



September 29, 2014

Docket Management Facility,
U.S. Department of Transportation,
1200 New Jersey Ave., SE, Room W12-140,
Washington, DC 20590-0001

Re: Docket DOT-OST-2014-0056

Dear Sir or Madam:

Enclosed is the filing of Airlines for America (A4A) in response to the Notice of Proposed Rulemaking titled "TRANSPARENCY OF AIRLINE ANCILLARY FEES AND OTHER CONSUMER PROTECTION ISSUES," Docket No. DOT-OST-2014-0056 (the NPRM).

The A4A filing is in three parts, as follows:

- Part 1 are comments that address the subject identified as "Disclosure of Certain Ancillary Fee Information through All Sales Channels" (79 Fed. Reg. 29974-29980; proposed section 399.90)
- Part 2 is the Report of Professor Daniel L. Rubinfeld, Compass Lexecon, on the Initial Regulatory Impact Analysis accompanying the NPRM with respect to the proposal to require "Disclosure of Certain Ancillary Fee Information through All Sales Channels" (79 Fed. Reg. 29974-29980; proposed section 399.90)
- Part 3 are comments that address the other subjects covered by the NPRM

Together, these three filings comprise A4A's comments on the NPRM. A4A's comments in Parts 1 and 3 rely on and incorporate the Rubinfeld Report (Part 2).

Thank you for considering our views. Please contact the undersigned if you have any questions.

Very truly yours,

David A. Berg
Senior Vice President and General Counsel
Airlines for America

Part 1: A4A GDS Comments on the
Proposed Rule; Transparency of
Airline Ancillary Fees and Other
Consumer Protection Issues

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

In the matter of)

**TRANSPARENCY OF AIRLINE)
ANCILLARY FEES AND OTHER)
CONSUMER PROTECTION ISSUES;)
PROPOSED RULE)**

Docket DOT-OST-2014-0056

**COMMENTS OF AIRLINES FOR AMERICA ON THE DISCLOSURE OF
CERTAIN ANCILLARY FEE INFORMATION TO CONSUMERS**

Communications with respect to this document should be sent to:

DAVID A. BERG
Senior Vice President & General Counsel
DOUGLAS K. MULLEN
Assistant General Counsel
Airlines for America
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-4000
dberg@airlines.org
dmullen@airlines.org

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**COMMENTS OF AIRLINES FOR AMERICA ON THE DISCLOSURE OF
CERTAIN ANCILLARY FEE INFORMATION TO CONSUMERS**

Airlines for America (“A4A”)¹ submits these Comments in response to Provision 2 in the Department of Transportation’s (“DOT”) Proposed Consumer Rulemaking Regarding Enhancing Airline Passenger Protections 3, as explained in its May 23, 2014 Notice of Proposed Rulemaking.² Provision 2 of the NPRM is entitled “Disclosure of Certain Ancillary Fee Information to Consumers,” and DOT refers to it as the “GDS Issue.” 79 Fed. Reg. at 29,970. In addition to the points made in these Comments, we incorporate by reference, and attach hereto, the comments previously submitted by A4A (then known as Air Transportation of America, Inc.) in response to the notices of proposed rulemaking in Docket Number DOT-OST-2010-0140-1881 (Sept. 23, 2010) and Docket Number DOT-OST-2007-0022-0250 (Mar. 9, 2009). *See* Attach. A at 51-53 (discussing GDS market power) & Attach. B at 43-45 (discussing costs of updating GDS-to-airline links).³

I. Introduction & Summary

A4A urges DOT to not impose new regulatory requirements on the locations at and methods by which U.S. airlines and travel agents disclose fees for so-called “basic ancillary services.” DOT correctly characterizes this proposal as a “GDS issue”: under any formulation, DOT’s proposed requirements would entrench the market power of Global Distribution Systems (“GDSs”), along with their outdated technology and high cost structure, to the detriment of consumers. As explained in Part II.A of these Comments, DOT has repeatedly avoided calls to directly regulate the airline distribution system and has instead relied on market competition and the antitrust laws

¹ A4A Airline Members are Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corp.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; United Parcel Service Co.; and US Airways, Inc. A4A’s Associate Member is Air Canada, which joins in these Comments.

² *See* Notice of Proposed Rulemaking, *Transparency of Airline Ancillary Fees and Other Consumer Protection Issues*, 79 Fed. Reg. 29,970 (D.O.T. May 23, 2014) (“NPRM”).

³ Southwest Airlines does not join in the A4A comments concerning the disclosure of basic ancillary fees. Southwest’s position on this issue is set out in its own comments filed in this docket.

and principles to lower prices and to give consumers more options. That approach is the correct policy, and there is no justification for DOT to depart from it.

As Part II.B explains, consumers already have ready access to the information DOT now seeks to further highlight – access that the industry has fully provided in response to existing regulatory requirements and to the pressure of a robust competitive market. Those existing industry disclosure practices are not unfair or deceptive practices under the Airline Deregulation Act (“ADA”). Further, those practices are not causing any injury to consumers, and neither the NPRM nor the record discloses any basis for DOT to conclude otherwise. DOT therefore lacks statutory authority to impose new fee-disclosure requirements.

Even if DOT had authority to promulgate its proposed rules, DOT has failed to justify the massive costs they would impose. Part II.C of these Comments describes why, as DOT has already conceded, the costs of its new regulatory proposal outweigh any quantifiable benefits; and DOT’s estimates of those costs are in any event significantly understated because they fail to account for lost consumer time and consumer confusion that would result from its fee-related proposals, the problem of entrenching incumbent GDSs against competition, and the cost of forcing airlines to build new infrastructure to accommodate outdated and inefficient systems. DOT’s assumption that asserted unquantifiable benefits will overcome the negative valuation of the proposed rule is unrealistic and unreasonable.

DOT should abandon this unjustified new regulatory effort and instead focus on the proposals in the NPRM that would provide a net benefit to passengers, such as its proposal to impose certain customer service requirements on ticket agents that mirror the services already provided by airlines.⁴

II. Requiring Display of Ancillary Service Fees Through All Sales Channels Is Unnecessary, Beyond DOT’s Statutory Authority, and Too Costly in Comparison to Any Benefits the Requirement Might Provide

A. DOT Has Already Decided Not To Directly Regulate GDSs, and No Justification Exists To Change That Position

DOT has long recognized that GDSs possess market power in their relationships with airlines. *See, e.g., Computer Reservations System (CRS) Regulations*, Dkt. Nos. OST-97-2881 et al., 69

⁴ These Comments are directed primarily to DOT’s specific proposals to require disclosure of fees for so-called “basic ancillary services” in Proposed § 399.85(b) and Proposed § 399.90 Option A and Option B. *See NPRM*, 79 Fed. Reg. at 30,000-02. A4A urges DOT not to adopt any of these provisions. The NPRM also includes roughly 30 open-ended questions related to the GDS issue such as whether “carriers and agents [should] be required to display all possible advance seat assignment fees, or a range, or the fee for each seat assignment available at the time of the search for a particular city-pair?” *Id.* at 29,978. A4A has attempted to answer those questions in its Comments, but further notes that the extreme complexity and open-ended nature of those questions underscore the difficulty of creating a regulatory structure that could accommodate the vast number of options that airlines might wish to offer and consumers might wish to buy.

Fed. Reg. 976, 989 (D.O.T. Jan. 7, 2004) (“*GDS Deregulation Order*”) (“Each CRS therefore continues to have significant market power based on the travel agents to which it has exclusive access.”). Customer groups, often large corporations, rely on third-party travel agencies to manage their corporate travel spending programs. Travel agents, in turn, rely almost exclusively on GDSs to obtain fare and flight information, to make the booking, and to issue tickets. Each travel agent usually has access to the fare and flight information from only *one* GDS. As a result, each GDS controls airline access to a distinct group of traveling customers representing a large share of airline revenue, and airlines have traditionally needed to participate in each GDS to obtain access to each of these distinct customer groups.

Because each GDS provides access to a different customer group, the GDSs (Sabre, Travelport, and Amadeus) are not substitutes for one another. That is to say, if an airline is not participating in Sabre, it cannot use Travelport to reach the customers of a travel agent that uses Sabre. Thus, each GDS has market power over airlines that want to sell tickets to their customer bases and can charge supracompetitive fees for each flight segment booked via that GDS. As a consequence, distribution of airline tickets through a GDS costs the airlines substantially more than distribution through the airlines’ websites.⁵ In addition, as DOT knows, the GDSs have imposed restrictive contract terms on the airlines. Those terms limit the airlines’ ability to develop and expand alternative means of distributing their services through travel agencies, including the requirement that airlines provide the GDSs with access to “full content” – meaning the ability to sell every fare the airline offers, even if it would be economical for the airline to offer that fare only to alternative distribution channels that are less costly or more efficient.⁶ This situation is different than what DOT envisioned in its *GDS Deregulation Order*. In that order, DOT anticipated that airlines would be able to compete with GDSs and travel agent outlets using “web-only” fares and that the distribution market would see new entrants. *See* 69 Fed. Reg. at 977.

Airlines have not historically been dependent upon GDSs as a distribution channel for ancillary services, and the airlines’ “full content” contractual obligations to GDSs typically have not extended to those ancillary services. As the supply of and demand for ancillary services has increased, the GDSs have often sought to negotiate for access to this content. In recent years, many airlines and GDSs have successfully negotiated agreements that enable the GDSs to

⁵ GDS abuses remain the principal obstacle for market forces in airline distribution. For example, Sabre has prohibited one new market entrant, Farelogix, from directly connecting airlines to travel agents’ Sabre-controlled systems. *See, e.g., Travelport joins Sabre in ending Farelogix developer agreements, available at* <http://www.tnooz.com/article/travelport-joins-sabre-in-ending-farelogix-developer-agreements/> (last visited Sept. 28, 2014) (For the record, all online articles and websites cited in these Comments are provided in Attachment C.); *see also* Report of Dr. Daniel L. Rubinfeld at Part V.A (Sept. 29, 2014) (“Rubinfeld Rep.”). Unfortunately, the proposed rules do nothing to address those abuses.

⁶ *See* Brett Snyder, *Why You So Rarely See Web Fares in the US*, *The Cranky Flier* (Aug. 25, 2014), <http://crankyflier.com/2014/08/25/why-you-so-rarely-see-web-fares-in-the-us/>.

distribute ancillary content. Some airlines have been able to use the GDSs' desire for access to ancillary content to bargain for concessions on booking fees – lower booking fees that, because of the intense price competition among airlines, translate into lower ticket prices for consumers.

Negotiations between airlines and GDSs over ancillary services benefit consumers for another reason. As described more fully below, GDSs have agreed to develop new technologies for accessing and distributing content for airline products and services. These new technologies are more flexible and robust than the older technologies on which the GDSs rely to access and display basic fare and flight information. These new technologies enable the airlines to price their products and services in a dynamic way and enable the information to be displayed to travel agents and consumers more effectively. GDS concessions on both pricing and technology were the product of commercial negotiations, in which the airlines had the option (and a market incentive) but not the obligation to provide ancillary content to the GDSs.

If DOT were to mandate that airlines provide content to the GDSs, either by express requirement as provided in Option A, or as a practical consequence of Option B,⁷ it would remove that entire topic from the negotiating table and would permanently empower GDSs in their negotiations with airlines. The Department would, in essence, deputize the GDSs. In the past, DOT has recognized that GDS contract provisions that require an airline to “provide all fares as a condition to participation may . . . constitute unfair methods of competition because they unreasonably limit each airline’s ability to choose how to market its services. That would buttress the [GDS]’s market power.” *GDS Deregulation Order*, 69 Fed. Reg. at 999. The GDSs are unsurprisingly the greatest proponents of DOT’s current proposals, which would require airlines to provide valuable content to them through regulation rather than negotiation.

DOT acknowledged in its *Passenger Protection II* Rulemaking the danger of “unintended consequences” of a rule entrenching GDS market power, “particularly given the sensitive nature of the market and the negotiations currently taking place between carriers and the GDSs.” Enhancing Airline Passenger Protections, 76 Fed. Reg. 23,110, 23,150 (D.O.T. Apr. 25, 2011) (“*Passenger Protection II*” or “*PPII*”). DOT recognized a similar sensitivity when it deregulated GDSs in 2004. At that time, DOT acknowledged that Congress gave it “no comprehensive oversight authority over airline distribution” and concluded that, because airlines had divested their GDS ownership, ending GDS regulation would “produce the best results for consumers over time.” *GDS Deregulation Order*, 69 Fed. Reg. at 978. Accordingly, DOT

⁷ As the NPRM correctly acknowledges, DOT’s proposed Option B will likely require airlines to continue to rely on GDSs to distribute airline fee information “as a practical matter.” 79 Fed. Reg. at 29,977. DOT’s Initial Regulatory Impact Analysis (“RIA”) similarly and rightly assumes that airlines will be forced to continue to use GDSs regardless of whether DOT adopts Option A or Option B (even though, as explained below, the RIA significantly underestimates the costs of that use). See Initial Regulatory Impact Analysis for Proposed Consumer Rulemaking Regarding Transparency of Airline Ancillary Fees and Other Consumer Protection Issues at 69 (D.O.T. Apr. 16, 2014).

decided to let most of its GDS rules lapse and “not to adopt rules governing the use of the Internet in airline distribution.” *Id.* “Airline deregulation has provided lower fares and better service for consumers, in part by enabling new firms to enter the airline business. . . . The deregulation of the [GDS] business should also benefit consumers, even though we cannot forecast how it will play out.” *Id.*; see Order, *Complaints of United States Travel Agent Registry Against Delta Air Lines, Inc. United Air Lines, Inc. American Airlines, Inc. Continental Airlines, Inc. Northwest Airlines, Inc. Violations of 49 U.S.C. § 41712 et al.*, Dkt. Nos. OST-98-4776 et al., Order 2004-6-17, 2004 WL 1380503, at *4 (D.O.T. June 21, 2004) (“[A]s a general matter we have consistently read the pro-competitive policy directives in 49 U.S.C. § 40101 as allowing each airline the same freedom to choose the channels and the terms for distributing its services that firms in other unregulated industries enjoy.”). Since 2004, Congress has not suggested that DOT should change course, even though it has elsewhere demonstrated that it knows how to protect particular segments of the air transportation system when it wants to. See, e.g., 49 U.S.C. § 41731 (small community air service program); *id.* § 41719 (requiring air service termination notices in certain circumstances); *id.* § 41761 (regional air service incentive program); *id.* § 41705 (protecting travelers with disabilities).

DOT’s current proposals would return to a regime of regulating airline distribution through GDSs, despite the absence of “compelling evidence” of consumer deception or unfair competition. See Order of Dismissal, *Petition of Rulemaking of Joel Kaufman re Ticket Change Penalties*, Dkt. No. OST 2003-14334, Order 2003-3-11, 2003 WL 23097368, at *1 (D.O.T. Mar. 18, 2003) (“*Ticket Change Penalties Order*”). Worse, DOT’s proposal would regulate in a manner that would strengthen the negotiating position of entrenched market players (the GDSs) at the expense of players exposed to fierce price competition (the airlines), and therefore at the expense of consumers. Those proposals are therefore a significant change from DOT’s deregulation decision in 2004 and from its decision not to reintroduce heavily intrusive regulations in 2011. Should DOT adopt such a proposal, it has an obligation to supply an explanation for this dramatic change in position. See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); *Philadelphia Gas Works v. FERC*, 989 F.2d 1246, 1250-51 (D.C. Cir. 1993). That obligation is especially strong here, because GDSs’ market power has not subsided since deregulation.⁸ And, even without considering this market power, DOT has conceded that the mandate it is considering has “significant costs” that outweigh the quantified benefits. See *infra* Part II.C.

⁸ If anything, ongoing antitrust litigation indicates that GDSs’ market power over the past decade has grown. See *U.S. Airways, Inc. v. Sabre Holdings Corp.*, No. 1:11-cv-2725-MGC (S.D.N.Y.); *In re Online Travel Co. (OTC) Hotel Bookings Antitrust Litig.*, -- F. Supp. 2d --, 2014 WL 626555 (N.D. Tex. Feb. 18, 2014).

This fundamental flaw in DOT's proposals would not be cured merely by the added regulatory step of requiring that GDSs with an existing distribution agreement not charge a separate fee for the distribution of ancillary fee information. *See NPRM*, 79 Fed. Reg. at 30,001-02 (Proposed § 399.90(g) Options A & B). Because, "as a practical matter," carriers will still be forced to comply with the proposed rule through GDSs, *see id.* at 29,977, the rule is an unwarranted and harmful intrusion into the marketplace. Making matters worse, as soon as those existing GDS agreements expire, the proposed regulation would deprive airlines of one of the few bargaining tools they have with GDSs – the ability to bargain over information about ancillaries. The resulting increase in distribution costs will harm carriers and consumers.

B. DOT Lacks Compelling Evidence of Significant Consumer Injury Regarding Current Fee-Disclosure Practices To Justify Taking Further Regulatory Action Targeting Airlines and Ticket Agents

DOT has suggested that new fee-disclosure requirements for ancillary services would be justified because travel agents' and air carriers' current methods of disclosure are "unfair or deceptive" under the ADA. 49 U.S.C. § 41712; *see NPRM*, 79 Fed. Reg. at 29,970. The record contains no basis for any such conclusion and therefore no basis for further DOT action in this area.⁹ The NPRM's analysis of the market is concededly incomplete and outdated.

In assessing the contents of the record, DOT must satisfy a demanding standard before it can exercise its authority under section 41712. A practice is only "deceptive" under section 41712 if it is likely to "mislead" reasonable consumers. Order Dismissing the Complaint and Denying Petition for Rulemaking, *Rulemaking Petition of Association of Discount Travel Brokers on Frequent Flyer Programs and Awards*, Dkt. Nos. 46280 & 47539, Order 98-5-60, 1992 WL 133179, at *6 (D.O.T. June 4, 1992) ("*Frequent Flyer Order*"); *see also Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986) (explaining that "deception" under the related FTC Act is "a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment") (internal quotations and emphasis omitted). A practice is "unfair" if "it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing benefits." *Frequent Flyer Order*, 1992 WL 133179, at *8.

Free-market competition is a countervailing benefit, and "[t]he marketplace is normally expected to be self-correcting because consumers are relied upon to survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory." Unfair or Deceptive Acts or Practices, 74 Fed. Reg. 5498, 5502-03 (Treas. Jan. 29, 2009)

⁹ The NPRM and RIA are arbitrary and capricious and therefore violate the Administrative Procedure Act because the (1) estimated costs far outweigh any speculative benefits (2) Department has failed to justify its change of position, by now seeking to regulate distribution channels (3) Department fails to identify consumer injury. 5 U.S.C. § 706(2)(A).

(“*Credit Card Order*”) (applying “unfair” as used in the FTC Act); *see Frequent Flyer Order*, 1992 WL 133179, at *8 (explaining that the FTC Act was the model for section 41712(a)).

1. Existing DOT Regulations and Market Forces Have Led to Enhanced Fee Disclosure Practices, and Further Developments Are Helping Consumers

Before exercising its authority to regulate domestic airlines to prevent unfair or deceptive practices, DOT looks for “*compelling evidence* of consumer deception or unfair methods of competition.” *Ticket Change Penalties Order*, 2003 WL 23097368, at *1 (emphasis added). Where there is no such compelling evidence, DOT has “allowed the marketplace to govern carrier decisions.” *Id.* That policy applies fully to disclosure requirements, including the disclosure of potentially important information about airfares. For example, airlines’ contracts with consumers often contain terms that restrict the availability of refunds. Airlines are permitted to incorporate such terms by reference so long as the “salient features” of those terms are disclosed on the ticket.¹⁰

DOT has applied its general approach of limited interference in the marketplace specifically to the context of online reservations and sales. When DOT decided to deregulate GDSs over a decade ago, the Department acknowledged that it “should adopt rules regulating industry practices *only* if they are reasonably necessary to prevent anti-competitive or deceptive practices that are likely to occur, *and* would cause significant consumer harm if they did occur, *and* that market forces are unlikely to remedy.” *GDS Deregulation Order*, 69 Fed. Reg. at 977 (emphases added). DOT’s approach for determining whether rules are necessary “is essentially the same” as that recommended by the Justice Department:

[R]egulation is appropriate “only when (1) market participants have substantial and durable market power that will likely harm consumers directly, or will be exercised in ways that exclude or limit competition in contiguous markets, and (2) the regulation will likely be effective and enforceable without imposing significant costs of its own.”

Id. (quoting Justice Department Reply Comments at 18). DOT’s current proposals to begin dictating the precise moment at which airlines and travel agents must disclose fees for ancillary

¹⁰ Notice of Terms of Contract of Carriage, Dkt. Nos. 40772 et al., 47 Fed. Reg. 52,128, 52,132 (C.A.B. Nov. 19, 1982). Even where “loss of [consumer] money is concerned,” for example with respect to terms restricting refunds or requiring additional payments for the cost of airfare itself (as opposed to ancillary services), DOT has promulgated and enforced rules that set forth only general requirements. *Id.*; *see also* 14 C.F.R. § 253.7 (for terms that “restrict[] refunds . . . , impos[e] monetary penalties . . . , or rais[e] the ticket price,” requiring only that carriers provide “conspicuous written notice . . . on or with the ticket” of the “salient features of those terms”). For all other terms of travel, DOT allows airlines to incorporate by reference, *see* 14 C.F.R. § 253.4(a) (“A ticket or other written instrument that embodies the contract of carriage may incorporate contract terms by reference (i.e., without stating their full text).”), with that contract made available to consumers upon request and on the carriers’ websites.

services – as well as the precise methods and details of such disclosures – cannot be reconciled with that approach. There is no basis in the record for finding that airlines have “substantial and durable market power” over the distribution of airline fee information. To the contrary, the NPRM acknowledges that “airlines are not able to forgo using GDSs to aggregate flight schedule and fare information because airlines earn a large percentage of their revenue from business travelers, and the majority of the world’s managed business travel is booked through travel management companies which use GDSs.” 79 Fed. Reg. at 29,976; *see id.* at 29,976 n.3 (“GDSs process 64 percent of the total U.S. airline gross sales by revenue.”).

Further, DOT has already promulgated safeguards in this area, concluding in its April 2011 rulemaking that those safeguards “partially address the problem of hidden and deceptive fees and allow consumers to price shop for air transportation.” *PPII*, 76 Fed. Reg. at 23,150. Existing regulations require:

- ticket agents and airlines to disclose “clearly and prominently” on their websites additional fees for transporting baggage, while permitting ticket agents to “refer consumers to the airline websites where specific baggage fee information may be obtained or to its own site if it displays airlines’ baggage fees,” 14 C.F.R. § 399.85(b);
- all e-ticket confirmations provided by travel agents and air carriers to “include information regarding the passenger’s free baggage allowance and/or the applicable fee for a carry-on bag and the first and second checked bag,” *id.* § 399.85(c);
- airlines to set forth baggage fees “as specific charges taking into account any factors (e.g., frequent flyer status, early purchase, and so forth) that affect those charges,” *id.* § 399.85(c) & (d), and not to increase those fees after the air transportation has been purchased, *id.* § 399.88(a);¹¹
- airlines to disclose “information on fees for all [other] optional services that are available to a passenger purchasing air transportation,” including “advance seat selection,” in a “clear” manner (e.g., “as a range”) “with a conspicuous link from the carrier’s homepage directly to a page or a place on a page where all such optional services and related fees are disclosed,” *id.* § 399.85(d); and
- airlines to allow most reservations to be held without payment or cancelled without penalty for at least 24 hours after the reservation is made, *see id.* § 259.5(b)(4), giving

¹¹ As discussed in A4A’s contemporaneous filing addressing the other issues raised in the NPRM, DOT recognizes that air carriers should not be prohibited from increasing the price of an advance seat assignment *before* a consumer purchases the seat assignment itself, as prices for seat assignments “are often dynamic and change based on route, aircraft size, availability, and time of purchase.” *NPRM*, 79 Fed. Reg. at 29,979. DOT’s existing regulations prevent air carriers from offering the same flexibility to consumers for baggage fees, making it impossible for airlines to discount baggage fees.

passengers the ability to continue to compare fees for ancillary services for a more than adequate time even after they purchase tickets.

Those provisions went into effect on January 24, 2012. *See* Enhancing Airline Passenger Protections: Limited Delay of Effective Date for Certain Provisions, Dkt. No. DOT-OST-2010-0140, 76 Fed. Reg. 45,181 (D.O.T. July 28, 2011). They already allow DOT to ensure consumers are able to make purchase decisions with readily accessible and up-to-date information about fees for optional services, and DOT has enforced them to achieve that purpose.¹² We also believe that DOT would take the position that it already has the authority, without additional regulatory mandates, to institute proceedings to prevent any particular fee-disclosure practice that is deceptive or unfair.¹³ That existing regulatory framework, along with market pressures, is sufficient to drive disclosure.

Market pressures complement these existing regulations to encourage air carriers to disclose fee information about ancillary services to consumers. Airlines want to sell ancillary services, especially to business travelers, who constitute a large segment of their repeat customers and revenue producers. *See NPRM*, 79 Fed. Reg. at 29,974 n.1, 29,976 n.2. Far from “myopia,” RIA at 7, airlines have a strong incentive to disclose fee information for ancillary services clearly and efficiently to those and other customers in order to earn long-term customer loyalty. *See also* Rubinfeld Rep. at 23 (explaining why “there is no reason to believe the airlines are exhibiting myopia as all four of the factors the RIA identifies impact the airline’s long-run financial well-being”). In that sense, airlines’ provision of ancillary services is much different than in other industries, such as banking or cable, where customers must make long-term commitments to a particular provider and so are less likely to change long-term service providers even if they feel surprised by fees for ancillary services (such as ATM access or video-on-demand access).

Accordingly, airlines already have the incentive to distribute information about ancillary products and fees and to facilitate the sale of these products through multiple distribution channels – including travel agencies – provided they can do so on commercially reasonable terms. And, as a result of existing regulations and market pressures, air carriers do, and will continue to, disclose fee information about ancillary services to consumers more effectively. As the RIA acknowledges, different GDSs and airlines have already developed ways to disclose fee information for certain ancillary services to travel agents and have made it possible for agents to purchase some of those services for consumers. *See* RIA at 26. The following chart demonstrates those current capabilities:

¹² For example, DOT penalized the online ticket agent Orbitz for improperly putting its baggage fee disclosure at a location that “may have required a user to scroll to the bottom of the first webpage.” Consent Order at 2, *In re Orbitz Worldwide, LLC*, Dkt. No. OST 2012-0002, Order 2012-8-24 (D.O.T. Aug. 20, 2012), *available at* http://www.dot.gov/sites/dot.gov/files/docs/eo_2012-8-24.pdf.

¹³ To be sure, there is scant evidence of DOT enforcement in this area. But that paucity of enforcement merely suggests that the industry is not engaging in unfair and deceptive practices with respect to ancillary fees.

	SABRE	AMADEUS	TRAVELPORT
Checked Bag 1	Ticket agents already have access to itinerary-specific checked baggage fees that are distributed by ATPCO		
Checked Bag 2			
Carry-On Bag	Not applicable because most carriers do not charge fees for carry-on bags		
Paid Preferred Seat Assignment	United (active) <ul style="list-style-type: none"> • Agreements announced December 2008¹ and May 2013² • Product live June 2014³ 	United (active)⁴ <ul style="list-style-type: none"> • Agreements announced October 2011⁵ and April 2014⁶ • Product live September 2014⁷ Delta (pending) <ul style="list-style-type: none"> • Agreement signed August 2012⁸ American (pending) <ul style="list-style-type: none"> • Agreement signed May 2013⁹ 	United (active)¹⁰ <ul style="list-style-type: none"> • Agreements announced August 2010¹¹ and June 2014¹² • Product live February 2014¹³ Delta (active) <ul style="list-style-type: none"> • Agreement signed June 2012¹⁴ • Product live April 2013¹⁵ American (pending) <ul style="list-style-type: none"> • Agreement signed March 2013¹⁶

¹ <http://www.businesstravelnews.com/article.aspx?id=11548&ida=Airlines&a=btn>

² <http://www.sabre.com/newsroom/united-airlines-and-sabre-gear-up-for-next-chapter-in-distribution/>

³ <http://www.sabre.com/newsroom/sabre-launches-the-capability-to-sell-united-economy-plus-seating/>

⁴ <http://www.travelweekly.com/Travel-News/Travel-Technology/Amadeus-adds-United-Economy-Plus-seats/>;
<http://origin.library.constantcontact.com/download/get/file/1110305070619-1147/UnitedAmadeusAgentcheatsheet.pdf>

⁵ <http://www.travelagentcentral.com/airline-policies/amadeus-and-united-sign-content-agreement-31612>

⁶ http://www.amadeus.com/web/amadeus/en_US-US/Amadeus-Home/News-and-events/News/041514_Amadeus-signs-new-global-agreement-with-United-Airlines/1259071352352-Page-AMAD_DetailPpal?assetid=1319593378477&assettype=PressRelease_C

⁷ <http://www.travelweekly.com/Travel-News/Travel-Technology/Amadeus-adds-United-Economy-Plus-seats/>

⁸ http://www.amadeus.com/web/amadeus/en_US-US/Amadeus-Home/News-and-events/News/080612_Delta-Air-Lines-to-sell-Economy-Comfort-seats-through/1259071352352-Page-AMAD_DetailPpal?assetid=1319576838431&assettype=PressRelease_C

⁹ <http://www.travelweekly.com/Travel-News/Travel-Technology/With-Amadeus-deal-AA-has-XML-connectivity-with-two-GDSs/>

¹⁰ <http://www.united.com/CMS/Documents/pdfs/agency/United-Economy-Plus-Travelport-Factsheet.pdf>

¹¹ <http://www.tnooz.com/article/travelport-agencies-to-sell-united-ancillary-services-economy-plus-seating/>

¹² <http://www.businesstravelnews.com/Business-Travel-Agencies/Travelport-announced-a--long-term--distribution-agreement-with-United-Airlines/?ib=Airlines&a=mgmt>

¹³ <http://newsroom.unitedcontinentalholdings.com/2014-02-07-Travelport-Launches-the-Capability-to-Sell-United-Economy-Plus-Seating-in-the-U-S>

¹⁴ <http://www.travelmarketreport.com/articles/Delta-to-Distribute-Economy-Comfort-Seats-Through-Travelport-GDSs>

¹⁵ http://www.delta.com/content/www/en_US/agency/news-for-travel-professionals/email-extra/april-2013/delta-air-lines-economy-comfort-seats-now-available-through-trav.html

¹⁶ <http://hub.aa.com/en/nr/pressrelease/american-travelport-distribution-agreement-resolution>

Additional examples demonstrate the beneficial result of the existing environment:

- GDSs and travel agents have independently developed programs to obtain information for and purchase ancillary services directly from airlines' websites.¹⁴
- As the NPRM recognizes, some airlines and new-entrant travel technology firms, such as Farelogix, have attempted to provide fare, schedule, and availability information to travel agents directly. *See* 79 Fed. Reg. at 29,976.
- The International Air Transport Association ("IATA") has developed a framework for a common technical standard for direct connect services. *See id.* DOT has acknowledged that IATA's framework has the potential to bring about substantial procompetitive and other consumer benefits.¹⁵
- For those airlines that allow customers to choose seat assignments at time of booking, the websites include seat assignment pages with fee disclosures.
- Some of our members have already invested in technology that enables passengers to enter their passenger name record on the carrier website to get customer-specific pricing information on products that can be purchased with a confirmed ticket.
- Third parties have obtained and aggregated publicly available information about ancillary service fees and encourage consumers to compare fees for ancillary services. *See, e.g.,* Kayak, *Airline Fees*, <http://www.kayak.com/airline-fees> (last visited Sept. 17, 2014); *Airline Fees: The Ultimate Guide*, Smarter Travel (May 1, 2014), <http://www.smartertravel.com/blogs/today-in-travel/airline-fees-the-ultimate-guide.html?id=2623262>.
- Other third parties provide information to customers who wish to explore alternatives to carrier-provided ancillary services, such as by transporting bags using a third party, *see, e.g., Comparing Airline Checked Bag Fees To Baggage Shipping Services*, The Points

¹⁴ *See, e.g.,* Jay Boehmer, *Travelport-BA Seat Selection Tool Uses BookingBuilder, Disregards Agent Incentives*, BusinessTravelNews.com, Feb. 16, 2011, *available at* <http://www.businesstravelnews.com/Travel-Management/Travelport-BA-Seat-Selection-Tool-Uses-BookingBuilder,-Disregards-Agent-Incentives/>.

¹⁵ On August 6, 2014, DOT approved the framework, *see* News Release, 2014 WL 3866707 (D.O.T. Aug. 7, 2014), confirming a prior tentative conclusion that, with safeguards, "the modernized communication standards and protocols [in the framework] and the marketing innovation they could facilitate *would be procompetitive and in the public interest*," Order to Show Cause at 9, *Agreement among Member Carriers of the International Air Transport Association concerning an agreement (Resolution 787) of the Passenger Services Conference*, Dkt. No. OST-2013-0048, Order 2014-5-7 (May 21, 2014) (emphasis added), *available at* <http://www.iata.org/whatwedo/airline-distribution/ndc/Documents/dot-tentative-ndc.pdf>; *see also id.* ("Resolution 787, if implemented as conditioned, . . . would make it easier for consumers to compare competing carriers' fares and ancillary products across multiple distribution channels, make purchasing more convenient, allow carriers to customize service and amenity offers, and increase transparency, efficiency, and competition.").

Guy (May 8, 2013), <http://thepointsguy.com/2013/05/comparing-airline-checked-bag-fees-to-baggage-shipping-services/> – another source of market competition.

- Some carriers have already begun “rebundling” (also called “branded fares”), and others have publicly announced plans to “rebundle” ancillary services into package offerings, a move described by one industry observer as a “great way” to provide easy-to-comprehend “value meals” for fliers. Brett Snyder, *I’ve Argued for Unbundling, And Now I’ll Argue for Re-Bundling*, *The Cranky Flier* (Sept. 23, 2013), <http://crankyflier.com/2013/09/23/ive-argued-for-unbundling-and-now-ill-argue-for-re-bundling/>.¹⁶

These developments show how the market is actively working not only to provide customers with more fee information about ancillary services, but also to lower the price of such services through competition. Even Travelport has recognized the consumer-oriented nature of these market-driven ancillary service agreements, stating in a recent press release:

Rich Content and Branding enables airlines to more effectively present the value proposition for their products through detailing their offers, including services and/or ancillary services available for purchase, as well as options to upgrade to alternative products via the Travelport travel commerce platform and travel agencies in a manner more similar to the airline’s own consumer-focused website experience.¹⁷

DOT’s proposed regulations are thus unnecessary – and, because they would grant special privileges to a particular class of intermediary, are likely to interfere with normal market operations that benefit consumers. For example, under the proposed rules, an airline could offer bundles to consumers only if every distribution method were ready to accept that airline’s product. That functionality could take years to develop. DOT has not addressed the consumer harm resulting from slowing or stopping market-driven improvements in ancillary service offerings. Although the RIA acknowledges that Proposal 2 may harm the market (“May Inhibit New Entrants”), as well as consumers and carriers (“May Decrease Carrier Flexibility to Customize Services”), it fails even to attempt to quantify these harms. RIA at 49-50.

¹⁶ See, e.g., Kate Rice, *Dynamic bundling of ancillaries could be future of airline sales*, *Travel Weekly*, Sept. 29, 2013, <http://www.travelweekly.com/Travel-News/Airline-News/Dynamic-bundling-of-ancillaries-could-be-future-of-airline-sales/?cid=eltrMtgNews>; Stephanie Rosenbloom, *Airline Extras at a Package Rate*, *N.Y. Times*, Oct. 10, 2013, http://www.nytimes.com/2013/10/13/travel/airline-extras-at-a-package-rate.html?_r=0.

¹⁷ Press Release, Travelport, *Travelport Signs New Global Distribution Agreement with United Airlines* (June 24, 2014), available at <http://travelport.mediaroom.com/index.php?s=43&item=1112>.

2. The Rulemaking Record Does Not Establish That Current Fee Disclosure Practices Are Causing “Substantial Consumer Injury”

The rulemaking record does not establish that the behavior targeted by DOT’s proposals is causing “substantial consumer injury.” *Frequent Flyer Order*, 1992 WL 133179, at *8. A finding of such injury is a necessary prerequisite to action by DOT. “Professing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking.” *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006); *see, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) (holding that even a regulation “perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist”) (internal quotations omitted). Any popular sentiment that regulation will create a *different* shopping experience is an insufficient basis for the proposed rule.

(a) *Pre-2012 Evidence Is Not Probative Because It Does Not Account for the Effect of Passenger Protection II or Recent Market Developments*

The vast majority of evidence to which DOT refers in the NPRM, along with many of the comments, relies on analysis that was generated or conclusions that were reached *before* DOT’s *Passenger Protection II* provisions went into effect in 2012. That evidence is entitled to little if any weight because it does not speak to the core issue before the agency: whether additional fee disclosure requirements, beyond those put in place in 2012, are necessary to prevent unfair or deceptive practices. An agency acts arbitrarily and capriciously when it “fail[s] adequately to address whether the regulatory requirements of [recent government action] reduce[s] the need for, and hence the benefit to be had from,” additional regulation. *Business Roundtable v. FCC*, 647 F.3d 1144, 1154 (D.C. Cir. 2011); *see also American Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2009) (“The SEC’s competition analysis also fails because the SEC did not make any finding on the existing level of competition in the marketplace under the state law regime.”).

For example, the NPRM relies on Recommendation 11 of the Future of Aviation Advisory Committee Report, which recommends that “[t]he Secretary of Transportation should ensure transparency in . . . [a]ir carrier pricing, including ancillary fees.” 2010 The Future of Aviation Advisory Committee, Final Report at 36 (D.O.T. Apr. 11, 2011) (“FAAC Report”), *available at* <http://www.dot.gov/sites/dot.gov/files/docs/faac-final-report-for-web.pdf>. That report was delivered to DOT on December 15, 2010, more than a year before the effective date of the *Passenger Protection II* provisions.¹⁸ Even at that time, the FAAC Report highlighted that “FAAC members hold differing views on how air carriers should fully disclose optional fees and charges before passengers purchase a ticket” with “[s]ome subcommittee members maintain[ing]

¹⁸ *See NPRM*, 79 Fed. Reg. at 29,972 (delivery date).

that a hyperlink to a page disclosing optional fees would provide a fully-accessible notice to passengers of optional fees, and air carriers should not be forced to provide fee schedules for optional services to alternative distribution channels.” *Id.* at 37. The hyperlink solution referenced in the FAAC Report is one of the innovations reflected in DOT’s *Passenger Protection II* rules. *See* 14 C.F.R. § 399.85(b).

Similarly, the NPRM also relies on the Advisory Committee on Aviation Consumer Protection’s October 22, 2012 report. *See NPRM*, 79 Fed. Reg. at 29,972; *see also* Report of the Advisory Committee on Aviation Consumer Protection (Oct. 22, 2012) (“ACACP Report”), *available at* <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2012-0087-0119>. That report, however, merely adopts the FAAC’s 2010 recommendation. *See* ACACP Report at 7. It does not suggest that the then-newly-adopted *Passenger Protection II* provisions were insufficient; nor does it take account of developments in the industry since that time. On the contrary, the ACACP Report suggests that DOT’s actions in *Passenger Protection II* were sufficient to spur the industry to continue developing transparent processes, “commend[ing] DOT for requiring greater transparency of fares and optional services and fees in Consumer Rule II” and “encourag[ing] all participants in the industry – airlines, distribution systems, and agents – to continue innovating with respect to transparency and distribution of optional products and services.” *Id.*

Likewise, the RIA relies heavily on a report by GRA, Inc., dated March 14, 2012, less than two months after the effective date of *Passenger Protection II*. *See* GRA, Inc., Benefits and Costs of Proposed Changes in DOT Regulations Regarding Transparency and Transactability of Ancillary Airline Fees (Mar. 14, 2012), *available at* <http://www.businesstravelcoalition.com/documents/gra-submission.pdf>. That report, funded by the Travel Technology Association (f/k/a The Interactive Travel Services Association), a trade association for GDSs, acknowledges that *Passenger Protection II* “will likely improve transparency” and that “[s]ome uncertainty about the rule’s impact on consumers exists because it was implemented only on January 24, 2012 and has not yet been enforced.” *Id.* at 17 & n.20.¹⁹ Moreover, even the non-GRA sources cited in the RIA are dated, with very few data points coming after 2011.

(b) *Post-2012 Evidence Does Not Suggest Any Consumer Injury*

The NPRM candidly recognizes the need to find evidence of actual consumer injury, admitting that DOT “lack[s] sufficient data to be able to quantify the extent of th[e] problem for consumers.” 79 Fed. Reg. at 29,975. Accordingly, the NPRM asks consumers to provide information about “whether it is difficult to find baggage and seat assignment information and [if

¹⁹ Due to implementation difficulties, DOT did not enforce parts of *Passenger Protection II* for six months after the effective date. *See* Response to Petition, *Petition to Delay the Effective Date of 14 CFR 399.85(c) and 399.87*, Order 2012-1-2, at 4 (D.O.T. Jan. 6, 2012).

so] how much of an impact this has on their ability to comparison shop among carriers.” *Id.*²⁰ *But see infra* Part II.B.4 (explaining that DOT does not have authority to rectify perceived difficulties in comparison shopping).

The consumer comments that DOT has received in response to these requests do not amount to “compelling evidence” of “deceptive” or “unfair” practices, *Ticket Change Penalties Order*, 2003 WL 23097368, at *1, that cause “significant consumer harm,” *GDS Deregulation Order*, 69 Fed. Reg. at 977. As an initial matter, there are approximately 650 comments in the record – even assuming that all those commenters recently purchased an airline ticket through the Internet (a highly speculative assumption), that is only 650 out of the approximately 166 million people who purchase airline tickets via the Internet in a year (according to the RIA at 69). It is questionable whether any valid inferences could be drawn from a self-selected sample of this size about the state of the industry or the market as a whole. DOT’s reliance on such a small sample size would be especially inappropriate in this instance because the conclusion that DOT seeks to support – that additional regulation is needed to address a practice already ameliorated by existing regulations and the market – is not itself “intuitive,” *Spirit Airlines, Inc v. DOT*, 687 F.3d 403, 411 (D.C. Cir. 2012), and DOT has acknowledged that the quantified costs of its proposals outweigh the quantified benefits. *See infra* Part II.C.

To flip its cost-benefit analysis from net negative to net positive, DOT relies on “unquantified benefits” that it contends will flow to an estimated 1.7 billion passengers over the next 10 years. *NPRM*, 79 Fed. Reg. at 29,972; *see* RIA at 69. But it would be wrong to assume that a mere 650 commenters describing prior experiences in the rulemaking docket provide a valid cross section of those 1.7 billion future passengers.

In any event, the comments shed little light on the questions before the agency.

First, the vast majority of the comments that support new regulatory action do not address any particular aspects of DOT’s proposed disclosure requirements – much less compare them to current regulatory requirements or industry practice. To be sure, many commenters express some form of dissatisfaction with the current industry situation. Most of those commenters, however, are concerned about issues irrelevant to this rulemaking (such as the very existence of fees for ancillary services)²¹ or object in general terms to “hidden fees,” without describing the particular “fees” of concern or what makes them “hidden,” whether their complaints are based on recent experience or a shopping experience possibly well prior to 2012, or how post-2012 disclosure practices do or do not rectify the problem.²² Only a small number of commenters

²⁰ The NPRM also asks consumers to answer the following specific questions: “Do you have a problem finding fee information? And if so, how significant is that problem? If you have a problem finding fees, how does it affect your ability to comparison shop?” 79 Fed. Reg. at 29,977.

²¹ *See, e.g.*, DOT-OST-2014-0056-0159 (“My strong feeling is that there should NEVER be a charge for either checked or (even worse), carry-on bags.”).

²² *See, e.g.*, DOT-OST-2014-0056-0507 (“At a minimum, advertised and offered fares for all transportation mean [sic] should include all mandatory fees and taxes. This includes airport fees, federal, state and local taxes, plus any

actually address DOT’s proposals, and, even as to those, DOT should recognize, as it does with complaints submitted to DOT throughout the year, that it “has not determined the validity of [any] complaints” those commenters might seek to lodge.²³

Second, a number of commenters make points that cut against any new regulatory mandate, even while they express generalized dissatisfaction. Some recognize that the competitive marketplace will provide airlines with a strong incentive to provide as much information about fees as consumers desire.²⁴ Others give examples of itinerary-specific disclosures already provided under the current system that would appear to pass muster under DOT’s proposal as well.²⁵

Open Allies for Airfare Transparency, an industry group that represents GDSs, recently released the results of a survey it claims finds “overwhelming support” for DOT’s proposals. Press Release, *Open Allies Survey: Consumers Demand Ability to Search, Compare, and Purchase Ancillary Fees* (Sept. 4, 2014), available at <http://www.faretransparency.org/open-allies-survey-consumers-demand-ability-to-search-compare-and-purchase-ancillary-fees>. As explained by A4A’s survey expert, however, Open Allies’ survey is fundamentally flawed for a number of reasons, including that, because it used the survey tool SurveyMonkey.com, it likely failed to use a population representative of consumers who shop for airline tickets online. See Attach. D at 8 (Report of Dr. Larry Chiagouris (Sept. 23, 2014)). In light of those flaws, the survey “should not be relied upon to arrive at conclusions concerning perceptions and attitudes about ancillary services held by the people who fly on commercial airlines in the United States.” *Id.* at 17.

DOT’s own complaint data, submitted through the Department’s regular complaint process, similarly provide a lack of justification for the proposed rules. DOT explained to A4A that it only recently (on June 1, 2014) began using an “ancillary fee” complaint category. That category includes a broad sub-category for “baggage fees,” which includes complaints about whether a charge is “valid[]” or “applicab[le].” See DOT-OST-2014-0056-0646, Appendix A at [10-11] (Aviation Consumer Protection Division, *Complaint Codes*); see also *id.* at [10] (listing a new “[s]eat selection fee” sub-category). Even as to those broad sub-categories of complaints,

other charge that the traveler *must* pay to be moved from point A to point B.”) (emphasis added). Under the full-fare advertising rule resulting from *Passenger Protection II*, the advertised fare for air transportation must now include all government-imposed taxes and fees as well as mandatory carrier-imposed charges. See 14 C.F.R. § 399.84(a); *PPII*, 76 Fed. Reg. at 23,143.

²³ *E.g.*, *Air Travel Consumer Report* at 46 (D.O.T. Aug. 2014), available at <http://www.dot.gov/sites/dot.gov/files/docs/2014AugustATCR1.pdf>.

