska Airlines, Inc.; American Airlines Group, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; FedEx Corp.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member. IATA represents over 290 airlines in 120 countries.

<sup>2</sup> 87 Fed. Reg. 63718 (October 20, 2022).

collect and consider all the information relevant and critical to this regulation, including whether such a rule is feasible for the airline industry.

The Department proposes that U.S. air carriers, foreign air carriers, ticket agents and metasearch engines disclose all ancillary fee information (e.g., baggage fees, change fees, cancellation fees and fees for a child to sit next to an adult to consumers) whenever fare and schedule information is provided to consumers for flights to, within and from the United States. The Department also proposes that these entities include an option to display ancillary fees that are individually customized to a passenger's frequent flyer or other status. The Department further proposes that carriers provide useable, current and accurate information regarding ancillary fees to ticket agents or metasearch engines that sell or display the carrier's fare and schedule information and if a carrier charges for an adult to sit next to a child the ancillary fee be transactable. Thus, the complexity of the airlines' comprehensive analysis described above is compounded with each scenario that the Department proposes to require ancillary fee information.

In addition to the proposed regulatory changes, the preamble to the NPRM seeks comments on many separate issues—posing over 45 questions or requests for comments. DOT decisions on these additional items could materially alter the proposed regulatory text and the potential impact of the proposal. For the public's benefit, we extracted a list of the Department's inquiries. *See Attachment A.* Our members' ability to sufficiently review and assess the impact of the NPRM is complicated by the fact that we, and all other stakeholders, must attempt to analyze every possible scenario raised by the NPRM, as well as the many questions posed by the Department in the preamble. Notable requests for information in the Ancillary Fee NPRM include whether:

- the final rule should require that carriers provide ancillary fee information to Global Distribution Systems ("GDS");
- the list of ancillary fee information covered by the NPRM should be expanded or reduced;
- the final rule should cover ancillary fees that carriers do not have now but may adopt in the future;
- the Department should address the potential need for a consumer to also pay a fare difference between old and new tickets when the passenger chooses to change a ticket; and
- the Department should require that the price for ancillary services not purchased with the ticket be frozen beyond first and second checked bag and a carry-on item.

The significance of the rule's impact—if adopted in final form as proposed in the NPRM and taking into account the dozens of questions and scenarios raised in the preamble—on the market and the relationships among market participants cannot be overstated. Indeed, mandating that carriers share ancillary fee information with GDSs presents an entire range of *additional* questions not addressed in the NPRM, but which have been repeatedly debated in rulemakings and the DOT's Aviation Consumer Protection Advisory Committee ("ACPAC") meetings over the past decade. For example, would mandating that carriers provide ancillary fee information to GDSs (as considered by the preamble) be consistent with Executive Order

14036 Promoting Competition in the American Economy given the concentration of the GDS market share?<sup>3</sup> The additional questions posed by the Department in the NPRM warrant an in-depth analysis that will reasonably require more than 60 days for all interested parties to review and comment on. The Department needs thorough comments to fully understand the implications (costs and benefits) of each alternative from the open issues it presents.

In addition, the NPRM has information gaps that the Department must clarify before stakeholders are able to provide meaningful comments. To provide “a meaningful opportunity to comment,” it is essential that the Department share additional information on its proposal by answering the attached questions (See Attachment B) before the comment period closes.<sup>4</sup> For example, we ask the Department to explain how it concluded current ancillary fee transparency practices are unfair given that the Regulatory Impact Analysis (“RIA”) contains statements that carriers are disclosing information to a large degree, indicating there is not “substantial injury” to consumers.<sup>5</sup> In addition, there is no Initial Regulatory Flexibility Analysis assessing the impact on small entities, and the RIA fails to estimate the benefits or costs of the NPRM. Allowing additional time during this comment period will assist the public in developing information missing from the RIA and will better inform the Department about the true impact of the proposal.

The public will have to develop as much information as possible about both initial and future costs and benefits resulting from a final rule to provide meaningful input. Speculation will not assist the Department, the public or stakeholders, and could lead to inappropriate benefit-cost analyses and decision-making, which would detract from the credibility of this rulemaking process. Simply put, it will be extremely difficult for our members and other stakeholders to develop complete information to inform the judgment of the Department regarding this rulemaking within the 60-day deadline created by the NPRM. With additional time, our organizations will be better positioned to submit comprehensive industry comments to assist in facilitating the Department’s analysis. While we appreciate that the Department provided a 60-day comment period, it is nonetheless insufficient for the reasons discussed above.

