

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

In the matter of: :
:
Notice of Proposed Rulemaking, : **Docket No. DOT-OST-2022-0109**
Enhancing Transparency of Airline :
Ancillary Service Fees :

PETITION FOR HEARING

Communications with respect to this document should be addressed to:

Doug Mullen
Vice President and Deputy General Counsel
AIRLINES FOR AMERICA
1275 Pennsylvania Avenue, NW
Suite 1300
Washington, DC 20004
(202) 626-4000
dmullen@airlines.org

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The members of Airlines for America (“A4A”) annually transport hundreds of million passengers to, from or within the United States in a safe, affordable manner and continually strive to provide the highest levels of customer service.¹ The competitive air travel marketplace has created more options than ever for consumers, each of whom are differently situated and want services that meet their personal air travel preferences. Airlines have clearly responded to consumers’ diverse interests by providing varying ancillary services and ancillary service packages that are competitively priced and that benefit each individual consumer. Moreover, to distinguish and sell their competitive and unique products, airlines are transparent in their ancillary service fee offerings and related fees. Therefore, A4A has a strong interest in ensuring that the U.S. Department of Transportation (“DOT” or “Department”) rationally bases its final rules on all available information and minimizes any adverse effects to consumers who are not injured or misled by current airline practices.

¹ 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.; United Airlines Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member. Southwest Airlines Co. is not participating in this petition.

I. PETITION FOR HEARING

Pursuant to the DOT’s rule on unfair and deceptive practices rulemakings, 14 C.F.R. § 399.75, A4A **petitions the Department’s General Counsel for a hearing on the notice of proposed rulemaking, *Enhancing Transparency of Airline Ancillary Service Fees*, which proposes unparalleled disclosure obligations by airlines regarding their ancillary service fees (hereinafter “Airline Ancillary Fee NPRM”).²** Specifically, we request the following issues be adjudicated:

- Whether consumers are or likely to be substantially injured or are misled by airlines’ current disclosures of ancillary service fees; and
- Whether disclosures of itinerary-specific ancillary fees at the time of first search will result in the display of incomplete or inapplicable ancillary fee information, cause consumer confusion, and distort the marketplace.

* * * *

II. INTRODUCTION

A grant of this petition is indisputably in the public’s interest. First and most importantly, the Department proposes substantial changes to airline disclosure requirements regarding ancillary service fees, when airlines are already obligated to make fee information available to consumers. Millions of stakeholders—including airlines, travel agents, booking entities, and most importantly, consumers—will be affected by the final rule. As explained in our comments, the Department’s support for its conclusion that consumers face substantial injury from or are misled by airlines’ current disclosure practices is utterly inadequate.³ Furthermore, if

² 87 Fed. Reg. 63,718 (Oct. 20, 2022) (hereinafter “Airline Ancillary Fee NPRM”).

³ See A4A, Comments of Airlines for America 20 – 30 (Jan. 23, 2023) (Docket DOT-OST-2022-0109) (hereinafter “A4A Comments”).

the Department finalizes the rules as proposed, airlines will have to substantially change their product displays, which already distinguish the unique and competitive service offerings and related prices.⁴ The resulting display will confuse consumers with incomplete or inapplicable ancillary service fee information and distract consumers on sales platforms that are already consumer focused.⁵ It will also materially impact the market, improperly defining the Department implies is most important to consumers during the search and ticket purchase process without allowing airlines to change the disclosures to meet the actual interests of passengers (*e.g.*, a preference to focus on specific flight times rather than price).

Second, each of the Department’s public interest factors supports a hearing on the issues presented here.⁶ Thus, the Department should thoroughly and carefully consider all potential impacts and unintended consequences of this rule—both good and bad. If the DOT does not conduct a hearing, the potential for consumer confusion and market manipulation resulting from the Department’s uninformed decisions and conclusions, will inevitably materialize. Based on the information provided herein, as well as in our comments, we submit that a denial of this petition will be an arbitrary and capricious exercise of the Department’s rulemaking authority and call into question whether the Department has met its obligations under the Administrative Procedures Act and applicable Executive Orders.⁷

In sum, we petition the Department for a hearing because, given the grave implications of the final rules, it is unquestionably in the public interest that the Department’s rulemaking process consider all available critical information, including for purposes of avoiding consumer

⁴ *Id.* at 17 – 18.