²⁴ See, e.g., DOT-OST-2014-0056-0447 (“[C]onsumers should have a clear and complete price before having to commit. Those airlines that don’t want to do that can *throw themselves upon the mercy of the marketplace as more people buy with those they can trust.*”) (emphasis added).

²⁵ For example, one commenter notes her experience in learning, prior to purchase, about seat-assignment fees “for each leg of the four-leg journey” (a pre-purchase disclosure that therefore was “itinerary-specific”) and acknowledges her “comfort[]” with the process so long as she can be “confident that that is the price I will pay—or very close to—when I hit ‘purchase,’” precisely the outcome that occurred in the commenter’s example. DOT-OST-2014-0056-0610. This particular commenter, like many others, fails to suggest how the proposed disclosure rules would have enhanced the process.

DOT's statistics provide no basis for concern. The statistics show that, of the 4,957 complaints that DOT has received since June 1, 2014, only 75 of them (1.5%) were about bag fees. *See id.* at [5]. Similarly, only 37 of those complaints (0.7%) were about seat-selection fees. *See id.* By those statistics, only one passenger out of every one million complained of one of those two fees.

Looking further back, DOT's statistics provide even less justification. Before June 1, 2014, DOT did not track complaints about seat-selection fees at all. *See id.* at [2]. And, with respect to checked or carry-on baggage, DOT tracked complaints with respect to fees only to the extent those complaints fell in either the "Overcharge" or "Charges Too High" sub-categories for baggage generally. *Id.* DOT has received 37,199 complaints over the past three years, yet only 482 of those complaints (1.3%) fell into the checked bags "Overcharge" or "Charges Too High" sub-categories, and only 155 of those complaints (0.4%) fell into the same sub-categories for carry-on bags. *Id.* at [3]. There is no reason to think that, even of that small share of complaints, the majority of them relate to perceived unfair or deceptive practices, rather than to a simple desire to pay less, to unintentional errors, or to unrelated misunderstandings. *See id.* (revealing that, to understand the nature of the complaints, one has to look at the complaints themselves). Even as to those broad complaint categories, the statistics show that only one passenger out of every three million complained about bag fees. Further, statistics about such complaints are also overstated for purposes of the NPRM because they include complaints that pre-date *Passenger Protection II* and the recent positive trends in making ancillary pricing easily available.

Finally, there is no evidence whatsoever that travel agents – who are travel professionals – cannot find or understand relevant information concerning ancillaries. The few comments that purport to support DOT's rule do not disclose how the tickets were purchased, let alone what role travel agencies played in the transaction. Thus, there is no evidence that professional travel agents are confused, or that an airline's decision not to provide all information to the intermediary GDSs is an "unfair and deceptive" trade practice. Although some travel agencies operate Internet sites that access ticket content from GDSs and sell directly to consumers, airlines have a market incentive to make appropriate disclosures to consumers through those sites about their ancillary services and fees (*see supra* Part II.B.1). How airlines provide that information should be determined by the airline and the online ticket agent. DOT has no need (or authority) to dictate the pipeline that airlines use to provide this information, particularly given the deficiencies in GDS technology and the costs to overcome those deficiencies. These types of decisions should remain with the airlines and the travel agencies, which share an interest in selecting the most capable and efficient technologies.

(c) *Any Additional Evidence Should Be Subject to Meaningful Comment*

Because DOT has acknowledged that it lacks sufficient data to evaluate the need for regulatory action – and because the comments and data to date have not rectified that shortcoming – the current record is insufficient to justify any regulatory action on Proposal 2. This lack of

information is a shortcoming that runs afoul of “longstanding regulatory guidance [that] directs agencies to identify a compelling public need before they commence regulation, not to commence regulation and then seek input on whether a problem exists.”²⁶ To the extent DOT intends to seek or to generate further data, interested parties must be given an opportunity to comment on any such data the Department receives as the comment period closes, and on any data that it seeks or receives after the close of the comment period. *See Solite Corp. v. EPA*, 952 F.2d 473, 500 (D.C. Cir. 1991) (setting aside agency action based on “‘uncommented upon data and calculations’” because the court could not know whether “‘further and ultimately convincing public criticism . . . would . . . have been forthcoming had it been invited’”) (quoting *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978)).

3. The “Basic Ancillary Services” Identified in the NPRM Are Optional Services Incidental, Not “Intrinsic,” to Air Transportation

The NPRM also fails to support its premise that the “basic ancillary services” DOT seeks to further regulate “are intrinsic to air transportation” and that “the cost of those services is a factor that weighs heavily into the decision-making process for many consumers.” 79 Fed. Reg. at 29,977. Advance seat assignment, checking a first or second bag, and boarding with a carry-on item for overhead storage are not intrinsic to air travel; in a competitive market, many customers prefer to fly more cheaply by doing without some or indeed any of these services. The Internal Revenue Code, for example, requires passengers to pay taxes on amounts paid “for taxable transportation of any person” by air, 26 U.S.C. § 4261(a), yet the IRS does not tax passengers for amounts paid for “transportation of baggage” or for any other service that is “optional and not reasonably necessary to the air transportation itself,” IRS Private Letter Ruling at [7, 8], PLR-118216-09, No. 201002004, 2010 WL 147820 (Jan. 15, 2010). The fact that there are a number of service providers that transport belongings of air travelers (e.g., USPS, express services) further demonstrates that baggage is not “reasonably necessary” or “intrinsic” to air transportation.

Airlines have never treated a customer’s selection of a particular seat as an intrinsic part of shopping for or booking a ticket. Purchase of a fare guarantees that the passenger will be seated in a particular cabin (such as First or Business Class) or section of a cabin (such as United’s differentiated EconomyPlus section). It does not now and never did ensure that the passenger would be seated in a particular seat number. Carrier Contracts of Carriage make it clear that seat assignment is not guaranteed.²⁷ In addition, Southwest Airlines (which carries the most

²⁶ Public Interest Comment of Sofie E. Miller, Senior Policy Analyst for the George Washington University Regulatory Studies Center, DOT-OST-2014-0056-0626, at 6 (“Miller Comments”); *see id.* (“Problem identification is crucial to the formulation of any policy.”).

²⁷ A typical term is in United Airlines’ Contract of Carriage: “Seat assignments, regardless of class of service, are not guaranteed and are subject to change without notice.” *Id.* at Rule 4(E), *available at* http://www.united.com/web/format/pdf/Contract_of_Carriage.pdf. There are a number of good reasons that seat assignment is not an inherent part of shopping or booking a ticket, including that seat maps may open at later times than the booking window opens and that the airline might need to substitute aircraft.

passengers in the United States) *never* offers passengers an advance seat assignment, yet clearly still sells air travel. Historically, seat assignments were not made by an airline until about 30 days before the date of travel. The Internet has allowed some airlines to experiment with providing an optional service for passengers that allows them to pick the particular seats they want at the time of booking. This demonstrates the dynamic and pro-competitive nature in which airlines are deploying ancillary services. In light of longstanding and continuing industry practice, consumers expecting to be able to select a specific seat as an intrinsic part of their purchasing experience would not be “acting reasonably in the circumstances.” *Southwest Sunsites*, 785 F.2d at 1436.

Not only are the services targeted by the NPRM extrinsic to air transportation itself (with the possible exception of a carry-on item allowance, for which none of A4A’s members currently charge), A4A believes that the cost of those services does not “weigh heavily into the decision-making process for many consumers.” NPRM, 79 Fed. Reg. at 29,977. In an A4A-funded study, the results of which are attached to these comments, a survey of nearly 200 travel agents revealed that checked baggage fees and preferred seating upgrade fees were on average the *least* important considerations to travel agents’ clientele when making travel arrangements, the more important considerations being the cost of the basic ticket (which ranked 1st), the schedule (2nd), whether the flight was nonstop (3rd), and the identity of the airline (4th). *See* Attach. E at 13 (Table 4) (Survey: Travel Agents’ Beliefs About Added Fees for Additional Airlines Services). The study reveals that these fees are not, as the NPRM incorrectly assumes, “of primary importance to many consumers when making air transportation purchasing decisions.” NPRM, 79 Fed. Reg. at 29,980. For the millions of passengers who do not want to check baggage or purchase an advance seat assignment when booking, or who are exempt from or indifferent to such fees, additional fee-disclosure regulations will unnecessarily increase the complexity of their booking process and the time they spend waiting for search results. As explained more fully below, *see infra* Part II.C.1, the mandate that carriers and agents prominently provide information irrelevant to many shoppers comes at the price of longer waits for search results and complex booking and shopping paths that will significantly waste consumers’ time.

4. Enhancing Comparison Shopping Is Not a Legitimate Justification for Promulgating Additional Fee-Disclosure Rules for Ancillary Services

The NPRM repeatedly states that DOT’s proposed additional fee-disclosure rules for ancillary services are necessary to help consumers “comparison” shop or “price” shop. *See* 79 Fed. Reg. at 29,975 (“[P]assengers need to be protected from hidden and deceptive fees *and allowed to price shop for air transportation in an effective manner.*”) (emphasis added); *id.* at 29,977 (same); *id.* at 29,975 (“We request comment from consumers about whether it is difficult to find . . . fee information *and how much of an impact this has on their ability to comparison shop among carriers.*”) (emphasis added); *id.* (“[R]epresentatives of business travelers complain that it is difficult to advise clients on the best *and most cost-effective flights . . .*”) (emphasis added). The RIA similarly relies on the benefit arising out of consumers who “will now save time in

comparing fares and planning their trips.” RIA at 40. Making it easier for passengers and travel agents to comparison-shop, however, is *not* a statutory justification for DOT regulation.

The test for whether a practice is unfair “is not whether the consumer could have made a wiser decision but whether an act or practice unreasonably creates or takes advantage of an obstacle to the consumer’s ability to make that decision freely.” *Credit Card Order*, 74 Fed. Reg. at 5503. DOT acknowledged that it did not have enough information to regulate comparison shopping among airlines in 2011 when it concluded that it “lack[ed] information critical to a decision” on whether “requiring carriers to provide information on their ancillary fees to GDSs would be a reasonable way, if not the best way, to ensure consumers can easily comparison shop for air fares.” *PPII*, 76 Fed. Reg. at 23,150. The NPRM fails to point to any evidence in this rulemaking to now suggest that its proposed additional disclosure rules rectify unfair or deceptive obstacles to comparison shopping. If anything, given the many other variables at play in booking a flight – including, as the NPRM itself concedes with respect to seat assignments, “route, aircraft size, availability, and time of purchase,” 79 Fed. Reg. at 29,979 – requiring travel agents and airlines to highlight more, possibly irrelevant and incorrect information to consumers in a particular manner is likely to make comparison shopping more difficult.

DOT staff recently stated at a meeting attended by A4A that “the purpose of the rule is not to enable comparison shopping.” DOT-OST-2014-0056-0624 (answer to question 9). A4A welcomes this clarification of DOT’s intent, which it believes is consistent with DOT’s lack of statutory authority to regulate for such a purpose. Given that clarification, as well as DOT’s failure to present a need for its proposals under any rationale, DOT should recognize that it lacks authority to further regulate the disclosure of fee information for ancillary services.

5. DOT Lacks Authority To Dictate the Terms of the Airline Distribution System

Even if DOT were able to find that airlines’ current practices are unfair and deceptive – which it has not done, and on the present record could not reasonably do – it would nevertheless lack statutory authority to require carriers to undertake the positive act of disclosing prices for ancillary services at a particular level of detail and at a particular point in a search for airfare. Section 41712(a) authorizes the Secretary only to decide that “an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition” and, upon such a finding, to “order the air carrier, foreign air carrier, or ticket agent to *stop* the practice or method.” 49 U.S.C. § 41712(a) (emphasis added). As DOT has acknowledged, section 41712 does not give DOT “comprehensive oversight authority over airline distribution.” *GDS Deregulation Order*, 69 Fed. Reg. at 978. Yet the proposed rules would do more than stop a particular practice or method. They would improperly require carriers to *begin* propagating ancillary fees to ticket agents, by establishing a costly system using a particular method of distribution. A4A is unaware of any DOT precedent for such regulatory interference.

C. By Reducing Consumer Options and Highlighting Irrelevant and Misleading Information, the Costs of More Demanding Fee-Disclosure Requirements Will Outweigh Any Benefits

1. The NPRM Fails To Acknowledge the Full Costs of DOT's Proposals

Any benefit to consumers arising out of mandatory pre-purchase disclosures of fee information for “basic ancillary services” provided in a particular way and at a particular time would be overwhelmed by the many costs of interfering with the existing regime, including, among other things, eliminating flexible pricing for ancillary services and efficient searches that timely highlight data that passengers want (fares and schedules) without data they have not yet sought (fees for optional services). Eliminating these advances would severely curtail competition among carriers and market participants for innovative ancillary service offerings. The “countervailing benefits” of free market competition enabled by the current pro-competitive regulatory environment should lead DOT to discard its fee-disclosure proposals. *Frequent Flyer Order*, 1992 WL 133179, at *8.

The ADA requires DOT to account for the competitive benefits of abstaining from further regulation in this space. DOT is responsible for ensuring “the availability of a variety of adequate, economic, efficient, and low-priced services,” 49 U.S.C. § 40101(a)(4); “plac[ing] maximum reliance on competitive market forces and on actual and potential competition . . . to encourage efficient and well-managed air carriers to earn adequate profits and attract capital,” *id.* § 40101(a)(6)(B); and “encouraging entry into air transportation markets by new and existing air carriers and the continued strengthening of small air carriers to ensure a more effective and competitive airline industry,” *id.* § 40101(a)(13). Placing additional constraints on travel agents’ and air carriers’ ability to market their ancillary services without firm evidence that the benefits outweigh the costs undermines all these statutory requirements.

Indeed, the Department’s RIA acknowledges that the quantifiable costs of Proposal 2 outweigh the quantifiable benefits by a net present value of more than \$20 million. *See* RIA at 3. That result is reason enough to abandon the current proposals.²⁸ In any event, the RIA’s analysis fails properly to account for the costs of further fee-disclosure regulation. *See Business Roundtable*, 647 F.3d at 1148-49 (holding that an agency acts arbitrarily when it “inconsistently . . . frame[s] the cost and benefits of [a] rule” or “fail[s] adequately to quantify the certain costs or to explain why those costs could not be quantified”).

²⁸ DOT’s proposal fails the public interest test due to this cost-benefit disparity, “combined with DOT’s dependence on assumptions regarding irrational behavior on the part of competitive, profit-motivated entities and its inability to identify what ‘failures of private markets or public institutions . . . warrant new agency action.’” Miller Comments at 8 (quoting Exec. Order No. 12866, *Regulatory Planning and Review*, 58 Fed. Reg. 51,735 (Oct. 4, 1993)).

(a) *Under DOT's Proposals, Airlines' Prior and Significant Investment in Complex Technology To Distribute Fee-Information About Ancillary Services Could Be Wasted*

Airlines have made significant investments in distribution technologies that provide them with greater flexibility in both setting ancillary fees and how those fees are displayed to passengers. For example, airlines have invested in distribution tools that use Extensible Markup Language (“XML”), which has come into common use in other areas of the economy for interchange of data over the Internet.²⁹ This technology differs from the ATPCO based technology, developed in the 1940s, which is based on use of a limited number of coded fields to provide air fare content.³⁰

Implementation of these technologies is expensive and time consuming. Typically, an airline must invest more than \$1 million to establish each link to a GDS, and it takes anywhere from 12 to 24 months from agreement to implementation. As explained above,³¹ United's links with Sabre, Travelport, and Amadeus are already operational.

Those existing technological investments have already enabled airlines to implement dynamic new ways to price ancillary services. They can, for example, discount fees when demand is lower. Airlines are also experimenting with new ways of offering value and ease of shopping to their customers, by flexibly pricing their products and by marketing new “branded” packages of fares and ancillary services that are attractive to consumers. Recently, those marketing efforts have included bundling seat products with other ancillary service offerings, so that consumers can purchase packages of ancillary services based on their preferences and often at a discount. For example, by marketing fares that include in-flight Wi-Fi and early boarding, an airline likely will appeal to more customers traveling for business. *See* Rubinfeld Rep. at 36, Table 1. Those offerings have been developed in response to consumer demand and have been well received by the market.³² The ability of airlines to experiment with different pricing strategies for bundled fare products is an important and developing aspect of the current competitive landscape.

Moreover, the airlines' and GDSs' existing investments in XML links allow them to provide information consistent with airlines' and travel agents' existing work processes. Current booking paths also permit anonymous shopping, which the Department supports and some

²⁹ *See, e.g.,* W3C, *Extensible Markup Language*, <http://www.w3.org/XML/> (last visited Sept. 18, 2014).

³⁰ The RIA acknowledges that DOT's proposals will drive the industry to an ATPCO solution. *See* RIA at 48 (“If carriers have to provide ancillary service fee information to [online ticket agents] and GDS, the GDSs will likely demand that carriers transmit the data through ATPCO . . .”).

³¹ *See supra* Part II.B.1, Table.

³² *See supra* pp. 12 & n.15; *see also* Jeff Ehling, *Expert: Flight Bundles Can Be Win-Win for Airlines, Travelers*, ABC13 News (Houston, TX, Dec. 23, 2013), *available at* <http://abc13.com/archive/9370120/>; Michele McDonald, *Farelogix Offers Customized Fare Bundles*, TravelMarket Report (Sept. 17, 2013), *available at* <http://www.travelmarketreport.com/articles/Farelogix-Offers-Customized-Fare-Bundles>.

consumers prefer. Both on the airlines' websites and online travel agencies, consumers first make a preliminary choice of their preferred fare and flight schedule. After they have entered passenger information, they may be offered the ability to select seats or other ancillaries for the selected flights. Most (though not all) airlines enable customers to preview seat availability on a particular flight (including whether there is a fee for a particular seat), but prices are not quoted and seats cannot be selected until the customer has selected a particular flight. This was the sequencing of customer choices long before the airlines began to unbundle seats and fares, and both airlines' and travel agents' systems are designed around this sequence. *See* Rubinfeld Rep. at Part IV.B.

As the RIA acknowledges, the likely practical effect of the rules would be to require the airlines to provide the ancillary fee information to the GDSs via ATPCO, rather than XML or another Internet-based technology. *See* RIA at 48. Driving the industry to an ATPCO solution for distributing ancillary fee information will deprive consumers of the substantial investments carriers have already made in reliance on the existing regulatory environment. Carriers have limited resources to dedicate to distribution technologies, and the substantial costs of complying with the proposed rule would interfere with their ability and appetite to develop more attractive alternatives. Compounding this loss, carriers have already incurred many millions of dollars in opportunity costs to develop ancillary-service technologies. DOT should not nullify those investments.

(b) DOT's Proposals Would Impose Massive Costs and Drive the Industry to Sub-Optimal Solutions

The RIA significantly underestimates the cost that moving to an ATPCO-based system would impose on the industry. In comments filed contemporaneously with these Comments, Dr. Daniel L. Rubinfeld provides a more realistic picture of the costs of compliance. *See* Rubinfeld Rep. at Part III. Dr. Rubinfeld estimates that, taking into account these costs, which the RIA fails to include, the true costs of compliance would be approximately \$7.21 million for each of the 167 carriers affected by the proposed requirements. *See id.* at 15.

The industry's recent experience with current section 399.85 for baggage fees is instructive.³³ In order to meet the compliance timeline for that regulation, the airlines were forced to rely on ATPCO to distribute baggage fees to travel agents. Even though there are *fewer* distinct baggage fees than there are seat-assignment fees, it took about two years to implement the regulation. *See Ancillary Fee Delay Order*, 76 Fed. Reg. at 45,181. Dr. Rubinfeld estimates that DOT's overall 10-year projected cost for its *Passenger Protection II* baggage fee requirements was short by a net present value of about \$18 million per carrier.³⁴ *See* Rubinfeld Rep. at 18. DOT should learn

³³ *See* 14 C.F.R. § 399.85.

³⁴ Moreover, given the significant limitations of the ATPCO system, which cannot support dynamic pricing, even the existing regulation effectively prevents airlines from engaging in dynamic pricing for bags. For example, an

from that experience before relying on similarly understated cost estimates to justify a new round of regulation.

DOT's proposals will also ultimately lead the industry to sub-optimal solutions. As noted, airlines have invested hundreds of millions of dollars in creating and marketing ancillary bundles and differentiated seat products. The proposed rules would require airlines to abandon those efforts (and the associated marketing investments) and would instead entrench a market that treats each ancillary service as a separate commodity. Moreover, requiring travel agents and carriers to provide fee information about "basic ancillary services" on the first screen on which a fare is displayed will force travel agents and airlines to deliver irrelevant, misleading, and potentially overwhelming search results, displacing more important information. For example, many customers would rather see additional flight options that could better fit their schedule or their budget instead of ancillary-service information about which they may not care at all. See Rubinfeld Rep. at Part III.D. Although the Department correctly does not propose to extend its new ancillary fee rules to mobile applications – limiting proposed 399.85(b) and 399.90(e) (both Options) to "Web site[s]" – were it to erroneously attempt to regulate mobile applications as well, this problem of clogging the first screen is particularly acute, because first-screen space is limited and valuable.³⁵ Moreover, mobile applications – increasingly used for all forms of purchasing – do not easily support roll-over or similar functionality that the NPRM proposes as alternatives.

Take a typical round trip connecting itinerary. For any given itinerary, depending on the airline chosen, the options for basic ancillary services could easily include the following:

- a first checked bag may cost \$25, a second may cost \$35;
- on the *first* outgoing leg of the trip, an aisle seat with extra leg room on the first segment of the outgoing flight might be \$22, a middle seat with extra leg room might be \$21, an aisle seat near the front of the plane but with standard leg room might be \$11, a seat in the back of the plane (aisle, middle, or window) might be free;
- on the *second* outgoing leg of the trip there might be no aisle seats with extra leg room available, but a window or middle seat might be \$51, while standard economy seats might be available for free;

airline that charges a first bag fee cannot waive or reduce that fee on specific flights where demand is low; ATPCO simply cannot handle that type of pricing. That harms consumers, who lose access to discounts.

³⁵ See, e.g., Grace Smith, *5 Pillars of Successful Mobile Design*, Mashable (June 2, 2013) ("Presenting large amounts of information on the limited real estate of a mobile screen is difficult."), available at <http://mashable.com/2013/06/02/mobile-design-tips/>.

- *but*, if the customer has a certain frequent-flyer status on that airline or pays with a certain credit card (information the customer may not necessarily provide until later in the search process), they might get any of those seats for free;
- and so on for the two return legs of the trip, with all of the seat prices subject to change or being sold to another customer prior to the searching customer's own purchase, and any of the seats might be free depending on frequent-flyer status.

The sheer volume of information required to be provided on the first screen on which a fare is displayed is likely to overwhelm, not assist, consumers in making a choice. Nor could this complexity be simplified by attempting to provide all this information via roll-over or similar functionality.

Further, as the example above illustrates, the strong trend in pricing ancillary services is *customized* pricing, in which some customers (for example, those that book a flight with a co-branded credit card or particular frequent-flyer status) receive certain ancillary services for free or at lower prices.³⁶ Additionally, bundling services with tickets frequently results in consumer discounts. Requiring travel agents and airlines to return a generic, itinerary-specific price on the first search screen in response to anonymous searches means that searches by passengers with entitlement to special pricing or exemptions will be irrelevant and incorrect.³⁷ With respect to fees for seat assignments in particular, given the dynamic nature of seat-assignment pricing, *see NPRM*, 79 Fed. Reg. at 29,979, the price of a seat assignment on an initial screen will not necessarily be available when the passenger proceeds to purchase the seat assignment after booking.³⁸ Finally, with respect to the customer-specific disclosure requirements of proposed § 399.90(d), a consumer performing a multiple-passenger search – including different passengers who may be eligible for different prices or together may be eligible for a package rate – will not, given the fact that the identity of the passenger or passengers is unknown at the point systems return fares and schedules on the first screen, receive accurate fee information. Many other permutations of common searches would similarly return incorrect pricing for some or all passengers in a party.

³⁶ *See, e.g.,* Stuart Green, *Airline Brands: Putting Passengers in the Captain's Seat*, Interbrand, available at <http://www.interbrand.com/en/best-global-brands/2013/sector-overviews/airlines-2013.aspx> (last visited Sept. 17, 2014); Jill Krasny, *Airlines Are Going to Start Profiling You and Decide How Much You Should Pay for a Ticket*, Business Insider (Oct. 24, 2012), available at <http://www.businessinsider.com/customized-fares-could-benefit-fliers-2012-10>.

³⁷ Alternatively, carriers could be forced to require or strongly encourage customers to provide frequent-flyer and credit card numbers at the start of the search process to obtain customer-specific fee quotes, a result many consumers and advocacy groups do not want, and resulting in reduced anonymous shopping and increased privacy complaints.

³⁸ For this reason, a link to a carrier webpage that discloses seat-selection fees as a range is the most practical method of ensuring consumers have complete and accurate information about their choices. *See* Comments of Airlines for America [on Non-GDS Issues] at 22 (Sept. 29, 2014).

Finally, neither DOT nor the RIA accounts for the cost of additional processing time created by the mandatory display of ancillary fee information. Consumers shopping online for airline tickets value receiving search results quickly.³⁹ Currently, a web-based search for itineraries includes only price and schedule and takes approximately 20-30 seconds to complete.⁴⁰ Including in that search ancillary pricing and availability for multiple carriers on potentially hundreds of itineraries – which would require, for each itinerary, processing data for two checked bag fees and potentially dozens of assigned-seat fees (including fees for aisle, window, and front-of-cabin seats) – would add approximately 20-40 seconds to each search. Conservatively applying that result only to online ticket agents, consumers searching for fares (including consumers who do not want or need ancillary fee information as part of their fare search) would lose an additional 5.5 million hours per year, at an annual cost to consumers of more than \$139 million.⁴¹

In sum, the NPRM fails to appreciate that, in a world of diversified and customized pricing, it is not feasible, and in many cases not even possible, to return useful and accurate customer-specific information on or via the first search screen. Pricing displayed on the first screen or from a link or roll-over on that screen not only will be irrelevant and confusing to many customers, but will necessarily be *wrong* for many of them. Such a result would likely be “deceptive,” and far more harmful than any of the purported deficiencies that DOT alleges supports its proposed intrusion into the marketplace. Correct pricing is possible only after the traveler’s identity is known. As airlines present consumers with a wider array of individualized options, consumers will gravitate to the airlines and technologies that make their shopping process more intuitive and satisfying. This process, rather than broad government mandates with unintended consequences, will produce far better outcomes for consumers.⁴²

³⁹ An industry report shows that “78% of consumers reported switching to a competitive site due to poor web performance at peak times” and “35% of online travel consumers make their bookings during those peak times”; in addition, “52% of online shoppers state that quick page loading is important to their site loyalty” and a “1-second delay decreases page views by 11% and customer satisfaction by about 16%.” CDNetworks, *How to Increase Travel & Tourism Revenue Through Accelerated Website and Application Performance* at 4-5, available at <http://www.cdnetworks.com/wp-content/uploads/2014/02/CDNetworks-How-to-Increase-Travel-Tourism-Revenue-EN-WP.pdf>.

⁴⁰ See Compuware, *Compuware APM Benchmarks: US Travel Online Flight Search Performance Detail – IE Transaction: Month Ending Sept. 1, 2014*, http://www.compuware.com/en_us/application-performance-management/benchmarks/united-states/travel/online-flight-search (last visited Sept. 28, 2014).

⁴¹ Calculation assumes one billion annual searches of U.S. consumer-facing sites and excludes searches using mobile applications. It also assumes an incremental search time of 20 seconds and a time value of \$25 per hour. See also RIA at 35 (Table 10). The Department should bear in mind the very high ratio of searches to bookings: online ticket agents receive an average of 2.2 bookings for every 100 searches. See PhoCus Wright, Inc. *Parsing Shop and Book: How Airlines, Hotels and OTAs Compete on the Desktop and Mobile Web* at 3 (July 2014).

⁴² The NPRM and RIA fail to meet Executive Order 12866 and Executive Order 13563 requirements in several respects; First, the NPRM and RIA fail to capture the costs and benefits of “provision 2” and therefore prevent the Department from adopting a final rule “upon a reasoned determination that the benefits of the intended regulation

2. DOT May Not Assume That Unquantified Benefits Will Shift Its Net Negative Cost-Benefit Analysis

Although DOT acknowledges that “[t]he quantifiable costs of this rulemaking exceed the quantifiable benefits,” it nevertheless contends that, by taking into account unquantified benefits such as “improved customer goodwill towards ticket agents, and greater competition and lower overall prices for ancillary services and products,” the entire rule “is expected to be net beneficial.” *NPRM*, 79 Fed. Reg. at 29,972. It is improper for DOT to rely on “unquantified benefits” to push forward with its proposed regulations despite the unfavorable results of its cost-benefit analysis. “Unquantified benefits can, at times, permissibly tip the balance in close cases. They cannot, however, be used to effect a wholesale shift on the balance beam.” *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1219 (5th Cir. 1991).

DOT’s reliance on unquantified benefits to “effect a wholesale shift on the balance beam” is especially inappropriate here because DOT has failed to justify its conclusion that any one of its proposals will bring about unquantified benefits. On the contrary, as explained in Dr. Rubinfeld’s comments, the proposed rules are likely to result in *reduced* consumer goodwill and availability and quality for ancillary services and products, increased search time, as well as *higher* overall consumer prices.⁴³ Similarly, although the NPRM and the Department’s RIA lists certain “unquantified costs” of its proposed rules – namely, “decreased carrier flexibility to customize services,” *NPRM*, 79 Fed. Reg. at 29,972, “inhibit[ion of] new entrants from coming into the market of airline information and ticket distribution,” RIA at 49; and “delay[ed] or abandon[ed] investment in developing new technology/alternative distribution methods,” *id.* at 50 – DOT improperly dismisses those costs as “minimal.” *NPRM*, 79 Fed. Reg. at 29,972. Neither the NPRM nor the RIA provides any analysis to support DOT’s conclusions that those costs are minimal, and, as explained above and in Dr. Rubinfeld’s analysis, those costs are in fact substantial.⁴⁴ DOT may not blindly dismiss these costs as “minimal” where it has for years acknowledged the importance of free-market principles to the airline distribution system and the dangers of fortifying GDS market power through regulation. *See supra* Part II.A.⁴⁵ Dismissing costs as minimal is especially inappropriate against the backdrop of Dr. Rubinfeld’s proof that both DOT and its economic contractor vastly underestimated the costs of the Department’s

justify its costs.” E.O. 12866 at § 1(b)(6), E.O. 13563 at § 1(b)(1). Second, the NPRM and RIA fail to identify a “compelling need” for regulating in this area E.O. 12866 at § 1(a). Third, the NPRM and RIA fail to design the regulations “in the most cost-effective manner” E.O. 12866 at § 1(b)(5). Fourth, the NPRM and RIA fail to take into account the cost of cumulative regulations. E.O. 13563 at § 1(b)(2)

⁴³ *See* Rubinfeld Rep. at Part III.D.

⁴⁴ *See supra* Part II.C.1; Rubinfeld Rep. at Part III.

⁴⁵ DOT’s supposition that all consumers are willing to pay a penny more per trip to cover the cost of this proposed rule is also unjustified in light of the recent vote by Missouri citizens to reject a ¾ cent tax increase for transportation infrastructure. *See* Jeff Haldiman, *Rejection of Transportation Sales Tax Effects [sic] Cities, Counties*, News Tribune, Aug. 10, 2014, available at <http://www.newstribune.com/news/2014/aug/10/rejection-transportation-sales-tax-effects-cities/>.

baggage rule in *Passenger Protection II*. Moreover, DOT's own economists, in reviewing the actual costs of the tarmac-delay rule from *Passenger Protection II*, thoroughly debunked DOT's own cost analysis that DOT used to support the rule,⁴⁶ providing another example of the difficulties of trying to accurately predict the true cost of DOT's regulatory initiatives.

III. Although DOT Has Not Specifically Proposed a Transactability Requirement, Any Such Requirement Would Increase Harm to Consumers Without Any Offsetting Benefits

The rules proposed in the NPRM do not include a transactability requirement, and the NPRM itself disclaims any intent by DOT to promulgate such a rule in the near future. Both of the proposed rules expressly state that “[n]othing in this section should be read to require that these ancillary services must be transactable (e.g., purchasable online).” 79 Fed. Reg. at 30,000 (Proposed Option A § 399.90(a)); *id.* at 30,001 (same) (Proposed Option B § 399.90(b)). And the NPRM itself repeatedly states that DOT's current proposal does not include a transactability requirement.⁴⁷

Commenters are entitled to take DOT at its word. “If the [Administrative Procedure Act]’s notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency’s representations about *which particular* aspects of its proposal are open for consideration.” *Environmental Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005). DOT may not pull a “‘surprise switcheroo,’” *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1108 (D.C. Cir. 2014) (quoting *Environmental Integrity Project*, 425 F.3d at 996), by focusing on proposed rules that require disclosure and then revealing a much more demanding transactability requirement in its final rule. “[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a *concrete and focused form* so as to make criticism or formulation of alternatives possible.” *Prometheus Radio Project v. FCC*, 652 F.3d 431, 449 (3d Cir. 2011) (quoting *Home Box Office*, 567 F.2d at 35-36) (emphasis altered). “[G]eneral notice that a new standard will be adopted affords the parties scant opportunity for comment.” *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994).

⁴⁶ See Econometrica, Inc. *Independent Review and Analysis of the Impact of the Three-Hour Tarmac Delay Rule* at 18-21 (Jan. 9, 2014), available at http://www.dot.gov/sites/dot.gov/files/docs/Econometrica_Tarmac_Delay_Report_1_9_2014.pdf.

⁴⁷ In the section of the NPRM entitled “Proposed Solutions and Alternatives Considered,” DOT limited the scope of its proposal to “two regulatory texts.” 79 Fed. Reg. at 29,977 (“Based on the information gathered, the Department is co-proposing two regulatory texts and seeking input regarding those two proposals.”). As in the text of the proposed rules, DOT makes clear in the NPRM that, under the first proposal, “the Department *would not require* carriers to allow ticket agents to sell/transact its ancillary services to consumers” and that “[e]ach airline would continue to determine where and how its ancillary services may be purchased.” *Id.* (emphasis added); *see also id.* (“In other words, the proposal . . . *would not require* that these ancillary services be transactable.”) (emphasis added). DOT further explained that its second proposal was the same as the first in this regard. *See id.* (“The second proposal is similar to the first *in all ways* except one [the scope of the regulated ticket agents]”) (emphasis added). And the NPRM repeats this disclaimer a page later: “[N]either of the Department’s two alternative proposals would require that carriers enable agents to sell the carrier’s ancillary services; in industry idiom, *we are not proposing* to require that the fees be ‘transactable.’” *Id.* at 29,978 (emphasis added).

Although DOT “has decided . . . *not to propose* a rule requiring ‘transactability,’” it has further stated that “[t]he Department may revisit the transactability of ancillary service fees *in the future if appropriate.*” RIA at 5 (emphases added). As A4A will explain in more detail in any future NPRM focused on transactability, it would be neither necessary nor appropriate to require transactability, and any such requirement would harm passengers without justification. Here are just a few reasons why:

- DOT has made no finding that any failure of carriers to enable ticket agents to allow customers to purchase ancillary services constitutes an unfair or deceptive practice, and there is no basis for such a finding.
- As DOT has acknowledged, a transactability requirement would be ill-advised “due to the uncertain nature of current developments within the industry and . . . other regulatory and oversight efforts.” *Id.* at 71.
- It is unknown whether agents will in fact voluntarily offer transactability to shoppers, making any conclusions as to the benefits arising from such a proposal tentative at best.
- The market has already caused some carriers to explore the option of making some ancillary services transactable, without regulatory interference.
- Many airlines do not currently allow bag fees to be paid at ticketing.⁴⁸ These policies are driven by operational considerations. Requiring passengers to be able to pay bag fees well in advance of departure would force airlines to alter those considerations and require substantial investments in revenue recognition software and systems. *See* Rubinfeld Rep. at Part V.B.
- Many passengers do not know the size and number of bags they will check until after they pack.⁴⁹ When passengers pay fees for checked-baggage in advance, some passengers will arrive at the airport with fewer or different bags than they paid for, requiring more time (and result in a worse customer-service experience) than would simply selling the service at check-in to begin with. *See id.*⁵⁰

The RIA briefly estimates the benefits of an (undefined) transactability requirement. *See* RIA at 47. That benefit is overstated for a number of reasons, at least because the RIA fails to address passengers who would continue to purchase ancillary services as they do today (e.g., at the

⁴⁸ American Airlines does not allow passengers to pay for checked bags until check-in, and Delta allows passengers to pre-pay bag fees, but only during the last 24 hours before the scheduled departure.

⁴⁹ *See* RIA at 29 (noting that consumers are “more likely to want to pay baggage fees at check-in”).

⁵⁰ In addition, some carriers grant waivers and exemptions to ancillary service fees at the time of check-in based on customer-specific information (for example, frequent-flyer status). Customers will not necessarily have that information in advance either.

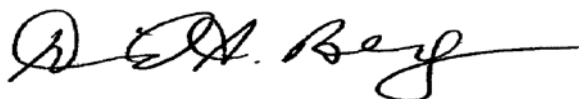
check-in counter). Moreover, the RIA fails even to attempt to estimate the additional costs of a transactability requirement. Although A4A likewise has not attempted to quantify the harms listed above – focusing instead on the display-only requirements DOT set forth in its proposed regulations – the added costs of those harms are substantially more than the already significant costs of the display-only proposals that DOT has provided.

To be sure, DOT's proposals, with or without transactability, would impose enormous costs on consumers not offset by any countervailing benefits. Those costs (described in Part II of these comments and in Dr. Rubinfeld's Report) can be avoided by allowing the existing regulatory framework and market pressures to do their work, continuing to push market participants to independently find and develop the best ways to provide information about ancillary services to consumers.

IV. Conclusion

Airlines are committed to providing consumers clear and easily accessible information regarding ancillary services – and today's highly competitive market gives them little choice about doing so. DOT's past passenger protection regulations have already set a baseline on which carriers and other entities in the airline distribution industry are building. DOT's current proposals ignore that progress and threaten to replace it with a harmful substitute that enhances GDSs' already substantial market power, limits consumer options, and increases the overall cost of flying. On this record, DOT should not (and indeed may not) proceed with its fee-disclosure proposals.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "D. A. Berg", with a long horizontal flourish extending to the right.

David A. Berg
Senior Vice President & General Counsel
Airlines for America
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-4000
dberg@airlines.org

September 29, 2014

Attachment A

**BEFORE THE DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC**

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In the matter of :
 :
NOTICE OF PROPOSED : **Docket DOT-OST-2010-0140**
RULEMAKING CONCERNING ENHANCING :
AIRLINE PASSENGER PROTECTIONS :
-----X

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

Communications with respect to this document should be sent to:

DAVID A. BERG
Vice President & General Counsel
DOUGLAS K. MULLEN
Senior Attorney
Air Transport Association of
America, Inc.
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-4000
dberg@airlines.org
dmullen@airlines.org

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The Air Transport Association of America, Inc. (ATA) submits these comments in response to the Department of Transportation’s notice of proposed rulemaking (NPRM) on enhancing airline passenger protections.¹ 75 Fed. Reg. 32318 (June 8, 2010). In addition to the points made in these Comments, we incorporate herein by reference the comments that ATA submitted in response to the NPRM in Docket Number DOT-OST-2007-0022-0250 (March 9, 2009).

I. Introduction and Summary

ATA members are committed to providing superior customer service to airline passengers, especially when extraordinary circumstances disrupt operations. Our members analyze the causes of delays, adapt their policies to meet new challenges and continue to implement new measures that will improve the passenger experience. Our recent efforts to improve customer service have included enhancing contingency plans, coordinating these plans with airports, improving customer service commitments – without regulatory requirements to do so, using new technology to provide passengers with more timely and extensive flight information, and fully participating in the Department’s past two passenger protection rulemakings by submitting extensive comments to assist the Department in making important decisions that impact the flying public, airports, and airlines.² Indeed, customer service is a

¹ ATA airline members are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Air Lines, Inc.; United Parcel Service, Inc.; and US Airways, Inc. ATA Airline Associate Members are: Air Canada; Air Jamaica Ltd.; and Mexicana.

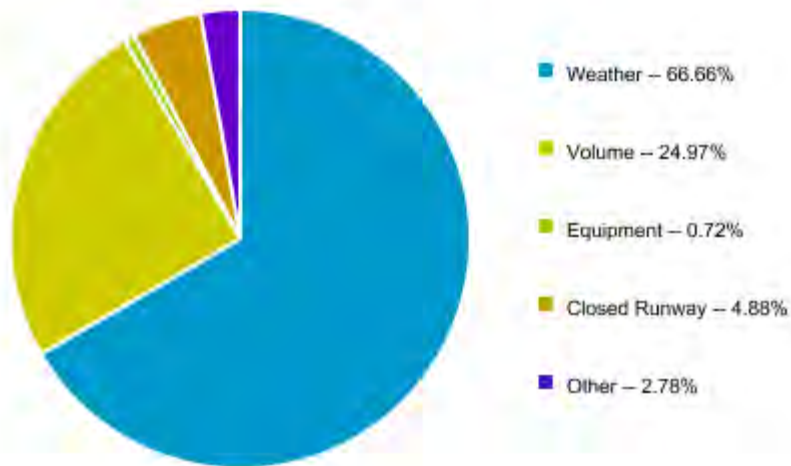
² ATA NPRM comments can be found at DOT-OST-2007-0022-0250.1; ANPRM comments at DOT-OST-2007-0022-189.1.

top priority for airlines, second only to safety. As the Department itself has noted recently, airline performance metrics have improved.³

ATA's members understand that the only way to be successful and expect repeat business is to treat customers well, and airlines compete vigorously on their services to differentiate themselves and to earn customer satisfaction and loyalty. A key, perhaps unique, feature of airline customer service is dealing with delays. In a system involving tens of thousands of domestic and international flights, delays are an unfortunate consequence of weather, airport infrastructure constraints and (at least in the U.S.) an outdated air traffic control system. Although often they are necessary for safety, a reason often overlooked, flight delays benefit neither passengers nor airlines from a service and operational standpoint. They frustrate passengers, disrupt schedules, and are costly to airlines and customers alike.

The chart below from the Bureau of Transportation Statistics website illustrates the major causes of delay; so far this year (2010) weather and volume accounted for 90% of the delays.

Causes of National Aviation System Delays
National (January - July, 2010)



³ See, for example, Press Release, U.S. Department of Transportation, (Sept. 13, 2010), available at <http://www.dot.gov/affairs/2010/dot16810.html>.

As we have noted before, competition in the marketplace and existing Department regulations supported by fair enforcement are sufficient to ensure airlines continue to deliver good customer service. That is why we believe this set of proposed rules – even though we support or do not oppose most of them – is premature. Only five months have passed since the tarmac delay rule took effect and we continue to believe that the Department should analyze the impact of that rule before proceeding with a new rule that further regulates in this area, displacing the market forces Congress intended to predominate with respect to airline services.

Turning to the NPRM, there is much that ATA and its members support, either as proposed or subject to some clarification or modification. The Department has identified a number of measures, many of which airlines have already adopted or are considering implementing, that will benefit customers. For the most part, the Department’s proposals on enhanced information and transparency are rational and reasonable and we support them. Some provisions we think are impractical or will reduce, not improve, customer service, and we explain our concerns below. Not surprisingly, we oppose a small number of provisions. The fault line generally runs between areas where the Department seeks to prescribe conduct that Congress determined should be motivated by market forces, and areas where the Department seeks to enhance information for consumers. Where the Department seeks to prescribe specific conduct or the terms of the relationship between the airlines and their customers, we think the Department has overstepped its authority or made the wrong policy choices. As noted, we generally support the Department’s efforts to enhance customer information and transparency.

Thus, in this latest proposed regulation, ATA supports: (1) adopting contingency plans for all airports a carrier regularly serves; (2) coordinating these contingency plans with all regularly served airports and all diversion airports; (3) in conjunction with DOT, coordinate contingency plans with the Transportation Security Administration (TSA) and the Customs and Border Protection (CBP); (4) increasing the maximum required involuntary denied boarding compensation (IDBC) for fare-paying passengers; (5) reporting of additional tarmac delay data; (6) agreeing not to include a choice of forum clause; (7) fee transparency by providing notice of baggage and other fees on carrier websites; (8) agreeing not to increase the price of air transportation after purchase; (9) prohibiting “each way” advertising, and; (10) requiring airports to adopt contingency plans.

In addition, there are several proposals that should benefit consumers if they are implemented fairly and allow an appropriate level of flexibility for airlines, which in turn provides passengers the greatest choice in air travel. Before proceeding, the Department should carefully consider the potential impact of these proposals, maintain flexible standards to permit carrier options and greater passenger choice, and provide additional guidance. These items include consumer notification of flight status changes, passenger tarmac delay updates, and passenger deplaning announcements.

A third category of proposals likely will reduce passenger choice and competition, unnecessarily delay passengers, create confusion, and ultimately affect fares. These areas include a government-imposed tarmac delay time limit for international flights, verbal instead of written explanations about oversale

policies at departure, imposing marketing carrier responsibilities on operating carriers, dictating social networking media use, and not permitting oversales on smaller aircraft.

Finally, a fourth category of proposals should be excluded from the final rule because they are beyond the Department's authority. These areas include the Department's proposals to (1) require airlines to incorporate customer service plans and contingency plans into contracts of carriage, an action the Department lacks authority to take and that would limit carriers' ability to compete in an open market; (2) change the Department's long-established full fare advertising policy, which would provide less transparency to passengers, hide from them the actual cost of government taxation, and not generate the benefits the Department claims, and (3) require airlines to provide optional service and fee information to Global Distribution Systems when this matter is a subject of competition between distribution channels and at issue in contract negotiations.

Finally, we also provide comments on the cost-benefit analysis, which as drafted does not satisfy the standards set forth in Executive Order 12866 and is otherwise insufficient to inform the public about the costs and benefits of the proposed rule.