We request DOT answer the attached questions (*See Attachment B*) before the comment period closes, which is necessary for the public to understand the fundamental sections of the NPRM’s benefits and impact, as well as enable comprehensive comments that are vital to the Department’s review in considering how to proceed with a final rule. The DOT’s ACPAC, which the Department has charged with providing recommendations on the NPRM, will also need this critical information from the public to provide well-informed recommendations to the Secretary.

Considering the critical importance of this rulemaking, the many open-ended questions in the preamble, the information gaps in the NPRM and the many issues needing clarity raised herein and by other stakeholders, including those raised by members of the ACPAC and the public during its June 2022 public meeting—as well as the extensive coordination required to provide the Department with the input necessary to proceed with this rule—the proposed 60-day

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<sup>3</sup> Executive Order No. 14036, 86 Fed. Reg. 36987.

<sup>4</sup> Executive Order No. 12866 58 Fed. Reg. 51735.

<sup>5</sup> 14 C.F.R. 399.79(b)(1).

comment period is inadequate.

We request that the Department extend the comment period by 60 days to give all interested parties adequate time to comment given the scope of the NPRM.

Respectfully submitted,



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## Attachment A - Ancillary Fee NPRM Questions

- 1) The Department solicits comment on whether the covered entities should be broader or more limited in scope. For example, regarding ticket agents who sell air transportation, should the proposed requirement to display information about certain critical ancillary services exclude corporate travel agents because the display content is typically negotiated by the business involved?
- 2) The Department requests comment on other factors that may be indicative of the airline or ticket agent doing business in the United States.
- 3) The Department seeks comment on whether the Department should require that carriers provide fee information about critical ancillary services to GDSs. Why or why not?
- 4) We request comment on whether the Department's list of critical ancillary services should be expanded or reduced.
- 5) Are there particular ancillary service fees (or set of fees) that have a material impact on the total price paid by the consumer or are of particular importance to consumers?
- 6) What are the benefits and potential challenges to expanding or reducing the Department's list of critical ancillary services?
- 7) Comments that are most useful provide information regarding the reasons why additional disclosures should or should not be required.
- 8) The Department also seeks comment on how to address future adoption by airlines of additional ancillary service fees and how to ensure their disclosure to the extent that they are of critical importance to consumers.
- 9) We request comment on whether this exception for certain air-tour packages adequately addresses concerns of air-tour package sellers. We also request comment on whether such an exception adequately protects consumers.
- 10) Should the Department require change fees be disclosed as proposed?
- 11) If so, how should the Department address the potential need for a consumer to also pay a fare difference between the old and new tickets brought about by dynamic pricing models many carriers employ?
- 12) Does the material change in fare that occurs with many ticket changes being a potentially larger component of the overall price relative to the change fee itself represent a more confusing situation for consumers?
- 13) Should the Department only require change fees be disclosed, or should it also require cancellation fees to be disclosed as proposed?
- 14) Should the Department allow the proposed disclosures to be provided later in the ticket purchase process than proposed in this NPRM?
- 15) Are there preferred methods for presenting the change and cancellation policy information?
- 16) Should the Department permit these (family/adjacent seat fee) disclosures to be provided later during the booking process, such as after the stage when a consumer inputs passenger name and age information?
- 17) Should the Department be more prescriptive about family seat fee disclosure requirements (e.g., requiring that websites be modified to enable consumers to indicate whether a passenger will be 13 or under prior to initiating the search)?
- 18) Are there technical or other practical considerations for requiring that family seating fees be disclosed and transactable?
- 19) Should disclosure be limited to fees or would additional information regarding airline family seating policies be useful to consumers during the ticket purchase process?
- 20) What disclosure should be required, if any, when no adjacent seats are available at the time