⁵ *Id.* at 7 – 8.

⁶ See 14 C.F.R. § 399.75(b)(2) (requiring consideration of certain factors in determining whether a petition is in the public interest).

⁷ 5 U.S.C. § 552 *et seq.*

confusion, and manipulation of the air travel marketplace. Moreover, a hearing is necessary for the Department to achieve its concurrent mandates to protect consumers *and* regulate in a manner that imposes the “*least burden* on society.”⁸

III. A HEARING ON THE ISSUES IS SUPPORTED BY THE DOT’S PUBLIC INTEREST FACTORS.

The Department proposes that airlines must disclose specific ancillary service fees at the time of the initial search and at the time of purchase.⁹ The Department justifies its proposal by asserting that airlines’ current disclosure practices, which are compliant with the Department’s current regulations, are unfair because they cause or are likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.¹⁰ The Department also asserts that airlines’ current practices mislead consumers.¹¹

*The Department’s proposal depends on conclusions concerning one or more scientific, technical, economic, or other factual issues that are genuinely in dispute.*¹² We first note that the Department presents no credible data to support a conclusion that the airlines’ current practices cause or may cause “substantial injury.”¹³ At best, the Department has simply “heard” from consumers that the process of determining fees is complicated and time-consuming.¹⁴ The Department also presents no credible data that adequately supports a conclusion that the airlines’ current practices mislead consumers.¹⁵ In fact, the Department’s proposal is entirely conclusory,

⁸ Executive Order 12866, “Regulatory Planning and Review,” 58 Fed. Reg. 51,735 (emphasis added).

⁹ See *supra*, note 2, Airline Ancillary Fee NPRM, 87 Fed. Reg. at 63,736 – 737.

¹⁰ See *id.* at 63,721 – 723.

¹¹ See *id.*

¹² See 14 C.F.R. § 399.75(b)(2)(i).

¹³ See *supra* note 3, A4A Comments at 20 – 30, 47 – 48, 51 – 56.

¹⁴ See DOT, *Department Responses to Questions by Airlines for America and International Air Transport Association Regarding Enhancing Transparency of Airline Ancillary Service Fees NPRM*, Answer 3 (Docket No. DOT-OST-2022-0109) (hereinafter “DOT Responses”).

¹⁵ See *supra* note 3, A4A Comments at 20 – 30, 48 – 50, 52, and 56 – 57.

which is evidenced by the lack of data in the Department's Regulatory Impact Analysis.¹⁶ Our

comments, on the other hand clearly demonstrate that:

- Airlines already disclose the existence of and provide specific baggage fee information to consumers during the ticket purchase process, including through links, popups, and online tools (such as bag calculators) that take into account fee-changing circumstances (*e.g.*, credit card benefits or military status), negating any substantial injury to or misleading of the consumer;¹⁷
- Airlines provide change and cancellation policies and fee information for passengers, including through links, within the purchase path, or on the ticket receipt, and most have eliminated change and cancellation fees for most main cabin and premium fares;¹⁸
- Airlines clearly disclose, during the ticket purchasing process, whether seat selection is available and, if so, the cost of such seat selection, while also making efforts to provide adjacent seating without payment and providing family seating policies and travel advice for families that is easily accessible online;¹⁹
- Airlines already provide ancillary service fee information for consumers purchasing products through third parties, provided that such third parties elect to receive and pass on the information that airlines already make available;²⁰ and
- Airlines use contractual obligations to ensure that product offerings that are marketed and sold through third parties are clear so that customers understand what they will receive, including through technological investments.²¹

In sum, these current disclosures negate the Department's unsupported conclusions that consumers are substantially harmed or misled by having to take little-to-no time to get the information from the airlines' websites during the course of the purchasing process.