II. Regulations that would benefit passengers

A. Expansion of Tarmac Delay Contingency Plans

The Department proposes that carriers adopt contingency plans for all U.S. airports they serve with at least 10,000 annual enplanements per year by adding to existing regulatory language "small hub airport and non-hub airports."⁴ In addition, contingency plans would have to be coordinated with airport authorities at all U.S. airports served with at least 10,000 enplanements as well as regular diversion airports.⁵ Finally, carriers would also have to coordinate contingency plans with TSA and CBP.⁶

ATA members generally support the proposal to expand the number and size of airports where a carrier must coordinate plans but stress that CBP and TSA coordination should be, in the first instance, an inter-agency and, secondly, an airport to CBP and TSA effort. The Department's National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays recognized the need for airport and government coordination for international passengers prior to any potential delay.⁷

Carriers already coordinate with TSA and CBP and will continue to do so. However, requiring carriers to coordinate with these government agencies alone will not get diverted passengers (who so desire) off airplanes. The government needs to take the lead in advance planning to address international passenger screening in the event of a diversion or arrival at an airport with little or no CBP presence or outside regularly scheduled working hours. Recent tarmac delay incidents reflect this problem. For

⁴ See proposed paragraph 259.4(a), 75 Fed. Reg. 32339.

⁵ See proposed paragraph 259.4(b)(7), 75 Fed. Reg. 32339.

⁶ See proposed paragraphs 259.4(b)(8)&(9), 75 Fed. Reg. 32339.

⁷ See the National Task Force Report

<http://airconsumer.dot.gov/publications/TarmacTFModelContingencyPlanningDocument.pdf>

pages 28, 34, 38, and 42.

example, on June 24, 2010, a Virgin Atlantic flight experienced a tarmac delay after it was unable to off-load its passengers at Hartford's Bradley International Airport, reportedly because CBP agents were not immediately available after hours. As we mentioned in prior comments, a similar event occurred in Portland, Oregon in January 2009,⁸ and Los Angeles in 2007.⁹ These reports are inconsistent with the Department's statement in the preamble that DHS advised DOT that subject to coordination with CBP regional directors, "passengers on diverted international flights may be permitted into closed terminal areas without CBP screening."¹⁰ In addition, ATA has recently been advised by CBP that in airports where no CBP officers are stationed, passengers may have to remain on board the aircraft longer than three hours, until officers can arrive at the airport for processing to ensure the passengers' physical security.¹¹ This is a new policy since CBP's previous commitments made during the Long Tarmac Delay Task Force and captured in a letter to the Task Force dated September 4, 2008.

Since the NPRM was issued, DOT, CBP and TSA have met with airline and airport representatives about this issue. We appreciate that effort and are hopeful about it. We would emphasize, however, that improvements to how diversions are handled will require close cooperation among government agencies, airlines and airports. In diversion situations, pilots do not always have the luxury of choosing a CBP-staffed airport. Pilots should, in fact, have no constraint in the best interests of the safety of their passengers and crew, which should be the only priority. This issue needs to be addressed between DOT and DHS before placing any further burdens on the airlines.

Diversions of international flights to U.S. airports with closed or understaffed Federal Inspection Services (FIS), as well as CBP system outages and slowdowns, are a well-known driver of the onboard tarmac delays the Department seeks to reduce. The U.S. government must play the leading role in preparing to prevent or reduce onboard delays driven by lack of FIS facilities or inspectors and CBP system outages and slowdowns.

B. Customer Service Plans

The Department proposes that U.S. and foreign carriers include and adhere to specific customer service standards for scheduled passenger flights to, from, or within the U.S. in their Customer Service Plan (CSP). The changes include (underlined sections reflect proposed changes):

(1) offering the lowest fare available on the carrier's website, ticket counter, reservations center;

(2) notify customers of known delays, cancellations, and diversions in the gate area, on board the airplane, on calls to a reservation center, and on the carrier's website;

(3) deliver bags on time, with reasonable efforts to return mishandled bags within 24 hours and compensate passengers for reasonable expenses that result due to delay in delivery;

⁸ See http://www.oregonlive.com/news/index.ssf/2009/01/passengers_endure_16hour_ordea.html

⁹ See <http://articles.latimes.com/2007/aug/14/local/me-airport14>

¹⁰ 75 Fed. Reg. 32321.

¹¹ See July 8, 2010 letter from Maureen Dugan, Acting Executive Director Admissibility and Passenger Programs Office of Field Operations, CBP to Barbara Kostuk, Managing Director, Passenger Facilitation Air Transport Association of America, Inc.

- (4) allow reservations to be held at the quoted fare for at least 24 hours after reservation is made with no penalties for cancelling;
- (5) where ticket refunds are due, providing prompt ticket refunds for credit card purchases and for cash and check purchases within 20 days after receiving a complete refund request;
- (6) properly accommodating passengers with disabilities as required by Part 382 and for other special-needs passengers as set forth in the carrier's policies and procedures, including during lengthy tarmac delays;
- (7) meeting customers' essential needs during lengthy tarmac delays as required by section 259.4 of this chapter and as provided in each covered carrier's contingency plan;
- (8) handling "bumped" passengers with fairness and consistency in the case of oversales as required by part 250 of this chapter and as described in each carrier's policies and procedures for determining boarding priority;
- (9) disclosing cancellation policies, frequent flyer rules, aircraft configuration, and lavatory availability on the selling carrier's website, and upon request, from the selling carrier's telephone reservations staff;
- (10) notifying customers in a timely manner of changes in their travel itinerary;
- (11) ensuring good customer service from code-share partners, including making reasonable efforts to ensure that its code-share partner(s) have comparable customer service plans or provide comparable service levels, or have adopted the identified carrier's customer service plan;
- (12) ensuring responsiveness to customer complaints as required by section 259.7 of this chapter; and
- (13) identifying the services it provides to mitigate passenger inconveniences resulting from flight cancellations and misconnections.¹²

ATA members support the proposed changes to the CSP noted above as long as the Department does not require the commitments to be incorporated into contracts of carriage. The contract of carriage is a private contractual matter between the airline and the customer. The Department cannot exceed its authority or impair the ability of airlines and customers to contract with each other and the well-established limitations on government authority with respect to such contracts of carriage. See pp. 37-50 below. The comments below respond to the questions and guidance statements in the preamble and note our concerns regarding the implementation of these provisions.

Guidance: A carrier's failure to adopt a customer service plan for its scheduled service, adhere to its plan's terms, audit its own adherence to its plan annually or make the results of its audits available for

¹² See proposed section 259.5, 75 Fed. Reg. 32340.

*the Department's review upon request would be considered an unfair and deceptive practice within the meaning of 49 U.S.C. §41712 and subject to enforcement action.*¹³

ATA comment: ATA members do not agree that an alleged violation of a CSP requirement (if mandated as proposed) is also necessarily an unfair and deceptive trade practice. Only violations with conclusive evidence of willful intent to deceive a consumer may be enforced as an unfair and deceptive trade practice.

*Question: The Department is soliciting comment on the costs and benefits associated with this requirement (adopt and audit CSP).*¹⁴

ATA Comment: As discussed more fully in our comments regarding the Preliminary Regulatory Analysis (PRA) (see Section VIII below), the Department must take into account the substantial litigation costs the carriers will incur if this proposal is adopted. Without doing so, the cost-benefit analysis is flawed because this rule will vastly increase costs that can be reasonably estimated.

*Guidance: We also note that all of the subjects for which we are proposing to require a standard are already required to be included in the customer service plans for U.S. carriers (e.g. oversales/denied boarding compensation, refunds), which should minimize the burden on these carriers to comply with the proposed new requirement to establish standards for those subjects. In addition, when determining what minimum standards to apply to these plans, the Department reviewed customer service plans as currently implemented by a number of carriers, and chose the services already provided by some carriers that appear to be "best practices."*¹⁵

ATA Comment: We note that under current regulations U.S. carriers are required to *address* each of the CSP topics in section 259.5. As the Department notes in the quote above, carriers compete on these customer service items, resulting in a range of practices, providing the public with different options in the marketplace. A deregulated industry produces options for consumers. We agree with the Department view stated in the last passenger protection NPRM that "we are tentatively rejecting the suggestions of those consumers and groups who believe that the Department should set minimum standards for the contingency plans rather than allow each carrier to set its own standards based on its particular circumstances. We continue to be of the tentative view based on the information available to us that the Department should not substitute its judgment in this area for that of the air carriers."¹⁶ The Department does not minimize the burdens of the proposed CSP changes by choosing its view of "best" practices that only a few carriers have adopted; instead it would harm competition and reduce the flying public's options. The dampening effect on innovation in customer service is evident; one ATA carrier has made it clear that it intends to remove a voluntary service commitment if this proposal is adopted because of litigation concerns. The Department has established what it perceives to be "best practices" by a less-than scientific and highly questionable method. If the Department believes minimum standards should be set, a claim which ATA refutes, it must first establish that the regulatory process is appropriate and then it should be carried out in a separate and later proposed rulemaking.

¹³ 75 Fed. Reg. 32322.

¹⁴ 75 Fed. Reg. 32322.

¹⁵ 75 Fed. Reg. 32323.

¹⁶ 73 Fed. Reg. 74589.

*Question: We request comment as to whether it is workable to set minimum standards for any of the subjects contained in the customer service plans and invite those that oppose the notion of the Department setting minimum standards for customer service plans as unduly burdensome to provide evidence of the costs that they anticipate. We further invite comment or suggestions on the type of standards that should be set.*¹⁷

ATA Comment: The Department is asking the wrong question when it comes to standard setting. The issue is not whether the proposal is “unduly burdensome,” but whether the Department can make a reasoned determination that the “benefits of the intended regulation justify the costs.”¹⁸ Therefore, in making a reasoned determination the Department must identify the market failure and a proposed solution while weighing the costs and benefits of the proposed solution and alternatives. This regulatory standard does not require that carriers prove a proposal is “unduly burdensome.”

The current Department effort requiring disclosure by airlines of market driven service policies and requiring carriers to *address* certain customer services in a CSP is the best approach and the most consistent with a deregulated industry. As the Department has found, carriers have varying standards on customer service items, which is a natural result of market competition.¹⁹ Requiring all carriers to adhere to one prescriptive standard removes competition on service terms, reduces the carrier’s ability to offer the lowest possible price, and limits passengers’ options. We provide additional information on costs in section VIII.

*Question: Although the subjects we are proposing that foreign air carriers address in their customer service plans are identical to those U.S. carriers already are required to include in their customer service plans, we request comment on whether any of these subjects [customer service plan] would be inappropriate if applied to a foreign air carrier. Why or why not?*²⁰

ATA comment: ATA members disagree with the statement that the subjects which foreign carriers must address in CSPs under this proposal are identical to those subjects U.S. carriers already address in CSPs. First, although carriers are required to address certain CSP topics, current regulations do not *mandate* minimum requirements. Second, the proposed minimum standards in section 259.5 are far more detailed and specific than existing subject areas, and if adopted would represent a major change to existing carrier policies in areas where U.S. carriers currently compete. Third, imposing the same standards for foreign carriers and U.S. carriers would discourage marketplace competition. Finally, the Department presupposes that extending such prescriptive regulations to foreign carriers is necessary and justified. But doing so could drive foreign governments to retaliate against U.S. carriers operating outside the U.S., create conflicting standards and unnecessarily drive additional costs. One such example is recently enacted passenger protections from the Government of Brazil. We discuss the potential impact of this proposal in section VII.

*Question: We seek comment on whether the Department should require that all airlines address any other subject in their customer service plans.*²¹

¹⁷ 75 Fed. Reg. 32323.

¹⁸ See Executive Order 12866.

¹⁹ See 75 Fed. Reg. 32323 “...the Department reviewed customer service plans as currently implemented by a number of carriers,”

²⁰ 75 Fed. Reg. 32324.

²¹ 75 Fed. Reg. 32324.

ATA Comment: ATA members oppose adding more topics for airlines to address in their CSPs. The proposal already goes too far in setting standards that would limit passenger options and increase ticket prices by stifling competition and re-regulating the industry. The Department has not allowed sufficient time to evaluate the impact of the first set of consumer protection rules, effective April 29, 2010. Moreover any further amendments must be published in another notice for public comment in accordance with the Administrative Procedure Act.

*Question: For example, should mandatory disclosure to passengers and other interested parties of past delays or cancellations of particular flights before ticket purchase be a new subject area covered in customer service plans? If so, what should be the minimum timeliness/ cancellation standard? In this regard, there is already a requirement for reporting carriers (i.e., the largest U.S. carriers) to post flight delay data on their websites and for their reservation agents to disclose to customers, upon request, the on-time performance code of a flight. Should more direct and mandatory disclosure be required, e.g., a required warning before the final purchase decision is made regarding chronically late or routinely canceled flights?*²²

ATA Comment: ATA members oppose additional information notices regarding past flight delays or cancellations before purchase of a ticket. The Department has recently adopted new flight information requirements in the consumer protection rules effective July 24, 2010 for June data. In accordance with those rules, the public will see flight delays, cancellations, and flights 30 minutes late more than 50% of the time before purchase on a carrier's website. In the previous NPRM on consumer protections, the Department recognized that additional flight disclosure information would be "excessive and unnecessary," and that "the costs of providing this [additional] and other information to callers whether requested or not would be unduly burdensome and of dubious benefit."²³ Before proposing more requirements the Department must determine that current notice is insufficient and it must also determine that any additional requirement will materially benefit passengers. The Department presents no evidence supporting the need for additional disclosure requirements, which are extremely costly to implement. Any further flight disclosure requirements are likely to apply only to carriers and not other sellers of air transportation, so even with new requirements only some consumers will get the additional information. Finally, as we stated in past comments, flight performance is principally driven by weather events. Disclosing performance information for a period in the past is not necessarily a reliable indicator of future flight performance, and such data disclosure is potentially misleading to the passenger.

*Question: We also seek comment on the appropriate minimum timeliness/cancellation standard for U.S. carriers and foreign air carriers that do not report on time performance data to DOT if we were to adopt a requirement that airlines address notification to consumers of past delays or cancellation in their customer service plans.*²⁴

ATA Comment: As all of our members are reporting carriers we have no comment on this question but note that for reporting carriers, flight information is already provided on (1) carrier websites (2) BTS website, (3) the Department's monthly consumer report, and (4) other independent sources such as Flightstats.com.

²² 75 Fed. Reg. 32324.

²³ 73 Fed. Reg. 74596.

²⁴ 75 Fed. Reg. 32324.

C. Airport Contingency Plans

*Question: Should coverage be further expanded to require U.S. airports to adopt tarmac delay contingency plans? Proponents of these or other alternative proposals should provide arguments and evidence in support of their position, as should opponents.*²⁵

ATA Comment: ATA members support airport tarmac delay contingency plans because airports are an integral part of recovery during delays and should have plans in place to work with airlines and government agencies to deal with contingencies. Airports should be prepared in advance to assist with deplaning of passengers during irregular operations. This may include having airport personnel on-call to keep terminal areas open, 24-hour contact information for TSA and CBP officials, designating areas of an airport for deplaning of passengers away from a gate, and identifying assets that could be used to transport deplaned passengers from an airplane to gate. All of these areas have been concerns in past tarmac delay incidents and requiring airports to address these matters in a contingency plan will help avoid repeat occurrences. In addition, an integral part of any regulatory requirement is the ability of the Department to take enforcement action. The Department should affirm it will investigate and enforce the passenger protection regulations against airports for non-compliance.

Airport contingency plans should be limited, however, to coordinating with airlines and government agencies and assisting airlines during tarmac delays. As the Department has recognized in this and past rulemakings, carriers are ultimately responsible for delayed passengers and therefore carriers are in the best position to decide how to accommodate passengers onboard their aircraft and what assets are needed during a delay. Any airport contingency plan requirement should recognize the carrier as the primary decision-maker during delays.

D. Tarmac Delay Data

In a new part 244, the Department proposes that U.S., foreign, and commuter carriers operating passenger service to U.S. airports with an aircraft designed to have a seating capacity of 30 or more seats report flight information on U.S. airport tarmac delays of 3 hours or more.²⁶ If a carrier experiences no 3-hour tarmac delays during a given month, it must still submit a monthly report to the Department stating no 3-hour tarmac delays occurred.²⁷ U.S. part 234 “reporting” carriers must only submit 3-hour tarmac information for public charter flights and international passenger flights, as the Bureau of Transportation Statistics (BTS) already collects domestic scheduled passenger flight information.²⁸

Since ATA members already provide domestic passenger flight information to BTS we generally support this proposal because it will provide the Department with additional information on tarmac delays. BTS already has U.S. carrier flight information for domestic passenger operations and will know if a carrier has not had a 3-hour tarmac delay during a given month. Accordingly, the Department should use

²⁵ 75 Fed. Reg. 32321.

²⁶ See proposed paragraph 244.2(a), 75 Fed. Reg. 32337.

²⁷ See proposed paragraph 244.2(b), 75 Fed. Reg. 32337.

²⁸ See proposed paragraph 244.2(c), 75 Fed. Reg. 32337.

existing part 234 data to fulfill this requirement. The Department should also clarify in proposed paragraph 244.3(a) that the part 244 report is due 15 days from the end of the month after the reporting period/month.

E. Oversales

The Department proposes several changes in the oversales rules:

- (1) increasing the involuntary denied boarding compensation (IDBC) maximum compensation amounts from \$650 if the carrier arranges for passenger transportation to the originally scheduled airport to arrive within 2 hours of the original flight if domestic or within 4 hours for an international flight. If the carrier does not meet those time periods the maximum compensation is \$1300;
- (2) if a carrier offers an involuntarily denied boarding passenger free or reduced rate transportation in lieu of cash the carrier must disclose all material transportation restrictions before the passenger decides to give up the cash;
- (3) a carrier must provide IDBC to a “zero fare ticket” holder;
- (4) the Department will use the Consumer Price Index for All Urban Consumers (CPI-U) every two years to review and adjust the IDBC amounts if needed;
- (5) if a carrier orally advises an involuntarily bumped passenger they are entitled to receive free or discounted transportation, the carrier must also orally advise the passenger of any transportation restrictions and that they are entitled to choose cash or check compensation instead;
- (6) for volunteers, the carrier must disclose the boarding priority rules the carrier will apply to the passenger’s specific flight so the passenger may determine if they in are danger of being involuntarily denied boarding, and;
- (7) if a carrier offers free or reduced rate air transportation as compensation to volunteers, the carrier must disclose all material restrictions on such transportation before the passenger decides to give up his or her confirmed reserved space.²⁹

ATA members support the proposed increase and do not oppose the use of CPI-U as a means to adjust IDBC amounts periodically. However, the Department should not expect to see, as it suggests, fewer IDB events. This is because passengers are more likely to hold out for IDB compensation when the amount has been increased. Based on the trend the Department has seen since the May 2008 increase, the proposed increased IDBC and extension to foreign carriers with higher international fares (and higher IDBC offers) will likely result in a higher number of IDB passengers. The DOT proposal may, in fact, be counter-intuitive to the identified problem.

ATA members do not oppose compensating many zero fare ticket holders as the Department suggests in the proposal, but we do have concerns with some specific requirements. The primary concern is that the phrase “zero fare ticket” as described in the rule text and preamble is overly broad. The rule states “the fare paid by these passengers for purpose[s] of this calculation shall be the lowest cash, check, or credit card payment charged for a comparable class of ticket on the same flight.”³⁰ This proposal would require airlines to compensate not only those passengers who use frequent flyer miles, industry or

²⁹ See proposed amended sections 250.2b and 250.5, 75 Fed. Reg. 32338.

³⁰ 75 Fed. Reg. 32325.

vendor passes, or vouchers to purchase a ticket but would also incorrectly include free “buddy” or employee pass travelers. We accept that carriers should make whole passengers who used some form of currency to travel, such as frequent flyer miles or vouchers. Carriers are prepared to compensate passengers in the same currency used to obtain the ticket. But forcing carriers to compensate passengers who, for example, are employees using travel privileges having the lowest boarding priority would negate the terms and conditions of most staff travel.

As a practical matter, gate agents will not be able to assign a value as suggested above because they do not have the information the Department contemplates such as the lowest payment made for a comparable class ticket on the same flight. We propose that the Department permit the terms and conditions of zero value tickets to apply, and that passengers holding such tickets would, instead of receiving mandatory compensation, be entitled to travel on the next available flight. Additionally, buddy passes and other industry tickets are benefits provided to employees and industry partners (in many cases the passes are for only standby travel) and carriers should not have to compensate these holders for cases where travel is not possible.

Question: We also ask for comment on whether we should completely eliminate minimum compensation limits and simply require that carriers base DBC to be paid to involuntarily bumped passengers on 100% or 200% of a passenger’s fare, without limit, and/or whether the 100% and 200% rates need to be increased in line with the proposed increase in the \$400/\$800 compensation limits proposed above, perhaps to 200% and 400% of the passenger’s fare, or higher.³¹

ATA Comment: As an initial matter, we think the Department may have inadvertently made a mistake in this statement by suggesting it would eliminate “minimum” compensation limits, when the regulations refer to “maximum” compensation limits. ATA does not support eliminating maximum compensation limits in favor of compensating strictly as a percentage of fare. The Department presents no evidence of a market failure that would be addressed by increasing IDBC to 200% and 400% of the passenger’s fare. As stated above, increasing IDBC amounts and removing the cap would strongly encourage passengers with higher fares not to accept VDB and increase IDB rates. Second, there is a strong argument against tying IDB compensation to an exact fare level; IDB passengers retain the value of air transportation purchased, so IDB compensation has no rational relationship to a “refund” of the fare or some multiple of the fare, but is instead a means of compensating the passenger for lost time, which is unrelated to ticket price. Third, the Department permits overbooking because it promotes efficiency and enables carriers to accommodate passengers on future flights without spoiling inventory. If IDB rates are excessively raised, carriers will need to compensate for that increase with higher cancellation fees for those passengers not arriving for a flight. Under this proposal, a passenger with a \$1,000 one-way fare whose arrival is delayed two hours might be compensated at \$1,000-\$2,000 – or \$500 to \$1,000 per hour of arrival delay. This rate of compensation is up to 35 times the value of passenger time the Department estimates in its cost benefit analysis.³² Forcing only air carriers to offer this kind of compensation would increase costs for all air travelers, reducing service on marginally successful routes and would be contrary to the public interest. Should the intent be to force carriers to limit or eliminate overbooking, passengers would be harmed by the lack of flight options and availability and through fare increases to make up for the lost seats.

³¹ 75 Fed. Reg. 32325.

³² Econometrica estimates the value of passenger time at \$24.15 per hour in the PRA.

*Question: We seek comment not only on whether zero fare ticket holders should receive DBC under Part 250 but also on whether the cash method described above for calculating DBC to be paid such zero fare ticket holders is reasonable and would truly capture these passengers' losses due to being bumped involuntarily to the same extent as for cash/check/credit ticket holders.*³³

ATA Comment: ATA members agree that many zero fare ticket holders should be compensated if they used some form of "currency" to purchase a ticket, or the ticket has some value such as a voucher. Most airlines already compensate passengers for tickets with a value, in the same currency used to purchase the ticket. However, passengers traveling on tickets with no value and standby passengers should not be eligible for IDBC and the Department provides no justification for requiring it.

*Guidance: A possible alternative to the above proposed method of compensation would be to allow carriers to compensate zero fare ticket holders using the same "currency" in which the tickets were obtained. For instance, under this alternative an involuntarily bumped passenger who used frequent flyer miles to purchase a ticket would be eligible to be compensated with mileage, the currency used to obtain that flight. Under the current rule, this would amount to 100% or 200% of the amount of mileage that was used to purchase the ticket, plus a cash amount if appropriate to account for any taxes, fees and administrative costs paid to obtain the ticket. Similarly, involuntarily bumped passengers who used a voucher to purchase a ticket, in whole or in part, would be eligible to be compensated with a voucher worth 100% or 200% of the value of their original voucher, and an appropriate cash payment if a portion of the ticket was paid for in that manner.*³⁴

ATA Comment: ATA members agree with this guidance and methodology, provided that carriers have the option of compensating passengers either by direct payments or by payments using the "currency" with which they obtained their tickets. But again, free or reduced rate tickets (such as employee travel, industry or vendor passes and buddy passes) that are made available as an employment benefit or accommodation for a vendor and not purchased with a form of currency should not be eligible for IDBC.

*Question: We also seek comment on any other alternative method of calculating DBC for zero fare ticket holders that would best quantify the financial loss and inconvenience to those passengers. How should the rule quantify the value of the remaining travel portion (either to the next stopover, or if none, to the final destination) if the DBC were to be paid with frequent flyer miles?*³⁵

ATA Comment: IDBC compensation for zero fare ticket holders should be allowed in the same currency used to obtain the ticket, e.g. frequent flyer miles, voucher, or, at the carrier's option, cash or credit. For example, a carrier should be able to offer a passenger traveling on a frequent flyer ticket a voucher, frequent flyer miles, or some combination and should retain the ability to compensate by cash or check at the carrier's discretion.

³³ 75 Fed. Reg. 32326.

³⁴ Id.

³⁵ Id.

F. Baggage and Other Fees

The Department proposes to require carriers with a website on which tickets can be purchased to promptly and prominently disclose on its website any carry-on or checked baggage fee increase or changes in the checked baggage allowance. Carriers must also provide notice of checked and carry-on baggage fees and baggage allowances in all e-ticket confirmations and on the summary page at the completion of an online ticket purchase for travel to, from, or within the U.S. In addition, U.S. and foreign carriers with websites that advertise or sell air transportation must disclose on their website fees for optional services such as advance seat selection, seat upgrades, or beverages, snacks, or meals.³⁶

ATA members generally support displaying changes to checked or carry-on baggage fees or allowances on a carrier's website. Carriers are likely to comply by placing a hyper-link on their homepage that would lead to more detailed and specific information. We also support providing *notice* of checked and carry-on baggage fees and baggage allowances in all e-ticket confirmations and at the conclusion of the online ticket purchase process through a web link with additional information. Finally, we also generally support the requirement to disclose on carrier websites fees for optional services - with some exceptions. Carriers already provide website information on optional fees. We believe that fees for optional services that will vary depending on the itinerary should only require a general description. The best example of this exception is food or beverage items for purchase during travel. The Department should expect carrier websites to provide the general prices of items on an airplane but carriers should not be required to list every single item and its price that may or may not be available for purchase on any given flight. For example, statements such as "alcohol beverages cost x" and "food items on domestic flights cost y through z," etc. should meet the Department's goal of providing notice to passengers. We also note the Department did not, and should not propose in the future a limit on baggage fees.³⁷

*Question: The Department invites interested persons to comment on this proposal, including whether the time period for displaying such changes [baggage fees] on the homepage should be greater or less than three months.*³⁸

ATA comment: ATA members support the requirement to display fee changes and believe the proposed three month time period is adequate.

*Question: The Department also asks for comment on the best options for displaying such information to the public if it were to adopt a notice requirement*³⁹

ATA comment: ATA members agree with the Department's suggestion that a hyperlink on the carrier's website is the best form of notice.

³⁶ See proposed 399.85, 75 Fed. Reg. 32341.

³⁷ The Department would need to provide notice and the opportunity to comment in accordance with the

APA.

³⁸ 75 Fed. Reg. 32329.

³⁹ Id.

Question: The Department invites comments regarding the proposal to have full, complete disclosure of all fees for optional services on one web page, accessible to the consumer through a prominent hyperlink. In particular, we solicit comment on whether we should limit the requirement to disclose fees to “significant” fees for optional services, including comment on the definition of “significant fee” and whether it should be defined as a particular dollar amount. The Department seeks comment on the alternatives to the proposed link to the information on a carrier’s homepage, such as disclosure of these optional fees on e-ticket confirmations or elsewhere.⁴⁰

ATA comment: ATA members generally agree that a hyperlink to a page disclosing optional fees would provide the best notice to passengers. This would include providing a link in an e-ticket confirmation that would lead the consumer to a carrier’s homepage with optional fee information.⁴¹ Since carrier websites will have fee information it would be repetitive and unnecessary to require such fee information to be reproduced within each e-ticket confirmation. We see no reason to distinguish significant from other fees, unless the Department would make this distinction to exclude optional fees that may vary by aircraft such as food or beverage menu options as discussed above.

Question: The Department is also seeking comment on the need for a special rule relating to the disclosure of fees and related restrictions in connection with code-share service. We believe that, at a minimum, prospective customers for these code-share flights should be made aware of any significant differences between the ancillary services and fees of the carrier under whose identity their service was marketed and those of the carrier operating their flights. Comments are invited on whether such disclosure by ticketing/marketing carriers should be required through reservation agents, websites, or e-ticket confirmations or through each of those mechanisms. Further comment is invited on whether there are any ancillary services that should not be allowed to vary among code-share partners, e.g., the free baggage allowance or baggage fees. Information on the cost of these proposals is invited.⁴²

ATA comment: ATA members agree with the Department that the best way to ensure transparency with varying policies and fees between code-share partners is to require disclosure on carrier websites through a hyperlink.⁴³ The hyperlink would take the customer from the marketing carrier's policies to the operating carrier's policies. Requiring all code-share partners to have the same optional fees would thwart competition and innovation, provide passengers with fewer options, be inconsistent with a deregulated industry, is impractical, and could violate antitrust laws. In particular, the practical implementation of any such proposal would be extremely difficult for flights that have three or four domestic or foreign code-share partners selling tickets on the same flight. With respect to antitrust concerns, agreements between or among carriers on ancillary fees could be considered anti-competitive behavior, especially among non-immunized carriers. The Department should coordinate with the Department of Justice before pursuing this proposal.

⁴⁰ 75 Fed. Reg. 32329.

⁴¹ A link to optional services should be directly to the carrier’s website and should not direct the consumer to a GDS website or require a carrier to provide optional fee information to a GDS as we more fully explain in section V, subpart C.

⁴² 75 Fed. Reg. 32330.

⁴³ See preamble discussion suggesting a hyperlink could be used, 75 Fed. Reg. 32329, col. 2 & 3.

G. Each Way Advertising

The Department also proposes to require that if sellers of air transportation want to advertise an “each-way” price that is contingent on a roundtrip ticket purchase, they must do so with the roundtrip purchase requirement clearly and conspicuously disclosed in a location that is prominent and proximate to the advertised fare amount. The proposal would prohibit seller of air transportation from referring to such fares as “one-way” fares that require a roundtrip ticket purchase.⁴⁴

ATA Comment: ATA members do not object to this provision, which is not new. Carriers already comply with such a requirement. However, the Department should clarify that sellers of air transportation are permitted to advertise “one-way” fares when a roundtrip purchase is not required.

H. Post Purchase Price Increases

The Department also proposed to add a new section (399.87) that would prohibit sellers of scheduled air transportation from raising the price of a seat, charging for baggage, or adding a fuel surcharge after air transportation has been purchased by the consumer. In making this change, the Department also removed a companion provision in Section 253.7 that currently permits carriers to raise the price of a ticket after purchase as long as the carrier gives written notice of this policy.

ATA Comment: ATA members support this change as applied to the purchase of scheduled air transportation because it is consistent with industry practice. ATA members urge the Department to clarify that the carrier may charge consumers to check bags post-purchase but before departure, provided that the fee was in effect on the purchase date. For example, a passenger may decide at some point after purchasing an airfare that he/she needs to check a bag; as long as the bag fee existed on the airfare purchase date, the carrier should be able to charge for the checked bag. Regarding section 253.7, we recommend the Department clarify that current e-ticket practices of providing a hyperlink that leads to information on ticket refunds and potential monetary penalties comply with the revised section 253.7 written notice requirements.

Question: One alternative the Department is considering would be to allow post purchase price increases, but only as long as the seller of air transportation conspicuously discloses to the consumer the potential for such an increase and the maximum amount of the increase, and the consumer affirmatively agrees to the potential for such an increase prior to purchasing the ticket.⁴⁵ Another alternative would be to allow post-purchase price increases, with full and adequate disclosure, that the consumer agrees to in advance of purchasing a ticket, but to prohibit price increases within thirty or sixty days of the first flight in a consumer’s itinerary.⁴⁶

ATA members support prohibiting post purchase price increases for scheduled service and do not believe an alternative is necessary.

⁴⁴ See proposed paragraph 399.84(b), 75 Fed. Reg. 32340.

⁴⁵ 75 Fed. Reg. 32330.

⁴⁶ Id.

I. Choice of Forum

The Department proposes to prohibit a choice-of-forum clause in a carrier's contract or carriage that would restrict in what court a passenger may bring a consumer related claim.⁴⁷

ATA members support this proposal.

*Question: Consumers should not be forced to litigate in a jurisdiction that could be thousands of miles from their United States residence. The Department believes that such narrow choice-of-forum provisions would operate as a limitation on the right of a consumer to bring legitimate and viable suits. We invite interested persons to comment on this proposal and on the use of such choice-of-forum provisions in contracts of carriage.*⁴⁸

ATA members agree that choice-of-forum provisions should not be included in contracts of carriage.

III. Rules that May Benefit Consumers, but the Department Needs to Clarify and Implement Fairly for All Parties

A. Flight Status Changes

The Department also proposes that for domestic flights, including code-share segments of domestic flights, carriers would have to promptly send notice of 30 minute flight delays or flight cancellations to passengers and other interested persons. Follow up notifications to passengers of additional 30 minute flight delays would also have to be sent. These updates would be required in the gate area, by reservation agents and on carrier websites. In addition, if a carrier provides flight status updates through subscription services, the carrier shall provide an update to passengers through this service within 30 minutes of becoming aware or should have become aware of a flight status change. At the airport, each reporting carrier would have to continuously update all flight status updates under its control with flight delays of 30 minutes or more or flight cancellations within 30 minutes of the carrier becoming aware of the flight status change or should have become of the change.⁴⁹

ATA members generally support this proposal to require various flight status updates to passengers and indeed most carriers already provide this information. Keeping passengers informed about flight delays or cancellations is an important goal. We do, however, have some concerns with the practical implementation of the proposal as written and believe it should be modified to permit flexibility. First, for flight status updates through subscription services and at airports, the Department includes a requirement that carriers should update passengers within 30 minutes of becoming aware of a delay or

⁴⁷ See proposed section 253.9, 75 Fed. Reg. 32338.

⁴⁸ 75 Fed. Reg. 32332.

⁴⁹ See proposed section 234.11, 75 Fed. Reg. 32336.

cancellation or “should have become aware” of a delay or cancellation. “Should have become aware” is a subjective standard derived primarily from tort case-law that will be extremely difficult to implement. It is not an appropriate standard in an administrative enforcement context, particularly given the role of third parties such as the FAA in controlling aircraft movement and providing information. Moreover, it is unnecessary given the 30 minute time-frame, which provides a bright-line standard that could be applied and enforced in a much more straightforward manner. Therefore, we ask the Department to remove the “or should have become aware” proviso.

Second, we also have concerns about trying to implement any requirement to give verbal updates to passengers at an airport or on the airplane because it will be impossible to document and prove such updates were given. All carriers currently provide updates to passengers in airports by several means, and verbally on aircraft, but proving a carrier gave verbal updates of a delay or cancellation will be extremely difficult. Therefore, we strongly suggest the Department not require verbal updates but permit a range of update options providing carriers and passengers’ flexibility in implementing this rule.⁵⁰

We also note a recent Federal Communications Commission rulemaking that proposed to prohibit proactive call-outs with flight status change information from carriers to passengers’ cell phones and possibly land lines without express consent.⁵¹ ATA filed comments in the FCC docket asking for an exception to the proposal for flight status updates but it is not clear at this time what the FCC final rule will require.⁵² We understand the Department also filed comments in the FCC rulemaking and encourage continued DOT coordination with the FCC on this matter to prevent a situation where FCC regulations prohibit carrier compliance with the Department’s regulations.

Question: This requirement [flight status changes] would apply to all the domestic scheduled flight segments that a reporting carrier “markets.” For example, for a code-share flight this proposed notification requirement would be the responsibility of the carrier whose code is used, whether or not it is operated under a fee-for-service arrangement.⁵³

ATA comment: ATA members agree that the marketing carrier should be responsible for flight status changes using media (text, email, etc.) up until the day of the flight, but the operating carrier should be responsible for flight status updates at the airport because the marketing carrier may not have a presence at the airport and may not have the required information.

Question: We seek comments on whether it is preferable to require carriers to provide prompt notification of flight status changes and leave it up to the carriers to determine how that notification is

⁵⁰ We also question whether not providing flight status updates could be construed as an “unfair and deceptive practice” and whether regulating this practice is within the Department’s authority.

⁵¹ See FCC Docket Number 02-278, 75 Fed. Reg. 13471.

⁵² See FCC Docket Number 02-278; <http://fjallfoss.fcc.gov/ecfs/document/view?id=7020512961>

⁵³ 75 Fed. Reg. 32331.

*provided, or prescribe particular means by which carriers must communicate or must make available flight status updates.*⁵⁴

ATA comment: The Department should leave the means of notification flexible so carriers can implement and passengers can select the optimal mean(s) of communication and adopt new technologies in order to offer passengers the greatest choice in how they receive notifications. The Department should also coordinate with the FCC to ensure that some flight status update options are not prohibited as part of the FCC's current rulemaking.

*Question: We ask for comment on the four proposed means of notification: an announcement in the boarding area, carriers' websites, carriers' telephone reservation systems, and airport displays under carriers' control. Commenters should support their opinions with as much detail as possible regarding the practicality, costs, and benefits of any standard they support or oppose.*⁵⁵

ATA comment: As stated above, the Department should allow multiple notification options without mandating any one particular method. Requiring only airport announcements or any verbal communication will not be the best method to ensure passenger notification as airports will be loud and crowded during irregular operations when flight status updates are needed most. Passengers may also not hear announcements if they are going through security, on the phone, in a bathroom, in an airport store, or speaking to a carrier agent. All three other options are currently in use by carriers and work well as part of an overall communications system to provide passenger information. Therefore, the Department should adopt a standard requiring at least one means of notification and allowing carriers to use other means of communication, including any new technology that may be developed.

*Question: We also seek comment about the cost and benefit of flight status update services.*⁵⁶

ATA comment: The Department will maximize the benefits of this rule if it permits flexibility and allows passengers and carriers to choose from several update options. Costs will be minimized if flight status updates are limited to displaying data already known to carrier systems. The Department should not require additional technology or programming to comply with this rule, given the various options currently available to passengers for flight status updates.

Question: It goes without saying that the quicker that changes to a flight's status can be provided to passengers, the more useful the information is likely to be. In addition to seeking comment on the need, in general, for this proposed notification requirement, we specifically ask for comment on whether the standard we propose - "30 minutes after the carrier becomes aware or should have become aware of a change in the status of a flight" - is a reasonable notification standard to apply in requiring carriers to pass along updates to passengers and to the public. Does it provide consumers sufficient lead time in most cases to act to protect themselves? If not, why not, and could carriers be expected to meet a more

⁵⁴ 75 Fed. Reg. 32331.

⁵⁵ Id.

⁵⁶ Id.

*stringent standard? Is the more stringent standard a reasonable standard for carriers to meet and, if not, why not?*⁵⁷

ATA comment: ATA members agree with the Department that the standard "30 minutes after the carrier becomes aware of a change in the status of a flight" is reasonable and appropriate. It is in the carriers' interest to keep passengers informed of any flight changes. A standard of 30 minutes provides adequate time for the carrier to receive flight status change from FAA controllers, communicate the change to all of the carriers' communication channels, and for those channels to relay the information to passengers. As described above, the phrase "should have become aware" is too subjective, does not provide a bright line standard, will pose compliance and enforcement difficulties, and should be eliminated from the final rule.

*Question: In addition, we are proposing that notification be provided regarding any changes that affect the planned operation of a flight by at least 30 minutes. While shorter flight delays occur more frequently, we believe they are less likely to significantly disrupt expectations or travel plans. We ask for comment on whether this 30-minute standard is appropriate. Do consumers in most instances require notice of flight delays that are less than 30 minutes? Would changing the standard of delays to less than 30 minutes impose unreasonable burdens or costs on carriers that outweigh any benefits to the public?*⁵⁸

ATA comment: A 30-minute standard is reasonable and will provide passengers notice of delays that could impact their travel schedule. Updates for shorter delays would impose unreasonable burdens on carriers and provide little or no benefit to passengers. Moreover, updates on a shorter delay guarantees that the flight will be delayed for the announced period. Once an announcement is made, carriers are locked in and will not be able to depart closer to the original departure time should circumstances change (such as weather conditions). In addition, carriers are only able to forward the information that the FAA provides on delays. The Department should confirm that FAA has the resources to provide an update every 30 minutes on every delayed flight.

We therefore agree with the Department's view stated in the December amendments to part 234, that in general a 30 minute delay and potential update would be useful for passengers, "the Department views the posting of the percentage of arrivals that were more than 30 minutes late as important because consumers are particularly interested in significant delays as these delays are the kind that are likely to result in missed connections and other serious problems."⁵⁹

*Guidance: With respect to flight status information outlets at an airport that are not under a carrier's control, e.g., flight arrival and departure displays that are under the control of an airport authority, a carrier's responsibility is limited to providing the updated flight information to the airport authority within the required 30 minutes.*⁶⁰

⁵⁷ 75 Fed. Reg. 32331.

⁵⁸ Id.

⁵⁹ 74 Fed. Reg. 68996.

⁶⁰ 75 Fed. Reg. 32331.

ATA comment: ATA members agree with the Department's statement because carriers do not control many of the flight information outlets at airports and it is important that passengers receive this information from many different sources. We also recommend that the Department consider requiring airports to update flight information boards (or any other sources of flight status updates) within 30 minutes of receiving information on a flight status change from a carrier.

B. Tarmac Delay Updates

The Department also proposes that carriers commit in their contingency plans to updating passengers on tarmac delays every 30 minutes and include reasons why the flight is delayed.⁶¹

While ATA carriers do not oppose the idea of flight status updates every 30 minutes we have concerns with how carriers will demonstrate compliance if there is a passenger allegation of no update. For passengers delayed on an airplane, crewmembers already make flight status announcements and will continue to do so. If the Department makes updates a regulatory requirement, it will be extremely difficult for carriers to prove that verbal flight status updates were made. In addition, the Department should ensure that FAA controllers are instructed to provide the reasons for a delay or provide an exception to the rule where a controller does not provide a reason for delay.⁶²

C. Onboard Announcements

*Question: We also invite comment on whether carriers should be required to announce that passengers may deplane from an aircraft that is at the gate or other disembarkation area with the door open.*⁶³

ATA Comment: Carriers should not be required to announce that passengers may deplane from an aircraft when at the gate. All carriers already announce when the main cabin door has been closed, and at that time, the fasten seat belt sign is illuminated and customers must be in their seats with baggage stowed, electronic devices turned off, etc. Before the main cabin door announcement has been made, customers can move around the cabin if there is a need to do so and deplane. If passengers are unsure whether they are allowed to deplane they simply should contact a crewmember to clarify the situation. This issue need not be further complicated by unnecessary regulation.

*Question: With respect to notifying passengers on board aircraft of delays, we seek comment on how often updates should be provided and whether we should require that passengers be advised when they may deplane from aircraft during lengthy tarmac delays. For example, we have received complaints from passengers that their aircraft has returned to the gate less than three hours after departure for emergency or mechanical reasons but they were not advised that they could deplane. Carriers may feel the 3-hour tarmac delay limit has been tolled by such a gate return, but passengers feel they were not truly afforded the opportunity to deplane within the meaning of this rule.*⁶⁴

ATA comment: In general, carriers do not object to providing flight status updates to passengers. All carriers announce when the main cabin door has been closed, and at that time, customers must be in seats, baggage stowed, etc. Before the main cabin door announcement has been made, customers have

⁶¹ See proposed 259.4(b)(5), 75 Fed. Reg. 32339.

⁶² See Section III, Flight Status Changes for additional comments.

⁶³ 75 Fed. Reg. 32321.

⁶⁴ 75 Fed. Reg. 32323.

the freedom to move around the cabin. A passenger can ask to deplane at any time, whether the cabin door is open or closed. The crew will advise whether it is safe or possible to deplane. If passengers are unsure whether they are allowed to deplane they simply should contact a crewmember to clarify the situation. This issue need not be further complicated by unnecessary regulation.

1. Flightcrew Information

*Guidance: We do not anticipate that a carrier's flight crews will know every nuance of the reason for the delay, but we do expect them to inform passengers of the reasons of which they are aware and to make reasonable attempts to acquire information about the reason(s) for that delay.*⁶⁵

ATA Comment: In many instances, the Federal Government (FAA, TSA, CBP) controls the information provided to crews regarding delays. Flight crews currently provide passengers the reasons for a delay when known. Therefore, the Government should have the only affirmative duty to provide information on the reasons for a delay. Flight crews should not be required to make "reasonable attempts" to require information but should continue the current practice of communicating information made available to them without an affirmative duty to repeatedly request the cause of a delay, especially during irregular operations when FAA controllers will be occupied with safety-related duties. Requiring flight crews to request information frequently and repeatedly will unnecessarily burden flight crews, other airline personnel and the FAA.

IV. Rules that Will Harm Passengers

A. Tarmac Delay Time Limit for International Flights

*Question: We ask interested persons to comment on whether any final rule that we may adopt should include a uniform standard for the time interval after which U.S. or foreign air carriers would be required to allow passengers on international flights to deplane. Commenters who support the adoption of a uniform standard should propose specific amounts of time and state why they believe these intervals to be appropriate.*⁶⁶

ATA Comment: ATA members continue to object to a hard time limit for international flights because it would not be in the passengers' best interest as described in our prior comments.⁶⁷ The Department recognized the potential harm to customers when it declined to adopt a hard time limit in the December 30, 2009 final rule.⁶⁸ For example, the Department recognized that "international flights operate less frequently than most domestic flights, potentially resulting in much greater harm to consumers if carriers cancel these international flights."⁶⁹ We agree that a hard time limit would result in overly

⁶⁵ 75 Fed. Reg. 32321.

⁶⁶ 75 Fed. Reg. 32320, concerning paragraph 259.4(b)(2).

⁶⁷ See Docket number DOT-OST-2007-0022-0250.1, page 25.

⁶⁸ 74 Fed. Reg. 68983.

⁶⁹ 74 Fed. Reg. 68985.

conservative tarmac operations and more international flight cancellations to avoid excessive fines. In addition, aircraft used for many international flights are able to comfortably accommodate passengers onboard for longer periods of time, with food service and entertainment options often available given the type of equipment used and the expected length of these flights. Finally, considering the time, costs and planning (including timing for slots at foreign airports) that go into providing international service, carriers have every incentive to operate flights on-time. The Department made the correct decision in the recent rulemaking to allow carriers the flexibility to set their own tarmac delay time limits for international flights and there is no evidence since the implementation of the new rules five months ago that the Department should change its position. We also note that the PRA does not estimate the substantial costs that all carriers would incur due to increased international flight cancellations if a hard time limit is imposed or passenger time in having to wait for future flights after a flight is canceled.⁷⁰ Including the cost of international flight cancellations in the PRA would exceed any benefit for imposing a hard time limit for international flights.