## Attachment A - Ancillary Fee NPRM Questions

- of the consumer's ticket purchase?
- 21) The Department seeks comment on the benefits, risks, and practicability of the proposed distinction between anonymous itinerary searches and passenger-specific searches, as described above.
  - 22) Is an opt-out provision needed to ensure that consumers can avoid receiving ancillary service fee information that is of no interest to them?
  - 23) We are also interested in learning what impact, if any, lack of an opt-out provision has on the speed of search results or particular display options an airline or ticket agent may provide.
  - 24) For commenters advocating an opt-out option, we also request information about how to define requirements for opt-out options that would adequately protect consumers and ensure any opt-out option is not confusing or abused, for example, preventing opt-outs accomplished through a "click wrap" or "browser wrap" tactic that does not represent a meaningful, intentional choice.
  - 25) The Department seeks comment on whether it should also consider specific fee disclosure requirements for airlines' or ticket agents' mobile applications (apps).
  - 26) The Department seeks comment on whether the proposed disclosure requirements should also extend to airline and ticket agent mobile apps, and whether there are any practical distinctions between information accessed on mobile websites and mobile apps.
  - 27) It would be helpful to the Department for commenters to provide data on the percentage of tickets booked on mobile applications, mobile websites, and desktop websites, or other usage statistics that are relevant.
  - 28) The Department seeks comment on whether links and rollovers would provide the necessary flexibility to allow for design displays that would enhance the user experience and encourage innovation as technology changes.
  - 29) Are additional flexibilities needed to ensure the display of ancillary service fee information does not result in screen clutter?
  - 30) Do rollovers work on mobile devices that have no cursor to hover over a link?
  - 31) Considering the screen size of mobile devices, would the proposed display requirement work on mobile platforms?
  - 32) Will there be a danger of too much unnecessary information creating confusion if fees that are not under consideration are displayed and are there ways the "too much information" can be mitigated?
  - 33) The Department also requests that commenters provide information as to whether hyperlink or other disclosures not adjacent to the fare on mobile sites would or would not be effective.
  - 34) Should the disclosure requirements be limited to websites accessed through desktop applications and not apply to those accessed through mobile applications?
  - 35) The Department seeks comment on its proposals that carriers and ticket agents inform consumers of the bag fees, change and cancellation fees, and family seating fees that apply when consumers attempt to purchase airline tickets offline, in person, or on the phone.
  - 36) The Department is also interested in obtaining input on alternative options for providing such fee information on the phone or in person (e.g., explaining that fees may apply and referring the consumer to the carrier or ticket agent's website, provided that the website

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- is accessible to consumers with disabilities)).
- 37) The Department solicits comment on its preliminary decision not to require airlines to share ancillary service fee data with GDSs.
  - 38) Should the Department require carriers to distribute the ancillary service fee information to all ticket agents, including GDSs, to which the carrier provides fare, schedule, and availability information?
  - 39) How would OTAs and metasearch sites receive ancillary service fee information from multiple airlines and disclose that information to consumers if airlines do not provide that information to GDSs?
  - 40) The Department is striving to find the most beneficial disclosure rule for consumers while avoiding any adverse impact on innovations in the air transportation marketplace, contract negotiations between carriers and their distribution partners, and a carrier's ability to set its own fees and fares in response to its own commercial strategy and market forces.
  - 41) Also, the Department solicits comment on requiring airlines to disclose that they charge fees for adjacent seating without disclosing the amount and requiring that it be transactable as proposed.
  - 42) We request comment on whether there is any benefit in retaining the requirements in 14 CFR 399.85(c) if the proposed requirement to display passenger-specific baggage fee information is adopted.
  - 43) The Department seeks comment on its amendment of section 399.88. Should the Department require that the price for ancillary services not purchased with the ticket be frozen beyond first and second checked bag and a carry-on item? For example, should it extend to fees for all baggage (including fees for oversized or overweight bags) or all ancillary services that have been identified as being critical to a consumer's purchasing decision?
  - 44) The Department solicits comment on defining base fare to mean all of the carrier-imposed charges included within the total price.
  - 45) The Department is soliciting comment on whether the full fare regulation should be amended to provide greater clarity on this type of advertising.
  - 46) We request comment on whether the Department should impose a date certain by which carriers must share ancillary service fee information with ticket agents.