The Department has made a conclusory and unsupported jump to propose disclosures at the time of first search. Specifically, the Department's proposal relies on the assertions by

¹⁶ See *id.* at 8.

¹⁷ See *id.* at 49 – 50.

¹⁸ See *id.* at 51.

¹⁹ See *id.* at 56.

²⁰ See *id.* at 18.

²¹ *Id.*

consumer advocates that “a lack of passenger specific information regarding fees for ancillary services *at the time of ticket purchase* is causing a market failure by limiting the ability of consumers to understand the true cost of the travel that they are looking to purchase and to compare pricing between carriers and travel options.”²² However, the Department presents no data to support the proposal of disclosure at time of first search, beyond that the Department has “heard” from consumers.²³ A hearing would be in the public’s interest to better understand why various consumer groups take different positions as to the timing of disclosure and why the Department selected one position over the other.

The Department’s proposal also presents complex and unresolved technical and economic issues that are genuinely in dispute, particularly with a proposed mandate of fee disclosures with the first search results page. As explained in our comments, such a mandate will undoubtedly impact the efficacy, convenience, and clarity of the e-commerce platforms, but it remains unclear that such additional specificity or earlier disclosure has benefits for the consumer that outweigh the costs.²⁴ As reflected in the consumer survey, consumers already find that current e-commerce platforms take longer than expected, involve too much scrolling, and contain text that is too small/difficult to read.²⁵ Contrary to the Department’s consumer-focused goals, the proposed display mandate, which is unsupported by consumer complaints to the Department, could exacerbate these issues. We also note that such issues remain unaddressed by the Department’s Regulatory Impact Analysis. The Department instead focuses on balancing the benefits of reducing deadweight loss and search costs against the increase in

²² See *supra*, note 2, Airline Ancillary Fee NPRM, 87 Fed. Reg. at 63,719 (emphasis added).

²³ See *supra* note 14, DOT Responses at Answer 3.

²⁴ See *supra* note 3, A4A Comments at 34 – 35.

²⁵ See *id.* at 35 and Attachment B at 10 (Campbell Hill, *Assessment of the Regulatory Impact Analysis Regarding Enhancing Transparency of Airline Ancillary Service Fees* (Jan. 2023)).

search costs for items displaced by new disclosures and the implementation costs for disclosures.

Meanwhile, the Department fails to examine how the degradation of speed, returned travel options, or reduced display clarity may impact consumers and lacks any reference to any consumer survey that suggests consumers would prioritize the Department's mandates over the affected e-commerce features at issue.

The Department suggests that a speculative market failure—*i.e.*, that a market failure “could occur”²⁶—justifies its proposal. The Department lacks any factual basis to determine that current airline practices are resulting in a marketplace failure. To the contrary, the Department’s beliefs are clearly rebutted by the facts provided by industry that the market is operating efficiently.²⁷ This dispute is ripe for adjudication in a hearing where stakeholders can present data and rebut positions of whether a marketplace failure exists.

The Department also fails to adequately consider the costs of providing inapplicable or inaccurate information to the consumer and the impact to consumers and the marketplace, especially with ancillary service fee information provided at time of first search. As explained in our comments, for example, consumers may be less likely to scroll or swipe through multiple screens, thereby making it less likely that the consumer will find the flight, fare, and ancillary service fee package that best fits their air travel preferences, all because the Department has required the consumer be inundated with information that is not germane to the consumer’s purchase.²⁸ Whether through travel agents or through airlines websites, the Department will unquestionably impact consumers’ selection of air travel (and the marketplace as a whole), regardless of the differences in consumers’ travel preferences (*e.g.*, time of flights vs. costs of

²⁶ See *supra* note 14, DOT Responses at Answer 11.

²⁷ See *supra* note 3, A4A Comments at 16 – 20.

²⁸ See *id.* at 38.

flights). Thus, it is imperative that the Department fully adjudicate the consequences of any required disclosure at the time of first search so as not to negatively impact consumers and inadvertently manipulate the marketplace.