B. Marketing Carrier Responsibilities

*Question: We also seek comment on whether we should expand coverage of the requirement to adopt tarmac delay contingency plans so that the obligation to adopt such a plan and adhere to its terms is not only the responsibility of the operating carrier but also the carrier under whose code the service is marketed if different.*⁷¹

ATA Comment: ATA members agree with the Department's statement in the Final Rule published in December 2009 that "it is the carrier operating the flight that has direct contact with the passengers on the aircraft during a tarmac delay and that remains directly responsible for serving them."⁷² Once the airplane departs the gate, the operating carrier has sole operating authority under part 121 and is in sole control of how a passenger is treated and it would be unreasonable to also hold a marketing carrier accountable for the operating carrier's actions.

A primary concern is that marketing carrier and operating carrier contingency plans may differ, or even be in conflict, creating compliance problems and confusing passengers. For example, for an international code-share flight departing a U.S. airport, the operating carrier may have a four hour tarmac delay self imposed time limit (assuming the regulation is adopted as proposed), whereas a marketing carrier may have a three hour self imposed tarmac delay time limit. Further, if the operating carrier follows its contingency plan and departs after a delay of 3:15, the operating carrier would not comply with the marketing carrier's contingency plan. This situation is further exacerbated when an operating carrier has multiple marketing carrier codes displayed on its operated flight. Finally, holding a marketing carrier responsible for a flight it does not operate will not benefit consumers because carriers will be less likely to code-share, to avoid conflicting policies and fines. Discouraging code-share flights conflicts with Department policy that such arrangements are in the public interest, providing easier and

⁷⁰ See PRA Section 6. Estimated Costs of Proposed Requirements, pages 45-58.

⁷¹ 75 Fed. Reg. 32321.

⁷² 74 Fed. Reg. 68985.

increased passenger access to cities domestically and around the globe.⁷³ Disclosing the operating carrier before a passenger purchases a ticket provides transparency and notifies the passenger of the carrier that will have responsibility (under 14 C.F.R. part 121) for the safe operation of the flight as well as responsibility for compliance with these rules.

C. Reservation Hold

ATA members strongly object to a new customer service plan proposal that would require a carrier to hold a reservation “at the quoted fare” for 24 hours after a reservation is made “without payment or cancelled without penalty.” Adopting this proposal would allow consumers to hold an unlimited number of reservations at once, without payment during the 24 hour hold, eliminating the carrier’s ability to sell these seats to another willing buyer during that period. The Department has not identified a market failure or unfair or deceptive practice (or the potential for one) that merits this extraordinary and market-interfering proposal. This requirement would effectively prevent re-pricing, which ordinarily happens multiple times a day, in response to market conditions. Any such 24-hour hold without payment is a matter of concern since lost bookings can occur at any time, and different flights experience peak booking levels at different times. This proposal would be especially troubling if a consumer were to hold reservations during the last 24 hours before a flight and then cancel, all with zero cost to the individual making the reservation, but *preventing* the carrier from reselling the seats. The effect would be to reduce options to other travelers and increase costs for carriers and passengers. It is conceivable that a meaningful share of inventory could be unavailable for sale if individuals attempt to “game” the system and serially reserve seats that expire at departure time without any payment. As seats are a perishable inventory, the inability to sell them in a timely manner represents a high cost to carriers. A smaller but real concern is the cost to carriers and other intermediaries from predictable spikes in abandoned reservations; even making and canceling reservations places a financial burden on carriers. This regulation will cause additional empty seats that cannot be resold to other passengers and likely will result in higher overall fares to compensate for losses.

Like many other aspects of this proposal, the issue of holding flight reservations without purchase or penalty is a practice on which carriers can and should compete. The Department has already regulated to an extraordinary extent by requiring carriers to refund reservations within a specified time. Moreover, consumers have options in choosing various tickets, and the marketplace should determine how long and when a carrier will hold a ticket without purchase.

This is yet another area where the Department cannot rationally justify treating airlines different than other retail industries. If the Department decides to adopt this proposal notwithstanding our objections, it should provide an exception where carriers do not have to hold reservations for the last 72 hours before a flight to ensure carriers have at least a minimal opportunity to sell seats.

D. Baggage Delivery

Question: With regard to delivering baggage on time, we solicit comment on whether we should also include a standard that (1) carriers reimburse passengers the fee charged to transport a bag if that bag is lost or not timely delivered; and (2) the time when a bag should be considered not to have been timely

⁷³ See Department policy concerning code-shares at <http://ostpxweb.dot.gov/aviation/intlaviationprog.htm>

*delivered (e.g., delivered on same or earlier flight than the passenger, delivered within 2 hours of the passenger's arrival).*⁷⁴

ATA Comment: ATA members oppose this suggestion. As stated above, bag fees are a competitive issue and whether a carrier chooses to refund a fee in all instances is a matter the marketplace should determine. Some passengers may choose to fly a certain carrier to avoid bag fees altogether, while other passengers may not need to check bags for certain trips so baggage fees are not an important factor in choosing a ticket or carrier. In these examples, a passenger may decide to buy a cheaper ticket that would impose bag fees and allow no refunds because the bag fees would not apply to the passenger. Passengers are best served by leaving these options in place, providing consumers the greatest choice in air travel and increasing competition among carriers. Automatic baggage fee refunds will raise prices for those customers that do not need or want to check bags.

Department-mandated policies on baggage fees also raise concerns about compliance and enforcement. For instance, a “timely delivered” bag is a subjective standard and does not address the question of when a bag is available for pickup versus when a passenger may actually possess the bag. An arbitrary “timely” delivered bag standard would also not account for varying conditions, such as passengers who live two hours away from an airport. Existing standards and requirements make additional baggage delivery and refunding standards unnecessary. The Department points to no market failure or deceptive practice to justify proposed additional baggage fee and service regulations. Higher costs to meet a standard and fines for failure to comply will increase the cost of tickets and bag carriage for all passengers. Finally, it is not clear the Department has the authority to prescriptively regulate standards for baggage delivery. DOT cites no express authority for such action.

E. Refunding Tickets

*Question: With regard to providing prompt refunds, we seek comment on whether we should also include as a standard that carriers refund ticketed passengers, including those with non-refundable tickets, for flights that are canceled or significantly delayed if the passenger chooses not to travel as a result of the travel disruption.*⁷⁵

ATA comment: ATA opposes a requirement that carriers automatically refund non-refundable tickets when a passenger decides not to travel, especially when the cause of the delay is out of the carrier’s control and usually caused by weather or an inadequate government operated ATC system. In most cases passengers from a canceled flight are accommodated on another flight soon after the originally scheduled flight. In many other cases carriers issue weather waivers to allow free rebooking. The terms and conditions of when a carrier will refund a ticket (whether refundable or not), including when and under what circumstances such terms and conditions may be waived by the carrier, are best left to the marketplace and individual carrier policies. Today, passengers have a choice in carrier and ticket price when choosing the type of ticket they purchase; imposing mandatory refunds in every instance when a *passenger* chooses not to fly would essentially convert all tickets in cancel or delay situations to fully refundable tickets. DOT is not authorized to interfere in the marketplace in this manner. For example, if a passenger holding a non-refundable ticket is on a flight that returns to a gate to meet the

⁷⁴ 75 Fed. Reg. 32323.

⁷⁵ 75 Fed. Reg. 32323.

Department's 3-hour tarmac delay rule and the customer chooses to not travel, the carrier should have the *option* of refunding the ticket or accommodating the passenger by some other means rather than mandating only a refund. Further complications arise when the passenger is mid-journey. This regulatory effort to redefine restricted tickets as fully refundable tickets even in many instances when cancellation is desirable (such as proactive cancellation due to impending weather) or required by government order, would impose obligations not present in any other mode of transportation or consumer service industry. We accept that the Department may require carriers to disclose the terms and conditions of refundable or non-refundable tickets, but mandating when those tickets must be refunded limits the types and prices of tickets available in the marketplace, which reduces competition and is not in the public's best interest. Disclosing of carrier refunding and ticket policies should be enough information for passengers to choose the best option for them in an open market. Limiting the carrier's ability to sell non-refundable tickets, impacts how tickets are priced, is beyond the Department's statutory authority post deregulation, and will cause prices to rise for all consumers.

Question: The Department's Aviation Enforcement Office has issued notices in the past advising airlines that it would be an unfair and deceptive practice in violation of 49 USC 41712 for a carrier to apply its non-refundability provision in the event of a significant change in scheduled departure or arrival time, whether it be due to carrier action or a matter out of the carrier's control, including "acts of god." We request comment on the methodology for defining a significant delay in the event such a standard is adopted. Should the Department establish a bright line rule that any delay of 3 hours or more is a significant delay? Should the determination of whether a flight has been significantly delayed be based on the duration of the flight (e.g., is 3 hours a significant delay on flights of two hours or less and 4 hours a significant delay on flights of more than two hours)?⁷⁶

ATA Comment: ATA members oppose any definition of "significant delay" that would essentially create a single government standard and eliminate carrier latitude to create policies on non-refundable tickets that serve customer and commercial needs. As stated above, the application of non-refundable tickets and carrier policies to re-accommodate passengers during an event beyond the carrier's control is best left to the marketplace in a deregulated industry, which will leave customers with more ticketing options. Assigning arbitrary time limits with no basis, and without reference to unique circumstances in place at major airports, would permanently supplant carrier policies that are based on market factors. There is no evidence that customers would prefer a government mandate restricting their options instead of open marketplace options. By regulating in this area, the Department would impede carrier efforts to accommodate delayed passengers on other flights, drive system inefficiencies, create incentives for passengers to change travel plans after a flight has already begun, and degrade service. As DOT is aware, "significant" delays are almost always driven by factors beyond carriers' control such as ATC, weather or mechanical failures and carriers should not be forced to provide automatic refunds in all situations.

Question: As for the customer service commitment to provide prompt refunds where ticket refunds are due, we invite comment on whether it is necessary to include as a standard the requirement that when a flight is cancelled carriers must refund not only the ticket price but also any optional fees charged to a passenger for that flight (e.g., baggage fees, "service charges" for use of frequent flyer miles when the

⁷⁶ 75 Fed. Reg. 32323.

flight is canceled by the carrier). Irrespective of whether such a standard is included in a carrier's customer service commitment, the Department would view a carrier's failure to provide a prompt refund to a passenger of the ticket price and related optional fees when a flight is canceled to be an unfair and deceptive practice.⁷⁷

ATA Comment: The idea that flight cancellations are a form of poor passenger service that requires automatic compensation to passengers is unfounded and unwarranted. As the Department is aware, thousands of flights are cancelled each month for many reasons, sometimes well in advance of the travel date including minor retiming, flight number changes and a host of other reasons inconsequential to the traveler. In fact, in some cases the Department encourages proactive cancellations, such as during anticipated or actual severe weather. Frequently the passenger who originally booked on a cancelled flight will travel on a different flight, just an hour before or after the cancelled flight or was given a free weather waiver or other accommodation.

ATA members object to the Department's concept that cancellation in itself should create a right to the refund of optional fees. First, and critically, the Department should clarify that a carrier has the opportunity to accommodate a passenger with other transportation options after a cancellation, instead of automatically refunding a ticket and ancillary fees. Second, the Department should clarify that "where ticket refunds are due" includes only those situations where the passenger is unable to fly due to the carrier's decision to cancel. The most likely scenario is the carrier would accommodate the passenger on another flight. In this case, the passenger travels on a different flight than originally scheduled and both the travel and any services are provided as agreed. Third, if the Department decides to adopt this proposal it should clarify that not all optional fees must necessarily be returned to the passenger; there are a host of services or situations where passenger actions or ticket conditions would not justify the return of a fee. For example, before a flight is canceled a passenger may have opted to purchase food and drink onboard the airplane and already consumed it (this example does not apply to the situation where a carrier is required to provide food and water after a two hour tarmac delay) or the passenger may have called a reservation line incurring a fee, which is a service already consumed. Requiring a fee refund for consumed services does not make sense. As the Department is aware, any excessive obligation to refund fees increases costs to all passengers who purchase services.

Accordingly, ATA members object to a rule that flight cancellations automatically trigger a refund and doubt the Department has the authority to impose such a rule. We request that the Department adopt a narrower definition of "optional fee" refunds, such as fees for services provided by the airline that the passenger has not used because of the carrier's cancellation of a flight. Where refunds are due, carriers already refund promptly in compliance with existing regulations and as a function of customer first commitments.

⁷⁷ 75 Fed. Reg. 32323.

F. Social Networking Media

Question: In particular, we are soliciting comments on any operational difficulties U.S. and foreign airlines may face in responding to consumer complaints received through social networking mediums such as Facebook or Twitter. Do airlines currently communicate to customers and prospective customers through social networking mediums?⁷⁸

ATA Comment: The Department has already addressed the topic of consumer complaints received through social networking media in guidance issued on April 8, 2010, concerning the final rule issued in December. In that guidance the Department stated:

...as a matter of enforcement policy, the Department's Aviation Enforcement Office will not take action against carriers that do not respond to complaints sent through Twitter or posted on their Facebook wall so long as: (1) the carriers' Twitter page and Facebook page clearly indicate that it will not reply to such complaints, and (2) on that page the carrier directs the consumer to the mailing address and e-mail or website location for filing written complaints. The office is adopting this policy because, upon further review of the purpose and use of Twitter and postings on the wall of Facebook, the Aviation Enforcement Office believes that the word "written" in the definition of a complaint was not intended to apply to such social networking sites but rather to refer to the traditional one-on-one methods of text communication (e.g. a letter, email, printed complaint form, or internet complaint form). With respect to the email component of Facebook, a carrier must respond to consumer complaints sent to its Facebook email account and the Aviation Enforcement Office will take action against carriers that fail to do so.⁷⁹

This guidance adequately addresses the issue of consumer postings on social networking media. As the Department notes, the consumer complaint regulation was never intended to apply to this type of social network. Some carriers have in excess of one million subscribers from various sites and face a constant stream of postings, many of which are not easily categorized as complaints. In addition, it is impossible to identify many members of these networks or ensure that they receive a response given the limited information carriers have of network members.

⁷⁸ 75 Fed. Reg. 32325.

⁷⁹ See <http://airconsumer.ost.dot.gov/rules/FAQ%20on%20Consumer%20Rule%20April%2028%202010.pdf> page 11, question 39.

G. Verbal Disclosures at Departure

ATA members oppose the proposal to verbally inform passengers of DBC policies because of the conflict between providing tailored information to each passenger potentially denied boarding while trying to board passengers and achieve an on-time departure. It is impractical to expect gate agents to explain boarding priority policies and transportation restrictions to passengers during the labor-intense, time pressured boarding process of very full flights when such policies are already provided to the customer in writing. The Department has not provided any evidence that current methods of communication, namely the written explanation gate agents give to IDB and VDB passengers are insufficient or ineffective. The Department's proposal would, in practice, have gate agents reading out loud the written statement to passengers. These additional verbal disclosures tailored to individual passengers in DBC situations would not benefit passengers because doing so will result in deteriorated on-time performance and lost time by passengers as flights are delayed to permit the verbal disclosure the Department contemplates.

Question: We ask for comment on our proposals here as well as on whether there are any other forms of notice that might better inform passengers being requested to volunteer to be bumped, or those involuntarily bumped, of their rights and carriers' obligations.⁸⁰

ATA Comment: Information contained in carrier written notices and posted on the Department's and carrier's websites provide sufficient notice. Additional data disclosure, especially if individualized to a particular passenger, at the gate near the departure time would result in reduced on-time performance.

Question: Thus for a passenger who is considering rejecting the volunteer offer in hopes of receiving involuntary DBC, it is material to know how likely it is, if involuntarily denied boarding, that the passenger's delay would exceed the one/two/four hour(s) limits. We seek comments on whether we should require this disclosure to every passenger the carrier solicits to volunteer and if so, what form, e.g., verbal or written, the disclosure should take.⁸¹

ATA Comment: DOT should not amend the DBC disclosure requirements, as doing so would delay the process of identifying willing volunteers and the general boarding and departure process, especially if several verbal disclosures are required for each individual solicited volunteer. Requiring verbal disclosures also creates enforcement and compliance problems, since it would be difficult to prove that verbal disclosures were or were not given. The additional employee time required to investigate alternative transportation options and provide all of the Department's proposed verbal notices at a critical time when the gate agent is trying to close the airplane door would result in delayed flights with no offsetting customer benefit by being verbally told something they already have in writing.

⁸⁰ 75 Fed. Reg. 32326.

⁸¹ 75 Fed. Reg. 32327.

H. Prohibiting Oversales on Smaller Aircraft

Question: We are also considering expanding the applicability of the oversales rule to the operations of U.S. certificated and commuter carriers and foreign carriers using aircraft originally designed for 19 or more seats. ...We have concerns that many carriers use code-share partners for their connecting services to smaller points, some of whom operate aircraft with 19-29 seats. Such flight segments are not covered by Part 250, but are associated with the identity of a large carrier and many, if not most, are “fee for service” flights under the total control of the large carrier, which controls booking. Should we allow those flights to be oversold at all? If we do, should Part 250 be applicable in its entirety?⁸²

ATA Comment: The Department should continue to allow oversales of all scheduled passenger flights to preserve competition and flexible travel options for passengers. Permitting the latitude to oversell smaller aircraft helps to ensure the financial viability of what are frequently economically marginal air services. A blanket prohibition on small aircraft oversales would threaten the existence of such services. Moreover, imposing costly IDBC rules for smaller airplanes would mean that carriers will underutilize assets by operating with additional empty seats, which may lead to reduction or elimination of service, especially to small communities, further limiting passenger travel options, which are already limited by reduced schedules. Doing so likely would force higher fares with less service and fewer seats. Prohibiting oversales may also force carriers to charge passengers a “no show” fee, which could prevent a passenger from ever using the ticket again. Finally, it is not clear DOT has the legal authority to regulate what amounts to a pricing decision.

I. Peanut Allergies

At this time, we are considering the following alternatives to provide greater access to air travel for individuals with severe peanut allergies: (1) banning the serving of peanuts and all peanut products by both U.S. and foreign carriers on flights covered by DOT’s disability rule; (2) banning the serving of peanuts and all peanut products on all such flights where a passenger with a peanut allergy is on board and has requested a peanut-free flight in advance; or (3) requiring a peanut-free buffer zone in the immediate area of a passenger with a medically documented severe allergy to peanuts if a passenger has requested a peanut-free flight in advance. We seek comment on these approaches as well as the question of whether it would be preferable to maintain the current practice of not prescribing carrier practices concerning the serving of peanuts. We are particularly interested in hearing views on how peanuts and peanut products brought on board aircraft by passengers should be handled. How likely is it that a passenger with allergies to peanuts will have severe adverse health reactions by being exposed to the airborne transmission of peanut particles in an aircraft cabin (as opposed to ingesting peanuts orally)? Will taking certain specific steps to prepare for a flight (e.g., carrying an epinephrine auto-injector in order to immediately and aggressively treat an anaphylactic reaction) sufficiently protect individuals with severe peanut allergies? Who should be responsible for ensuring an epinephrine auto-injector is available on a flight – the passenger with a severe peanut allergy or the carrier? Is there recent scientific or anecdotal evidence of serious in-flight medical events related to the airborne transmission of peanut particles? Should any food item that contains peanuts be included within the definition of peanut

⁸² 75 Fed. Reg. 32327.

*products (e.g., peanut butter crackers, products containing peanut oil)? Is there a way of limiting this definition?*⁸³

ATA comment: ATA members do not support regulation in this area because it would be ineffective and costly to implement. A ban on serving peanut products is not equivalent to ensuring that a passenger will not be exposed to such products in flight as neither carriers nor the Department can prevent passengers from consuming peanut products before boarding or bringing peanuts and peanut products onboard. Peanuts and peanut products are sold and consumed in thousands of concessions or facilities at airports around the world. There is no conceivable, practical screening process that would ensure passengers do not bring peanut or peanut products onboard or that passengers who recently consumed peanut products do not have peanut oil or residue on their hands or clothing nor is it conceivable that the Department, TSA, carriers, or any other entity try to create one. In the absence of any regulatory mandate, carriers have developed policies to accommodate passengers with known peanut and other allergies which reduce the risk of inadvertent exposure to the allergen. Moreover, under FAA regulations all commercial passenger aircraft with more than nine seats are equipped with emergency medical kits containing injectable epinephrine that can be used in the rare instances in which someone does experience a severe allergic reaction. The Department should maintain its current policy of not prescribing carrier practices and allowing each carrier to set its own policy in this area. Finally, there is no indication that the Department or Congress has received “a peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact with very small airborne peanut particles of the kind that passengers might encounter in an aircraft” as cited in the Department’s June 22 clarification notice and required by Public Law 106-69.⁸⁴ In fact, there is virtually no scientific evidence to support the underlying premise that peanut particles can and do become “airborne” in the aircraft cabin environment. As the Department recognized in its June 22 notice, it (and Congress) must receive such a scientific study before taking any further action on the regulation of peanuts on aircraft. Therefore, the Department cannot consider adopting any of the three options until it fulfills the requirements of Public Law 106-69.

V. Rules That Are Likely Illegal⁸⁵

A. Incorporating Contingency Plans and Customer Service Plans into Contracts of Carriage

⁸³ 75 Fed. Reg. 32332.

⁸⁴ See Docket Number DOT-OST-2010-0140-0316.

⁸⁵ The proposals included in this section raise the most obvious legal concerns, e.g. the Department lacks statutory authority to regulate. However, as noted throughout our comments, we question the Department’s authority to regulate in several other areas.

As in the tarmac delay rulemaking, which culminated in a regulation adopted less than six months before the current notice was published, ATA opposes the Department's proposal to require carriers to include the terms of their contingency plans in their contracts of carriage. ATA also opposes the Department's new proposal to require carriers to incorporate Department-prescribed customer service plans into their contracts of carriage. ATA opposes both proposals on three interrelated grounds.

First, the Department's proposals to create a private cause of action under contract law for violating a provision in a contingency plan or any of the terms of Department-prescribed customer service plans exceeds the Department's regulatory authority and contravenes Congress's choice of the appropriate enforcement mechanism for alleged violations of the Department's regulations or the consumer protection provisions of the statute. Courts have uniformly held that Congress neither created nor implied a private cause of action for alleged violations of the Department's rules against unfair or deceptive practices, *see* 49 U.S.C. § 41712, and the Supreme Court has made it abundantly clear that agencies cannot create by regulation a cause of action that Congress has declined to create by statute, *see Alexander v. Sandoval*, 532 U.S. 275, 291-292 (2001). Even more fundamentally, efforts to create a private cause of action as a means of enforcing section 41712 would be inconsistent with the enforcement mechanism that Congress *did* create—namely, one in which *the Department* exercises both the authority and the responsibility to fashion and enforce appropriate rules against unfair practices in commercial aviation.

Second, the actions the Department is proposing to take cannot be squared with the terms of the statute. The law permits the Secretary to order air carriers to “stop” engaging in any action the Secretary finds to be “an unfair or deceptive practice or an unfair method of competition.” 49 U.S.C. § 41712. To date, however, the Department has failed to identify any theory under which tarmac delays would violate section 41712. Yet, even if tarmac delays were deemed to be an unfair or deceptive practice, and even if failing to have a well-publicized contingency plan to deal with tarmac delays were an unfair practice, it stretches the words of the statute beyond their meaning to contend that failing to incorporate an already well-publicized plan for tarmac delay into the contract of carriage constitutes an unfair or deceptive practice. This is equally true of the proposed requirement to include Department-prescribed customer service plans in contracts of carriage. Indeed, the Department offers no explanation for how an airline's failure to incorporate these proposed regulatory requirements into its contract of carriage—which is a unilateral offer of the terms on which a carrier is willing to provide service—could constitute the kind of “practice” contemplated by the statute, especially in light of the injunctive relief that section 41712 specifies as its exclusive remedy. However broadly the terms of section 41712 might be read, they cannot be read to reach the supposed practice of failing to incorporate contingency or customer service plans in the contract of carriage.

Third, the record is devoid of evidence supporting the proposed regulations and is laden with reasons to avoid adopting them. The Secretary has suggested that incorporating contingency plans (and customer service plans) into the contract of carriage will help make passengers more aware of their rights, but both the contingency plan (and service plan) and the contract are available on carrier websites, and no evidence suggests that consumers are better aware of contract terms than plan terms. Nor is there any indication that Departmental enforcement proceedings—and the substantial penalties they can entail—are insufficient to deter carrier violations of contingency or government-mandated service plans. To the contrary, the threat of class action proceedings may entice carriers to weaken their plan terms before incorporating them into the contract of carriage, or carriers may adhere too strictly to the maximum delay terms, worried about the costs of class-action discovery and the risk of convincing a

jury, rather than the Secretary, that “there [was] a safety-related or security-related impediment to deplaning passengers.” Enhancing Airline Passenger Protections, 74 Fed. Reg. 68,983, 68,987 (Dec. 30, 2009). At a minimum, the record contains nothing that would justify the Secretary’s abandonment of his decision, reached a mere six months before this new round of rulemaking commenced, to make incorporation voluntary and to assess the success of that approach in providing sufficient protection to air passengers before considering whether any additional regulatory action may be required.

In general, ATA is concerned about two related, problematic turns in the Department’s development of national transportation policy, embodied in these proposals, to require the inclusion of particular terms in carriers’ contracts of carriage. The first is a willingness on the Department’s part affirmatively to regulate the commercial terms that carriers *must offer* to their customers, rather than cautiously to police the marketplace for terms that carriers *must not offer* because they are deceptive or unfair. Such prescriptive regulation of industry behavior represents a step backwards towards the regulated-industry scheme that Congress rejected in the Airline Deregulation Act more than 30 years ago and is inconsistent with the Department’s proscriptive authority under §41712 . The second is an abdication of the Department’s authority and responsibility to assess alleged violations in their unique factual contexts, and to exercise the discretion granted and intended by Congress to decide whether enforcement action—either injunctive relief or monetary penalties—is warranted. ATA members have every incentive to treat their customers fairly (and indeed do) and to avoid delays, and the Department should trust those incentives—together with the Department’s own substantial oversight authority—to ensure that carriers comply with the requirements of contingency (or customer service) plans. The Department, meanwhile, has an important public policy role to play in determining when certain decisions by carriers and their pilots are consistent with safety and the public interest. Inserting the private, class-action bar into the judgment calls of carriers and their pilots will serve only to increase the costs of doing business in a way that is bad for carriers and consumers alike, and to distort existing incentives to supply passengers with the safest, timeliest, and most comfortable service possible at the lowest possible price.

1. DOT Lacks the Authority to Create a Private Cause of Action in Contract for Violating the Terms of a Contingency (or Government-Mandated Service) Plan.

Section 41712 neither creates nor implies a private cause of action. In the words of the Sixth Circuit, “[e]very court faced with the question of whether a consumer protection provision of the [Airline Deregulation Act] allows the implication of a private right of action against an airline has answered the question in the negative.” *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1252 (6th Cir. 1996) (collecting cases). The various Courts of Appeals to consider the matter have broadly held that there is no private cause of action, express or implied, in section 41712 or any other consumer section of the Act.⁸⁶ Indeed, far from creating an “especial benefit” for a specific class as

⁸⁶ See, e.g., *Statland v. American Airlines, Inc.*, 998 F.2d 539, 541 (7th Cir. 1993) ([§ 411, later renumbered § 41712] “does not create a private right to sue”); *In re Mexico City Air crash of October 31, 1979*, 708 F.2d 400, 408 (9th Cir. 1983) (“Federal Aviation Act does not contain an implied private right of action.”); *Wolf v. Trans World Airlines*, 544 F.2d 134, 136 (3d Cir. 1976) (“[§ 41712’s statutory predecessor] does not create a private right to sue”); *Polansky v. Trans World Airlines*, 523 F.2d 332, 338-40 (3d Cir. 1975) (same); see also *Casas v. American Airlines*, 304 F.3d 517, 523 (5th Cir. 2002) (no private right of action under Airline Deregulation Act); *Musson Theatrical*, 89 F.3d at 1252 (same); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 n. 13 (5th Cir. 1995) (en banc) (same); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986) (no private right of action under

required for the implication of a private cause of action, *see, e.g., Cort v. Ash*, 422 U.S. 66, 78 (1975), section 41712 “is expressly premised on a finding that the ‘public interest’ is involved,” and so “may not [be used] to vindicate private rights.” *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 302 (1976) (quoting *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 83 (1956)) (emphasis added).⁸⁷ This leads to the unavoidable conclusion that Congress did not create a private right of action under section 41712.

The legal issue at stake in these proposals thus resolves into the narrow but fundamental question of whether an administrative agency may create a cause of action that Congress did not. The answer to that question is plainly no. This is especially so where, as here, Congress specifically decided to vest the agency with the authority and responsibility to distinguish between reasonable measures and unfair or deceptive practices, and to take action against the latter only “in the public interest.” At base, creating a private cause of action under section 41712 that bypasses any review by the Secretary would inescapably entail an abdication of the Secretary’s responsibility to assess the public interest before initiating a proceeding for unfair or deceptive practices.

a) The Supreme Court Has Expressly Held That an Agency Cannot Create a Private Cause of Action That Congress Did Not.

The Department’s effort to create a private cause of action is squarely at odds with Supreme Court precedent. In *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), the Supreme Court held that where a statute itself does not explicitly or implicitly provide for a private right of action, an administrative agency enforcing that statute cannot create a private judicial enforcement mechanism by regulation. “Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.” *Id.* As the Court made clear:

Language in a regulation may invoke a private right of action that Congress through statutory text created, but *it may not create a right that Congress has not*. . . . [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer’s apprentice but not the sorcerer himself.

Id. at 291 (emphasis added). Here, no amount of dexterity will allow the Department to make a private cause of action appear out of a statute that has none. This is because Congress, not the agency, has the power to decide both the “substantive federal law” and “private rights of action” that will entitle a private party to recover in court.

The Court of Appeals for the Fifth Circuit has specifically affirmed this principle with respect to the Department of Transportation. In *Casas v. American Airlines*, 304 F.3d 517 (5th Cir. 2002), the plaintiff brought a class action against American Airlines for losing his video camera. At the time, American had a provision in its contract of carriage disclaiming all liability for valuables such as video cameras, but a Departmental regulation prevented American from limiting its liability for any lost

the Federal Aviation Act); *Diefenthal v. CAB*, 681 F.2d 1039, 1047, 1048-50 (5th Cir. 1982) (in an action brought by commercial airline passenger, holding that no private right of action exists to enforce Federal Aviation Act provision requiring air carriers to maintain a certain level of service); *see also Angela Cummings, Inc. v. Purolator Courier Corp.*, 670 F. Supp. 92, 94 (S.D.N.Y. 1987).

⁸⁷ The Supreme Court has emphasized that “individual consumers are not even entitled to initiate proceedings under [§ 41712]” before the agency, let alone in court. *Nader*, 426 U.S. at 302.

property “to an amount less than \$1250 for each passenger.” *Id.* at 520 (quoting 14 C.F.R. § 254.4). The district court had held that the plaintiff had a cause of action under the Department’s regulation and that American’s liability was limited only as to amounts over \$1250 per passenger. The Court of Appeals readily rejected this position under *Sandoval*. *See id.* at 524. It did allow that the plaintiff had a cause of action under federal common law to seek recovery on the loss, but in finding that claim barred by American’s liability limitation, the Court of Appeals articulated a holding that squarely covers these proposed regulations.

According to the Court of Appeals, the plaintiff’s contention that American’s liability limitation was contrary to the Department’s regulation did not save his case. This was because:

[t]o hold otherwise would be, in substance, to *craft a private right of action for violations of* 14 C.F.R. § 254.4—and thus to circumvent the conclusion that the [Airline Deregulation Act], and therefore the regulations enacted pursuant to it, creates no private right of action for the wrong of which Casas complains. Casas has not demonstrated that Congress intended to alter the contours of the federal common law in this way when it enacted the ADA.

Casas, 304 F.3d at 525 (emphasis added). In short, a regulatory provision from the Department cannot be allowed to dictate the terms of a contract between a carrier and a passenger in a civil case without running afoul of *Sandoval*’s rule against regulatory creation of causes of action. As a regulator and not a legislator, the Department simply lacks the power to do what it is proposing to do here.

b) The Department Cannot Abdicate to Plaintiffs’ Lawyers the Authority and Responsibility Vested in the Secretary by Congress.

It is particularly inappropriate to create a private right of action to enforce the terms of contingency plans and government-mandated service plans—rather than to leave it to the Department to enforce those provisions itself—because Congress expressly conditioned the enforcement of section 41712 on the exercise of the sound discretion of the Secretary. The intent that the Departmental enforcement mechanism be exclusive is evident in the text and structure of the statute and is confirmed in numerous cases. Indeed, ATA’s opposition to involving the private class-action bar and the contract doctrines of the several states in the regulation of these aspects of consumer protection is of a piece with ATA’s continued support for the congressionally mandated role of the Department and the Federal government as the centralized authority for airline consumer protection and regulation. *See generally Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *West v. Northwest Airlines, Inc.*, 995 F. 2d 148 (9th Cir. 1993). The Department must not abdicate that authority in such a way as to create what “Congress obviously did not intend”—namely “a vacuum to be filled by the Balkanizing forces of state and local regulation.” *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157, 173 (1st Cir. 1989).

Congress has specified exactly how section 41712’s prohibition on “unfair or deceptive practice[s]” should be enforced, relying exclusively on direct enforcement by the Secretary or by the Department of Justice acting on his behalf. Section 41712 itself gives the Secretary the authority to issue cease and desist orders. *See* 49 U.S.C. § 41712. The Secretary may also impose civil penalties for violations after providing notice and a hearing, *see id.* § 46301, and these penalties are explicitly limited by Congress to \$2,500 per violation for an individual or small business and \$25,000 per violation

otherwise, *id.* § 46301(a)(1), (a)(5)(D).⁸⁸ Congress further authorized the Department to bring a civil action in federal district court to enforce the statutes it administers and any implementing regulations, or to request that the Attorney General bring an action for the same purpose. *Id.* §§ 46106, 46107(b)(1)(A). Yet, while Congress did permit private parties to file written complaints with the Secretary alleging unfair or deceptive practices by airlines, *see id.* § 46101(a), Congress did not permit private parties to sue for violations of section 41712 in court—in clear contrast to other related statutory provisions in which Congress did expressly allow private suits, *see, e.g., id.* § 46108 (permitting interested persons to bring a civil action in federal court to enforce the statutory provision requiring air carriers to hold a Department of Transportation certificate).

Numerous courts have held that the Department-directed enforcement mechanism that Congress specified is *exclusive* and have refused, for that reason, to permit private parties to go to court to enforce section 41712. These decisions recognize that Congress would not have gone to such great lengths to specify multiple enforcement mechanisms—all of which rely on Departmental action or direction—if it had also intended to allow private parties to circumvent those mechanisms. *See, e.g., Casas*, 304 F.3d at 522-523 (finding no evidence in the legislative history that Congress intended to allow private judicial enforcement, and noting that “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 407 (9th Cir. 1983) (“Because of the [Federal Aviation] Act’s emphasis on administrative regulation and enforcement, we conclude that it is highly improbable that Congress absentmindedly forgot to mention an intended private action.” (internal quotations and citations omitted)); *Diefenthal v. CAB*, 681 F.2d 1039, 1049 (5th Cir. 1982) (“When Congress has established a detailed enforcement scheme [for the Federal Aviation Act] which expressly provides a private right of action for violations of specific provisions, that is a strong indication that Congress did not intend to provide private litigants with a means of redressing violations of other sections of the Act.”).

These precedents further acknowledge that judicial enforcement by private parties would be inconsistent with the enforcement mechanisms that Congress specified. *See Polansky v. Trans World Airlines*, 523 F.2d 332, 339 (3d Cir. 1975) (refusing to find a private cause of action under statute giving the Civil Aeronautics Board the authority to prevent unfair or deceptive methods of competition, in part because “[t]he considerable discretion required in weighing the public interest can best be exercised by an agency knowledgeable in all aspects of the regulated airline industry.”); *Diefenthal*, 681 F.2d at 1050. Indeed, private enforcement is inconsistent with the very terms of the statute, which require the Secretary to consider whether action is in “the public interest,” rather than in the interest of particular parties. *See Nader*, 426 U.S. at 302.

Revealingly, it has long been *the Department’s own position* that allowing private enforcement of Section 41712 conflicts with the Secretary’s responsibility to assess the public interest. Before the Court of Appeals for the Fifth Circuit in *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997), the Department argued that private judicial enforcement of section 41712 is inconsistent with a legislative scheme designed to give the Secretary authority over the direction and development of enforcement policy:

⁸⁸ These amounts are adjusted periodically pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, and now stand at \$27,500 for other than small businesses.

[A]llowing private enforcement actions would risk interfering with Congress’s intent to exercise discretion in determining whether and how to take action against particular business practices. The statute provides that “if the Secretary considers it is in the public interest,” he may investigate and restrain a particular unfair or deceptive practice. 49 U.S.C. § 41712. These provisions are intended to give the Secretary enforcement discretion and some flexibility in fashioning an appropriate remedy. *See Nader*, 426 U.S. at 302. Private suits would arguably interfere with the exercise of such discretion.

Brief for the United States as Amicus Curiae at 12, *Sam L. Majors Jewelers*, 117 F.3d 922 (No. 96-50146), 1997 WL 33560672.

The Department should recognize the force of its own logic and abstain from inviting second guessing by plaintiffs’ attorneys and state court juries of safety and service decisions best left to experienced pilots—subject, of course, to the regulatory oversight mechanisms that Congress created. Maintaining its traditional role as policeman rather than legislating rules for private plaintiffs to enforce ensures that the Department remains within its regulatory authority and conforms to Congress’s express intent regarding the proper method of enforcement against unfair and deceptive practices. Section 41712 requires that the investigation of whether a particular practice is unfair or deceptive be undertaken in “the public interest.” Attempting to pass that judgment off to private litigation not only violates the rule against regulatory invention of causes of action, but also abdicates the responsibility that Congress specifically entrusted to the Department, and so violates the statute.

2. The Terms of the Statute Do Not Permit the Department to Label the Failure To Incorporate a Ground Delay Contingency Plan or a Government-Mandated Customer Service Plan into the Contract of Carriage an “Unfair or Deceptive Practice.”

Although an agency often has some latitude in the interpretation of broadly phrased statutory provisions, *see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), the Department’s proposal would improperly supplant the administrative, case-by-case process contemplated by section 41712. Moreover, the proposal would stretch the phrase “unfair or deceptive practice” well beyond any reasonable construction of the statute. This is so for three reasons. *First*, there is nothing unfair or deceptive—and the Secretary has thus far articulated nothing unfair or deceptive—about failing to incorporate into a contract of carriage a contingency plan or other government-mandated service plan that is already fully enforceable by the Department through cease and desist orders and substantial civil penalties. *Second*, failing to incorporate the largely mandatory terms of a contingency plan into the contract of carriage cannot be an “unfair or deceptive practice” because it is not a practice at all within the meaning of section 41712, especially in light of the injunctive enforcement mechanism contemplated by the statute. *Third*, interpreting the phrase in a manner that allows the Department to dictate common contract terms that every airline must affirmatively offer runs directly counter to the policy of the Airline Deregulation Act to “rely[] on actual and potential competition to provide efficiency, innovation, and low prices and to decide on the variety and quality of . . . air transportation services.” 49 U.S.C. § 40101(a)(12).

a) Failing to Incorporate Contingency Plans and Government-Mandated Service Plans into Contracts of Carriage Is Neither Unfair Nor Deceptive.

The Department's sole explanation for its authority to implement its proposal is that its "broad authority under 49 U.S.C. 41712 to prohibit unfair and deceptive practices encompasses this power." Enhancing Airline Passenger Protections, 73 Fed. Reg. 74,586, 74,590 (Dec. 8, 2008). The Department has yet to explain, however, why the failure to incorporate a contingency plan or customer service plan into a contract of carriage would be "unfair or deceptive"—or even whether it considers that failure to be "unfair," or "deceptive," or both. It is neither.

First, failure to incorporate these plans into the contract is in no way deceptive. Assuming the Department proceeds to mandate the terms of carriers' customer service plans, neither plan would make any promise or hold out or advertise any service to passengers that the airline is not obligated to provide. Indeed, under the most recent rule, the Department has already specified that "failure to comply with the assurances required by this rule and as contained in [a] Contingency Plan for Lengthy Tarmac Delays will be considered an unfair and deceptive practice . . . subject to enforcement action by the Department." 74 Fed. Reg. at 69,003. Thus, carriers are already obligated to comply with the terms of a contingency plan, making it extremely difficult even to hypothesize a customer who could be deceived about the obligations of the carrier. To be able to show deception, the Department would have to assume that there are passengers who: (1) review the contract to know their rights; (2) also review the contingency (and service) plans; (3) fail to appreciate that the guarantees in the contract are different from the guarantees in the contingency (and service) plans; and (4) mistakenly believe that if a carrier fails to adhere to the terms of its customer service or contingency plan that the passenger has a cause of action against the carrier for breach of contract. Unsurprisingly, the record is utterly devoid of any indication that even one such passenger exists.⁸⁹ To construe "deceptive practice" to capture the failure to incorporate a contingency (or prescribed service) plan into the contract of carriage is accordingly unreasonable and unambiguously contrary to the statute.

For similar reasons, there is no apparent sense in which the failure to incorporate the contingency (or prescribed service) plan into a contract is "unfair." Passengers subject to contingency plans are protected by the prospect of Departmental enforcement; the existing rule already guarantees them substantial protections in the event of ground delay with civil penalties available as a sanction if a carrier falls short of what the plan requires. The underlying unfairness (if there is any) is the ground delay itself. It is not at all clear why it is unfair to passengers to provide them with a regulatory guarantee against such delay—that is, Departmental enforcement through imposition of substantial civil penalties and the entry of a cease and desist order—rather than a guarantee enforceable through an action for breach of contract. Indeed, the fact that Congress provided for regulatory enforcement of section 41712 and failed to provide a separate, private cause of action demonstrates that Congress did not believe that there was anything inherently "unfair" in this remedial structure.

The Code of Federal Regulations, moreover, is replete with consumer and employee protection provisions that are subject only to administrative enforcement, including—in a noteworthy example—the drug-testing regulations of the Federal Aviation Administration. See *Schmeling v. NORDAM*, 97 F.3d 1336, 1344 (10th Cir. 1996) (holding that an employee has no private right of action to enforce drug-testing regulations). There is thus nothing unfair about such an enforcement system, and the Department cannot use section 41712 to transmute every regulation into a private cause of action by

⁸⁹ In fact, as discussed below, *infra* Section I.C.3., all the record evidence suggests the exact opposite.

declaring it “unfair” not to incorporate that regulation into the terms of a service or employment contract.

Section 41712 is concerned with instances of unfair or deceptive behavior by air carriers; it is not an all-purpose invitation to the Department to announce best practices and to require carriers to incorporate them into their contracts. The Department cannot bootstrap its finding that lengthy ground delays are unfair to passengers into a finding that failing to incorporate a contingency plan for dealing with lengthy ground delay into the contract of carriage is also unfair to passengers. And it certainly cannot do so absent a *specific* account of why that failure to so incorporate the contingency (or prescribed service) plan is unfair in itself. Such an account is absent from the record, likely because the words “unfair or deceptive” simply cannot be read to apply here.

b) Failure to Incorporate Contingency (or Prescribed Service) Plans into Contracts of Carriage Is Not the Kind of Practice the Secretary Can Enjoin Under Section 41712.

The Department’s proposal reflects an overly expansive reading not only of the terms “unfair or deceptive,” but of the very statutory concept of an “unfair or deceptive *practice*.” According to the Department’s apparent theory, carriers are currently engaged in the “practice” of having contingency plans for lengthy ground delay while failing to incorporate them into their contracts of carriage. The Department’s remedy is not to order carriers to “stop” doing anything, 49 U.S.C. § 41712, but rather to order them to *start* incorporating contingency (and other prescribed customer service) plans in their contracts. This is contrary to the plain terms of the statute. When combined with the Department’s overly expansive reading of “unfair or deceptive,” this interpretation would allow the Department not merely to police the market for occasional misconduct, but instead to prescribe the precise rules for doing business.

The specific terms and articulated enforcement mechanism of section 41712 are instructive in this regard. The statute provides that:

[i]f the Secretary, after notice and an opportunity for a hearing, finds that an air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall *order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.*

49 U.S.C. § 41712 (emphasis added). The terms of the statute contemplate a “practice” that the carrier is “engaged in” and that the Secretary may order it to “stop,” rather than the other way around. The Secretary’s power is primarily injunctive—he has the power to identify and root out certain actions that carriers are taking that are unfair or deceptive to consumers. This power does not include the authority to dictate that carriers *add* provisions to their contracts of carriage that the Department simply believes may be beneficial to passengers but that do not alter the underlying regulatory obligations of the carriers. The ability to prescribe the commercial terms on which carriers and passengers will do business is an exceedingly broad and powerful regulatory authority. Congress would not have created it in such a peculiar, and seemingly unlimited, way. Indeed, the words of the statute indicate that Congress intended to create the exact opposite kind of scheme.

c) *The Department's Interpretation Is Directly Contrary to Congress's Goal of Airline Deregulation.*

While contingency plans for ground delay are a narrow subject matter, the authority that the Department is claiming is at bottom a broad and sweeping regulatory power that is fundamentally at odds with the Airline Deregulation Act. By combining an expansive vision of the terms “unfair or deceptive” with a willingness to dictate affirmative obligations rather than enjoin particular “practices,” the Department essentially claims the ability to use section 41712 to tell carriers the terms on which they must agree to provide service—in essence, to write (or re-write) the terms of every contract of carriage. This represents a dramatic about-face from the congressional policy of allowing competition and consumer choice to dictate the practices that either fail or prevail in the marketplace of business ideas.

For over three decades, it has been the policy of the United States to “plac[e] maximum reliance on competitive market forces and on actual and potential competition,” to “decide on the variety and quality of . . . air transportation” and to provide the necessary incentives for “efficiency, innovation, and low prices.” 49 U.S.C. § 40101(a)(6), (12). Of course, Congress also recognized the need for regulatory oversight, and so empowered the Department to police the market for anticompetitive or anti-consumer abuses. The Department’s proposal turns that scheme on its head, using it as a power to mandate terms the Secretary considers more beneficial rather than the power to enjoin unfair ones. The Department, however, is “bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.” *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n. 4 (1994). To treat section 41712 as an invitation to return to pervasive regulation is contrary to both the means and ends that Congress articulated, and so an unreasonable construction of the statute.