## Attachment B – Questions Regarding DOT Ancillary Fee NPRM

1. Did the Department comply with the Joint Explanatory Statement of the 2018 Consolidated Appropriations Act requesting that the Department work in collaboration with industry, consumers and other stakeholders to establish guidelines on transparency of airline ancillary fees and submit a report to Congress?<sup>1</sup>
  - o Can the Department share the report to Congress relevant to the Joint Explanatory Statement?
2. The Department stated that it would provide carriers four months to review and adjust family seating policies in a notice published on July 8, 2022.<sup>2</sup> DOT further stated after the four-month period it will consider what actions may be appropriate including rulemaking. The NPRM did not indicate why the four-month review period was abandoned and DOT went straight to rulemaking, can the Department explain why it included family seating in the ancillary fee NPRM when carriers were to have more time to adjust policies?
3. Can the DOT explain how it determined consumers spend additional time searching for ancillary fee information as described in the unfair analysis and how much time they are spending?<sup>3</sup>
4. Is the Department proposing to eliminate the requirement in 14 CFR 399.85(c) regarding disclosure of bag fee information on e-ticket confirmations? The preamble states that DOT is considering eliminating 399.85(c) but the e-ticket requirement is proposed in section 399.85(h).
5. Can the Department clarify the statement below from the RIA is incorrect because current DOT regulations require the disclosure of “information on fees for all optional services that are available to a passenger purchasing air transportation.” 399.85(d) “Department regulations already require carriers to display some ancillary fee information through a link on the homepage.”<sup>4</sup>
6. Does this NPRM comply with Executive Order 12866 standards that the benefits outweigh the costs of a regulation if the agency does not have information that supports the underlying assumptions needed to calculate hypothetical or illustrative benefits?
7. Can the Department explain how it came to the conclusion that existing ancillary fee disclosures are unfair and deceptive when the RIA states “While industry is already disclosing the required information required to a large degree, we expect that carrier and ticket agents will need to adjust how they display price information.”<sup>5</sup>

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<sup>1</sup> See <https://www.congress.gov/congressional-record/2018/03/22/house-section/article/H2697-1> at page H2872.

<sup>2</sup> See <https://www.transportation.gov/individuals/aviation-consumer-protection/family-seating/June-2022-notice>

<sup>3</sup> See “The substantial injury this practice is likely to cause is the additional time spent searching to find the total cost of travel and any additional funds spent on air transportation that might have been avoided if the consumer had been able to determine the true cost of travel up front and readily select the best price.” 87 Fed. Reg. 63721,

<sup>4</sup> RIA page 16.

<sup>5</sup> RIA page 27.

## Attachment B – Questions Regarding DOT Ancillary Fee NPRM

- More specifically how can there be substantial harm under the unfair or deception analysis as DOT alleges, if industry is already disclosing the required information to a large degree?
8. Has the Department completed and posted for public comment an Initial Regulatory Flexibility Analysis that describes the impact of the rule on small entities?
  9. Does the Department believe that an inability to determine whether a proposed rule has a substantial impact on small entities complies with Regulatory Flexibility Act requirements?<sup>6</sup>
  10. Is it the Department’s policy goal to impose regulatory burdens to force carriers to eliminate ancillary fees or change base fares as the RIA suggests by stating “If the technology and search costs are high enough, then airlines may respond by ending the practice of charging seat assignment fees for families. Airlines may further respond by changing ancillary fee charges, changing base fares, or assessing new ancillary fees.”<sup>7</sup>
  11. How is it that the Department is unable to determine the primary and secondary effects this proposal will have on contracts between carriers and ticket agents for ancillary fee information as discussed in the RIA, given the extensive comments on the impacts the 2014 NPRM and any similar proposal (such as the 2022 NPRM) would have on contracts that A4A, IATA, and carries provided in response to the 2014 NPRM and at the 2019 and 2022 ACPAC meetings?<sup>8</sup>

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<sup>6</sup> See “Because the Department could not estimate these costs reliably, it could not determine whether the proposed rule would impose a significant impact on a substantial number of small entities.” 87 Fed. Reg. 63733

<sup>7</sup> RIA page 28.

<sup>8</sup> See “The same uncertainties that prevent estimating primary effects also preclude assessing potential secondary effects, including effects on airfares, ancillary fees, or GDS contracts with carriers and ticket agents.” RIA page 29.