The different positions presented by direct channels of sale (*i.e.*, airline websites) and indirect channels of sale (*i.e.*, ticket agent websites) expand these factual, technical, and economic issues, as well as their complexity. For example, airlines are already transparent about their ancillary services fees, as discussed above, but indirect sales channels may not be consuming the information from airlines and then making that information available to the public. As raised in our comments, the indirect sales channels are known to have lagged airlines in technology advancements that can accommodate additional functionality and transparency.²⁹ Rather than taking a reasoned and methodical analysis of the differently positioned stakeholders, the Department effectively conflates the sales channels for purposes of alleging deceptive and misleading practices by the entire industry. This conflation is systemic in the Department's assessment of substantial injury to consumers, technical issues, and economic issues, warranting a more thorough presentation of information and analysis during a public hearing.

*The ordinary public comment process is unlikely to provide an adequate examination of the aforementioned issues to permit a fully informed judgment.*³⁰ Because the Department seemingly lacks a factual basis for its assertions of substantial injury or the misleading of consumers, the Department is considering, in the first instance and through public comments, viable data that may support or counter such assertions. It is also unclear whether the Department already considered input besides what it has “heard” from consumers. This is also

²⁹ See *id.* at 10.

³⁰ See 14 C.F.R. § 399.75(b)(2)(ii).

true for the Department’s proposal to require fee disclosures at the time of first search and the potential for consumer confusion and adversely impacting the marketplace. The public comment process does not resolve the factual disputes, nor does it give the public the opportunity to present other information or data to rebut the contrary assertions. For example, stakeholders do not know which consumers (or consumer advocates) the DOT “heard” from, the context for any of those statements from consumers (*e.g.*, whether they involved airline transparency, ticket agent transparency or something else), or whether there is any data or other factual bases supporting such statements. Moreover, as explained in our comments, the deficiency of the NPRM is magnified by the stale sources that DOT cites regarding concerns about consumer deception, such as sources which are more than five-years stale.³¹ In other words, the Department may be making incorrect factual conclusions based on vague anecdotal input from one stakeholder group, despite additional information or data that supports a contrary position and that could be presented during the hearing. A hearing will also provide stakeholders with the opportunity to put assertions and data that are provided during the public comment process in the appropriate context so that the Department has a complete understanding of the consumer experience. We respectfully submit that it is in the public interest for the public and stakeholders to be fully apprised of and understand the specific data and information that the Department is relying on to make its determinations of unfair and deceptive practices. This will be best accomplished through a hearing that gives stakeholders and the Department full opportunity to present, rebut, and put the information into the appropriate context, so as to better and more accurately inform the input of interested parties.

³¹ See *supra* note 3, A4A Comments at 21 – 22.

Moreover, each airline's disclosure of ancillary service fees during the ticket purchase process differs. Thus, it is important for the Department to fully understand how consumers are informed of ancillary service fees through airline websites. In sum, without a hearing, the Department will not be able to rightfully conclude that consumers have adequate access to ancillary service fee information.

The resolution of these issues will have a material effect on the costs and benefits of the proposed rule.³² Because the Department lacks adequate evidence of a substantial injury or the misleading of consumers, adoption of the Department's proposal will likely have an inevitable result: airlines' costs for the display of their ancillary service fees will be substantially and materially increased with little-to-no benefit to the consumer. More than likely, those increased costs will be passed on to consumers through higher fares. Additionally, if the Department forgoes an analysis of its market manipulation resulting from first-search ancillary fee disclosures, the Department will inevitably and unjustifiably provide a market advantage to some airlines over others in the consumer selection process, without consideration of the actual preferences of the traveling public nor the total actual cost of travel.

A hearing would advance the consideration of the proposed rule and the General Counsel's ability to make the rulemaking determinations required by DOT's rules.³³ First, as explained in our comments, the Department must show a rational connection between its choices and the facts underlying those choices.³⁴ Thus, without a full understanding of the underlying facts, which can only be accomplished through adjudication during a hearing for the reasons explained herein, the Department will not be able to show or even make a rational connection

³² See 14 C.F.R. § 399.75(b)(2)(iii).