All of these objections apply with equal or greater force to the Department’s off-handed references to its authority under section 41702 to ensure “safe and adequate transportation,” *see, e.g.*, 75 Fed. Reg. 32,324. Of course, under *Sandoval*, the Department may no more create a cause of action through this provision than through any other. Yet the terms “safe and adequate” are even further removed from the contract issues under consideration than the terms “unfair and deceptive.” Clearly, incorporation of contingency (or prescribed service) plans into contracts of carriage would have no effect on the safety or availability of air travel, especially where the relevant obligations are already fully enforceable by the Department through cease and desist orders and sizeable civil penalties. Nevertheless, the Department’s position appears to be that section 41702 applies because a mandate over “safe and adequate transportation . . . clearly encompasses the regulation of contingency plans.” 75 Fed. Reg. 32,324. Most importantly, the issue here is not the regulation of contingency plans but the regulation of contracts of carriage. Yet it is also important to note that the Department’s position is nothing short of a bid to return to the days of pervasive regulation under the Civil Aeronautics Board. If the Department’s most general mandate—to “ensure safe and adequate transportation”—gives it the power to dictate not the parameters of safe air travel but rather the commercial contract terms on which it is offered, Congress and the industry will have achieved very little in thirty years of airline deregulation.

3. The Department's Proposal is Unsupported by the Record and Contrary to Sound Public Policy.

Less than six months before initiating this round of rulemaking, the Department determined it was unnecessary to require the incorporation of contingency plans into contracts of carriage. See 74 Fed. Reg. at 68,989 (“[T]he Department has decided that it will not require such incorporation at this time. Instead, the Department strongly encourages carriers to incorporate the terms of their contingency plans in their contracts of carriage . . . [and] will undertake a series of related measures to ensure the dissemination of information regarding each airline's contingency plans.”). In the latest notice, the Department does not explain the reasons for its hasty change of direction. It does note that, in the previous rulemaking, it “indicated that it would address this issue in a future rulemaking and take into account, among other things, whether the voluntary incorporation of contingency plan terms had resulted in sufficient protections for air travelers.” 75 Fed. Reg. 32,324. It also suggests that incorporation will be “an important means of providing notice to consumers of their rights, since that information will then be contained in a readily available source.” *Id.* Yet the Department offers no basis to conclude that incorporation will lead to more informed customers, nor does it point to any evidence that the plan it adopted only six months prior to its latest proposal failed to provide “sufficient protections for air travelers.” The Department, moreover, fails to offer any reasoned explanation for switching course so quickly and rejecting its prior determination that the decision whether to compel adoption of contingency plans should turn, at least in part, on the sufficiency of the protection actually achieved for consumers. Accordingly, the record does not support the Department's proposal; rather, incorporation will in fact undermine protections for air travel safety and convenience in two important respects. Thus, for the foregoing reasons, implementing the Department's proposal would be arbitrary and capricious.

a) *The Record Fails to Justify Incorporation on Notice Grounds.*

Attempting to justify its proposal, the Department has suggested that incorporating contingency plans into contracts of carriage would improve passenger notice. This claim is in tension with the facts. As of now, both the contingency plan and the contract of carriage are available in the exact same place: the carrier's website. See 14 C.F.R. § 259.6(b), (c) (requiring carriers to post both contract of carriage and contingency plan on the website). As of July of this year, not a single commenter at any stage of either this or the prior passenger protections rulemaking has suggested that passengers would better know their entitlements under the contingency plan if those entitlements were incorporated into the contract. To the contrary, all the commenters that have opined on the issue at any stage in these proceedings have suggested that “most passengers do not read the contract of carriage,” Public Submission of Ryan P. Mikolajczyk, Comment on DOT-OST-2007-0022-0005 (DOT Nov. 28, 2007); that “a few passengers out of a thousand read the specific carrier's contract of carriage,” Public Submission of Ryan McCord, Comment on DOT-OST-2007-0022-0220 (DOT Feb. 2, 2009); and that consumers often express uncertainty about rights even when they are contained in the contract of carriage, see Public Submission of Mindy A. Bockstein, NYSCPB, Comment on DOT-OST-2010-0140-0424 (DOT July 16, 2010) (noting that “several consumers have called . . . to ask what the rule is if they encounter a tarmac delay, or if they experience a problem such as lost luggage,” despite the fact that baggage loss terms are among those contained within the contract). In short, the only record evidence available suggests the opposite of what the Department contends—namely, that requiring incorporation of contingency plans (available on carrier websites) into contracts of carriage (also available on the carrier websites) will do little if anything to improve consumer notice of contingency plan terms.

b) The Record Fails to Justify the Need for an Alternative Enforcement Mechanism.

The Department has also failed to explain why, after so little time and with virtually no actual experience with the new rule's application in real world settings, it became convinced that Departmental enforcement would provide inadequate protection for consumers. The Department has the authority to seek substantial monetary penalties. See 49 U.S.C. § 46301. Given the size of that sanction, and the strong commercial and operational incentives carriers already have to avoid ground delays, there is no indication that carriers have failed or will fail faithfully to implement their delay contingency plans. Indeed, there is not a single piece of record evidence suggesting that a private cause of action is necessary to shore up the Department's new—and still largely experimental—regime. Changing course so early is not only unsupported by the evidence, it also denies to carriers and to the Department the opportunity to show that the current regime is fully capable of protecting the interests of passengers.

Indeed, the Department's rapid change of course represents the very definition of "capricious" decision making. See 5 U.S.C. § 706(a). The Department's stated goal for airline contingency plans in its very recent rule was to ensure "sufficient protection for air travelers." 74 Fed. Reg. 68,989. In issuing the latest notice, the Department does not even endeavor to show that this goal has not been met. Instead, it merely notes that many carriers have declined to do voluntarily what the Department abstained from requiring them to do in its rule. The Department's apparent unwillingness to even consider the question of whether the scheme it already adopted has resulted in sufficient protection for air travelers undermines its explanation for *both* its initial decision to abstain from regulation and its current decision to reconsider. Rather than articulating a reasoned public policy goal and attempting to ensure that its chosen tactics serve that end, the Department appears to be choosing and changing its strategies on a whim.

Most notably, the Department's own public statements belie the need for any additional enforcement mechanisms with regard to tarmac delays. On September 13, 2010, the Department issued a press release indicating that tarmac delays over three hours had fallen between July 2009 and July 2010 by over 98%. See Press Release, U.S. Department of Transportation, Long Tarmac Delays in July Down Dramatically from Last Year (Sept. 13, 2010), available at <http://www.dot.gov/affairs/2010/dot16810.html>. According to the Department itself, July witnessed only three delays of three hours or more, all of which were attributable to severe electrical storms at O'Hare International Airport on July 23. The same year-over-year data for May and June indicated an even steeper fall in long-term tarmac delays. *Id.* Although the data substantiates the predication that maximum tarmac delay rules would lead to greater numbers of cancellations,⁹⁰ it also shows that the rules are achieving the end to which they were enacted, and that further action such as mandatory incorporation into contracts of carriage is completely unnecessary to achieve "sufficient protection for air travelers."

In sum, the Department has implemented a more efficient and less expensive mechanism of enforcing its recent ground delay rule, yet has failed to even allow that plan the chance to demonstrate its effectiveness. It would be a serious error to jump headlong into a class action lawsuit creating scheme that will raise costs for carriers and consumers with no offsetting benefits. There is no evidence

⁹⁰ The cancellation rate grew from 1.2 percent in July 2009 to 1.4 percent in July 2010, an increase of over 16%.

or other basis to support such a step and no reason to take it. The ATA thus respectfully submits that the Department should refrain from enacting this ill-considered, harmful and unlawful proposal.

B. Full Fare Advertising

The Department proposes to fundamentally change the advertising practices in the aviation industry by prohibiting sellers of air transportation, including ticket agents, from providing full disclosure of taxes and other government mandated charges in advertised prices. In addition, carriers seeking to advertise “each way” fares requiring a roundtrip purchase would have to prominently and conspicuously note in the advertisement the roundtrip requirement and could not advertise such flights as “one-way” fares. Also, sellers of air transportation would be prohibited from automatically including optional services in connection with air transportation (such as insurance or entertainment options) in the purchase price if the consumer fails to opt out.

ATA members fully support fare transparency but raise policy and legal objections to the Department’s proposal that would require any advertising or solicitation by air carriers or agents to be one ticket price that includes all mandatory government taxes and fees. The original Full Fare Advertising rule was first issued in 1984.⁹¹ Soon after the Department issued an enforcement statement clarifying that advertising a base fare with a separate listing of government taxes and fees meets the intent of the regulation.⁹² This policy statement stood for 25 years and was reaffirmed in 2006 when the Department withdrew a proposal similar to this one. In the 2006 rulemaking the Department stated:

We find the reasons for maintaining the status quo to be most compelling. As enforced, § 399.84 protects consumers, facilitates price comparison, fosters fare competition, and affords sellers an appropriate degree of freedom to innovate. We have reviewed the Federal Trade Commission’s written policies on pricing activities, including its guidelines for activities on the Internet, and have concluded that our enforcement policy produces approximately the same balance between consumers’ and sellers’ needs as that which would result if air carriers were subject to the Commission’s jurisdiction. It would therefore be poor public policy to weaken or abolish our rule only to have to work our way back to the present equilibrium, case by slow and costly case, via enforcement under section 41712.⁹³

The Department continued...

...comments fail to establish a rationale for undoing over 20 years of permitting exceptions to the rule’s strict terms as a matter of enforcement policy. Strict enforcement of § 399.84 would still create marketing difficulties for sellers *without necessarily making prices more transparent to consumers*.⁹⁴ (Emphasis added).

In this NPRM, the Department suddenly proposes to reverse its longstanding and recently affirmed determination without any explanation of what has changed in the past four years to suddenly make current advertising practices unfair and deceptive. Simply declaring advertising practices unfair or

⁹¹ 49 Fed. Reg. 49440, December 20, 1984.

⁹² See 70 Fed. Reg. 73960, 73961, Price Advertising Notice of Proposed Rulemaking.

⁹³ 71 Fed. Reg. 55401, September 22, 2006, Price Advertising Withdrawal of Notice of Proposed Rulemaking.

⁹⁴ Id. at 55402.

deceptive without some explanation, justification or basis in fact would be arbitrary and capricious. Without an identified unfair or deceptive trade practice the Department cannot rely on section 41712 as authority to propose this change.

In addition, as the Department mentioned in 2006, FTC advertising rules permit advertising without including government taxes and fees. Several industries present examples where market competition resulted in unbundling of prices and associated advertising to present consumers with more options. These industries include hotel,⁹⁵ telecommunications,⁹⁶ legal services,⁹⁷ brokerage,⁹⁸ pipelines,⁹⁹ automobile selling, leasing or renting, utilities,¹⁰⁰ and real estate. In several areas, the FTC has affirmed the lawfulness of unbundled advertising practices.¹⁰¹ Given the wide and varied practice of unbundling services and advertising such services, it is not clear why the aviation industry should be treated differently and why the Department believes excluding taxes and fees until purchase is an unfair and deceptive practice contrary to the practice of these other industries. This is especially concerning because the Department has consistently allowed posting of air transportation prices separate from government taxes and fees for the past 25 years and has not explained what has changed to reverse this longstanding practice.

Contrary to the Department's stated claims, this proposal would actually provide less transparency than current advertising practices because the cost of providing one price inclusive of taxes and fees with additional information in "fine print" about taxes and fees, along with carrier concerns over enforcement, will effectively suppress information on government taxes and fees. This will provide the public with less, not more transparency. The Department's policy here does not meet the goal of the regulation, which is to provide full disclosure of a price for air transportation, not air transportation and all other fees an airline would not include in a price but for a government mandate to do so. This lack of transparency will be substantial. Government add-on fees and taxes can amount to more than 20% of the cost of a fare. The proposal would mask the amount of taxes and fees passengers must pay, and provide no consumer benefit. This restriction on advertising may also be an unconstitutional restriction on commercial free speech.¹⁰²

⁹⁵ <http://travel.yahoo.com/p-interests-35116808>

⁹⁶ http://www.fcc.gov/wcb/cpd/triennial_review/

⁹⁷ <http://www.civiljusticenetwork.org/pages/unbundled.html>

⁹⁸ http://bannronn.com/market_basics/us_brokers/online_discount_stock_broker.html

⁹⁹ <http://www.ferc.gov/legal/maj-ord-reg/land-docs/restruct.asp>

¹⁰⁰ http://www.energyvortex.com/energydictionary/unbundled_services.html

¹⁰¹ Automobile Leasing, <http://business.ftc.gov/documents/bus18-advertising-consumer-leases>; Automobile Renting, <http://www.ftc.gov/opp/advocacy/1989/V890027.PDF>; Real Estate Services (p3, p6),

<http://www.ftc.gov/os/adjpro/d9320/091102realcompopinion.pdf>

¹⁰² The Department's abandonment of more than 20 years of enforcement policy allowing the separate listing of taxes and fees imposed by governments on air travelers on a per passenger basis also raises serious concerns under the First Amendment, which protects commercial speech – expressions related solely to the economic interests of the speaker and its audience, *Virginia Pharmacy Bd. v. Virginia Citizen Consumer Council*, 725 U.S. 749, 762 (1976) – from unwarranted governmental regulation. *Id.* at 761-762. See also *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995), and *Greater New Orleans Broadcasting Assoc. Inc. v. United States*, 527 U.S. 173 (1999).

In *Central Hudson*, the Court adopted a four part test for assessing the constitutionality of restrictions imposed on commercial speech:

Special Aviation ¹⁰³ Tax or Fee	1972	1992	1/1/2010
AIRPORT & AIRWAY TRUST FUND (FAA)			
Passenger Ticket Tax ^{1a} (domestic)	8.0%	10.0%	7.5%
Flight Segment Tax ^{1a} (domestic)	---	---	\$3.70
Frequent Flyer Tax ²	---	---	7.5%
International Departure Tax ³	\$3.00	\$6.00	\$16.10

[whether the speech] concern[s] lawful activity and [is] not ... misleading[,] whether the asserted governmental interest [in regulating the speech] is substantial[,] [and if both questions are answered in the affirmative,] ... whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The Court extended First Amendment protections to commercial speech because:

[c]ommercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interests in the fullest possible dissemination of information. In applying the First amendment to ... [commercial speech, the Court has] rejected the highly paternalistic view that government has complete power to suppress or regulate [such] ... speech.

Id. at 561-562 quoting *Virginia Pharmacy Bd.* (internal quotation marks omitted).

These are the very principles that led the Department to accept the separate listing of government-imposed taxes and fees that carriers are required to collect from passengers for remittance to the levying agency. As the Department explained,

[s]eparate listing of these charges is not deceptive because it informs consumers of the exact amount that will be collected and passed on to the government. The carrier retains no part of these charges. Not only is separate listing of these charges not deceptive, but we believe that passengers benefit from knowing how much they are paying to government entities apart from the fares they pay the carriers.

Clarification of Amendment of Exemption to Allow Separate Listing of Service Fees in Advertisements for Air Transportation, Order 88-8-2, August 2, 1988, at 3. *See also* Price Advertising, 54 Fed. Reg. 31,052, 31,053 (July 26, 1989) (with the separate listing of government-imposed taxes and fees, an ordinary person reading such an ad would be aware of the total amount to be paid for the transportation and would also be provided valuable information on government-imposed charges).

Although the First Amendment does not extend to commercial speech that does not “accurately inform the public about lawful activity,” or is “more likely to deceive the public than to inform it[,]” *Central Hudson* at 563-564, the separate listing of government-imposed taxes and fees suffers from neither of these limiting characteristics, as the Department has previously acknowledged. Nor has the Department identified an important governmental interest that would be served by burdening carriers with restrictions on their ability to inform the public of the taxes and fees governments impose on air travel, as the Department’s 1988 and 1989 discussions highlight. As such, the Department’s sudden about face on the issue of the separate listing of such taxes and fees simply cannot be squared with the First Amendment protections accorded to truthful, non-deceptive commercial speech.

¹⁰³ See <http://www.airlines.org/Economics/Taxes/Pages/GovTaxesandFeesonAirlineTravel.aspx>

International Arrival Tax ³	---	---	\$16.10
Cargo Waybill Tax ^{1b} (domestic)	5.0%	6.25%	6.25%
Commercial Jet Fuel Tax (domestic)	---	---	4.3¢
Noncommercial Jet Fuel Tax (domestic)	7.0¢	17.5¢	21.8¢
Noncommercial AvGas Tax (domestic)	7.0¢	15.0¢	19.3¢
ENVIRONMENTAL PROTECTION AGENCY (EPA)			
LUST Fuel Tax ⁴ (domestic)	---	0.1¢	0.1¢
LOCAL AIRPORT PROJECTS			
Passenger Facility Charge	---	Up to \$3.00	Up to \$4.50
DEPARTMENT OF HOMELAND SECURITY (DHS)			
September 11th Security Fee ⁵	---	---	\$2.50
Aviation Security Infrastructure Fee ⁶	---	---	Varies
APHIS Passenger Fee ⁷	---	\$2.00	\$5.00
APHIS Aircraft Fee ⁷	---	\$76.75	\$70.50
Customs User Fee ⁸	---	\$5.00	\$5.50
Immigration User Fee ⁹	---	\$5.00	\$7.00

Including all taxes and fees in an advertised price would also impact carrier competition because fees vary from airport to airport. Carriers that operate from airports with higher or additional fees would be at a competitive disadvantage to carriers operating at nearby airports with lower fees. The only truly comparable price is the base fare. In addition, carriers providing routing with multiple legs will be disadvantaged compared to carriers providing direct service because all taxes and fees from each airport would have to be included in the advertised price, making it artificially higher. Disadvantaging multiple leg routings could impact service to smaller communities; if direct flights are favored carriers may opt to provide more service to larger hubs and provide less frequent or no service to smaller communities. For carriers to be asked to provide a fare that includes government imposed taxes and fees appears to be an attempt by the Department to hide the fact that airline passengers pay high taxes and fees for air travel, which is already taxed more than alcohol, tobacco and firearms.

Finally, this proposal will drive carrier direct costs by requiring additional route pricing analysis to determine if each route is viable. This additional analysis will be separate and distinct from any pricing analysis that airlines currently undertake and will drive significant costs. Carrier marketing departments would also have to spend additional time determining how best to advertise within the prescriptive proposal. Carriers would also have to make internal programming changes, website changes, and expend audit and compliance resources to test and ensure compliance with the new rule.

Question: We also seek comment on the costs and benefits of requiring that two prices be provided in certain air fare advertising – the full fare, including all mandatory charges, as well as that full fare plus the cost of baggage charges that traditionally have been included in the price of the ticket, if these prices differ. We would regard charges for one personal item (e.g., a purse or laptop computer), one carry-on

*bag, and one or two checked bags as baggage charges that traditionally have been included in the price of a ticket.*¹⁰⁴

ATA comment: ATA members strongly object to this proposal because having two prices would provide less transparency and would be more confusing to passengers, especially when not all passengers use optional services. In effect the Department is imposing an “opt out” concept that it seeks to prohibit in proposed section 399.84(c). Many passengers (in some cases as many as half) do not check bags and others pay no baggage fee because of their status with a carrier’s frequent flyer program, charge card or other carrier exemptions.. In addition, the European Union has taken the opposite approach of this proposal, allowing carriers such as Ryan Air, a successful low fare innovator operating in Europe, to advertise unbundled fares. The operating environment in the EU permits Ryan Air to offer exceedingly low fares, promote the fares in advertising, resulting in a very successful business model and greater consumer options. The Department should reconsider this proposal and continue to allow the same innovation currently permitted in the U.S. and in other countries. The best solution is to require a link that discloses all fees, so passengers can choose their preferred optional services.

It is also unclear how a carrier would comply with a rule to advertise a fare that includes baggage fees when many passengers do not know if or how many bags they will use until well after the point of booking and the carrier will not know how many bags a customer will check or how large or heavy the bags may be, which would also impact baggage fees. Because passengers must choose which options they would like during the search process or after purchasing the air fare, two prices - one for a fare and one for fare with passenger selected options - could only be provided at the very end of the ticket purchase process or as a separate transaction after purchasing airfare. The Department has presented no evidence that airline customers, unlike theatre-goers or patrons of professional sporting events, are deceived by advertising that shows the cost of air transportation alone, without including the cost of optional ancillary services. Additionally, any requirement that an advertised price must include baggage fees fails to recognize widespread consumer awareness of ancillary fees. It does not make sense to require bundled prices when most passengers understand that baggage charges exist on some carriers for some passengers. Airline customers do not have rights different than theatre or sporting event customers simply because the airline business model has evolved over time.

*Question: Should such a requirement for a second price, if adopted, be limited to the full fare plus the cost of baggage charges? Should the Department require carriers to include in the second price all services that traditionally have been included in the price of the ticket such as obtaining seat assignments in advance? Why or why not?*¹⁰⁵

ATA Comment: The Department’s questions indicate it currently does not have enough information to determine whether additional disclosure of fees is in the public interest. Moreover, the Department has not quantified the costs or benefits in accordance with Executive Order 12866. It is also clear the Department has not decided how such an advertisement would be practically implemented given that a full fare with optional services cannot be known until each individual passenger selects options during the purchase process. The Department has also provided no rational basis for determining the service items that have been “traditionally included in the price of a ticket.” For example, advance seat selection practice has varied widely among carriers for more than a decade, some not charging at all,

¹⁰⁴ 75 Fed. Reg. 32329.

¹⁰⁵ 75 Fed. Reg. 32329.

some charging prices for seats with extra leg room, some assigning many seats at the gate or offering no advanced seating assignment, and some providing access to early boarding. Therefore, like many ancillary fees, it would be impossible to include seat selection in a second price because carrier practices vary and many passengers have the option to choose a different seat and boarding priority up until the time of check in at the airport.

Question: In the alternative, the Department is considering requiring sellers of air transportation to display on their websites information regarding a full price including optional fees selected by the passenger when a prospective passenger conducts a query for a particular itinerary. In other words, passengers would be able to conduct queries for their specific needs (e.g., air fare and 2 checked bags; air fare, 1 checked bag, and extra legroom). The benefit of this approach is that consumers would be able to more easily compare airfares and charges for their own particular itinerary and options. We invite comment on this approach, including its feasibility, as well as its costs to airlines and ticket agents.¹⁰⁶

ATA comment: The Department's questions in effect ask the public how to draft a proposal in this area. The Department does not have enough information to make a decision or publish proposed regulatory text (or include this alternative in its cost benefit analysis). Without specific regulatory text it is impossible to provide substantive comments on this pre-decisional material (and provide potential costs). If the Department chooses to pursue this matter, additional notice and opportunity for comment in accordance with the APA would be necessary. Because carriers vary on (1) what optional services are available on a particular flight; (2) which customers can choose optional services, and (3) what services if offered incur a fee, it would be impossible to mandate a set of criteria that carriers would have to include in a query. In addition, carriers support transparency of fees and ample information on the cost of such services is already available on carrier websites.

C. GDS Distribution

Question: The Department is also considering requiring that carriers make all the information that must be made directly available to consumers via proposed section 399.85 available to global distributions systems (GDS) in which they participate in an up-to-date fashion and useful format. This would ensure that the information is readily available to both Internet and "brick and mortar" travel agencies and ticket agents so that it can be passed on to the many consumers who use their services to compare air transportation offers and make purchases. We invite comments on this proposal, including the present ability of carriers to meet this requirement, the potential costs of the requirement, including costs of developing new software or systems to deliver such information to GDS's, if necessary, and the benefits of this requirement.¹⁰⁷

ATA comment: Carriers are currently developing new systems and expanding existing systems to sell optional services on their websites at the time customers purchase tickets. Whether carriers should provide fee schedules for optional services to GDSs, or authorize travel agents to sell such services and collect the fees from customers, are among the principal competitive issues presently under consideration or negotiation among carriers, GDSs, and travel agents.

¹⁰⁶ 75 Fed. Reg. 32329.

¹⁰⁷ 75 Fed. Reg. 32329.

Although not explicitly stated in this preamble question, the Department presumably would seek to rely on its unfair and deceptive statutory authority if it were to take action in this area. However, the Department has failed to identify what unfair and deceptive practice it would seek to prevent in this instance. There is nothing unfair or deceptive about private parties negotiating to determine what information is provided between them. The Department cannot rely on its unfair and deceptive statutory authority if it will not in fact prevent some action harmful to the public and acting without such a determination would be arbitrary and capricious.

The parties may or may not reach commercial agreement on this highly contested matter. A government mandate that carriers must provide GDSs with fee schedules would further strengthen GDS market power, thwart the entry of new competitors in the GDS market, and expose consumers to higher prices necessary to recoup excessive GDS booking charges.

When the Department deregulated GDSs in 2004, with support from the Department of Justice, it voiced concern over GDS market power.¹⁰⁸ Nonetheless, citing changes in GDS ownership and developing technologies, DOT and DOJ expressed some degree of optimism that competitive forces in a deregulated market would reduce the market power held by GDSs.

GDSs have been forced to change many of their anti-competitive practices. Nonetheless, six years later, the GDS market is more concentrated than ever as new entrants have either failed or been acquired by the biggest players. In 2004, the U.S. GDS market was divided among four companies, none of which had more than a 50% share, and several alternative GDSs promised to re-invigorate competition.

By 2009, the U.S. market had been transformed into a duopoly, with Sabre accounting for almost 60% of U.S. point-of-sale bookings and together with Travelport (which by that point had acquired both Galileo and Worldspan) accounting for more than 90%. These CRSs are threatened by internet innovations and would like to thwart the many new internet distribution firms.

Three new entrants have attempted to enter the GDS market since 2004, and none has succeeded. ITA left the market to focus on serving as an airline hosting system. G2 Switchworks was acquired by the same group that owns Sabre, sold its code to Travelport, and was liquidated. Farelogix was unable to penetrate the GDS market, turned to providing direct connections for airlines, and remains under attack by the GDS duopoly

In the final CRS rule in 2004, the Department was careful not to take any action that would strengthen the superior bargaining leverage already enjoyed by GDSs. In maintaining the prohibition against contract clauses requiring a participating airline to provide all web fares as a condition to participation (sometimes referred to as most-favored-nation provisions), the Department said that to do otherwise “would deny the airline the ability to use its control over access to its web fares as a bargaining leverage to obtain better terms and prices for system participation.”¹⁰⁹ The Department went on to state that “such a clause would additionally tend to prevent the development of alternative sources of information and booking channels, for a travel agency would have less incentive to use alternatives if the system used by the agency already provided complete information on web fares.”¹¹⁰

¹⁰⁸ 69 Fed. Reg. 976, January 7, 2004.

¹⁰⁹ 69 Fed. Reg. 992, col. 1.

¹¹⁰ Id.

In the final rule, the Department also stated that "airlines should have some bargaining power against systems if each airline can choose which services and fares will be saleable through each system and the level at which it will participate in each system."¹¹¹ Put another way, airlines should be able to use their control over access to their web fares as a bargaining tool for getting better terms for CRS participation. The airlines' ability to deny access to their web fares has caused two of the systems, Sabre and Galileo, to give airlines booking fee reductions in exchange for the ability to sell their web fares."¹¹² Despite limited progress against the GDS duopoly, carriers have been repeatedly retaliated against by GDS vendors for attempting to reduce GDS fee and practices. In 2004, after the repeal of the GDS rules, Northwest Airlines attempted to charge back all GDS fees by Sabre to travel agents. Sabre sued Northwest and pulled all of Northwest's international displays.

A similar situation is presented here, except that instead of mandatory access to web fares, the issue is mandatory access to ancillary fee information. For all the reasons stated by the Department in the 2004 CRS rule with respect to bargaining leverage, carriers should not be compelled to provide fee information to GDSs. This is without question a matter for bargaining in contract negotiations, and a critical element of disciplining the growing market power that GDSs hold over airlines. Additionally, in the case of at least one ATA carrier, providing fee information for certain services is impossible. In this carrier's case many charges for non-transportation services vary depending on the frequent flyer status of the customer (a status that can extend to the traveling party or family); whether the passenger has a carrier loyalty credit card; and whether the passenger has purchased, among other options, an annual subscription to some ancillary services. Any fee information provided to GDSs would not necessarily apply to all passengers and these fees and services at the present time are not tailored to be sold by intermediaries. DOT should not let the GDS's acquire more market power, acquire content for free or injure airline sources in the distribution network. Doing so will hurt consumers because fares will be under pressure to cover the power granted to GDS systems. For instance, international GDS costs are about \$25 per ticket.¹¹³

VI. Proposals for which we have no comment

A. What are the costs and benefits for narrowing or expanding contingency plans

Question: We also seek comment on the cost burdens and benefits should the requirement to have a contingency plan be narrowed or expanded. For example, while we are proposing here to include foreign carriers that operate aircraft originally designed to have a passenger capacity of 30 or more seats to and from the U.S., we invite interested persons to comment on whether, in the event that we adopt a rule requiring foreign carriers to have contingency plans, we should limit its applicability to foreign air

¹¹¹ 69 Fed. Reg. 1005.

¹¹² 69 Fed. Reg. 1029, col. 3.

¹¹³ Southwest Airlines supports these comments except with respect to the GDS fee disclosures as discussed in Section V(C). Southwest's position on this issue is set out in its own comments filed in this docket.

carriers that operate large aircraft to and from the U.S.—i.e., aircraft originally designed to have a maximum passenger capacity of more than 60 seats.¹¹⁴

ATA members have no comments to this question.

B. Expansion of Tarmac Delay Data Reporting Requirements

Question: We are tentatively of the opinion that we should expand the pool of carriers that must file information with the Department regarding tarmac delays to U.S. carriers and foreign carriers that operate any aircraft originally designed with a passenger capacity of 30 or more passenger seats with respect to their operations at U.S. airports.¹¹⁵

ATA members have no comment to this question.

Question: We seek comment on whether we should limit the requirement to file tarmac delay data to U.S. and foreign air carriers that operate large aircraft to and from the U.S.—i.e., aircraft originally designed to have a maximum passenger capacity of more than 60 seats. Commenters should explain why they favor such a limitation and suggest alternate approaches to capturing tarmac delay data.¹¹⁶

ATA members have no comment to this question.

Guidance: We recognize that carriers subject to our new contingency plan rule that went into effect April 29, 2010, are required to retain for two years certain information regarding tarmac delays of 3 hours or more. We note that the reporting requirement proposed in this notice is separate and distinct from that information retention requirement, with a different purpose. Where that rule is focused on carrier compliance with consumer protection-related requirements and requires only that carriers retain the information for a limited period of time, we propose here that carriers report monthly a set of data regarding tarmac delays that will provide the Department more complete information on lengthy tarmac delays throughout the air transportation system in the U.S.¹¹⁷

ATA members have no comment to this guidance.

Question: We welcome suggestions from the public and the industry on whether there are other means to further reduce the carriers' burden yet still effectively achieve the goal of this proposal.¹¹⁸

ATA members have no comment to this question.

C. Customer Service Plan Expansion to Foreign Carriers

Question: We ask interested persons to comment on whether the proposed requirement for foreign air carriers to adopt, follow and audit customer service plan should be narrowed in some fashion – e.g., should never apply to aircraft with fewer than 30 seats?¹¹⁹

¹¹⁴ 75 Fed. Reg. 32320.

¹¹⁵ 75 Fed. Reg. 32321.

¹¹⁶ 75 Fed. Reg. 32322.

¹¹⁷ 75 Fed. Reg. 32322.

¹¹⁸ 75 Fed. Reg. 32322.

ATA members have no comment to this question.

Question: We would like foreign carriers to comment on whether similar plans already exist, and if so, how they currently implement such plans.¹²⁰

ATA members have no comment to this question.

D. Response to Consumer Problems

The Department proposes to extend the December 2009 final rule on responding to consumer complaints to foreign carriers and carriers operating smaller aircraft (by expanding the term “covered carrier”). These changes include adding a designated advocate for passenger’s interests, informing consumers how to complain, and setting complaint response times. The only proposed change for ATA members is to add that complaint procedures should also be provided upon request at ticket counters and boarding gates staffed by carrier contractors.¹²¹

ATA members have no comment on these proposed changes.

Question: We invite interested persons to comment on this proposal. What costs and/or operational concerns would it impose on foreign carriers and what are the benefits to consumers?¹²²

ATA members have no comment to this question.

E. DBC Limits

Question: We seek comments on whether the proposed increase in DBC minimum limits is called for and whether any such increase based on the CPI-U calculation is a reasonable basis for updating those limits or whether some other amounts would be more appropriate to adequately compensate passengers for the inconvenience and financial loss brought about by involuntary denied boarding. If not, by how much should the amounts be increased, if at all?¹²³

ATA members have no comment to this question.

F. Expansion of Baggage Fee Notice

Question: The proposed section 399.85 would apply to all U.S. and foreign air carriers that have websites accessible to the general public in the United States through which tickets are sold, as well as to their agents. The Department invites comment on alternative proposals, including limiting the applicability of the proposed section 399.85 to all flights operated by U.S. carriers, U.S. and foreign carriers that operate

¹¹⁹ 75 Fed. Reg. 32322.

¹²⁰ 75 Fed. Reg. 32322.

¹²¹ See proposed section 259.7, 75 Fed. Reg. 32340.

¹²² 75 Fed. Reg. 32325.

¹²³ 75 Fed. Reg. 32325.

any aircraft with sixty (60) or more seats, or U.S. and foreign carriers that operate any aircraft with thirty (30) or more seats. In addition, we invite comment on whether the rule should apply to all ticket agents, as defined in 49 U.S.C. § 40102, which includes not just agents of carriers, but also others who, as a principal, “sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for air transportation.”¹²⁴

ATA members have no comment on this question.

G. Expansion of Post Purchase Price Increase Proposal

Question: We ask for comment on whether the [post purchase price increase] regulation should cover a greater number of carriers and operations, including operations of smaller U.S. carriers and/or international operations of U.S. and foreign carriers. What would be the cost or benefit of expanding coverage to those additional carriers?¹²⁵

ATA has no comment on the potential expansion of this proposal.

VII. International Analysis

The Trade Agreements Act (19 U.S.C. 2531-2533) prohibits agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

The Department did not include a Trade Agreements Act analysis in its proposal and it must do so before proceeding given the proposed expansion to foreign carriers and international flights. For instance, the Department should consider whether any of the proposed items conflict with foreign regulatory requirements. In particular the Department should weigh whether foreign governments will retaliate against U.S. carriers operating outside the U.S., given the application of this proposal to foreign carriers.

VIII. Cost and Benefit Analysis Comments

The Department contracted with Econometrica, Inc. to conduct a Preliminary Regulatory Analysis (PRA) for this proposal. The PRA assessed the cost and benefits of eleven subject areas and concluded that the expected present value of passenger benefits from the proposed requirements is \$87.59 million and the expected present value of costs to comply with the proposal is \$25.98 million.¹²⁶ However, for seven of the eleven analyzed subject areas the Department fails to provide either a cost or benefit estimate and only one of the eleven subjects include an estimated benefit higher than estimated cost. With such

¹²⁴ 75 Fed. Reg. 32330.

¹²⁵ 75 Fed. Reg. 32331.

¹²⁶ 75 Fed. Reg. 32332-32333, Docket Number DOT-OST-2010-0140-0003, page 2.

incomplete data, the Department has not met its obligations under Executive Order 12866 to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”

To meet its obligations under E.O. 12866 the Department will need to provide an estimate for each of the incomplete/not estimated items in PRA Table 33, which is included as Attachment 1. Without estimates and analysis it will impossible for the public, the Department, or the Office of Management and Budget to determine the true estimated impact of this rulemaking and whether this proposal will provide more benefits than costs. We provide comments on various provisions of the PRA and respectfully request the Department consider them before proceeding.

A. Litigation Costs

One of the areas where the PRA does not provide any estimate of benefits or costs is the Department’s renewed proposal to require contingency plans and customer service plans in carrier contracts of carriage. Econometrica stated that it is not possible to develop quantitative estimates of benefits for this requirement; the Department speculated that this particular requirement, if adopted, would provide consumers with notice of their rights, “since that information will then be contained in a readily available source.”¹²⁷ Given that carriers currently are required to post their CP and CSP’s on their websites, the estimate of an additional benefit is illusory. Indeed, as discussed above, this requirement may have a negative impact on consumers.

In terms of costs, ATA has previously submitted the results of a member survey of incremental litigation costs that would result from a requirement that carriers incorporate contingency plans and customer service plans in their contracts of carriage.¹²⁸ We incorporate by reference our prior comments on the cost of this item. Our survey indicates that, on average, each member would see an increase of 250 claims per year if customer service plans are incorporated into contracts of carriage resulting in an additional \$500,000 annual litigation costs per member or \$5.5 million in ongoing additional litigation costs for ATA members. Of course these estimates do not include the Department’s expansion of this rule to regional carriers and foreign carriers operating to or from the U.S.; expanding the number of carriers subject to this requirement would greatly increase the estimated cost.

The Department should have started with the ATA estimate or used another reasonable estimate of the incremental litigation costs that would arise from this proposal, multiplied by the number of affected U.S. and non-U.S. carriers. Even conservatively assuming that including smaller and foreign carriers adds 50% in incremental litigation costs to previous ATA estimates, the incremental litigation costs would be \$17.5 million per year. The Department’s claim that litigation costs could not be reasonably estimated is not credible, particularly in light of the benefit it was able to estimate from the full fare advertising proposal. Clearly the multi-million dollar annual cost of incremental litigation alone means that this proposal fails on a cost-benefit basis.¹²⁹

¹²⁷ 75 Fed. Reg. 32324.

¹²⁸ See pp 40-43, Docket number DOT-OST-2007-0022-250.1

¹²⁹ We also note that carriers could opt to remove items from its CSP that exceed the Department’s proposed regulatory standards in order to minimize its liability, which would further reduce any potential benefit of this proposal.

B. Full Fare Advertising

Econometrica estimates that the full fare advertising proposal would generate the greatest benefit of all eleven topics, so much so that it and the Department rely on this single item to justify the entire rulemaking. The Department should not rely on the alleged positive benefits from a single, severable proposal to justify all other aspects of this rulemaking. Fully 84% of all benefits from the rulemaking come from the full fare advertising proposal, which translates to a net present value of \$73.50 million over ten years.¹³⁰ The majority of this benefit derives from Econometrica’s estimate of reduction of “dead weight loss,” \$5.8 million per year and \$58 million over ten years. Econometrica asserts that this deadweight loss arises from prospective air travelers misallocating their expenditures to air travel that they would have spent elsewhere if they knew earlier in the booking process the total travel costs including taxes and fees. Econometrica calculates that fewer passengers would purchase air transportation if they were aware of total air travel costs earlier in the booking process. It estimates 438,086 passengers who would have purchased tickets absent this proposal will elect not to do so if the rule is adopted as proposed. Oddly, this is considered a benefit rather than a cost. Econometrica supports its theory with a study of grocery store shoppers, which supposedly showed that shoppers purchased fewer products when posted prices included taxes.¹³¹

We disagree with Econometrica’s analysis and conclusions because this aspect of the proposal would not result in fewer purchased tickets. Moreover, if that were the result, fewer traveling passengers should not be considered a benefit. First, the assertion that this aspect of the proposal would result in over 400,000 fewer ticket sales per year is incorrect; passengers currently see a base fare with all government mandated taxes and fees and all optional services fully disclosed during the ticket buying process – commonly early in the price comparison process and always at a point before purchase. Thus, there is no basis in fact to conclude that fewer sales would occur. In any case, even if the decrease in passengers materialized as Econometrica theorizes, this loss in passengers would be a cost to carriers, not a societal benefit.¹³² The Department must also include the cost to airports and small communities as well as to tourism if a substantial number of passengers do not book flights as result of this proposal. Also, as shown above, this proposal will drive less fee transparency and result in skewed price comparisons.¹³³

Second, Econometrica determined that a decrease in passengers would be a benefit, it never explains why that is so. We fail to see how fewer passengers is positive, especially where alternate modes of transportation advertise prices without government mandated taxes or fees or additional options, so passengers would be in the same place regardless of the mode of transportation. Given the distortions

¹³⁰ PRA page 61.

¹³¹ PRA page 40.

¹³² Additionally, Econometrica’s estimate for “revealed” prices of 5% is low. PRA Table A-15 states that in addition to the 7.5% excise tax, taxes and fees revealed under full fare advertising would be 5%. In fact, taxes and fees incremental to fare and excise tax commonly exceed 5%, see for example the Bureau of Transportation Statistics Passenger Origin and Destination Survey indicates 9% and some estimates range as high as 20%. See <http://www.airlines.org/Economics/Taxes/Pages/GovTaxesandFeesonAirlineTravel.aspx>

¹³³ Prices would be skewed not only among carriers but also in contrast to all other goods and services that do not require all taxes and fees be included in advertising.

this proposal would introduce, we disagree that there would be a reduction in deadweight loss resulting from display of the full cost of travel earlier in the booking process.

Third, the Econometrica analysis systematically ignores the costs to air carriers of the full fare advertising proposal. According to Econometrica, this proposal will ensure that some share of sales will be diverted to other distribution means that are more costly than carrier websites. Also, higher costs to comply with the rule in traditional and online advertising are excluded, as are regulatory fines.

Finally, the study Econometrica relies on justify its deadweight loss theory applies more closely to current practice than to the proposal. DOT proposes to require that advertising include all taxes and fees, while the study upon which Econometrica relies does not apply to advertising, but illustrates that display of a higher price at the place and close to the time of purchase (supermarket aisle) depresses expenditures. In fact, consumers currently see the full price prior to purchase at the place and time of purchase (like the supermarket study) and therefore, Econometrica cannot rationally claim any reduction in deadweight loss for this proposal because consumers are already aware of the full price of their air travel prior to purchase. The Department's analysis fails to demonstrate (directly or by analogy) that a requirement that advertisements must include all taxes and fees will have any effect on the decision to purchase air travel. The claimed benefits of more optimal purchasing decisions (and reduced deadweight loss) in this proposal are simply wrong. Even if there were net positive benefits from the full fare advertising proposal, which there are not, these purported benefits cannot be used as the means by which all other proposals in this rulemaking are justified.

We also note the following weaknesses of the cost/benefit analysis of the full fare advertising proposal:

- The PRA overstates the number of passengers impacted by this proposal because it uses passenger enplanements. The appropriate metric is origin-destination (O&D) traffic, commonly called one-way passengers.¹³⁴
 - For example, according to the PRA, a customer traveling from DCA to SEA via ORD would be represented in the analysis as two passengers (DCA to ORD and ORD to SEA).
 - If the O&D metric is used, then this same customer would be represented as one passenger (DCA to SEA).
 - In an attempt to determine the true number of customers who are purchasing tickets, a 1995 American Travel Survey from BTS is cited showing the average travel trip party size is 2.6 passengers – this overstates current observations by nearly 85%
 - An ATA survey from 2008 shows that the average number of passenger bookings per passenger name record was 1.37
 - A study from the Travel Industry Association of America (2007) shows that the average party size for air trips is roughly 1.4 persons
 - The PRA inappropriately relies on a PhoCusWright study from 2009 which estimated that 72% of total passengers book their trip online (carrier websites + OTAs)¹³⁵
 - An ATA survey from 2008 shows this value to be 52%

¹³⁴ See PRA Table 15, page 41.

¹³⁵ See PRA page A-29.

- DOT assumes that the “savvy passenger” would save five minutes as a result of the full fare advertising proposal – but there is absolutely no evidence or basis to support this assertion, which does not meet the data quality standards required for a cost benefit analysis under Executive Order 12866.
- DOT uses *American Express Business Travel* as a source for average airfare prices.¹³⁶ However, AmEx’s customer base is, as the title “Business Travel” reveals, primarily driven by corporate travelers. These travelers tend to rely on traditional travel agencies, not websites and online agencies. The ticket prices used in the analysis are not representative of the average traveler or travelers who primarily book online
 - BTS’s O&D survey is the appropriate source for industry airfares paid for the purposes of this rulemaking.
- The Final Regulatory Analysis for the previous rule shows just 1,983 annual advertising-related complaints made to the Department. It is highly unlikely that all of these complaints were from passengers stating that they were deceived about taxes and fees and/or the price of ancillary services. Even imagining that every fare advertising complaint DOT received was a complaint about full fare advertising, and that the \$6.8 million cost to carriers of the proposed rule is correct, the Department’s regulatory “solution” would cost \$3,459 per complaining party. Even using DOT’s multiplier of 61 for the share of consumer complaints relative to complaints to DOT, the “solution” to this perceived problem would cost \$56.70 per complaint – a cost far in excess of the general benefit of this proposed rule.¹³⁷

C. Miscellaneous Comments

We note several areas the Department should consider in drafting its Final Regulatory Evaluation for this proposal:

- Costs concerning increased refunds to passengers experiencing “significant delay” are not included in the PRA. As recent carrier experience shows, the December tarmac delay rules already push more flights over any threshold of “significant” delay since flights must return to gate prior to three hours to avoid significant penalties. The combination of the existing three hour rule, which may be extended to additional carriers, and the potential new requirement to refund tickets if a passenger decides not to travel because of a delay, could create substantial costs that must be quantified before proceeding. According to the Final Regulatory Analysis for the December rulemaking, about 200,000 passengers averaged 3+ hr taxi out delay in 2007 and 2008.¹³⁸ . Therefore the Department should include a cost associated with a percentage of passengers choosing not to travel after a delay caused when an aircraft must return to the gate

¹³⁶

Id.

¹³⁷

Final Regulatory Evaluation, Enhancing Passenger Protections, DOT-OST-2007-0022-0265, Table 19, p

48.

¹³⁸

DOT-OST-2007-0022-0265, p. 40.

to comply with the 3 hour rule. The Department cannot reasonably ignore this potentially significant cost.