³³ See 14 C.F.R. § 399.75(b)(2)(iv).

³⁴ See *supra* note 3, A4A Comments at 15.

between those facts and its choices. Second, the Department is required to consider that it should “plac[e] maximum reliance on competitive market forces and on actual and potential competition,” which is at the heart of the first-search disclosure issue. It is incumbent that the Department not over-rely on what it has “heard,” but, rather, on clear data and information that demonstrates whether or not a market failure exists. Finally, the Department will be able to make the concurrent and required determination of whether its proposal imposes the “least burden on society.” In sum, for the Department to uphold the administrative requirements for its rulemakings, the Department must conduct a hearing on the issues.

*A hearing will not unreasonably delay completion of this rulemaking.*³⁵ First and foremost, the issues are sufficiently narrow to ensure that the Department’s adjudication is focused on examination of data required for the Department’s unfair and deceptive practices determination. For example, the Department can focus the hearing on identifying the cost to consumers from airlines’ current disclosure practices (*e.g.*, the time to search or revise a search). It can also focus on current disclosure practices and the extent to which its first-search disclosure proposal would modify such disclosures and impact the presentation to consumers on ancillary services and the related fees. Thus, a hearing will not unreasonably delay completion of this rulemaking. Second, the Department will inevitably take significant time to adjudicate the public comments, as well as complete its Aviation Consumer Protection Advisory Committee recommendation process. Finally, resolution of the disputed facts will allow the Department to focus its review on those comments germane to actual facts. Therefore, any short delay that

³⁵ See 14 C.F.R. § 399.75(b)(2)(v).

results from holding a hearing will be reasonable in the context of the Department's rulemaking process.

* * * *

In conclusion, the aforementioned issues, facts, and reasons make a clear and convincing showing that a grant of this petition would be in the public interest. Given the weight of the evidence necessitating a hearing, we respectfully submit that a denial of this petition would be an arbitrary and capricious action and is unwarranted by the facts.

IV. WE REQUEST THAT THE DEPARTMENT APPOINT AN OBJECTIVE HEARING OFFICER.

We respectfully request that the Department's General Counsel appoint an objective hearing officer that has no relationship, representation, or obligations to serve specific stakeholders that have a significant interest in the rulemaking, including industry or consumers. This request includes the exclusion of employees within the Department that currently serve in such roles and whose service as hearing officer would call into question the nature of the hearing and potentially biased approach to the Department's rulemaking effort.

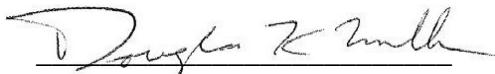
The appointment of an objective hearing officer ensures that the Department obtains the critical information for a well-informed rulemaking in a fair and unbiased manner. Accordingly, we strongly recommend that the Department appoint a third-party hearing officer from outside of the Department, making the hearing officer independent from the Department's mission or political objectives. Alternatively, we believe that the Department may appoint an administrative law judge from the Department's Office of Hearings to conduct the hearing in the necessarily objective manner.

V. CONCLUSION

The Department has proposed substantial and novel changes to the travel industry's display of ancillary services fees that will have significant impacts—potentially beneficial and adverse—on the consumer, the travel industry, and the marketplace. It is undoubtedly in the public interest for the Department to take the necessary steps to ensure that the factual record is fully developed and that the Department's decisions regarding the final regulations are fully informed and protect consumers in the manner that is the least burdensome to society.

Accordingly, given the evidence and information provided herein, and in our comments, a hearing on the aforementioned issues is in the public interest and the failure to conduct such a hearing would be an arbitrary and capricious exercise of the Department's rulemaking authority. We appreciate the Department's consideration of this petition and our comments and look forward to working with the Department to continue to provide the public with the safest mode of transportation.

Respectfully submitted,



Douglas Mullen

Vice President and Deputy General Counsel

AIRLINES FOR AMERICA

January 23, 2022