- The PRA underestimates the cost to extend customer service plan requirements to foreign carriers and regional carriers. The Final Regulatory Analysis for the prior passenger protection rulemaking lists the cost to create and audit a customer service plan to be about \$91,000 per year for carriers that do not currently have a plan.¹³⁹ The PRA cost estimate of extending customer service plans to foreign carriers and regional carriers is \$3.24 million.¹⁴⁰ Given its earlier estimate of the cost per plan, it would take just 36 carriers at a cost of \$91,000 each to reach the PRA estimate. DOT has understated the costs of this aspect of its proposal since there are 86 foreign carriers that will have to develop and audit a customer service plan.¹⁴¹
- The Department also asks whether it should expand this proposal to require marketing carrier responsibility for flights operated with its code.¹⁴² As we discuss in section III, operating carrier compliance with a contingency plan and customer service plan for each of its code-share partners would be virtually impossible. The Department would have to estimate the cost for carriers to adhere to code-share partner policies before deciding whether to adopt this proposal.
- In addition, the Department asks whether it should change its policy regarding carrier responses to comments made on social media websites such as Facebook or Twitter.¹⁴³ The Department would also need to include costs for additional staff to research and respond to such comments before deciding to change its policy in this area.
- The Department also would have to include cost estimates if it were to change the IDBC formula to a percentage of a fare (200%/400%) with no cap,¹⁴⁴ and a cost estimate for compensating zero fare ticket holders, including costs for compensating passengers that did not pay for a ticket.¹⁴⁵
- The Final Regulatory Analysis of the previous rulemaking showed the benefits of the existence of CS plans as unquantified.¹⁴⁶ That Final Regulatory Evaluation states that that no good estimate has been found of value of improved customer service.¹⁴⁷ By contrast, the present NPRM asserts specific quantified benefits of these Customer Service plans. The Department should provide the source of its ability to quantify benefits arising from the mere existence of such plans.

¹³⁹ DOT-OST-2007-0022-0265, Table 28, p. 36

¹⁴⁰ PRA, Table 33, p. 60.

¹⁴¹ PRA, Fn. 5, p. 6.

¹⁴² 75 Fed. Reg. 32321.

¹⁴³ 75 Fed. Reg. 32325.

¹⁴⁴ 75 Fed. Reg. 32325.

¹⁴⁵ See proposed 14 CFR 250.5(c), 75 Fed. Reg. 32338.

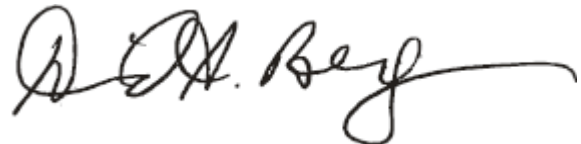
¹⁴⁶ DOT-OST-2007-0022-0265, p. 66.

¹⁴⁷ Id at page 76.

IX. Conclusion

Carriers are committed to providing excellent customer service and compete fiercely in a deregulated industry. Recent Department passenger protection regulations and an upgraded ATC will provide the framework to accomplish that goal. While carriers will continue to implement policies and practices to improve passenger services in response to market forces, it is important that the Department closely analyze current rules to determine their impact before proceeding with a new rule. In addition, it is clear that several items will not positively impact customer service, will reduce competition and customer options, will lead to increased ticket prices, and should be eliminated. It is in the best interest of all parties, and the Department's responsibility, to further analyze these issues before proceeding to a final rule.

Respectfully submitted,

A handwritten signature in black ink that reads "D. A. Berg". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David A. Berg
Vice President & General Counsel
Air Transport Association of America, Inc.
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 626-4000
dberg@airlines.org

September 23, 2010

Attachment B

**BEFORE THE DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC**

-----X
In the matter of :
 :
NOTICE OF PROPOSED : **Docket DOT-OST-2007-0022**
RULEMAKING CONCERNING ENHANCING :
AIRLINE PASSENGER PROTECTIONS :
-----X

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

Communications with respect to this document should be sent to:

DAVID A. BERG
Vice President & General Counsel
DOUGLAS K. MULLEN
Senior Attorney
Air Transport Association of
America, Inc.
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-4000
dberg@airlines.org
dmullen@airlines.org

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**BEFORE THE DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC**

-----X
In the matter of :
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NOTICE OF PROPOSED : **Docket DOT-OST-2007-0022**
RULEMAKING CONCERNING ENHANCING :
AIRLINE PASSENGER PROTECTIONS :
-----X

COMMENTS OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, INC.

The Air Transport Association of America, Inc. (ATA) submits these comments in response to the Department of Transportation's notice of proposed rulemaking (NPRM) concerning potential actions to enhance national airline passenger protections.¹ 73 Fed. Reg. 74586 (December 8, 2008). In addition to the points made in these Comments, we incorporate herein by reference the comments that ATA submitted in response to the Advanced Notice of Proposed Rulemaking in this docket. Docket Number DOT-OST-2007-0022-0189.1. (January 29, 2008).

The NPRM seeks comments from the public about whether the Department should amend its economic and procedural regulations (14 C.F.R. Parts 234, 259, and 399) to:

- Require carriers to adopt contingency plans for lengthy tarmac delays and incorporate those plans into their contracts of carriage;

¹ ATA airline members are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Midwest Airlines, Inc.; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc. ATA Airline Associate Members are: Air Canada; Air Jamaica Ltd.; and Mexicana.

- Require carriers to respond to consumer complaints within certain timeframes and provide complaint contact information to passengers by various means;
- Define “chronically delayed” flights and to consider flights that remain chronically delayed to be an unfair and deceptive practice and an unfair method of competition;
- Require carriers to publish delay and other data on their web sites, and;
- Require carriers to adopt customer service plans, incorporate them into their contracts of carriage, and internally audit adherence to those plans.

I. SUMMARY OF ATA POSITION

ATA shares the Department’s goal of ensuring that passengers receive timely information and that carriers provide basic services when extraordinary circumstances cause delays. Our members are in the service business and therefore embrace the Department’s goal of providing good customer service to airline passengers. Consistently providing high quality customer service is in our members’ commercial interest. Delays disrupt airline operations, upset our customers, tax our employees, and are very costly; no one dislikes delays more than airlines.

While we share the Department’s goal, we disagree with the view that additional regulation is necessary to achieve it. In almost all cases, extended flight delays are caused by a weather system that prevents airlines from operating as scheduled, and safety considerations become even more important. In these circumstances aircraft movements are largely out of the control of the airline -- as they are limited under guidelines established by the Federal Aviation Administration (FAA) –Air Traffic Control (ATC) authorities and by the individual airport specifying when it is safe for normal operations to resume and when and how passengers experiencing a long tarmac delay can be deplaned if they choose to do so. When these extreme circumstances occur, market forces and existing Department regulations, backed up by the

Department's enforcement authority, are sufficient to ensure airlines uphold their customer service obligations. In point of fact, carriers have learned from their experiences over the past two years and long delays have dropped in number and severity, while carrier responses have improved. The following customer service metrics taken from DOT's monthly consumer report, confirm improvement in the relevant categories:

<u>DOT Airline Customer Service Metrics Improve in 2008</u>			
	<u>2000</u>	<u>2007</u>	<u>2008</u>
Flight Cancellations (as % of sched. domestic departures)	3.30	2.16	1.96
Taxi-Out* Times > Three Hours (per 10,000 domestic departures)	2.92	2.15	1.76
On-Time Arrival Rate (% of domestic flights within 00:15)	72.6	73.4	76.0
Customer Complaints (per 100,000 domestic passengers)	2.98	1.38	1.13

Carriers have worked with the Department, airports and passenger groups to enhance their plans for unexpected, extended delays by participating in the National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays (Task Force), created by the Secretary last year. We also supported changes to delay reporting requirements to more completely capture delay data because it gives consumers better information for purchasing decisions and is pro-competitive.

In irregular operational situations, preserving flexibility for airlines is critically important. From a customer service perspective, flexibility allows airlines to get passengers to their destinations safely, as soon as possible given each carrier's operating constraints and unique circumstances when weather situations occur. Adopting regulations with strict, arbitrary deadlines will likely result in more flight cancellations, meaning that more passengers will be

prevented from reaching their destinations and suffering greater delays than they would otherwise.

Our biggest concern with the NPRM, from both policy and legal perspectives, is the Department's proposal to require carriers to incorporate their contingency plans and their customer service plans into their contracts of carriage. DOT does not have the authority to dictate contract terms between airlines and their passengers, and the operational nature of these plans makes them ill-suited as contract terms. This particular proposal is not only legally flawed but will have the perverse effect of leading to more cancellations, increased passenger inconvenience and ultimately, make flying more expensive. Finally, there are several respects in which the Department's cost benefit analysis underestimates the true costs and overestimates the benefits of this rulemaking to carriers and passengers. The costs of several components of the proposed rule far outweigh their potential benefits and must be eliminated as required by Executive Order 12866.

The most effective action the Department can take to improve customer satisfaction with airline service is to reduce delays by enhancing the capacity of the ATC system, particularly in the New York/New Jersey area. To do this, the Department should expeditiously implement the capacity enhancement measures identified by the New York Aviation Rulemaking Committee² and deploy NextGen technologies as a critical step to help improve system operations and thus reduce congestion and delays. The Department maintain its focus on the actions that must be taken to improve the air traffic control system so as to reduce congestion and stress in navigable airspace. Increasing airspace capacity and updating outdated radar technology will reduce stress on the system and do more to ensure passengers do not endure long delays than any other action the Department might take.

² See New York Aviation Rulemaking Committee Final Report originally issued December 13, 2007.

II. NPRM Provisions

We offer the following comments on the specific provisions included in the NPRM:

A. Contingency Plans

ATA recognizes the Department's goal to make sure carriers have coordinated contingency plans in place in advance to deal with extraordinary circumstances. In fact, all ATA carriers, which represent the vast majority of the U.S. industry, currently have very specific detailed operational contingency plans in place today. The specifics of each carrier's contingency plan reflect the diverse facilities, equipment and network of each carrier competing in the marketplace. While each carrier contingency plan differs based on its unique position, every ATA member is committed to preventing passengers from experiencing long delays on aircraft to providing services to customers (such as food, water, and working lavatories) when long delays do occur and to notify emergency services for medical attention if needed.

1. Flexibility

ATA supports the Department's decision to allow each carrier to determine the specifics of its contingency plan, instead of the Department prescribing one-size-fits-all terms. Allowing each carrier the flexibility to determine what contingency terms fit its particular operational parameters will benefit passengers and allow carriers to respond appropriately to unpredictable circumstances. For these reasons, we strongly oppose any requirement for a hard time limit for returning to a gate and/or deplaning passengers remotely, even a time limit determined by each carrier, as the NPRM proposes. As explained below in detail, this requirement is not in the best interests of consumers because it will increase flight cancellations and curtail the flexibility carriers need to take care of their passengers. In addition, hard time limits are equivalent to artificial scheduling restrictions. If airplanes must clear a taxiway or deplane by a certain time,

carriers will be forced to change flight schedules at the last minute in response to unpredictable weather events, which will disrupt customer travel itineraries, cause unwarranted confusion and delay passengers unnecessarily. Even passengers not directly affected by a service disruption will have downline negative impacts since aircraft and crew would get displaced, especially at congested airports such as those in the New York area.

First, an overarching consideration is that the movement of an airplane at an airport is controlled by the FAA. While a crew can request permission to return to a gate, Air Traffic Control and Ground Control ultimately decide where and when the airplane can move.³ One major factor in FAA's decision-making about handling an aircraft that requests a return to the gate is the airport's configuration. Airport surface movement areas are far more limited than is generally understood. Taxiways are typically only 75 feet wide and, as a result, can only accommodate aircraft taxiing in the same direction. As a result, returning to the gate may not be a simple proposition because there is likely to be insufficient room for an aircraft to turn around, taxi past other aircraft in line for takeoff behind it, and proceed back to the terminal. Equally important, at many airports, there is only one taxiway that leads to the takeoff end of a runway. Even if there are two taxiways for the runway, aircraft lined up for takeoff often occupy both of them, especially during congested periods. In either situation, there is a unidirectional flow of aircraft that must be dealt with.

Accommodating an aircraft that wants to get out of line, therefore, can be complicated and time consuming, and can adversely affect departing and arriving aircraft. To get out of the takeoff line may require the use of an intersecting taxiway, which may be hundreds of feet away from the aircraft when it makes the request. The aircraft will have to wait for the queue to move to gain access to such a taxiway. Once on such a taxiway, it may have to await permission to

³ Federal Aviation Administration Order 7110.116, Standardized Taxi Routes (Oct. 1, 1999).

cross an active runway, which, once given may delay aircraft departing or landing on the runway. At some airports, an aircraft seeking to return to the gate may have to taxi on the runway to get beyond the lined-up aircraft on the taxiway, further delaying other aircraft.⁴

In sum, insuperable physical limitations—taxiway and runway layouts, and aircraft queues—are likely to impede a return to the gate or from permitting passengers to disembark. These limitations are especially pronounced during periods of congestion, the very time that a hard-and-fast return rule would most likely be triggered. Given these realities, remaining in line for takeoff may be the most sensible decision. The discretion to make that decision should not be removed from pilots and management.

Second, even if the aircraft can return to the gate, the gate may not be available to disembark passengers, especially during extraordinary circumstances such as a snow or lightning storm. Moreover, airports may not have equipment available to deplane passengers away from a gate or FAA may not allow deplaning for safety reasons. Third, during extraordinary circumstances such as a snow or thunderstorm the FAA is likely to be controlling hundreds of airplanes at or near a particular airport. The increased stress on the transportation system may require officials to concentrate on their primary objective, which is safe operations leaving fewer resources available to concentrate on delayed passengers.⁵ Fourth, hard time limits are not in the passengers' best interest in many circumstances, such as when an airplane is encroaching on the DOT time limit due to a ground delay program and the airplane is third in line to depart. Clearly, taxiing to a gate, disembarking passengers, reboarding passengers and taxiing back out to depart

⁴ An example of this challenge is the introduction of the new Airbus A380 airplane at several U.S. airports, including Los Angeles International Airport (LAX), which will require temporary closure of service roads, taxiways and runways to other commercial aircraft when the A380 is departing or landing. See http://www.latimes.com/news/printedition/california/la-me-airbus25-2009jan25_0,7101057.story.

⁵ We note the Department recognized the effects weather systems have on operations in the presentation given by Livaughn Chapman on June 16, 2008, during the Task Force meetings. In the presentation, the Department details how delays in the months of February and March of 2008 were the direct result of two separate severe weather systems. See docket number DOT-OST-2007-0108-0091.4.

would actually delay passengers longer if an airplane would have otherwise departed in fifteen minutes. That certainly would be the case if the flight had to be cancelled.

In addition, several other government agencies also may impact the movement of airplanes during delays. As we indicated in our ANPRM comments,⁶ certain U.S. Department of Health and Human Services programs for potential pandemics may require carriers to keep passengers on airplanes under certain circumstances.⁷ Security or law enforcement agencies may also prevent an airplane from returning to a gate. An example of this occurred recently in Portland, Oregon when U.S. Customs and Immigration personnel were not available to process passengers on a diverted flight originating from Mexico.⁸ Another example involved delays caused by the failure of U.S. Customs and Immigration computers at LAX in 2007, delaying approximately 17,000 passengers for up to 12 hours.⁹ Medical emergencies on an airplane can also delay movement of many aircraft while emergency services respond. A Department requirement that carriers set and adhere to an *unqualified, hard time limit* to return to the gate will undoubtedly conflict with other government agency directives that govern safety or security.

Finally, it is critical that the Department consider the consequences of a hard time limit and whether it would further the Department's worthy policy goals. The result of a hard time limit will be to punish airlines for their reaction to ground delays when an airline's response is limited by factors it does not control, as discussed above. In addition, forcing carriers to cancel flights that are directly affected by a long tarmac delay indirectly impacts many thousands of other passengers at downline stations that are relying upon arrival of the aircraft and crew of the cancelled flight to provide the air services that passengers at those locations had previously

⁶ See ATA Comments to ANPRM, page 4, Comment number DOT-OST-2007-0022-0189.

⁷ See for example, HHS Pandemic Influenza Plan, Supplement 9, Managing Travel-Related Risk of Disease Transmission (<http://www.hhs.gov/pandemicflu/plan/sup9.html#III.A.3>).

⁸ http://seattletimes.nwsources.com/html/localnews/2008661196_jetpassengers23.html?syndication=rss

⁹ <http://articles.latimes.com/2007/aug/14/local/me-airport14>

purchased. Forcing a flight cancellation in one location through regulation can have a significant and detrimental impact on passengers in other cities further exacerbating the impacts of long tarmac delays in the city that is directly affected. The prospect of enforcement action when a carrier fails to meet a hard time limit likely will force carriers to cancel flights more frequently and lead to unnecessarily conservative decision-making, thereby further delaying passengers and causing both airlines and their passengers to incur additional costs. These direct and indirect passenger delays and flight cancellations will far exceed the costs the Department estimates in the Preliminary Regulatory Evaluation (PRE) and will certainly exceed the PRE's estimated of *one cancellation per year*.

2. Contracts of carriage

The most troubling and costly proposal in the NPRM is that carriers must incorporate contingency plans and customer service plans into their contracts of carriage.¹⁰ DOT admits that the purpose of this proposal is to enable passengers to sue carriers for breach of contract under state contract law in the event a carrier fails to adhere to its plans.¹¹ The NPRM claims that DOT has the right to require the carriers to incorporate new provisions into their contracts of carriage because of its “broad authority under 49 U.S.C. 41712,” which permits DOT to issue a cease and desist order directing a carrier to stop engaging in an “unfair or deceptive practice.”¹²

¹⁰ See 73 FR 74603 proposed section 259.6.

¹¹ See 72 FR 65234; 73 FR 74599. The Department also contemplates that class-action litigation may be available. See 73 FR 74590.

¹² See 73 FR at 74,590 & 74,600. In passing, DOT also cites 49 U.S.C. §§ 40101(a)(4), 40101(a)(9), and 41702 as potential sources of authority. See 73 FR at 74,586. These provisions, however, merely provide policy guidance and are not an independent source of enforcement authority. See 49 U.S.C. 40101(a) (preamble) (purpose of subsection is to list “consider[ations]” for the Secretary when interpreting other parts of the Title); *Pan Am. Airways Corp. v. Air Line Pilots Ass’n*, 206 F. Supp. 2d 12, 23 (D.D.C. 2002)(49 U.S.C. § 41702 states “only the general policy” and “is too broad and generalized to invoke” as an independent source of authority) *aff’d* 62 Fed.Appx. 356 (D.C.Cir 2003).

As we made clear in our comments to the ANPRM, the Department lacks authority to require carriers to incorporate contingency plans or customer service plans into their contracts of carriage. Congress specified exactly how the prohibition in 49 U.S.C. § 41712 on “unfair or deceptive practice[s]” is to be enforced — namely, through action by DOT or by the Department of Justice on DOT’s behalf. Accordingly the Department may not substitute a different enforcement process for the one Congress prescribed. Numerous courts have held that Congress intended direct DOT action to be the *exclusive* means for enforcing § 41712, thus ruling that the statute does not give consumers a private right to sue for alleged violations of that provision. The Department’s proposal would create the very private judicial enforcement mechanism for alleged violations of § 41712 that the courts have said Congress precluded.

DOT may not circumvent this limit by defining a carrier’s failure to incorporate tarmac-delay and customer service plans into its contract of carriage as an “unfair or deceptive practice.” Even if DOT finds that it is unfair or deceptive for a carrier to fail to have such plans, or to fail to comply with them, it does not follow — and cannot follow — that the carrier’s failure to enable private judicial enforcement of those plans is also unfair or deceptive. DOT must follow Congress’s intent in implementing § 41712, and Congress did not intend there to be private judicial enforcement of that provision. Consequently, Congress could never have intended a carrier’s failure to enable such enforcement to be “unfair” or “deceptive.” Moreover, subjecting a federally imposed regulatory duty to the vagaries of fifty states’ contract doctrines and judicial procedures comes perilously close to facilitating the tangle of conflicting state rules and policies that Congress sought to avoid by preempting state regulation of air carriers’ services in the first place.

a) Congress Has Created a DOT-Directed Mechanism for Enforcing § 41712 that Precludes Private Judicial Enforcement.

Congress has specified exactly how § 41712’s prohibition on “unfair or deceptive practice[s]” may be enforced. Congress relied exclusively on direct enforcement by DOT or by the Department of Justice acting on DOT’s behalf. Section 41712 itself gives DOT the authority to issue cease and desist orders.² DOT also may impose civil penalties for violations after providing notice and a hearing.³ Those penalties are explicitly limited by Congress to \$2,500 per violation for an individual or small business, and \$25,000 per violation otherwise.⁴ In addition, Congress authorized DOT to bring a civil action in federal district court to enforce the statutes it administers and any regulations issued thereunder, or to request the Attorney General to bring an action for the same purpose.⁵ While Congress permitted private parties to file written complaints with the Secretary of Transportation alleging unfair or deceptive practices by airlines,⁶ Congress did not permit private parties to sue for violations of § 41712 in court⁷ — in direct contrast to other statutory provisions in which Congress did expressly allow private suits.⁸

Numerous courts have held that the DOT-directed enforcement mechanism that Congress specified was intended to be *exclusive*, refusing, for that reason, to permit private parties to go to court to enforce § 41712 themselves. At this point, it is well settled that § 41712 and similar provisions do not provide private parties with an explicit or implicit right of action: the Supreme

² 49 U.S.C. § 41712.

³ *Id.* § 46301.

⁴ *Id.* §§ 46301(a)(1), (a)(5)(D). These amounts are adjusted periodically pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996.

⁵ *Id.* §§ 46106 and 46107(b)(1)(A).

⁶ *Id.* § 46101(a).

⁷ Further, we note that § 41702, which the NPRM mentions briefly, also does not create a private right of action. *Diefenthal v. CAB*, 681 F.2d 1039, 1349 (5th Cir. 1982) (§ 1374(a), the statutory predecessor to § 41702, does not create a private cause of action).

⁸ *See, e.g., id.* § 46108 (permitting interested persons to bring a civil action in federal court to enforce the statutory provision requiring air carriers to hold a DOT certificate).

Court has so ruled twice.⁹ Numerous lower courts are in accord.¹⁰ And the Department itself has taken this position in court.¹¹ Indeed, “[e]very court faced with the question of whether a consumer protection provision of the [Airline Deregulation Act] allows the implication of a private right of action against an airline has answered the question in the negative.”¹² The courts recognize that Congress would not have gone to such great lengths to specify multiple enforcement mechanisms — all of which rely on DOT action or direction — if it had also intended to allow private parties to circumvent those mechanisms and enforce the statute in court. *See, e.g., Casas v. American Airlines*, 304 F.3d 517, 522-23 (5th Cir. 2002) (finding no evidence in the legislative history that Congress intended to allow private judicial enforcement, and noting that “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.”); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 407 (9th Cir. 1983) (“Because of the [Federal Aviation] Act’s emphasis on administrative regulation and enforcement, we conclude that it is highly improbable that Congress absentmindedly forgot to mention an intended private action.”) (internal quotations and citations omitted); *Diefenthal v. CAB*, 681 F.2d 1039, 1049 (5th Cir. 1982) (“Congress has

⁹ *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 302 (1976) (“[I]ndividual consumers are not even entitled to initiate proceedings under § [41712].”); *American Airlines, Inc. v. North American Airlines*, 351 U.S. 79, 83-84 (1956) (equating § 41712’s statutory predecessor to Section 5 of the FTC Act, from which it was modeled, and which has no private right of action).

¹⁰ *See, e.g., Statland v. American Airlines, Inc.*, 998 F.2d 539, 541 (7th Cir. 1993) ([§ 411, later renumbered § 41712] “does not create a private right to sue”); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 408 (9th Cir. 1983) (“Federal Aviation Act does not contain an implied private right of action.”); *Wolf v. Trans World Airlines*, 544 F.2d 134, 136 (3d Cir. 1976) (“[§ 41712’s statutory predecessor] does not create a private right to sue”); *Polansky v. Trans World Airlines*, 523 F.2d 332, 338-40 (3d Cir. 1975) (no private cause of action under [§ 41712’s statutory predecessor]); *Sanders v. Air India*, 454 F. Supp. 1371, 1378 (S.D.N.Y. 1978); *see also Casas v. American Airlines*, 304 F.3d 517, 523 (no private right of action under Airline Deregulation Act); *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1252 (6th Cir. 1996) (same); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 n. 13 (5th Cir. 1995) (en banc) (same); *Diefenthal v. CAB*, 681 F.2d 1039, 1047, 1048-50 (5th Cir. 1982) (in an action brought by commercial airline passenger, holding that no private right of action exists to enforce Federal Aviation Act provision requiring air carriers to maintain a certain level of service); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir. 1986) (no private right of action under the Federal Aviation Act); *Angela Cummings, Inc. v. Purolator Courier Corp.*, 670 F. Supp. 92, 49 (S.D.N.Y. 1987).

¹¹ *See* Amicus brief of United States in *Sam Majors Jewelers v. Airborne Freight Corp. and ABX Air.*, 1997 WL 33560672 at *6 (5th Cir. 1997).

¹² *Musson Theatrical*, 89 F.3d at 1252.

established a detailed enforcement scheme [for the Federal Aviation Act] which expressly provides a private right of action for violations of specific provisions, that is a strong indication that Congress did not intend to provide litigants with a means of redressing violations of other sections of the Act.”).

These courts also acknowledge that judicial enforcement by private parties would be inconsistent with the enforcement mechanisms that Congress specified. *See Polansky v. Trans World Airlines*, 523 F. 2d 332, 339 (3d Cir. 1975) (refusing to find a private cause of action under statute giving the CAB the authority to prevent unfair or deceptive methods of competition, in part because “[t]he considerable discretion required in weighing the public interest can best be exercised by an agency knowledgeable in all aspects of the regulated airline industry.”); *Diefenthal v. CAB*, 681 F.2d at 1050. The Department itself has argued that private judicial enforcement of § 41712 is inconsistent with a legislative scheme designed to give DOT authority over the direction and developing pattern of enforcement:

[A]llowing private enforcement actions would risk interfering with Congress's intent to exercise discretion in determining whether and how to take action against particular business practices. The statute provides that “if the Secretary considers it is in the public interest,” he may investigate and restrain a particular unfair or deceptive practice. 49 U.S.C. § 41712. These provisions are intended to give the Secretary enforcement discretion and some flexibility in fashioning an appropriate remedy. *See Nade at 302*. Private suits would arguably interfere with the exercise of such discretion.¹³

In sum, creating a private right of action to enforce § 41712 runs counter to an unbroken line of judicial precedent, is unnecessary to achieve the objectives of the statutes that the Department has cited in the NPRM, and is at odds with clear statements of position enunciated by the Department itself.

¹³ Amicus brief of the United States and DOT in *Sam Majors Jewelers* 1997 WL 33560672 at 11.

b) The Department Cannot Replace Congress’s Chosen Enforcement Mechanism with One of Its Own Creation.

The NPRM proposes to create, by indirection, the private judicial enforcement mechanism that the courts have found Congress withheld. But where a statute itself does not explicitly or implicitly provide for a private right of action, an administrative agency enforcing that statute cannot create a private judicial enforcement mechanism by regulation. “Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.” *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). As the Court made clear:

Language in a regulation may invoke a private right that Congress through statutory text has created, but it may not create a right that Congress has not.... [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer’s apprentice but not the sorcerer himself.

Id. at 29 See also *Freedman v. Meldy’s, Inc.*, 587 F. Supp. 658, 662 (E.D. Pa. 1984) (an agency “may express, as it has, its opinion that private rights of action should be provided, but the [agency’s] opinion cannot supplement or supply the requisite Congressional intent”).

The Fifth Circuit has specifically affirmed this principle with respect to DOT. In *Casas v. American Airlines*, 304 F.3d 517, an airline’s contract of carriage contained a provision excluding liability for lost cameras in checked luggage; A plaintiff whose camera was lost sued the airline and argued that a DOT regulation made the contractual liability exclusion unenforceable. The Fifth Circuit disagreed: The plaintiff was effectively claiming a right to enforce the regulation, but Congress did not create a private right of action to enforce the ADA, and a DOT regulation could not create the right of action that Congress did not. “To hold otherwise would be, in substance, to craft a private right of action for violations of [the regulation] and thus to circumvent the conclusion that the ADA, and therefore the regulations

enacted pursuant to it, creates no private right of action for the wrong of which [Plaintiff] complains.” *Id.* at 525. Yet creating a private right of action to enforce § 41712 is precisely what the DOT would be doing here, in clear contravention of the Supreme Court’s holding in *Sandoval* and the Fifth Circuit’s decision in *Casas*.

It is no answer to say that the private lawsuits contemplated by the proposed rule would be state-law breach of contract actions rather than being explicitly labeled as actions to enforce § 41712 as a matter of federal law. This would distort what is occurring. The contractual duty that a plaintiff would be suing to enforce would not be the airline’s “own[] self-imposed undertaking” or “privately ordered obligation” reflecting the airline’s “business judgments,” *American Airlines v. Wolens*, 513 U.S. 219, 228-29 (1995); rather, it would be an action to enforce the DOT’s regulation of an airline practice it deemed to be “unfair or deceptive” under § 41712. In actions for an alleged breach of a contract of carriage, courts have had no trouble distinguishing between contract provisions that reflect truly voluntary undertakings and those that are merely implementations of regulatory mandates.¹⁴

Nor can this formalism erase the conflicts between Congress’s intended enforcement scheme and the one proposed in the notice. Congress specified exactly who could move against an “unfair or deceptive practice” and how. The point of Congress’s design — as DOT itself argued in *Sam Majors Jewelers* — is to give the Department exclusive control over the direction and development of enforcement actions. That design, the clarity of which is unmistakable, dates back to the Civil Aeronautics Act of 1938 and has its origin in section 5 of the Federal

¹⁴ See, e.g., *Chukwu v. Bd of Dir. British Airways*, 915 F. Supp. 454, 456 (D. Mass. 1996) (approving of argument that there can be no breach of contract suit for actions that reflected tariff obligations rather than “privately ordered obligations”); *Johnson v. American Airlines, Inc.*, 663 N.E.2d 54, 57 (Ill. App. Ct. 1 Dist. 1996) (distinguishing between state-law actions for breach of a contract duty that is “solely a self-imposed undertaking that the airline itself undertook to perform,” versus action for breach of “a state law or policy, external to the airline’s own self-imposed undertaking”).

Trade Commission Act. The present proposal upsets that design at this late date by ceding control to private plaintiffs and the vagaries of litigation in multiple state courts. In the same fashion, the proposal violates Congress's instructions for a uniform system of penalties for violations of § 41712. Whereas Congress expressly capped civil penalties as described above, DOT's proposal would replace those penalties with state-law measures of contract damages — and different measures in each state, no less, risking the very tangle of inconsistent and conflicting state rules that Congress sought to avoid in preempting state regulation of air carriers' rates, routes and services. *See* H.R.Rep. No. 95-1211, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3752. (Airline Deregulation Act is intended to “prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to Title IV of the Federal Aviation Act, no state may regulate that carrier's routes, rates or services”); *Rowe v. New Hampshire Motor Transp. Ass'n*, 128 S.Ct. 989, 996 (2008) (rejecting interpretations of the ADA that could result in “a patchwork of state service-determining laws”); *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 222 (2d Cir. 2008) (“Congress enacted the ADA in 1978, loosening its economic regulation of the airline industry....To ensure that the States would not undo [this] deregulation with regulation of their own, Congress included an express preemption provision.”) (citation omitted).

There is no precedent for a regulation like the one proposed here. The NPRM cites 14 C.F.R. Part 253, which sets uniform disclosure requirements for terms incorporated by reference into contracts of carriage that preempt any State requirements on the same subject. But the legislative foundation for that regulation highlights the lack of justification for this proposal. Part 253 reflects the Secretary of Transportation's explicit statutory authority to preempt state law on the incorporation of contract terms into written instruments. 49 U.S.C. § 41701. The

mere fact that a federal agency can preempt state law through regulation does not mean that the agency may create out of whole cloth new mechanisms for enforcing a statute; in expressly granting the former power, Congress cannot be assumed to have silently provided authority to do the latter. *Compare Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979) (validly enacted regulations under § 5 of FTC Act can preempt state law) *with Naylor v. Case & McGrath, Inc.*, 585 F.2d 557, 561 (2d Cir. 1978) (no private right of action under § 5 of FTC Act.); *see also Sandoval*, 532 U.S. at 291 (rejecting argument that if “*regulations* contain rights-creating language [they] must be privately enforceable” because only Congress, not administrative agencies, can create a private right of action).

c) An Airline’s Failure To Incorporate Customer Service Plans into Its Contract of Carriage Cannot Be an “Unfair and Deceptive Practice” Within the Meaning of § 41712.

Finally, DOT does not, because it cannot, support its assertion that the failure to incorporate contingency and customer service plans into contracts of carriage is itself an unfair and deceptive practice. In this regard, the NPRM contains unbridgeable leaps of logic. With respect to both tarmac-delay and customer service plans, it starts with a finding that an airline’s failure to adopt plans containing certain terms would be “unfair and deceptive” within the meaning of § 41712. Then — without any analysis whatsoever — it jumps to the assertion that an airline’s failure to incorporate the plans into its contract of carriage “*also* would be unfair and deceptive.” *See* 73 Fed. Reg. 74,586, 74,589-90 (tarmac-delay contingency plans); *id.* at 74,599-600 (customer service plans).

But the second proposition does not follow logically from the first. DOT may (or may not) have a basis for concluding that a carrier’s failure to adopt a tarmac-delay contingency plan and a customer service plan constitutes “an unfair or deceptive practice.” DOT similarly may (or

may not) have a basis for concluding that it is “unfair or deceptive” for a carrier to adopt such plans and then fail to abide by them. In such cases, as the NPRM recognizes, DOT would be able to initiate action against these carriers directly, *see id.* at 74,589, assuming DOT concluded that it was in the public interest to do so given the specific facts and circumstances of each case.

It is an entirely different matter, however, to say that a carrier’s failure to incorporate these plans into its contract of carriage is itself “unfair” or “deceptive.” To do so, DOT would have to find that a carrier’s failure to submit itself to state court lawsuits by customers — on top of the DOT enforcement mechanisms already available — would somehow violate public policy (DOT’s definition of “unfair”),¹³ or be misleading to a significant number of customers (the definition of “deceptive”).¹⁴ This DOT cannot do.

Congress, of course, is the ultimate arbiter of public policy, and DOT must interpret § 41712 in accord with the policy judgments Congress made.¹⁵ As described in detail above, Congress deemed DOT enforcement actions to be the sufficient and appropriate means for remedying unfair and deceptive practices — so much so that it chose to make such actions exclusive and omit the option of private enforcement. It makes no sense at all to say that it violates public policy for airlines to fail to subject themselves to the vagaries of private state court enforcement litigation that Congress itself rejected – litigation that is also at odds with the federal preemption of state regulation of air carriers’ rates, routes and services set out in the

¹³ *See Ass’n of Discount Travel Brokers*, 92-5-60, at 12 (May 29, 1992) (“A practice is unfair if it violates public policy, is immoral, or causes substantial consumer injury not offset by any countervailing benefits.”).

¹⁴ *See Computer Reservation System (CRS) Regulations*, 67 Fed. Reg. 69,366, 69,384 (proposed) (November 15, 2002)

(defining a deceptive practice as one “that will tend to deceive a significant number of customers”).

¹⁵ *See Federal Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (“courts...must reject administrative constructions of [a] statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement”); *Dixon v. United States*, 381 U.S. 68, 74 (1965) (“The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is ... the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.”).

Airline Deregulation Act. Nor can significant numbers of customers be deceived if airlines' tarmac-delay and customer service plans are backed up "only" by the rigorous DOT enforcement that Congress itself expected. Surely, customers cannot have assumed that they have a right of enforcement that Congress reserved for DOT and the Department of Justice. That being the case, they can hardly be deceived if their contract of carriage gives them no such right.

By the same token, it cannot be "unfair" or "deceptive" to leave the direction and development of enforcement policy in this new area to DOT's exclusive control, exactly as Congress intended, as opposed to subjecting it to the vagaries of fifty states' contract-law doctrines and fifty states' various measures of contract damages for the same conduct. DOT itself acknowledges the potential for its proposed rule to lead to "multiple lawsuits by classes as well as individual plaintiffs" and "inconsistent judicial decisions among the various jurisdictions" — although it tentatively dismisses these risks as "exist[ing] already," given the current enforceability of other contract of carriage provisions in state court. 73 Fed. Reg. at 74,590. The difference here—and it is decisive—is that the contractual provisions at issue would not be the fully voluntary "contract terms set by the parties themselves," *American Airlines v. Wolens*, 513 U.S. at 222, but rather the direct construction and implementation of DOT's authority to protect against "unfair or deceptive practices" under § 41712. Thus, state courts would be construing federal law and not private contract terms. But taking action against airlines that engage in such practices is a matter that Congress assigned to DOT exclusively and denied to the states, precisely to avoid the tangle that DOT's proposal threatens to create. See H.R.Rep. No. 95-1211, 95th Cong., 2d Sess. 16 (1978), reprinted in 1978 U.S.C.C.A.N. 3737, 3752; *Cuomo*, 520 F.3d at 222.

DOT, like all agencies, is “bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.” *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n. 4 (1994). Congress has prescribed a specific regulatory and judicial framework for enforcing § 41712 that is premised on DOT direction and control of enforcement actions and that excludes private judicial remedies. DOT has no authority to create the private judicial enforcement mechanism that Congress omitted — least of all where such a mechanism would undermine Congress’s instructions regarding DOT control of § 41712 enforcement and its preference for consistently applied and appropriately capped penalties.

In sum, an administratively imposed requirement that airlines incorporate contingency plans for lengthy tarmac delays and customer service plans into their contracts of carriage, thereby making those plans privately enforceable through state-court litigation would be invalid.

2. Record Retention

The Department also sought comment on the proposal for carriers to retain certain information for two years on every ground delay of four or more hours.¹⁶ ATA questions why the Department included this provision, which relates to the gate reporting requirements of the Bureau of Transportation Statistics (BTS at 14 CFR part 234), when BTS recently began collecting and reporting additional delay information (*see* 73 FR 29426). Based on these new BTS reporting requirements, the Department is able to determine the length and nature of ground delays, including delays for cancelled flights and diversion of any time length, not just ground delays of more than four hours. Today, consumers can visit BTS’ website and view detailed charts for varying time periods (i.e. monthly, yearly, year to date) and for different delay causes,

¹⁶ See 73 FR 74602, proposed 14 CFR 259.4(d) Retention of records.

such as weather delay, national aviation system delay, or air carrier delay, etc. The Department has therefore already imposed the first two record keeping requirements (length and cause of delay) through established monthly reports to BTS. It follows that requiring carriers to retain this information separately is unnecessary, burdensome and would not provide a meaningful benefit to the public.

The final category of information entitled, “carrier actions in response to delay situations,” does not need to be retained for two years; six months will provide plenty of time for the Department to request and review this information. Requiring that this information be stored for long periods of time will impose additional and unnecessary costs.

3. Airports

The National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays (Task Force) concluded that responses to ground delays must be a coordinated effort between airlines, airports, and government agencies.¹⁷ Along these lines, the Department proposed in the present NPRM that airlines must coordinate contingency plans with airport authorities at all medium and large hub airports. ATA and ATA member carriers participated in the Task Force and firmly support the concept of coordinating their contingency plans with airports. Moreover, ATA carriers do coordinate their plans with airports that choose to cooperate in doing so. But if an airport lacks the desire to so coordinate, airlines cannot compel them to do so; hence airlines must not be regulated in a way that makes them responsible for airport behavior. Since the Department does not assert authority in the proposed rule to require airports to participate in contingency plan coordination or to hold airports accountable for failing to carry out a contingency plan, it should not adopt this portion of the proposed rule at all.

¹⁷ See National Task Force to Develop Model Contingency Plans to Deal with Lengthy Airline On-Board Ground Delays Report, November 12, 2008, page 1.

At the very least, it must make significant changes that are necessary to make this aspect of the rule fair and effective.

Since the fact that carriers have no direct leverage to compel any airport to coordinate a contingency plan and the proposed rule contains no mechanism to ensure that airports coordinate their plans with the affected airlines. Thus, if an airport refuses to cooperate in plan coordination, the Department presumably would hold one, or perhaps all airlines operating at the airport, accountable for failing to coordinate their contingency plans with that of the airport. By contrast, the airport would incur no penalty. By the same token, only carriers face enforcement action for failing to execute a contingency plan even though airports usually play a major role in executing such plans. A carrier does not control the services an airport provides, such as medical assistance or shuttle service from an airplane when a gate is unavailable; yet these are often critical to carrying out a contingency plan. Carriers should therefore not be held accountable for an airport's failure to provide such services.

Airlines and airports know how each of their respective businesses operate. An airline should be responsible for a contingency plan that utilizes its own resources. Likewise, an airport should be held accountable for the services it provides during delays. Airlines have every reason to coordinate with airports, but attempting to mandate this coordination by placing all responsibility on airlines is unfair and subjects airlines to an obligation they cannot fulfill alone. As the Department does not assert any authority over airports to require their participation in contingency plan coordination or to hold an airport accountable for its role in carrying out a contingency plan, it must not adopt a final rule that holds airlines responsible for airports' failures of either coordination or execution. If the Department does decide to require carriers to coordinate contingency plans with airports in the final rule, it should also assert authority over

airports as it does over airlines, requiring them to coordinate contingency plans and holding them accountable for any services or role they may play in carrying out a contingency plan.

4. International Flights

We request that international flights¹⁸ be excluded from any hard time limits, for many of the same reasons that international flight on-time reporting was excluded from the NPRM. As noted earlier in these comments, hard time limits can effectively force carriers to cancel flights instead of delaying them and/or motivate carriers to return flights that might exceed the limit to the gate prematurely, even against passenger wishes and common sense. Given the inherent differences between domestic and international flights, which the Department recognized in this preamble, hard time limits make even less sense in this context.¹⁹

First, relative to domestic flights, it is more difficult to accommodate a passenger from a cancelled international flight on a future flight. International flights tend to be operated less frequently with larger aircraft with more passengers than domestic flights. In many cases destinations may only be served with just one carrier by only one or two flights per day, thus limiting the ability to rebook passengers. If an international flight is canceled because of a hard time limit, most passengers are unlikely to be re-accommodated on the next flight, which may not even be scheduled to depart for 24 hours. Second, international flights often are able to accommodate passengers on-board in comfort for long periods of time, with food service and entertainment options readily available given the type of equipment used and the expected length of these flights. Finally, given the time, cost, and planning (including slots at foreign airports) that go into providing international service, carriers have every incentive to operate flights on-time.

¹⁸ Using the definition of “flight” in 14 CFR 234.2 would exclude international flights.

¹⁹ See 73 FR 74598.

5. Miscellaneous

The Department also asks for comment on whether it should limit a carrier's ability to retroactively apply contract of carriage amendments to passengers who have already purchased tickets.²⁰ In a similar fashion, the Department proposes to allow carriers to amend contingency plans to increase hard time limits, but limits the applicability of these increased time limits to flights that have not sold any seats, in effect limiting new hard time limits to future passengers.²¹

We oppose both measures because they conflict with the essential request we have made in both the ANPRM comments and here; carriers are committed to customer service and continue to improve reactions to extraordinary events, but need flexibility to do so. The Department recognized the need for flexibility by proposing to allow carriers to set the terms and conditions of contingency and customer service plans. However, it is unclear why on the one hand, the Department embraces the concept of flexibility, but on the other hand restricts the application of flexible standards based on the time of ticket purchase. Flexibility encompasses both ideas, carrier set terms and conditions and applicability to passengers. Restricting contract of carriage and hard time limit amendments to future passengers will be difficult to track and will create additional burdens with little or no benefit. It will also discourage carriers from making improvements in customer service standards due to the difficulty of administering various standards depending on the time of ticket purchase.

As described in section III of these comments, we also note the Preliminary Regulatory Evaluation (PRE) fails to assign any cost associated for litigation the Department seeks to encourage for this component. We estimate the cost of litigation to ATA member airlines would be \$110 million over ten years. In addition, the PRE greatly overestimates the benefits of this

²⁰ See 73 FR 74600 "8. Retroactive Applicability of Amendments to Contracts of Carriage"

²¹ See proposed 14 CFR 259.4(c) "Amendment of plan"

component; claiming benefits of \$67.5 million over ten years, primarily for passenger access to services such as food, water, and lavatories on aircraft during long delays. However, the PRE fails to acknowledge that all ATA members currently have contingency plans that provide for these services. The true benefit of this component is only a mere fraction of the PRE estimated benefits and must be corrected before adopting a final rule.

B. Response to Consumer Problems

1. Complaint Response

ATA agrees with the Department's proposal to require that airlines acknowledge a consumer complaint within 30 days of receipt and provide a substantive response within 60 days.²² This time period mirrors many air carrier customer commitment plans that have been in place for a number of years now and which already include voluntary commitments regarding response to customer complaints. However, the Department should clarify the definition of "complaint" in this context to confirm that it means a complaint made to an airline's customer service department concerning a customer service issue. Complaints made through other means cannot be tracked by the carriers and the response coordinated, making compliance with the proposal impossible. In addition, we recommend that the Department add an exception to the 30 day acknowledge receipt requirement for extenuating circumstances, such as delivery of mail to an incorrect or unclear address, needing to get additional information from a customer, contacting customers that reside outside the U.S., or if a carrier or consumer has problems sending or receiving email (possible due to a server malfunction).

2. Employee Designees

²² See proposed 14 CFR 259.7(c), 73 FR 74603.

ATA supports the Department's proposal to require a current airline employee to monitor flight delays at operations centers.²³ However, we oppose the proposed requirement to designate an employee at each airport dispatch center because doing so would be duplicative of existing carrier procedures to monitor and address delay situations. Dispatch personnel, station managers and system operations center staff already work together on an ongoing basis to manage operations and address delays and cancellations as they develop in order to minimize operational disruptions and maximize flight completion. Carrier and passenger interests are served by completing schedules on time to the greatest extent possible, and numerous economic factors provide a strong incentive to avoid delays, cancellations and diversions. Existing passenger service commitments and regulations add to those incentives. Mandating specific staffing at airport dispatch centers may sound good but will not improve the existing coordination systems or commercial incentives to respond to irregular operations situations. We also note that many stations have limited resources, and for this reason to best serve passenger and the operation, major disruptions are appropriately handled centrally. For all of these reasons we oppose the Department's proposal to require employee designees at each airport dispatch center.

3. Contact Information

ATA supports the Departments' proposal to require complaint contact information on a carrier's website and all of our members already do so. This mechanism provides easy access for a consumer who is interested in this information. On the other hand, and in line with our view that the Department is correct to specify ends, but not means, we do not believe the Department should dictate the particular methods that carriers must make available to consumers to contact an airline. For example, proposed section 259.7(b) lists the specific proposed methods

²³ See proposed 14 CFR 259.7(a), 73 FR 74603.

of communication carriers would have to disclose for customer service purposes were the final rule to follow the wording of the NPRM. Instead of that approach the Department should allow carriers to choose the contact method for customer complaints, including email, via the airline's website, traditional mail, telephone, fax or other existing or future methods of communication. As each of these various methods carry with them associated costs, some much greater than others, the Department should give carriers the flexibility to determine which method best fits their individual carrier response plans and responds to the marketplace. As discussed in comments to the ANPRM, telephone "talk time" is very expensive (costing one dollar per minute for one ATA carrier). Thus requiring that all carriers receive complaints by phone in addition to other methods of complaint receipt would impose a high cost, without countervailing benefits given the various other complaint methods available to customers.²⁴ From a customer perspective, those without access to the internet (a rapidly shrinking population, given the free access at most public libraries)²⁵ could use traditional mail, which would provide the consumer with a record of the complaint. Furthermore, DOT should drop its requirement that airlines name a specific employee contact person for complaint purposes. Airline personnel change frequently, making this requirement impractical. Instead, carriers should be required to provide a position title (e.g., Vice President of Customer Satisfaction) for consumer complaints to ensure they are directed to the right department.

In addition, we reiterate strong opposition in this docket to the proposal in the NPRM to require that carriers begin to print complaint contact information on e-tickets.²⁶ There is no indication from the Department, the Inspector General or customers that finding complaint

²⁴ See ATA Comments to ANPRM, page 15, Comment number DOT-OST-2007-0022-0189.

²⁵ A November 2008 Harris Interactive Poll suggests that the number of U.S. adults accessing the internet (at least 81%) continues to increase each year. See http://www.harrisinteractive.com/harris_poll/index.asp?PID=973.

²⁶ See ATA Comments to ANPRM, page 10, Comment number DOT-OST-2007-0022-0189.

contact information is a problem. Such information is readily available on carrier and DOT websites, airport counters, from travel agents and other sources. This proposal is an expensive solution in search of a problem. We see this requirement as unnecessary because passengers using e-tickets will visit a carriers' website, which has complaint contact information made available to the consumer. E-ticket space is limited, it has significant commercial value to both carrier and third parties, and serves to provide the customer with important flight information. Any DOT final rule that requires using this scarce space on millions of e-tickets will only serve to confuse the customer and impose a high opportunity cost to airlines – a cost that far outweighs any speculative benefit of providing yet one more source of information about complaint reporting to customers. We estimate that the value to the U.S. industry as a whole of the e-ticket space the Department proposes to confiscate is \$5 million annually, a figure that exceeds the DOT's estimate of the value of providing yet another source of complaint address location by fifteen-fold (PRE, table 22, page 52). This estimate of the value of e-ticket space is based on a calculation of the revenue generated from offers now printed on the e-ticket for services and offers for purchase of the space by third parties, which is generalized to the U.S. industry. Space on each e-ticket is valuable property, and DOT has utterly failed to show that this proposed confiscation of airline property is justified. Accordingly, the Department should not incorporate in the final rule a requirement that airlines include complaint address information on e-tickets.

C. Chronically Delayed Flights and Unfair and Deceptive Practices

ATA supports the Department's proposed definition of a chronically delayed flight as one operated at least 30 times in a calendar quarter and arriving more than 15 minutes late more than 70 percent of the time during that quarter or cancelled more than 70 percent of the time during that quarter. ATA also supports DOT's definition of a substitute flight as one that operates

within 30 minutes of the most frequently occurring scheduled departure time on the same route. ATA urges the Department to adopt the proposed definition because it strikes an important balance, capturing flights with a higher frequency of operation, while retaining the traditional definition of a late arriving flight. The frequency of cancellation or delay standard of 70 percent allows the Department to focus on those flights that require a schedule adjustment, without capturing flights that carriers may be using various mitigating actions to assist in improving on-time arrival. Mitigating measures may take some time to implement and produce results that both the Department and the carrier seek to achieve. In addition, we support the Department's suggestion not to treat a flight that remains chronically delayed over three calendar quarters as an unfair or deceptive practice if passengers are informed of the flight history before purchasing a seat. We do not see how fully disclosing a flight history could be construed as unfair or deceptive.

While ATA understands the Department's desire to adopt standards in this area, we again highlight that the Department must not limit its efforts to regulating airlines, but instead must fulfill its own responsibilities by addressing the root causes of delayed flights. In particular, it must update the air traffic control system and complete other delay reduction measures on which there was industry consensus. The Department assembled the New York Aviation Rulemaking Committee, representing a wide-range of interests, to find solutions to congestion and delay in the New York area. To this date only 24 of the 77 recommendations have been completed.²⁷ New York/New Jersey airspace is especially important because it accounts for approximately 45 percent of all delays in the U.S. Projects that would assist with congestion include RNP routes in the West Atlantic, new automation tools that reroute flights around weather, Airspace Flow Programs to filter business jets out of congested chokepoints during peak periods – especially

²⁷ See docket number DOT-OST-2007-0108.

afternoon peaks, improved surface management systems (traffic flows between runways and gates – in particular continue accelerated deployment of ASDE-X), and realigning/relocating arrival, departure and overflight routes to avoid conflicts that drive inefficient routings. Finally, the Department should focus on implementing ADS-B, upgrading the out-of-date U.S. radar system, which would open additional routes and assist with more efficient spacing of aircraft.

The Department also proposes to restrict carrier advertising of on time performance to those instances where the basis of the calculation is revealed, including, the time period involved, the pairs of points or the percentage of system wide operations involved, and whether all scheduled flights are included or only those actually operated.²⁸ Failure to include this information would be considered an unfair and deceptive practice. We oppose this proposal because the effect of requiring so many data points will be to prevent use of this statistic at all. There is no indication from carrier experience, the Department or the Inspector General that use of on-time performance in advertising is a problem, carriers have not observed consumer demand for the detail the Department proposes to require. No other mode of transportation is required to provide this level of information in advertising; the Department should not adopt this proposal, which would create a burden with no benefit to the public.

D. Delay Data on Web Sites

ATA supports the Department's proposal to require carriers to post the on time arrival percentages for each flight (within 15 minutes of scheduled arrival time) on carrier websites for the previous calendar month, limited to displaying data already reported to BTS.²⁹

²⁸ See proposed 14 CFR 399.81(b).

²⁹ Although we support posting this information for consumers, we reiterate our comment from the ANPRM that past delay information is unlikely to predict future performance because of variations in seasonal weather and schedules and changes in equipment and routing.

Unfortunately the Department is also proposing that carriers be required to post significant additional information on their websites that they are not now required to collect or report, and that consequently is not captured internally at all airlines. The Department seeks to require a carrier to (1) highlight flights that are late more than 50% of the time, (2) display the percentage of time a flight was late more than 30 minutes late, and (3) display the percentage of time a flight was cancelled. This requirement is extremely burdensome and potentially confusing to the flying public without offsetting benefits. DOT should eliminate from the final rule any requirement that carriers report and display any performance data not currently required by the BTS.

As noted in comments to the ANPRM,³⁰ BTS does not collect any of these data categories and carriers do not report or display them. For this reason, DOT should not require carriers to report or display otherwise unreported metrics. Such a requirement conflicts with the current part 234 requirements and creates confusion by introducing new (and entirely non-predictive) performance metrics.³¹ Existing DOT metrics and reporting requirements that were established through BTS rulemakings with input from the Air Carrier On-Time Reporting Advisory Committee (ACOTRAC) have been in place for a number of years and are effectively providing the Department and consumers with flight performance information. If the Department seeks to change the existing reporting metrics - which it should not - it should do so through a separate rulemaking with BTS, seeking input from the ACOTRAC. Such a deliberate process will permit ample discussion on metrics and permit the Department to capture a better estimate of the full cost of capturing and reporting additional performance data.

³⁰ See ATA Comments to ANPRM, page 12, Comment number DOT-OST-2007-0022-0189.

³¹ These new benchmarks were reached without the input of the Air Carrier On-Time Reporting Advisory Committee and the Department has not disclosed why or how these additional benchmarks were reached.

If DOT imposes these new data collection and display requirements, carriers would have to undertake substantial efforts to capture and provide this information. In some cases, significant reprogramming of internal software, rebuilding portions of websites and the delay of critical technology projects and of other government-mandated programming would be required. Additional data on the extensive cost that would result from a final rule requiring carriers to provide this new information is included in section III. This potential requirement is especially troubling in light of the total lack of consumer demand for this kind of information, as the Department indicates in the PRE.³²

Apart from the absence of consumer interest the proposal is flawed because little or no public benefit can be gained from requiring carriers to report and display of yet more extensive performance data. This data provides little additional consumer benefit since the customer is already getting flight on-time performance for each and every flight displayed on an airline's website operated by that airline. Given the speed at which customers generally process information and make on-line bookings, having to represent the same flight data three different ways beyond the on-time performance information is unlikely to be viewed by most passengers and will provide little additional utility. Mandatory display of multiple items of past performance data prior to booking necessarily means that passengers will be required to review data that they did not request, imposing additional public costs.

As the Department acknowledges, 70 percent of delays and cancellations are due to weather which makes performance data from previous periods a poor predictor of the passenger's flight experience; the passenger who books a flight in February will see January data, but may not fly until May, when weather-driven delay will be entirely different.³³ Time and again, reports show

³² See PRE, page 16, Footnote. 25.

³³ See http://www.faa.gov/about/initiatives/nextgen/media/NGIP_0130.pdf, at page 20.

that consumers base flight decisions on fares, not delay information. This additional information could be especially misleading if for example a location such as the New York City Area were to experience a short-term weather disruption causing a one-time rise in all of the new proposed reporting categories. Two examples of delays caused by weather events were summarized by the Department during Task Force meetings in June of 2008.³⁴ Carriers have very few options to “correct” flights impacted by a temporary weather system.

In addition, carriers remain concerned that flight on-time statistics can be miss-interpreted by the customer. First hand experience with passengers shows they look at a flight’s previous month’s performance and erroneously assume that because a flight was delayed in August that must mean the flight will be delayed in September. As a result, the passenger then shows up at the airport late and ends up missing an on-time departure for the flight on which they wanted to fly on. Many operational factors change by day of week, by month, by quarter and by year, just like weather also changes by month, by quarter and by season and it is wrong to assume that because a flight was late during the previous month the same factors will be in play to make the flight late the very next month.

Finally, the Department chose not to impose any data reporting requirements on travel agents, including online agents, for the very reasons we believe the additional reporting requirements (beyond on-time performance) should not be imposed on carriers because the costs outweigh any benefits. If adopted as proposed, this rule would unfairly burden carriers and the approximately thirty percent of passengers who book through a carrier web site would be burdened with having to see performance information that they did not request and likely do not want. Passengers booking through other channels, which constitute the majority of passengers, would enjoy a faster booking process. Carriers uniquely would bear the cost of collecting such

³⁴ Supra Fn 5.

data, programming and updating their booking sites to reflect such data and slowing and even discouraging booking travel through their sites due to excessive performance data display.

E. Customer Service Plans, Contracts of Carriage, and Audits

ATA agrees with the Department's decision to propose that carriers adopt, adhere to, and audit compliance with customer service plans. As the Department is aware, our members adopted customer service plans in 2000 and have made the details of these plans available to the public. In addition, our members have substantially updated customer service plans over the past two years to better address long tarmac delays created by extraordinary circumstances, such as snow or thunderstorms. Changes include policies to ensure passengers do not remain on airplanes for long periods time. Of course any customer service plan and contingency plan that calls for deplaning is subject to safety and operational limitations, such as FAA ground control airplane movement orders.

One result of these changes is that carriers are much more likely to cancel flights to prevent even the possibility of an on-board delay; without this incentive cancellation statistics would have declined even further. Here the Department and airlines face a key question, is it better to have passengers sitting in an airplane waiting to depart at the first opportunity (noting that onboard experience indicates repeatedly that passengers want to get to their destination, recognizing that continuing the journey is likely to speed their travel) or is it better to cancel flights preemptively and run the risk of extensive delays for passengers at their origin airport, while frustrating downline passengers who await the aircraft and crew that has returned to the gate?

As we have stated before, each situation is unique and carriers need flexibility to take action they believe will minimize the impact of delays. A carrier's main objective is to get passengers

to their destination safely, as soon as possible. A passenger's best chance of reaching his or her destination is to be ready to depart the moment it is safe to do so. This is one of the main reasons carriers have asked repeatedly that no hard time limits, even carrier-determined limits, be set for returning to the gate or deplaning of passengers. Without flexibility a flight may be forced to abandon its position to depart when only another 20 minutes is needed. In addition, at the very least, the Department should acknowledge and write an exception into the rule text that a carrier will not be held responsible for violating any rule, including any time limits, if doing so would conflict with a FAA or other agency rule or order, such as ground control or air traffic control movement orders.

The Department asks if it should require carriers to describe in customer plans the services a carrier provides to mitigate passenger inconveniences resulting from cancellations and misconnects.³⁵ ATA believes carriers should not be required to provide a description of the services since each situation is unique and the services offered vary case by case. Carriers already provide details in their commitments about services offered for things like long delays, missed connections, etc. (things like hotel, meal, snack vouchers, rebookings, etc. per the occurrence). We oppose this suggestion because these services can be very specific, change over time and can include competitively sensitive information. Moreover, the effect of such a requirement would be to decrease the flexibility of a compensation provision and with that new rigidity, diminish passenger satisfaction. The Department in this NPRM has not demonstrated the need for regulation in this area and we are unaware of any other mode of travel, or in fact any other service in the United States that is subject to such a degree of transparency and regulation.

1. Audits

³⁵ See 73 FR 74600, first column.

We agree with the Department’s decision to permit self audits of customer service plans instead of requiring an audit from an outside firm. Carrier internal auditors are already familiar with aviation industry processes and would have a certain level of experience and knowledge that would reduce errors due to inexperience and communications problems. In addition, use of carrier employees would save time and training costs that outside auditors would create. Finally, we believe **all** carriers (for scheduled and charter operations) should have customer service plans, not just U.S. airlines that account for at least one percent of scheduled domestic passenger revenue and that the Department is within its authority to require such plans.

III. Cost Benefit Analysis Comments

The Department sought comment on the Preliminary Regulatory Evaluation (PRE) and the assumptions made therein; this section provides comments in response to that request. Specifically, the PRE contains a number of erroneous assumptions, which prevent the Department from complying with its obligations under Executive Order 12866 to “propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.” Particularly since the NPRM includes a number of independent proposals, we have addressed these proposals separately to illustrate that many of them fail to meet the cost-benefits test. Particularly, given the very meager anticipated net benefits of most of the proposals—and the likelihood that they will have unknown costs and unintended consequences—we question the value of adopting those proposals.³⁶

As proposed, the benefits of this regulation do not justify its costs; we estimate a cost benefit ratio of 0.03. With only three changes, the Department could easily solve this flaw and

³⁶ We also note that many of the PRE tables provide conflicting results and we were unable to reproduce several totals. For instance, we concluded DOT’s total cost estimate of \$65.39 million by summing the costs for all ten years in table 22. This appears to conflict with the \$45.2 million cost (10Year PV &% discounting) in Table 21. The cost to carriers for component one in Table 22 of \$3.33 million is not consistent with subtotal costs of \$2 million, \$0.02 million, and \$1.4 million.

adopt a rule that meets E.O. 12866 requirements while still enhancing passenger protections. First, the Department should eliminate the proposal’s single greatest cost component, which was not included in the PRE - the requirement to incorporate contingency plans and customer service plans into airline contracts of carriage. Given the enormous cost of litigation that this requirement will drive, as discussed below, eliminating this one proposal would cut costs by more than 60%. Second, the Department should require that carriers post only on-time arrival information on their websites, at a point before purchase. Eliminating other proposed data posting requirements would align this regulation with existing Bureau of Transportation Statistics reporting requirements, further saving costs without degrading benefits. Third, the Department must eliminate the non-essential and costly proposal that would require carriers to include complaint address information on e-tickets.

Summary of Cumulative Costs and Benefits for Proposed Rule ³⁷ (in millions)						
Category	DOT Costs	DOT Benefits	DOT Ratio	ATA Costs	ATA Benefits	ATA Ratio
Long On-Board Delays	\$23.49	\$67.51	2.87	\$2.19	\$.34	0.16
Respond to Consumer Complaints	\$16.3	\$5.8	0.35	\$66.3	\$5.8	.08
Chronically Delayed Flights	\$1	\$2	2	\$1	\$2	2
Publish Delay Data Online	\$16.3	\$83.7	5.13	\$34.6	0	0
Customer Service Plan & Audit	\$8.3	\$0	0	\$8.3	\$0	0
Litigation Expenses	\$0	\$0	0	\$110	\$0	0
Total ³⁸	\$65.39	\$159.01	2.43	\$221.69	\$8.14	0.03

³⁷ Adapted from Tables 21 and 22, PRE pages 50-53.

³⁸ DOT totals are estimates because the PRE never presents the total cost or benefit of this proposal without the discount rates. See PRE Table 21, page 50. These totals were calculated by summing the various cost and benefit subtotals across the ten-year period. See Table 22, PRE pages 51-56.

Discount 3%³⁹	55.0	132.3	2.41	\$189.03	\$6.94	0.03
Discount 7%⁴⁰	45.2	105.9	2.34	\$155.64	\$5.72	0.03

A. Costs

The PRE concludes that on an annual basis over 10 years this proposal would cost \$4.5 million and produce \$10.6 million in benefits, resulting in a positive benefit to cost ratio of 2.34 or an average benefit of a \$6.1 million per year. However, as discussed below, the costs associated with this proposal are greatly understated and when corrected show costs were underestimated by \$156 million or by a factor of 3.39. The information we provide below includes a range of costs, based on member information; an average cost is used for all calculations.

1. Litigation Costs

The PRE fails to include any costs associated with litigation generated by incorporating contingency plans and customer service plans into contracts or carriage. As the Department stated in the ANPRM and retained in the NPRM, a requirement to incorporate contingency plans and customer service plans into contracts of carriage “would enable passengers to sue for breach of contract in the event a carrier fails to adhere to its plan.”⁴¹ Indeed, the Department contemplated private litigation as the primary means of enforcing this rule. The Department is also of the opinion that such actions may be brought as class action lawsuits. Despite these statements in both the ANPRM and NPRM, incredibly, the PRE fails to include any cost estimate associated with this litigation.

³⁹ The 3% Discount figures are from Table 21, page 50.

⁴⁰ The 7% Discount figures are from Table 21, page 50.

⁴¹ See 73 FR 74587, 74589.

The greatest flaw of the incorporation requirement is that it fails to account for the filing of lawsuits even where an airline is ordered by the FAA to stay on a tarmac for safety reasons. Lawsuits will be filed *because of* a delay regardless of the circumstances surrounding the reasons for a delay. And the mere fact that a lawsuit has been filed will result in costs to carriers, regardless of the merits of a case. Given the strains already on carriers during these difficult economic times, understaffed legal offices and the prospect of cases being filed in numerous jurisdictions, carriers will have no choice but to use outside counsel to handle many of these matters.

Based on the proposed final rule and member responses to a cost survey, we divided potential legal costs into two categories; (1) projected costs associated with long on-board delays and (2) projected costs associated with customer service agreements. With respect to the first category long on-board delays currently lead to claims alleging false imprisonment, slander, libel, and seek large sums of money; they would now also include claims for breach of contract. Lawsuits alleging these causes of action typically are not filed in small claims court given the request for a greater recovery (some may allege damages exceeding \$100,000 per passenger). With respect to the second category of claims —those involving breach of customer service agreement—damages would be limited purely to economic damages and thus probably would be filed in a small claims court.

2. Litigation Cost Resulting from Unavoidable Tarmac Delays

Based on current litigation trends as reported by ATA members, it is reasonable to estimate that if the proposed rule goes into effect, at least two passengers involved in an extended tarmac delay will file a lawsuit against the carrier. Based on public reports, each carrier on average is likely to have 6-8 flights per year delayed by extreme weather conditions

that could lead to extended tarmac delays, such that each carrier might be forced to defend 10-15 lawsuits annually. Based on current estimates, each lawsuit would cost between \$10,000 to \$125,000 on average to defend. Using a median of \$50,000 per lawsuit, multiplied by 10 to 15 lawsuits per year, results in \$500,000 to \$750,000 in incremental annual litigation costs per carrier for litigation arising from tarmac delays as a result of the proposed rule. Multiplying the more conservative value of \$500,000 per carrier by 11 ATA passenger carrying members produces approximately \$5.5 million in litigation costs per year for this category of litigation.

3. Litigation Costs Resulting from Customer Service Commitments

Based on our member survey, carriers estimate that if each customer service commitment plan were considered part of a contract of carriage, litigation costs would increase dramatically over current levels, and well above levels resulting from litigation involving tarmac delays only. Carriers estimate an incremental increase (over current levels) of at least 250 claims a year per carrier. These cases would be filed in small claims courts or initial trial level courts. The cost of defending a typical lawsuit in small claims court varies. Many small claims courts do not allow corporations to be represented by counsel. In those cases, company representatives are required to appear in person to defend claims against the company based on varying state laws. While there is no attorneys' fee cost component to these cases, the cost to defend each case is still about \$2,000 per lawsuit, which takes into account average judgments, but does not take into account travel expenses or other costs associated with having personnel available to defend these claims, i.e., the employment-related costs. In some small claims courts, corporations must still appear represented by a lawyer. In those cases, roughly 10% of all small claims court cases, the estimated costs to defend are between \$3,000 to \$10,000 (including attorney and court fees). Given a conservative estimate of an additional 250 cases per carrier per year at an average cost

of \$2,000 per case, the, resulting additional costs are roughly \$500,000 per carrier per year. The overall cost for all 11 ATA passenger carrying member therefore would be \$5.5 million per year.

Importantly, there are small claims courts in every state in the U.S. By way of example, there is at least one small claims court in each of the 62 counties in New York State, including at least one in each of the five boroughs of New York City. Multiplying the number of small claims courts in the State of New York alone by 50 makes clear that carriers face small claims litigation in literally thousands of small claims courts all across the U.S. (and its territories). Moreover, there exists no equivalent to a small claims court in the U.S. federal court system, compounding the potential for a patchwork of rulings and decisions under differing states laws. In small claims court, the litigants are pro se, the proceedings are swift, the rules of civil procedure and evidence are relaxed, and a trial by jury is seldom or never allowed. All of these characteristics result in inconsistent rulings and decisions.

Litigation Categories	Cost Per Category	Estimate Number of Cases Per Year	ATA Litigation Estimate Per Year	Department Litigation Estimate
Tarmac Delays	\$50,000	110	\$5.5 million	0
Customer Service Plans	\$2,000	250	\$5.5 million	0
Total Litigation Costs Per Year			\$11 million	0

4. Publish Delay (and other) Data on Websites (Component 4)

The Department also proposed that airlines report on-time arrival percentage, the percentage a flight arrives 30 minutes late, the percentage of time a flight is cancelled, and special highlighting if a flight is more than 15 minutes late at least 50% of the time on their websites. In determining the cost of this proposal, the Department made several assumptions, including the assumption that “[a]ll delay information needed to comply with the Rule is already

required to be reported to BTS.”⁴² This assumption is incorrect and therefore the costs of this element of the proposal are enormously understated. The only information included in this portion of the proposal currently reported to BTS is on-time arrival. Requiring airlines to collect the additional information and report it on their websites when BTS does not collect or disseminate this information will impose a significant new burden. Each of the three categories of new information will incur programming and software costs as described below.

Based on a survey of our members, the one-time cost per airline to capture this information so it can be displayed on a website would average \$400,000. Assuming this expense would be incurred by the 11 ATA passenger carrying member airlines that provide online display and sale of flights, the one-time cost of this proposal would be \$4.4 million. The Department erroneously assigned only \$305,650 or less than 10 percent of the actual of cost to capture this information.⁴³ The Department’s erroneous cost estimate apparently results relying on the Department’s estimate in another rulemaking where the information sought by BTS (delays associated with gate return and diversions) was *already* collected by the airlines and therefore the cost to report the information to BTS was minimal.⁴⁴

The PRE also fails to account for the time cost incurred by passengers who do not need or want to review this additional information but would be forced to do so before purchasing a ticket. Using the lowest value of time the Department uses in the PRE, which is \$10.60 per hour (for “meeters and greeters” Table A-18) and assuming that providing this information causes just a ten-second delay in booking a flight on-line, the total cost per year for passenger time along would be between \$1,460,444 and \$3,651,111. This estimate was reached by taking 248 million passengers, the approximate number of passengers that book flights on airline

⁴² IRE page 24, section 2.1.2.1.

⁴³ Table B-7 PRE page 97.

⁴⁴ See 73 FR 29430.

websites (one third of the total number of scheduled revenue passengers for the period of December 2007 to November 2008 or 744,907,000 passengers⁴⁵ and multiplying that number by \$0.029 (\$10.60 per hour equals \$0.17 per minute or \$0.029 per ten second increment). Multiplying 248 million passengers by \$0.029 equals \$7,302,222. Assuming between 20 percent and 50 percent of passengers booking on airline websites would be uninterested in the additional information (an extremely low estimate) the total additional passenger time cost would be between \$1,460,444 and \$3,651,111 per year.

The PRE also includes other inconsistent calculations for this component. For instance, the cost estimates for alternative 4, which would require travel agencies to post the same information, includes other costs such as “modifications to GDS systems” (\$9.3 million) and “maintenance of GDS systems” (\$1,385.00). There is no explanation why these costs are excluded from the DOT’s estimate of carrier costs and the Department must exclude these costs or explain why they are only included for alternative 4; in fact, any new data reported to and on GDSs would require development work from both the airline and GDSs.

In addition, table B-7 incorrectly includes the “Cost of adjusting schedules” (\$1.6 million) for alternative 4.⁴⁶ This cost is misplaced because alternative 4 estimates costs for online travel agents, who obviously will not be adjusting airline schedules. Therefore, the Department needs to exclude the schedule adjusting costs from alternative 4 estimates and either remove the GDS cost estimates, add the same cost estimates for airlines, or explain why these costs are only borne by online travel agencies.

5. Response to Consumer Complaints (Component 2)

⁴⁵ Based on BTS T-100 data, see http://www.bts.gov/xml/air_traffic/src/index.xml#TwelveMonthsSystem
⁴⁶ Table B-7, PRE page 98, the chart states this cost is “n/a” but still includes it in the “Total Costs” column.

The PRE underestimates the costs associated with providing contact information on e-tickets. ATA comments to the ANPRM noted there is an ongoing business and commercial value to the space on every one of the hundreds of millions of e-tickets carriers issue. Based on a survey of members, the value of this space is approximately \$5 million per year. This cost estimate is based on revenue from passenger purchases of offers included on issued e-tickets. Ignoring the value of this space, the PRE erroneously claims that the costs to display complaint information on e-tickets is zero after year one. Accounting for the real, ongoing value of the e-ticket space, the costs of this element of the NPRM exceed the DOT's estimate of benefits fifteen-fold. Even without adjusting the cost estimates, the PRE shows that costs are approximately three times the projected benefits every year.⁴⁷

6. Contingency Plans (Component 1)

The proposal erroneously asserts that return to gate would generate savings in crew costs. In fact, forced gate returns would increase costs. Crews are guaranteed their block time for pay purposes, the fact that the flight is in delay means actual block will exceed scheduled, thus more pay to crew, not less as the PRE perplexingly claims. A taxi back forced by regulation only to taxi out again will result in even more actual block and higher crew costs (among other higher costs such as reduced aircraft utilization).

In estimating the flight crew savings, the PRE estimates cockpit crew labor costs at \$91.11 per hour and flight attendant labor costs at \$41.61 per hour.⁴⁸ The PRE then estimates the “price” of flight crew savings of \$605.26, multiplied by two flights for a total savings of \$1,211.⁴⁹ However the PRE never explains how it reaches \$605.26; no discussion of how many

⁴⁷ PRE Table 22, page 52.

⁴⁸ PRE page 76, 77.

⁴⁹ PRE Table B-1, page 93.

pilots and how many flight attendants contribute to the \$605.26.⁵⁰ Most importantly, there is no explanation of how much time this proposal will supposedly save and no corresponding amount of labor costs for that period of time (one hour, fifteen minutes, etc.) At the very least, the Department needs to eliminate this proposed cost savings because it is not justified. A true estimate of additional crew costs would estimate how much additional time a return to the gate and flight cancellation would consume and add the associated labor costs.

The Department's reliance on a study of flight cancellations after airport closures for security reasons as a proxy for cancellation rates for hard time limits is inappropriate. A better way to estimate the number of flight cancellations is to find each major weather system over the past two years and track the number of canceled flights at airports in that area, during the weather event. The time period of the weather event should be from the time the first flight canceled until the last was canceled. In addition, the study cited in the PRE states 14 % of flights are cancelled after an airport security shutdown, not 0 to 5% as the Department uses.⁵¹ In addition, the PRE states "In 95% of these cases, passengers will remain at the airport for a delay of 519 to 549 minutes."⁵² However, the PRE does not assign any cost to this delay time period.

The PRE understates the cost of this element of its proposed regulation by assuming that the proposed regulation will not change the overall trip time. This assumption is completely wrong. Forced return to the gate almost always will increase the time passengers spend on a trip, and also ordinarily increase the time spent by passengers on other flight(s) in- and outbound,

⁵⁰ Table A-9 also does not disclose the number of flight attendants the PRE uses in its calculations. Four aircraft are listed in the table with various crew estimates (from one flight attendant to twelve), but there is no statement concerning the number the PRE used in its calculations.

⁵¹ See "Airline Schedule Recovery after Airport Closures: Empirical Evidence since September 11th" page 12; PRE page 21.

⁵² PRE page 21.

who may temporarily lose that gate to board or deplane and by downline passengers deprived of timely use of the aircraft and/or crew forced to return to the gate.

The PRE also understates the costs of the proposed rule by ignoring lost aircraft and crew utilization and lost passenger time due to taxi back. Total costs should also include the cost to the carrier, passengers and other entities (such as shippers) of airlines’ overly conservative decision-making in response to regulation and the threat of DOT enforcement and passenger litigation.

B. Benefits

1. Contingency Plans (Component 1)

The benefit claimed by the PRE for component one totals \$6.14 million for 2009 and escalates each year to \$7.40 million in 2018.⁵³ Three categories constitute this benefit including (1) Knowledge of a Plan, Plus Access to Adequate Food, Water, and Earlier Deplaning; (2) Food and Water, and (3) Meeters and Greeters. As explained below, all but a mere fraction of this benefit is miscalculated and should be excluded from this analysis.⁵⁴

Reproduction of Table 22, PRE page 51

Contingency Plan for Long On-Board Delays	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Benefit - Passengers	\$6.14	\$6.26	\$6.40	\$6.53	\$6.67	\$6.81	\$6.95	\$7.10	\$7.25	\$7.40
Knowledge of a Plan, Plus <u>Access to Adequate Food, Water, Earlier Deplaning</u>	\$4.1	\$4.2	\$4.3	\$4.4	\$4.5	\$4.6	\$4.7	\$4.8	\$4.9	\$5.0
<u>Food and Water</u>	\$1.9	\$2.0	\$2.0	\$2.1	\$2.1	\$2.2	\$2.2	\$2.2	\$2.3	\$2.3
Meeters and Greeters	<\$0.1	<\$0.1	<\$0.1	<\$0.1	<\$0.1	<\$0.1	<\$0.1	<\$0.1	<\$0.1	<\$0.1

⁵³ PRE Table 22, page 51.

⁵⁴ Id.

The PRE claims a \$4.1 benefit for the first category in 2009, which steadily increases to \$5 million for 2018. Included in this category is \$3.4 million for “Benefits to Passengers from Adequate Food, Water, Lavatories and Access to Medical assistance.”⁵⁵ The problem with this claim is that carriers already provide these services to passengers voluntarily, therefore the Department cannot claim this proposed regulation would provide this benefit; it already exists. The PRE claims an additional \$572,422 benefit to “Passengers from Knowledge that a Contingency Plan Exists.” Carriers already have contingency plans in place for operational reasons; therefore this benefit is also unfounded.⁵⁶

The PRE claims an additional \$1.9 million in benefits for “Food and Water.”⁵⁷ How this benefit of access to food and water is different from the \$3.4 million already claimed in the first category is unclear because the \$1.9 million is not mentioned or described in any other area of the PRE; it is a mystery why the PRE would count this benefit twice without any description at all. This second category of access to food and water accounts for \$21.3 million in benefits over the 10-year analysis period. This benefit should be excluded because passengers already have access to food and water and this benefit is counted twice.⁵⁸

The third benefit for component 1 assumes flights and passengers will arrive more timely, thus saving time for those picking up passengers from the airport (“meeters/greeters”).⁵⁹ In calculating the potential delay a meeter or greeter might experience due to a delayed flight, the PRE estimates an average commute of 20.11 minutes to an airport, based on the average airport

⁵⁵ PRE Table B-2, page 95.

⁵⁶ Given the Department’s acknowledgement that the public rarely accesses BTS on-time statistics, how realistic is it that the public will know whether a contingency plan exists? See supra note 28.

⁵⁷ PRE Table 22, page 51.

⁵⁸ We note that since airlines already provide basic services to passengers such as food and water that if hard time limits were not imposed, airlines would already have these provisions on board. However, if hard time limits were imposed, additional costs may be incurred here.

⁵⁹ PRE page 34.

traveling distance from that city’s “downtown Hilton.”⁶⁰ The PRE estimates a meeters and greeters benefit of less than \$100,000 per year. This benefit, whatever the true number is, should be removed from this calculation. First, the PRE never discloses exactly what the actual benefit estimate is, so it is impossible to analyze the data. Second, using the average commuting time to an airport makes no sense because a meeter or greeter will have to make that commute no matter when the airplane arrives, we do not understand why this metric in table A-19 was included. We also note a commuting distance from a Hilton hotel using Google maps would not be representative of the local populations’ commute to an airport. Third, more or different information about currently arriving flights, which would be of interest to a meter/greeter is not part of the rule, so any claim of benefits to these individuals is incorrect. Fourth, real-time airplane arrival and departure information is now readily available through multiple means. Finally, extended taxi-in delays of arriving flights, which would be of interest to meters and greeters, are quite uncommon.

In summary, out of the \$6.14 million benefit the PRE claims as benefits for component one in year 2009 (and more each subsequent year), the only true benefit would be time passengers spend after deplaned during a long delay. The PRE calculates this benefit to be \$34,166 per year and we agree this should be included in the analysis. Therefore the total benefit for component one should be \$34,166 for 2009 and a total of \$340,166 for all ten years. This results in overestimating benefits for component one by more than \$67 million.

2. Publish Delay (and other) Data on Websites (Component 4)

⁶⁰ PRE Table A-19, page 83.

The benefit claimed for component four totals \$2.8 million for 2009 and dramatically escalates to \$10.1 for 2018, incredibly hypothesizing \$83.7 million in benefits over ten years.⁶¹ The PRE theorizes that publishing delay data online will lead consumers to choose less delayed flights forcing some carriers to adjust flight management and schedules to result in fewer delays. Fewer delays result in saved passenger time, which the PRE assigns a benefit value.⁶² This time savings benefit claimed by the PRE is inherently flawed for several reasons and should be completely eliminated from the final regulatory evaluation.

The first flaw with the PRE estimation is the desire to claim a benefit for posting delay data online when at the same time the PRE acknowledges that "...the primary factors behind a flight choice are price, and, to a lesser degree, schedule, some passengers may make different choices based on delay information."⁶³ The PRE continues to acknowledge "While similar delay data are available on the BTS website, they appear to be little used."⁶⁴ The PRE goes to great lengths to justify a \$83.7 million benefit when it is clear from the PRE statements that delay data is not a passenger priority.

To determine when a passenger "may" make different choices based on delay information, the PRE cites a study of Canadian hospitals that began posting patient delay statistics online. The PRE acknowledges that "While demand for these services (airline tickets and hospital services) is primarily a function of unrelated factors – price and schedule for airlines; location, reputation and referral for hospitals – the supply for both is limited to a few competitors."⁶⁵

⁶¹ Table 22, PRE page 53.

⁶² PRE page 40.

⁶³ PRE page 16.

⁶⁴ Id.

⁶⁵ PRE page 41.

Unfortunately the use of this study as a proxy for airline passengers does not, by any means, constitute a “reasoned determination” as required by Executive Order 12866. By extension, all of the data and analysis pulled from the Canadian study are facially invalid and cannot be used to support a benefit estimate for component 4. The benefit analysis for component 4 does not meet the reasoned determination test because (1) the PRE acknowledges that delay data is not a primary or even secondary passenger consideration in purchasing a ticket, but the PRE still continues to search for a (beneficial) change in passenger behavior; (2) the PRE acknowledges that “unrelated factors” drive Canadian hospital patient behavior and airline passenger behavior but still uses the Canadian study as a proxy; (3) the Department does not have to go to such lengths to find a proxy for delay statistics; a source of statistics already exists within the Department, in BTS; (4) the PRE’s estimate (based on the Canadian hospital proxy) that airplane arrivals late more than 50% of the time would decrease 40% is unfathomable given points one and two above.

Why the Department felt compelled to use hospital statistics when it could use the impact BTS reported delay statistics have had on performance is hard to comprehend. Surely the Department has access to how often delay statistics are accessed and could use such numbers in a corrected cost benefit analysis. Moreover, frequent delay is airport or region-specific, not airline specific, therefore, BTS data for airports or regions is likely to give passengers a better sense of delays. Therefore, the Department has presented no evidence that posting delay data on carrier websites will change passenger purchasing behavior or provide the \$83.7 million in benefits claimed for this component; this benefit should be completely eliminated from the cost benefit analysis for the reasons stated above.

IV. Conclusion

As stated in the ANRPM and NPRM, the Department has an important responsibility to strike the proper balance between protecting consumers and affording carriers flexibility to respond to rapid developments during extraordinary circumstances and in the marketplace. As with any other service industry, airlines recognize that high quality customer service is critical to commercial success. Airline success at delivering consistently good customer service has been impacted by an ATC system that is incapable of handling reasonable and expected growth by all aviation sectors. No one cares more about completing scheduled flights on time than the airlines and their employees. After safety, on-time service and customer care are critical for success in the airline business. Excellent service and on-time performance ensure repeat business, and that is the goal for all airlines because it leads to commercial success. We encourage the Department to work with ATA and its members to identify those initiatives that will truly enhance a consumer's experience. In addition, we recommend a significant implementation period (more than six months) after a final rule is adopted because many of the provisions suggested in this NPRM would require substantial software programming or operational changes.

ATA appreciates the opportunity to comment on this NPRM and looks forward to working with the Department in the future.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. A. Berg", with a long, sweeping horizontal line extending to the right.

David A. Berg
Vice President & General Counsel
Air Transport Association of America, Inc.
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 626-4000
dberg@airlines.org

March 9, 2009

Attachment C



1215 days ago

Travelport joins Sabre in ending Farelogix developer agreements

In late December, just a week after American Airlines removed its fares from Orbitz, Travelport terminated a developer's agreement it had with Farelogix.

Tnooz reported in 2009 that Sabre, too, had terminated its developer's agreement with Farelogix, but Travelport's move against Farelogix hadn't been widely known until American Airlines discussed it in its April antitrust complaint against Travelport. American Airlines provided further details about the global distribution moves against Farelogix, which handles direct-connects for the airline, when it added Sabre as a defendant in an amended complaint filed June 1.

American Airlines alleges that Travelport terminated a Farelogix developer's agreement Dec. 28, 2010, a week after the airline severed its relationship with Travelport-controlled Orbitz because of Farelogix's role in advancing American Airlines' direct-connect initiative.

"Other software developers have been told that under their agreements with Travelport they are not permitted to work with Farelogix or AA Direct Connect," the airline alleges.

What did the cut-off mean to Farelogix?

"It means that Farelogix can no longer provide any Travelport GDS connectivity through a Farelogix platform for travel agencies even when the agency wants us to and the agency already had a subscriber agreement with Travelport," says Jim Davidson, Farelogix CEO.

Travelport declined to comment on the issue. "We do not, by policy, comment on the specifics of our commercial relationships or pending legal matters," says Travelport spokeswoman Jill Brenner.

American Airlines also provided further detail in its amended complaint about Sabre's termination of a Farelogix developer's agreement in 2009, alleging the action was taken because Farelogix was helping airlines with their direct-connect plans.

The airline noted that without the development agreement with Sabre, which had been in place since 2005, "Farelogix does not have access to the APIs that are needed to allow its software to interoperate with Sabre subscribers' front-, mid- and back-office systems."

In 2009, Sabre spokeswoman Nancy St. Pierre commented about the termination of the Farelogix developer's agreement:

However, as we said earlier this year, the termination of the developer agreement with Farelogix only affected a handful of Sabre subscribers and we have worked hard to ensure their needs have been taken care of. Our action was taken in light of the evolution of the Farelogix business model to one of content fragmentation, and what became clear was an attempt to free ride off of our database and systems. The termination was fully

compliant with the terms of the agreement and with any applicable law. Sabre has not told any of its subscribers not to do business with Farelogix.

American alleges that Sabre also ordered Pass Consulting, a Farelogix partner which offers multi-GDS access, to restrict Farelogix's access to Sabre through PASS or risk losing its own developer's agreement with Sabre.

"Other software developers working with Farelogix and American on Direct Connect development have reported similar from Sabre that they are not to work with Farelogix or any other entity that facilitates direct connections," American alleges.

Asked to comment on American's allegations, St. Pierre said: "We are not going to litigate in the media. We will respond to allegations in court."

The airline's allegations are part of antitrust lawsuits against Sabre, Travelport and Orbitz Worldwide.

The U.S. Department of Justice previously delved into the Sabre-Farelogix matter and currently is investigating the GDS antitrust issue.



About the Writer :: Dennis Schaal

Dennis Schaal was North American editor for Tnooz.

Comments

[...] Travelport joins Sabre in ending Farelogix developer agreements [full story] [...]

1209 days ago



The law is being abused here. But then the law in the USA is sometimes all about abuse by the rich and powerful vs the guy less fortunate who cannot afford access to the law's might.

It would be great if that we could see that without rancour parties make the smartest decisions possible.



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Why You So Rarely See Web Fares In the US

By CF on Aug 25, 2014 | 16 Comments

I was talking about mistake fares with someone the other day, and that reminded me of a time when I filed a couple of mistakes myself as a pricing analyst at America West. One, from Phoenix to Baltimore for under \$100 roundtrip, did very little damage since it was a web-only fare. We caught it before many had seen the error. That turned the discussion toward web fares in general. You might wonder why you so rarely see them anymore here in the US. There's actually a reason for that.

When airlines first realized that the internet was a viable option for selling flights back in the 1990s, they saw dollar signs in their eyes. Selling through traditional channels was expensive. The Global Distribution Systems (GDSs) like Sabre charge a whole lot of money to sell through them. Every time a traveler booked a segment (not even ticketed, just booked), that meant dollars out the window for the airlines. At the same time, airlines still paid travel agent commissions to anyone who sold a ticket. It was an expensive proposition.

With the internet, airlines realized they could cut their fares but then cut their costs even more. The end result was that they'd make more money on a ticket even with a lower fare. And with a lower fare, they could convince more travelers to try out the new technology. That meant that the web became the discount channel by default. Airlines touted the increase in the percentage of bookings via their own websites as a major sign of success. They invented all kinds of unique promotions, including those weekly web fares ("Surf 'n Go" at America West) that helped fill seats on empty flights at the last minute.

While this was happening, the GDSs sat on the sideline anxiously. They saw airlines aggressively trying to shift business away from them, and that meant their big revenue streams were at risk. They had to do something to stop the inevitable shift away. They knew that they still had a lock on corporate travel at that point, so they could use that as leverage. An idea was born.



The GDSs agreed to dramatically reduce booking fees for airlines on one condition. The airlines had to publish all fares in the GDS. This deal, commonly called a "most favored nation" clause, was the death knell for web fares. After all, if you could no longer shift share by discounting, why would you offer it at all? That was the point. But airlines looked at the ability to reduce their booking costs and realized they had to take the deal. It was a smart move financially, at least in the short run.



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Over the years, we've seen airlines get more and more testy about these deals. We've even seen American argue in court that they're anti-competitive. American and others have suggested that the GDSs are using their monopoly standing to force them into these deals because the financial penalties for opting out are too onerous. Others have gotten creative.

Frontier, having signed this deal when it was effectively a different airline, has been trying to reduce costs. It created a equivalent fare that would reduce benefits (carry-on bag fees, for example) for those who booked through third parties. I'm sure that was probably going to end up in court, but Frontier backed away and revamped its fare structure completely anyway. Now the benefits have been stripped from all fares.

Of course, not all airlines have played this game. Southwest largely doesn't sell through third parties so it never even engaged in this. Spirit, however, does. And the airline is notably more expensive if you don't book on the airline's website. You'll see Hawaiian also is cheaper on its own site. Internationally, the one that stands out to me has always been Air New Zealand. But there are others as well.

Eventually, as GDSs either change or lose their grip, we'll see these deals come apart. But even if they do, we probably won't see airlines rushing back into the web fare game as you know it. The days of discounting just to convince people to use the web for booking have long passed. But it wouldn't surprise me to eventually see airlines have differentiated pricing in different channels. People will hate it if it's not done right, but that's a conversation for another time.

Tweet 13 Like 1

16 Responses to *Why You So Rarely See Web Fares In the US*

David SF eastbay says:
Aug 25, 2014 at 7:38 am

I think people also found out if they are looking for the lowest fare, going to an airline web site doesn't always do that. That's why third party web sites and travel agents are still around. They can see fares for a lot of carriers. Those looking for the lowest fare don't care if it's AA/UA/DL/etc, and don't want to check each airlines web sites since it's not always the easiest thing to do.

[Reply](#)

Matt says:
Aug 25, 2014 at 9:05 am

This whole distribution business is evolving far faster than the technology can. If AA and others can get their direct connect going, it's possible to create real disruption in the industry by offering new players the opportunity to build something that is competitive to the established players. Third-parties innovate, but its important to control your own data and how/who/where it goes. I see this as the critical step for the airlines to disrupt the traditional GDS model.

[Reply](#)

Bob Skinner says:
Aug 25, 2014 at 9:20 am

A few years back, I was victimized by a travel agency that knew there was a significantly lower fare available but booked me into a more expensive one anyway. I suppose that this was to increase their own profit. I was quite angry when I found out that my ticket cost so much more than it should have. I threatened to report the travel agency to the BBB and they - reluctantly - refunded my ticket cost. Now I always check each of the airlines as

2009: J F M A M J J A S O N D
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@KristineOwram well, this fits with our conversation from earlier today
<http://t.co/t4LULzTRcM>

about 14 hours ago



Dear @flyethiopian - generally not smart to cxl a flight 11 days before departure and then rebook someone for 2 days later on the next one

about 15 hours ago

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United, Sabre To Enable Point-Of-Sale Upselling

December 08, 2008 - 12:00 AM EST

By **Jay Boehmer**

United Airlines and Sabre are working to enable the global distribution system's subscribers to upsell economy passengers to the carrier's Economy Plus cabin at the point of sale. Officials said the option would be available to Sabre-subscribing travel agencies in the first quarter of 2009.

The move makes United the first U.S. legacy carrier to take advantage of new GDS initiatives that enable merchandizing options at the point of sale. Most carriers thus far have assessed unbundling and upselling charges at the time of checkin, on the airplane or exclusively through their Web sites, which corporate travel buyers say makes their use difficult to track ([BTNonline, April 28](#)).

GDSs in the past year have stepped up efforts to make their merchandizing and shopping capabilities more in line with those that airlines deploy through their own channels ([BTNonline, July 23, 2007](#)).

Like many carriers, United earlier this year launched capabilities on its Web site to purchase such upgrades prior to travel. Those efforts have lagged in the GDS environment. Midwest Airlines this year unveiled a comparable program with Sabre to upsell customers who elect to pay more for its higher-tier Signature economy seat at the time of booking ([BTNonline, July 21](#)).

"We built the solution initially for Midwest so it could be further leveraged by additional carriers as they came into the fray, and United is the first to elect to do that," Sabre vice president of product marketing Kyle Moore said this month.

Moore noted that more carriers are working to launch their own upselling and unbundling initiatives through the GDS, anticipating a snowball effect and eventual tipping point for new capabilities. Likening the rollout process to that for direct connects several years ago, Moore said, "The first carrier you do, the implementation is long and arduous. The next one is less so, and the next one is less so, until you get to the point where it really does just become configurations and flip-of-the-switch stuff."

Still, Moore said carriers want different capabilities, precluding any one-size-fits-all approach. Moore said the GDS capabilities eventually would be as varied as the ancillary items carriers sell. "We will leverage the same capabilities to address not just seats, but ultimately baggage and lounge access and everything," Moore said.

During the Credit Suisse Global Airline Conference in New York this month, several legacy airlines, including American Airlines and US Airways, promised acceleration of the unbundling trend. United senior vice president and CFO Kathryn Mikells during the conference said seat upselling has been well received by customers, claiming through internal research that eight out of 10 passengers who upgrade to Premium Plus would do so again.

"The airline revenue model is clearly changing and unbundling is giving customers more choice," Mikells said, noting that further unbundled offerings through the GDS are in "the pipeline to be announced next year."

Sabre competitors Amadeus and Travelport GDS also are hard at work on offerings to enable new selling and shopping options. Travelport GDS in April announced the acquisition of some of G2 SwitchWorks' "software assets and intellectual property," which it planned to use to deliver a new platform for merchandizing, upselling and unbundling products and services.

Meanwhile, Amadeus this year also announced its work on the Airline Retailing Platform to deliver such capabilities to airlines and agents ([BTNonline, April 3](#)).

Amadeus executive vice president of commercial and recently appointed CEO David Jones said United's upselling initiative would be a good fit for their platform.

"One of the objectives of the Airline Retailing Platform is exactly to enable that type of upselling," Jones said, "so I think it makes a hell of a lot of sense."



United Airlines and Sabre gear up for 'next chapter in distribution'

BY NANCY ST. PIERRE - 22 MAY 2013



Sabre announced today it has signed a new, long-term, full content agreement with United Airlines. Sabre and the airline plan to work together to make United's material ancillary products and services, including its Economy Plus seats, available in the Sabre global distribution system (GDS).

Sabre and United will co-develop solutions using next-generation technology that will permit United to offer more relevant personalized offers to their loyal customers. These advancements will also better promote and disclose the unique value of the airline's different fare and ancillary products and services to travel agents with additional descriptive text and graphics for enhanced on-screen merchandising within the Sabre Red Workspace and through Sabre Web Services.

Read more about this agreement at <http://www.sabre.com/newsroom/category/media-releases/>

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About Nancy St. Pierre


Nancy St. Pierre is Head of Strategic Content and is part of Sabre's External Communications team. She can be reached at Nancy.St.Pierre@sabre.com. [View all posts by Nancy St. Pierre](#) →

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Sabre Launches the Capability to Sell United Economy Plus Seating

13 JUN 2014



UNITED AIRLINES' ECONOMY PLUS SEATS ARE BACK IN THE SABRE TRAVEL MARKETPLACE.

SOUTHLAKE, TEXAS AND CHICAGO, June 17, 2014 – [Sabre Corporation](#) (NASDAQ: SABR) and [United Airlines](#) today announced that the airline's Economy Plus seats are available for sale globally through travel agents using the Sabre global distribution system (GDS), which enables airlines to bring unique products and a multitude of personalized offers to travelers.

United's Economy Plus seats, which are located at the front of the Economy cabin, enable customers to stretch out with more room to work and relax. The airline offers more extra-legroom economy-class seating than any other airline in North America.

In addition to having the ability to book United's [Economy Plus](#) seats within their existing workflow, travel consultants can view a multitude of detailed seat characteristics and expanded cabin layouts, which also include flat-bed seats, via Sabre's enhanced interactive seat map.

The airline seats can be purchased on United flights, regardless of destination, by Sabre subscribing agencies. Sabre agents can also assign Economy Plus seats to United's eligible frequent flyers and those who have purchased an annual subscription.

"Sabre continues to invest in technology to support airlines' merchandising strategies today and into the future," said Shelly Terry, Sabre Travel Network's vice president of supplier merchandising. "The Sabre travel marketplace provides an invaluable platform for airlines to market and sell their products the way they choose, and for agents to best serve leisure and business travelers in the most seamless and efficient manner. We are thrilled to have United's Economy Plus seats back in our marketplace."

“Our Economy Plus seats provide tremendous value to our customers,” said John Slater, United’s vice president of sales for the Americas. “This next-generation travel technology enables our travel management partners and travel agencies to offer the same Economy Plus shopping experience as we do on united.com.”

United joins more than 20 airlines worldwide using Sabre’s supplier merchandising capabilities to sell their products in new ways. Sabre’s solutions allow airlines to sell their ancillaries in over 120 countries, more than any other GDS, and are directly imbedded in an agent’s shopping workflow for seamless efficiency.

###

[Sabre®](#) is a leading technology provider to the global travel and tourism industry. Sabre’s software, data, mobile and distribution solutions are used by hundreds of airlines and thousands of hotel properties to manage critical operations, such as passenger and guest reservations, revenue management, and flight, network and crew management. Sabre also operates a leading global travel marketplace, processing over \$100 billion of estimated travel spend in 2013 by connecting travel suppliers to their most valued customers, the business traveler. Headquartered in Southlake, Texas, USA, Sabre operates in approximately 60 countries around the world.

About United

United Airlines and United Express operate an average of more than 5,200 flights a day to 369 airports across six continents. In 2013, United and United Express carried more passenger traffic than any other airline in the world and operated nearly two million flights carrying 139 million customers. United operates nearly 700 mainline aircraft and, in 2014, will take delivery of 35 new Boeing aircraft, including the B787-9 as the North American launch customer, and will welcome 28 new E175 aircraft to United Express. The airline is a founding member of Star Alliance, which provides service to 195 countries via 26 member airlines. More than 85,000 United employees reside in every U.S. state and in countries around the world. For more information, visit [united.com](#), follow @United on Twitter or connect on Facebook. The common stock of United’s parent, United Continental Holdings, Inc., is traded on the NYSE under the symbol UAL.

Cautionary Note Regarding Forward-Looking Statements

Any statements in this release regarding Sabre that are not historical or current facts are forward-looking statements. Such forward-looking statements convey Sabre’s current expectations or forecasts of future events. Forward-looking statements regarding Sabre involve known and unknown risks, uncertainties and other factors that may cause Sabre’s actual results, performance or achievements to be materially different from any future results, performances or achievements expressed or implied by the forward-looking statements. Certain of these risks and uncertainties are described in the “Risk Factors” and “Cautionary Note Regarding Forward-Looking Statements” sections of Sabre’s registration statement on Form S-1, the “Risk Factors” and “Forward-Looking Statements” sections of its Quarterly Report on Form 10-Q, and any of Sabre’s other applicable filings with the Securities and Exchange Commission. Unless required by law, Sabre undertakes no obligation to publicly update or revise any forward-looking statements to reflect circumstances or events after the date of this press release.

Posted on: September 3, 2014

Amadeus adds United's Economy Plus seats

By Kate Rice

Amadeus subscribers in the U.S., Puerto Rico and the U.S. Virgin Islands can now book United Airlines' Economy Plus seats with extra legroom.

Agents can book the seats during the initial booking or after a ticket has been issued.

Travelport and Sabre resumed selling Economy Plus seats earlier this year.

United had pulled its Economy Plus seats from the GDSs more than two years ago, when it transferred its reservation system to a new platform as part of the United-Continental merger. This page is protected by [Copyright](#) laws. Do Not Copy. [Purchase Reprint](#)

United and Amadeus Booking Economy Plus®



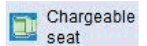
Basic flow

- Step 1.** View Seat Map - Command SM2
- Step 2.** Request Seat - Command ST/12A
- Step 3.** Price seat - Command FXG
- Step 4.** End Transact - Command ER (Required to book seat. IR to confirm KK status.)
- Step 5.** Issue ticket/EMD - Command TTP/TTM/RT

Results: FA line is added to PNR and attached to applicable/SSR for seat.
View seat transactions: Command TJQ/T-UA



Economy Plus seats are shown as "Y" on the cryptic seat map or marked as a chargeable seat on graphical seat maps



Seat requests

- Confirmations of seats only happen after EOT.
- A "/SSR" indicates seat is chargeable.
- All segments must be confirmed before requesting chargeable seats on a previously ended PNR.

Seat pricing

- PNR itinerary has to be priced and the fare stored before the agent can price the seat.
- Seat pricing is necessary before end transact (confirming the seat).
- A \$0 price is returned for MileagePlus Premier members with entitled, complimentary seats. A customer's MileagePlus number must be in the booking record in order to display.
- One TSM-P per seat per passenger is created.
- Once the seat has been confirmed, agents need to cancel and re-book the seat to re-price the seat.

Seat booking

- Agents must End Transact to send seat booking request.
- United will respond with the seat status (KK) if the seat is confirmed, or (NO) if the seat is denied.
- All seat confirmations and updates are added in Q1*C6.
- Seats are held in the United system for 24 hours. Refer to SSR ADMD in the PNR.
- The seat needs to be issued within 24 hours. Any change that affects seat pricing after PNR has been ended, requires an agent to:
 1. Cancel the seat and EOT
 2. Re-book seat, re-price and EOT

Seat issuance

- A seat with a price greater than \$0 has to be issued before expiry of the seat. A seat with a \$0 price **does not** require any issuance.
- In the case of an issuance timeout, instead of an FA- line, an FN line is added to the PNR, indicating which TSM failed to issue, associated to the applicable /SSR.
- FOP information needs to be added manually to the TSM until end of October 2014.
- Only one FOP can be used per issuance request and one FOP per TSM-P.
- **Credit Card is the only FOP allowed.**
- Seats & Service fees (MCOs) cannot be issued together. TJQ will show the issued air ticket, but EMD for United will not be present. TJQ/T-UA will show the United EMD (E-DOC) that you issued.

Post booking changes

- For complete refundability rules, check united.com/refunds.
- In case of an "involuntary change" in the PNR, if a new Economy Plus seat is assigned and:
 1. **The old seat has been issued**
 - No issuance is required for the new seat.
 2. **The old seat was not issued**
 - The new seat, resulting from an involuntary change, has to be cancelled (You will not be able to price or issue this seat).
 - Another Economy Plus seat has to be re-booked, priced and issued.

Need more help?

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AIRLINE POLICIES

Amadeus and United Sign Content Agreement



By **George Dooley** | October 24, 2011

Amadeus subscribers gain access to the full range of United's content and the carrier's Economy Plus seating.

Filed under : [airline policies](#)

Amadeus and **United Airlines** have signed a multi-year extension agreement for full content and ancillary seats. The extension agreement into 2013 guarantees Amadeus subscribers access to the full range of United's content and ability to offer the carrier's Economy Plus seating.



Amadeus and United said they will continue to collaborate on technology enhancements to meet the needs of the airline's merchandising strategy in the travel agency channel.

"We appreciate our strong working relationship with the United team and are proud to help them sell Economy Plus seats through the travel agency community," said **Scott Alvis**, senior vice president, client management, for Amadeus' Airline Group in the **Americas** region. "We look forward to continuing to work closely with United as they evolve their offer and to enable them to sell future products and services via the agency channel according to their strategy."

The extended content agreement upgrades the existing arrangement between the two companies. Amadeus travel agents will continue to be able to access and book the complete range of fares, schedules and inventory for both United and **Continental**. United's Economy Plus seating will become available to U.S.-based Amadeus travel agencies beginning mid-year 2012.

"Amadeus is working hand-in-hand with major carriers worldwide to provide full content on fares and availability along with the introduction of ancillary products for efficient and transparent shopping," Alvis said.

"United is committed to providing the industry's leading air travel products along with the most robust and personalized shopping experience for our customers. To accomplish our vision, we need innovative and efficient partners who are committed to working together with us to distribute our products and services where our customers shop," said Mark Bergsrud, Senior Vice President, Marketing Programs and Distribution for United. "We value Amadeus' worldwide reach and look forward to working together on future distribution opportunities."

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September 25th at 2:00 PM EST





Amadeus signs new global agreement with United Airlines for distribution services and ancillary offerings

Amadeus subscribers worldwide will have continued access to the carrier's full content, including Economy Plus® extra-legroom seating

04/15/2014.

Madrid, Spain, April 15, 2014 -- Amadeus, the leading technology provider for the global travel industry, announced today a new multi-year agreement with United Airlines for worldwide distribution services. Under the new agreement, Amadeus subscribers around the world are guaranteed continued access via the Amadeus System to United's full range of content. The agreement also provides for access and booking of the carrier's ancillary offerings such as Economy Plus® extra-legroom premium seating.

"We're very pleased to reach this new global agreement with Amadeus to offer United's full range of products and services to our corporate and agency partners around the world," said Tom O'Toole, United's senior vice president of marketing and loyalty. "We look forward to working with Amadeus to better merchandise our content and to provide the ability for travelers and agents to access, shop and buy these offerings."

Amadeus is committed to deliver leading merchandising technology to airlines around the world while giving agencies valuable new content to best serve traveler needs. As a global leader in airline merchandising, Amadeus has deployed ancillary services across 74 markets worldwide, and 23 airlines currently distribute their services via the Amadeus System with over 50 more signed up to do so.

"With this agreement, we are excited to continue our long-term global partnership with United including distribution of their ancillary offerings. We look forward to continuing to work jointly with United to advance their global merchandising goals," said Holger Taubmann, Senior Vice President, Distribution, Amadeus IT Group.

Availability of United's Economy Plus seating for Amadeus travel agencies in North America is scheduled for mid-year with global implementation planning underway.

"Amadeus is committed to establishing long-term content agreements like this to provide stability to our travel subscribers. Distribution of United's content and ancillary services in North America and around the world is critical to our subscribers and their ability to serve passengers. United and Amadeus will continue to work together to maximize United's business opportunities across our global network," said Scott Gutz, President and CEO, Amadeus North America.

Notes to the editors:

About Amadeus

Amadeus is a leading provider of advanced technology solutions for the global travel industry. Customer groups include travel providers (e.g. airlines, hotels, rail and ferry operators, etc.), travel sellers (travel agencies and websites), and travel buyers (corporations and travel management companies).

The Amadeus group employs around 10,000 people worldwide, across central sites in Madrid (corporate headquarters), Nice (development) and Erding (operations), as well as 71 local Amadeus Commercial Organizations globally.

The group operates a transaction-based business model.

To find out more about Amadeus please visit www.amadeus.com

About United Airlines

United Airlines and United Express operate an average of more than 5,300 flights a day to more than 360 airports across six continents. In 2013, United and United Express carried more passenger traffic than any other airline in the world and operated nearly two million flights carrying 139 million customers. United is delivering a more flyer-friendly experience, offering more premium-cabin flat-bed seats and extra-legroom, economy-class seating than any airline in North America. In 2013, United became the first U.S. global carrier to offer satellite-based Wi-Fi, including on long-haul overseas routes. The airline also features DIRECTV® on more than 200 aircraft, with more live television access than any airline in the world. United operates nearly 700 mainline aircraft and, in 2014, will take delivery of 35 new Boeing aircraft and welcome the E175 aircraft to United Express. Business Traveler magazine awarded United Best Airline for North American Travel for 2013, and readers of Global Traveler magazine have voted United's MileagePlus program the Best Frequent-Flyer program for 10 consecutive years. Air Transport World named United the Eco-Aviation Airline of the Year Gold Winner in 2013. United is a founding member of Star Alliance, which provides service to 195 countries via 26 member airlines. More than 85,000 United employees reside in every U.S. state and in countries around the world. For more information, visit united.com or follow United on Twitter and Facebook. The common stock of United's parent, UnitedContinental Holdings, Inc., is traded on the NYSE under the symbol UAL.

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Delta Air Lines to sell Economy Comfort seats through Amadeus

Expanded partnership includes access to the carrier's premium economy seats with more leg room

08/06/2012.

ATLANTA and MADRID, August 6, 2012 – Delta Air Lines (NYSE: DAL), and Amadeus, a leading travel technology partner and transaction processor for the global travel and tourism industry, announced today they have expanded their commercial relationship to enable the sale of Economy Comfort, Delta's premium economy seats offering more leg room, through Amadeus' global distribution system (GDS).

The expanded long-term agreement provides more choices for Delta customers and travel agents to access the popular Economy Comfort seating when booking travel via Amadeus.

"Delta is encouraged by the direction of the technology innovation at Amadeus, and this partnership demonstrates that Delta is listening to its valued corporate and agency partners by broadening the availability of our popular Economy Comfort seating," said Wayne Aaron, Vice President, Marketing Programs and Distribution Strategy at Delta. "It's part of the more than \$3 billion we're investing to improve the travel experience of our customers at all points of their journey."

As part of this new agreement, Amadeus also will work with Delta on initiatives to further personalize and enhance the customer experience as Delta continues to transform the distribution of its products and services. Amadeus also will continue to distribute Delta's branded fares as well as its Economy Comfort premium seats.

Economy Comfort features three to four inches of additional leg room across Delta's fleet of two-class aircraft as well as giving passengers priority boarding. On long-haul international flights, the seats also have up to 50 percent more recline than standard economy class seats and customers receive complimentary beer, wine and cocktails. Economy Comfort is available on all Delta mainline aircraft and more than 250 two-class regional jets.

"This new agreement is a testament to the partnership philosophy shared by both companies and an understanding of what is important to our mutual customers. We believe this opportunity to distribute Delta's Economy Comfort product will allow Amadeus to further demonstrate our innovative technology that meets the complex and changing needs of the global marketplace. We are also especially pleased to reach this agreement with Delta Air Lines because of their critical importance to travelers across the globe," said Holger Taubmann, SVP Distribution for Amadeus worldwide.

Amadeus has a committed focus on securing long-term distribution partnerships with leading airlines around the world. Amadeus currently has long-term content agreements in place with airlines worldwide representing over 80 percent of all bookings made by Amadeus travel agencies.

#

Notes to the editors

About Amadeus

Amadeus is a leading transaction processor and provider of advanced technology solutions for the global travel and tourism industry.

Customer groups include travel providers (e.g. airlines, hotels, rail, ferries, etc.), travel sellers (travel agencies and websites), and travel buyers (corporations and individual travelers).

The group operates a transaction-based business model and processed more than 947 million billable travel transactions in 2011.

Amadeus has central sites in Madrid (corporate headquarters), Nice (development), and Erding (operations – data processing center) and regional offices in Miami, Buenos Aires, Bangkok, and Dubai. At a market level, Amadeus maintains customer operations through 73 local Amadeus Commercial Organizations covering 195 countries.

Amadeus is listed on the Madrid, Barcelona, Bilbao and Valencia stock exchanges and trades under the symbol "AMS.MC". For the year ended December 31, 2011, the company reported like-for-like revenues of €2,712 million and EBITDA of €1,039 million. The Amadeus group employs around 10,000 people worldwide, with 123 nationalities represented at the central offices.

To find out more about Amadeus, please visit www.amadeus.com

To visit the Amadeus Investor Relations center, please visit www.investors.amadeus.com

About Delta Air Lines

Delta Air Lines serves more than 160 million customers each year. During the past year, Delta was named domestic "Airline of the Year" by the readers of Travel Weekly magazine, was named the "Top Tech-Friendly U.S. Airline" by PCWorld magazine for its innovation in technology and won the Business Travel News Annual Airline Survey. With an industry-leading global network, Delta and the Delta Connection carriers offer service to nearly 350 destinations in 65 countries on six continents. Headquartered in Atlanta, Delta employs 80,000 employees worldwide and operates a mainline fleet of more than 700 aircraft. A founding member of the SkyTeam global alliance, Delta participates in the industry's leading trans-Atlantic joint venture with Air France-KLM and Alitalia. Including its worldwide alliance partners, Delta offers customers more than 13,000 daily flights, with hubs in Amsterdam, Atlanta, Cincinnati, Detroit, Memphis, Minneapolis-St. Paul, New York-LaGuardia, New York-JFK, Paris-Charles de Gaulle, Salt Lake City and Tokyo-Narita. The airline's service includes the SkyMiles frequent flier program, a world-class airline loyalty program; the award-winning BusinessElite service; and more than 50 Delta Sky Clubs in airports worldwide. Delta is investing more than \$3 billion through 2013 in airport facilities and global products, services and

technology to enhance the customer experience in the air and on the ground. Customers can check in for flights, print boarding passes, check bags and review flight status at delta.com.

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Posted on: May 12, 2013

With Amadeus deal, AA has XML connectivity with two GDSs

By Kate Rice

American Airlines' new long-term global distribution agreement with Amadeus means the carrier now has XML connectivity with two GDSs, enabling subscribers of each to sell American's full range of fares, plus a la carte products such as Preferred Seats and Main Cabin Extra.

The development of enhanced XML connectivity outlined in the new agreement will also support real-time personalized offers, a major goal of airlines.

Cory Garner, American's managing director of sales operations and distribution, could not give a date for when all those products would be on agents' desktops, but he said that both American and Amadeus are interested in "getting this done as quickly as possible."

When it announced the agreement last week, Amadeus said it would work with American on implementation and timelines. Once those plans are finalized, Amadeus said it will give subscribers information about the availability of American's Main Cabin Extra premium seating product and other preferred seating types.

Garner would not comment on compensation — airlines have long paid airlines transaction fees for bookings — but did say that from a high level, he saw no "material changes" in the commercial model.

Garner said the agreement with Amadeus was very similar to American's agreement with Travelport, which was announced in March.

Garner has compared the ancillary content that this agreement enables to HDTV. He compared the XML pipe — in this instance, one built by Farelogix and Google's ITA Software — to the fiber optic cables that deliver HD content to set-top boxes and TV screens.

That pipe is compliant with IATA's New Distribution Capability (NDC), a proposed XML standard outlined in IATA's Resolution 787, now before the Transportation Department.

Garner said American was not jumping the gun by adopting this standard because the airline's own direct connect standards, in production since 2008, predate NDC.

"It just so happens that the API that we use has substantively been adopted by Open Axis and later by IATA as the New Distribution Capability standard," Garner said. American, he said, is simply using the same technology it has always used.

Amadeus said it has been using XML to connect to airlines' host systems since 2009 and to connect to travel agents for much longer. It is already using XML code to link with several low-cost carriers to access their availability and pricing data as well as to manage their ancillary services, according to an Amadeus official.

Ancillary services are high-margin services, particularly when compared with the narrow margins that typify the airline industry overall.

Garner and other airline executives have said they do compensate travel agencies for high-yield tickets, but these compensation agreements can vary from airline to airline and from agency to agency. Garner said that compensating agencies for high-yield sales has been a practice in the business for a “very long time.”

But, he said, ancillaries are a “whole new revenue pie” for airlines to think about. He said that any time agencies can generate incremental revenue for airlines, “there is an opportunity to share that value.”

Still, no major airline has yet determined that it will treat an ancillary sale as incremental, since airlines can sell ancillaries at check-in and even on the plane itself.

Follow Kate Rice on Twitter [@krtravelweekly](#).

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United Economy Plus® and Travelport factsheet

Selling United Economy Plus seats on U.S. Travelport platforms

- The sale of an Economy Plus seat is enabled in the U.S. agency workflow.
- In addition to enabling the sale of Economy Plus seats, agents will have access to additional seat map functionality, such as seat prices.
 - Travelport Options Integrator (TOI) must be downloaded by Travelport agents in order to sell Economy Plus seats. Agents should contact a Travelport representative for details on downloading TOI.
 - Economy Plus will be available in Smartpoint later this year
- Seats are sold on a per segment (flight) basis.
- Seats can be sold on ticketed itineraries only.
 - Ticketing is not required to view seat prices, check availability or book qualified Premier customers and their qualified companions.
- A travelers MileagePlus® number is required for accurate pricing and benefits, based on member status.
 - Advance complimentary access to Economy Plus is available on all United and United Express operated flights
 - United will return a \$0 price for MileagePlus Premier members entitled to a free Economy Plus seat

MileagePlus Premier member Economy Plus rules

Status	When Available	Companions
Global Services / Premier 1K	At booking	+8
Premium Platinum	At booking	+8
Premier Gold	At booking	+1
Premier Silver	At check-in	+1

Payment

- Payment for Economy Plus seats can be made with a **credit card only**, processed directly with United Airlines.
 - Credit card number, card type, expiration month / year are required for purchase.
 - CID/CVV2, billing address and card holder name are preferred but not mandatory
 - Accepted forms of credit card payments:
 - Visa
 - Mastercard
 - American Express
 - Discover
 - JCB
 - Diner's Club International
 - UATP

Refunds

Refunds for Economy Plus purchases are processed automatically after scheduled departure in the event of flight cancellation or change to a different flight, when travel is completed in a standard United Economy seat, or when travel is completed in a seat of equal or greater value

through the purchase of a premium cabin seating offer. If a Complimentary Premier Upgrade is issued, then the Economy Plus purchase is not eligible for a refund.

Frequently asked questions:

Q: Can an Economy Plus seat be sold on a PNR prior to ticketing?

A: No, the PNR must be ticketed in order to purchase an Economy Plus seat.

Q: Can TOI be used to book complimentary Economy Plus seats?

A: Yes, both complimentary and paid seats are available for booking using TOI.

Q: In what currencies are United Economy Plus seats priced?

A: All seats are priced in US dollars (\$) only.

Q: Are United Economy Plus seats available on codeshare flights where United is not the operator?

A: No, United Economy Plus seats are only available on United and select United Express operated flights.

Q: Are United Economy Plus exit row seats available for purchase?

A: No, at this time only non-exit row seats are available for purchase. Exit row seats may only be purchased directly through united.com, United Reservations or an airport kiosk. Bulk-head seats are available for purchase however.

Q: Will TOI record the seat assignment and purchase transaction details in the GDS PNR?

A: Yes. Users are required to select the optional macros available in TOI in order to add the applicable information to their GDS booking.

Q: Can agents view seat prices and availability in TOI without ticketing the PNR?

A: Yes. The TOI seat map will show a range of prices initially however the exact price of an individual seat will only be returned if the agent selects the seat and requests a price. If the PNR is not ticketed, the seat cannot be purchased, however the price will still be returned.

Q: Are Economy Plus seats available for purchase on the second and subsequent legs of a change of gauge flight?

A: No. Economy Plus seats can only be purchased on the first leg of a change of gauge flight. If the flight is a thru flight with no change of gauge, the seat price will be reflective of the entire flight, not for an individual leg.

Q: Will United issue an EMD (Electronic Miscellaneous Document) for the sale of Economy Plus?

A: No. However, upon receipt of payment, United will create an Electronic Data Document (EDOC) to store the payment information. The EDOC number will be returned from United and serve as the receipt of payment for the Economy Plus seat.

Seat change questions:

Q: What if a customer has already purchased a paid seat, but wants to change to a new seat that is the *same price or less than* the original seat?

A: If the seat change is the same price, a zero price will be returned. If the new seat costs less than the original seat, there is no refund for the difference in seat prices.

Q: What if a customer has already purchased a paid seat, but wants to change to a new seat that is *higher* in price than the original seat?

A: The full price of the new seat will be charged to the passenger's credit card. A refund for the full price of the original seat will be simultaneously credited back to the same credit card.

Q: What if a customer who has purchased an Economy Plus seat subsequently purchases an upgrade to United Business, United BusinessFirst, United First or United Global First?

A: After the completion of the upgraded flight, the customer will be refunded the full amount of the Economy Plus seat.

Q: What if a customer who has purchased an Economy Plus seat is offered a complimentary upgrade to United Business, United BusinessFirst, United First or United Global First?

A: Since the upgrade is complimentary, the customer will not receive a refund.

Q: Can agents change a paid seat to a different paid seat in the traditional green screen environment instead of using TOI?

A: No, paid seat to paid seat changes can only take place in TOI. However, it is possible to cancel a paid seat or change to an unpaid seat in the traditional green screen.

Additional Resources

For additional information related to rules, pricing, refunds and terms and conditions for Economy Plus, please refer to united.com

Agents should contact their Travelport representative for instructions on how to download and use the TOI application.



Economy Plus

Opt to sit farther from your feet.

Economy Plus® is the simple choice for extra comfort at the best value. Economy Plus seats offer up to five extra inches of legroom, and their location near the front of the economy cabin gives the added benefit of making a swift exit from the plane upon arrival.



Extra legroom could be yours on your next United flight. Here are some details about how and where Economy Plus is available.

- United B747, B777 and international B767 aircraft feature more than 65 Economy Plus seats each.
- All United Express® explusSM are configured with an Economy Plus section.

1506 days ago

Travelport agencies to sell United ancillary services, Economy Plus seating

Travelport and United Airlines extended their content agreement two years, and as part of the pact travel agencies hooked up to the Apollo, Galileo and Worldspan global distribution systems should be able to offer the airline's Economy Plus seating later this year.

Economy Plus

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Extra legroom could be yours on your next United flight. Here are some details about how and where Economy Plus is available.

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- All United Express® explusSM are configured with an Economy Plus section.

Travelport says agencies connected to its GDSs and using the Apollo Focalpoint, Galileo Desktop and Worldspan GoRes desktops will get the capability later this year to book these United premium seats within their transaction flow.

“Travelport will also integrate these merchandising capabilities over time into the Travelport Universal Desktop, making it easier for Travelport-connected agents around the world to transact this premium coach seat capability within their standard workflow,” Travelport says.

From a technical standpoint, one might assume Travelport could have gained access to United’s Economy Plus seating sooner than the stated timetable since Travelport’s Apollo GDS hosts United’s internal reservation system.

However, Sabre beat Travelport in providing access for Sabre-connected agents to United Economy Plus by a good stretch of time.

Sabre gave its agents that capability in early 2009.

The development occurs as the GDSs are sparring with airlines over the introduction of standards as a way to deliver airline ancillary services to travel agents through GDSs. The Airlines Reporting Corp.

is testing Electronic Miscellaneous Documents as a means of settling payments for ancillary services and is slated to introduce them in the fall.

All of United's published fares, including Web fares, and seat inventory would be made available to Travelport GDS subscribers, under the terms of the Travelport-United extension through 2013, Travelport says.

Travelport's extension of its content agreement with United through 2013 follows a similar extension with Continental, which was announced last month.

With regulatory approval, the two airlines would merge in the fourth quarter.



About the Writer :: Dennis Schaal

Dennis Schaal was North American editor for Tnooz.

Comments

[...] This post was mentioned on Twitter by Dennis Schaal, Social Mapping, Tnooz, Turisdata, Steve Orr and others. Steve Orr said: RT @denschaal: Travelport agencies to sell United ancillary services, Economy Plus seating <http://bit.ly/9Ke1H0> (Tnooz) [...]

1506 days ago

[...] Travelport extended its content agreement with United Airlines through 2013 and says travel agents connected to its GDSs will be able to book the airline's Economy Plus seating later this year. Full story here. [...]

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The Intel Services logo, featuring the Intel logo and the word "SERVICES" below it.

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Travelport announced a "long-term" distribution agreement with United Airlines that will provide subscriber access to the airline's "best inventory and prices" and unspecified ancillary products. As part of the deal, United agreed to participate in the Travelport Merchandising Platform, including the Rich Content and Branding module. The airline this year began selling its Economy Plus seating product via Travelport, but United declined to identify other ancillary services covered in the agreement. "We'll work with Travelport to develop solutions that will provide the most meaningful ancillary content to the Travelport agent and to our customers," according to a United spokesperson. "We're still developing the timetable for additional ancillary product rollouts."



Travelport Launches the Capability to Sell United Economy Plus Seating in the U.S.

First GDS to Reconnect Ability to Sell

February 07, 2014



CHICAGO and ATLANTA, Feb. 7, 2014 /PRNewswire/ -- Travelport and United Airlines today announce that Travelport-connected agents in the U.S. can now sell United Economy Plus extra-legroom seating. With this announcement, Travelport becomes the first global distribution system (GDS) to re-launch the capability for travel agents to sell the additional space and comfort of Economy Plus while maintaining the processing efficiency of GDS bookings. In addition, Travelport-connected agents in the U.S. now have the ability to access Economy Plus seat availability and prices within the agent workflow, as well as book complimentary Economy Plus seats for qualified MileagePlus customers and their companions.

"We're delighted to provide Travelport-connected travel agents in the U.S. with the ability to offer and fulfill their customers' wishes to purchase United Economy Plus seating and to become the first GDS to do so," said

Chris Engle, vice president, Air Services, Travelport. "This is a prime example of Travelport executing one piece of its merchandising strategy: to partner with airlines to enable them to distribute their fares and ancillary content exactly how they choose to, to do so through the travel agency channel, and to do it in a way that supports the integrity and efficiency of the GDS booking and management process for travel agents."

"We're extremely pleased to join with Travelport to sell United Economy Plus seating to our mutual customers through this channel," said John Slater, United's vice president of sales for the Americas. "This next-generation travel technology enables our travel management company partners to utilize the same dynamic pricing and to provide the same Economy Plus shopping experience as we do on united.com."

United offers more extra-legroom, economy-class seating than any other airline in North America.

The airline is working closely with Travelport to improve its ability to sell ancillary products like Economy Plus.

About Travelport

Travelport is a leading distribution services and e-commerce provider for the global travel industry.

With a presence in over 170 countries, approximately 3,500 employees and 2012 net revenue of more than \$2.0 billion, Travelport is comprised of the global distribution system ("GDS") business, which includes the Galileo and Worldspan brands, its Airline IT Solutions business and a joint venture ownership of eNett.

Headquartered in Atlanta, Georgia, Travelport is a privately owned company.

Follow Travelport on Twitter at <http://twitter.com/Travelport>

About United

United Airlines and United Express operate an average of more than 5,300 flights a day to more than 360 airports across six continents. In 2013, United and United Express carried more passenger traffic than any other airline in the world and operated nearly two million flights carrying 139 million customers. United is delivering a more flyer-friendly experience, offering more premium-cabin flat-bed seats and extra-legroom, economy-class seating than any airline in North America. In 2013, United became the first U.S. global carrier to offer satellite-based Wi-Fi, including on long-haul overseas routes. The airline also features DIRECTV® on more than 200 aircraft, with more live television access than any airline in the world. United operates nearly 700 mainline aircraft and, in 2014, will take delivery of 36 new Boeing aircraft and welcome the E175 aircraft to United Express. *Business Traveler* magazine awarded United Best Airline for North American Travel for 2013, and readers of *Global Traveler* magazine have voted United's MileagePlus program the Best Frequent-Flyer program for 10 consecutive years. Air Transport World named United the Eco-Aviation Airline of the Year Gold Winner in 2013. United is a founding member of Star Alliance, which provides service to 195 countries via 28 member airlines. More than 85,000 United employees reside in every U.S. state and in countries around the world. For more information, visit united.com or follow United on **Twitter** and **Facebook**. The common stock of United's parent, United Continental Holdings, Inc., is traded on the NYSE under the symbol UAL.

(Logo: <http://photos.prnewswire.com/prnh/20130404/MM89155LOGO>)

SOURCE United Airlines

For further information: United Airlines Worldwide Media Relations, 872.825.8640, media.relations@united.com; Travelport Media Contact, Jill Brenner, Senior Director, Corporate Communications, Tel: +973 753 3110, Email: jill.brenner@travelport.com

Delta to Distribute Economy Comfort Seats Through Travelport GDSs

by Michèle McDonald

June 07, 2012

Travel agents who use one of Travelport's GDSs – Apollo, Worldspan or Galileo – will be able to book Delta Air Lines' Economy Comfort seats on the system within a few months.

It will be the first time that Delta distributes its premium economy product through a GDS. The option has been available only through direct channels: delta.com, the carrier's call centers and airport kiosks and counters.

Additional leg room, priority boarding

Economy Comfort, introduced a year ago, provides three to four inches of additional leg room on Delta's two-class aircraft, including its two-class regional jets, along with priority boarding. On long-haul international flights, the seats also have up to 50% more recline than standard economy seats, and alcoholic beverages are complimentary.

United's Economy Plus

Meanwhile, Travelport and Sabre are still working to rebuild the connection between their GDSs and United Airlines' systems so that subscribers can resume selling Economy Plus. That capability was lost when United migrated from the Apollo platform to SHARES, the passenger services system of its merger partner, Continental.

DELTA AIR LINES ECONOMY COMFORT SEATS NOW AVAILABLE THROUGH TRAVELPORT GDS SYSTEMS



DELTA AIR LINES ECONOMY COMFORT SEATS NOW AVAILABLE THROUGH TRAVELPORT GDS SYSTEMS

(April 9, 2013) - Delta Air Lines is pleased to announce that beginning on April 9, 2013, Economy Comfort™ seating is available for sale through Travelport by travel agency partners in the U.S. and Canada who use the Galileo, Worldspan or Apollo GDS systems.

The joint effort, originally announced in June 2012, demonstrates Delta's commitment to providing corporate and agency customers the best possible solutions for ancillary products. (Click [here](#) to view the June announcement.)

Complete details related to the following topics may be found on WorldAgent Direct. To view the complete News Article, please click: [Delta Air Lines Economy Comfort Seats Now Available through Travelport GDS Systems](#).

- Implementation
- Economy Comfort Features
- Economy Comfort Availability, Complimentary Access and Discounts
- Selling Delta Economy Comfort Seats
- Changes, Cancellations and Refunds
- Travelport Product Support Resources
- FAQs

Thank you for your support of Delta, Air France, KLM and Alitalia.

LES SIÈGES ECONOMY COMFORT DE DELTA AIR LINES DÉSORMAIS DISPONIBLES GRÂCE AUX SYSTÈMES GDS TRAVELPORT

(9 avril 2013) Delta Air Lines a le plaisir d'annoncer qu'à partir du 9 avril 2013, les sièges Economy Comfort™ sont disponibles à la vente via Travelport dans les agences de voyage partenaires aux États-Unis et au Canada qui utilisent les systèmes GDS Galileo, Worldspan ou Apollo.

L'effort conjugué, initialement annoncé pour juin 2012, prouve la volonté de Delta de fournir aux clients d'entreprise et aux agences les meilleures solutions possibles pour les produits auxiliaires. (Cliquez [ici](#) pour consulter l'annonce du mois de juin.)

Toutes les informations sur les sujets suivants sont disponibles sur WorldAgent Direct. Veuillez cliquer ici pour lire l'intégralité du communiqué de presse : [Les sièges Economy Comfort de Delta Air Lines désormais disponibles grâce aux systèmes GDS Travelport](#).

- Réalisation
- Services Economy Comfort
- **Disponibilité des sièges Economy Comfort, accès gratuit et réductions**
- Vente des sièges Economy Comfort de Delta
- Modifications, annulations et remboursements
- **Ressources de soutien produit**
- Foire aux questions

Nous vous remercions du soutien que vous apportez à Delta, Air France, KLM et Alitalia.

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TRAVELPORT AND AMERICAN AIRLINES ANNOUNCE DISTRIBUTION AGREEMENT, RESOLUTION OF LITIGATION

ATLANTA and FORT WORTH, TX, MARCH 13, 2013 – Travelport, a leading provider of critical transaction processing solutions and data to companies operating in the global travel industry, and American Airlines, a wholly owned subsidiary of AMR Corporation, today announce a new long-term, global distribution agreement. In addition to enabling continued access to shop and book the full content of flights marketed by American Airlines, the new agreement positions Travelport to become the first global distribution system to offer access to American’s other products and services.

Following a period of technical integration, Travelport and American plan to use their industry-leading technology, including both Travelport’s Universal API technology and American’s XML-based direct connect interface, to deliver additional capabilities to all Travelport subscribers, including the ability to sell American’s newly introduced Main Cabin Extra seating product.

Main Cabin Extra makes travel more comfortable by providing four to six inches of additional legroom and Group 1 boarding. And since Main Cabin Extra seating is close to the front of the plane, customers can get on and off the plane much faster. By making Main Cabin Extra available through global distribution systems for the first time, American is delivering on its commitment to make the travel experience more connected and comfortable from start to finish.

“Travelport deserves praise for working with American to create a solution that can display all of our product options to travel agents in a transparent, customer-friendly way that also clearly differentiates American’s products from other airlines,” said Derek DeCross, vice president of global sales for American Airlines.

Dan Westbrook, vice president and general manager of Global Distribution Sales and Service, Travelport, said, “American is an industry leader, and the perfect partner with which to build upon Travelport’s airline partnership approach to merchandizing, optional ancillary sales and product differentiation. All of our subscribers will continue to access American’s full content, while American can merchandize its full line of products through Travelport, providing consumers and travelers a transparent marketplace and the ability to shop and book all services at their channel of choice.”

American and Travelport also resolved all litigation between themselves. The terms of the settlement agreement require review and approval by the court presiding over AMR Corporation's restructuring.

About Travelport (www.travelport.com)

Travelport is a leading provider of critical transaction processing solutions and data to companies operating in the global travel industry.

With a presence in over 170 countries, approximately 3,500 employees and 2012 net revenue of more than \$2.0 billion, Travelport is comprised of the global distribution systems (GDS) business, which includes the Galileo and Worldspan brands, its Airline IT Solutions business and a majority joint venture ownership in eNett.

Headquartered in Atlanta, Georgia, Travelport is a privately owned company.

Follow Travelport on Twitter at <http://twitter.com/Travelport>

About American Airlines

American Airlines focuses on providing an exceptional travel experience across the globe, serving more than 260 airports in more than 50 countries and territories. American's fleet of nearly 900 aircraft fly more than 3,500 daily flights worldwide from hubs in Chicago, Dallas/Fort Worth, Los Angeles, Miami and New York. American flies to nearly 100 international locations including important markets such as London, Madrid, Sao Paulo and Tokyo. With more than 500 new planes scheduled to join the fleet, including continued deliveries of the Boeing 737 family of aircraft and new additions such as the Boeing 777-300ER and the Airbus A320 family of aircraft, American is building toward the youngest and most modern fleet among major U.S. carriers. American's website, AA.com[®], provides customers with easy access to check and book fares, and personalized news, information and travel offers. American's AAdvantage[®] program, one of the most popular frequent flyer programs in the world, lets members redeem miles for flights to almost 950 destinations worldwide, as well as flight upgrades, vacation packages, car rentals, hotel stays and other retail products. The airline also offers nearly 40 [Admirals Club](#)[®] locations worldwide providing comfort, convenience, and an environment with a full range of services making it easy for customers to stay productive without interruption. American is a founding member of the **oneworld**[®] alliance, which brings together some of the best and biggest airlines in the world, including global brands like British Airways, Cathay Pacific, Iberia Airlines, Japan Airlines, LAN and Qantas. Together, its members serve more than 840 destinations with some 9,000 daily flights to nearly 160 countries and territories. Connect with American on Twitter [@AmericanAir](#) or [Facebook.com/AmericanAirlines](https://www.facebook.com/AmericanAirlines). American Airlines, Inc. and American Eagle Airlines, Inc. are subsidiaries of AMR Corporation. AMR Corporation common stock trades under the symbol "AAMRQ" on the OTCQB marketplace, operated by OTC Markets Group.

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For media inquiries, please contact:

Matt Miller
817-967-1577
MediaRelations@aa.com

Jill Brenner, Corporate Communications, Senior Director, Americas
Tel: 1 973 939 1325
Email: jill.brenner@travelport.com

Kate Aldridge, Corporate Communications, Senior Director, EMEA and APAC
Tel: +44 (0) 1753 288720
Email: kate.aldrige@travelport.com



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Travelport-BA Seat Selection Tool Uses BookingBuilder, Disregards Agent Incentives

February 16, 2011 - 01:21 AM EST

By Jay Boehmer

Travelport GDS this week enabled U.K.-based subscribers to pre-pay for British Airways seat assignments, though no incentive or commission structure for agents has been determined. Travelport is facilitating the sale of seat assignments--previously only available through [ba.com](#)--using its Options Integrator, which "links directly to BA's pre-paid seating content" and is supported by technology from BookingBuilder.

Travelport plans to use Options Integrator to sell other ancillary services from other airlines. Next up: upselling for United Airlines' Economy Plus seats, expected to begin later this month. ([Sabre already offers the Economy Plus upsell](#)).

Somewhat complicating the selling of BA's seat assignments, the carrier only charges the fee to some passengers. Though BA offers free seat selection to all customers at the time of check-in, many economy passengers must pay an additional fee to secure seats at booking. Some elite loyalty program members, however, are exempt, and travel management company sources indicated that preferred partners also can be exempted.

Apart from Spirit Airlines, U.S. carriers generally do not charge passengers to select general seating at the time of booking, though fees to book exit row or bulkhead seats abound. TMC sources told *The Beat* that BA's close partner, American Airlines, as recently as December was planning to institute a seat selection fee by spring 2011. An AA spokesperson would not "comment on rumors or speculation," but added that the carrier is "constantly evaluating products and services for our customers."

Travelport's commitment to sell BA seat assignments dates back to a [full-content agreement they announced in late 2009](#), which is set for expiration in April 2013.

While the prospect of enabling ancillary sales in travel agency channel has been tied to the opportunity for agencies to earn commissions or incentive revenue on those sales, the BA-Travelport program does not now contemplate such a benefit. "There is a case to be made to do that in the future, but these are early days," said Travelport GDS portfolio director and head of regional product management Reg Warlop. "What we're trying to do today is enable the agents to do the booking without impacting their workflows, their productivity."

There may be other extras planned for the future which are better candidates for agency incentives than something like seat selection which previously was included in the fare and which travelers' may need little incentive to buy.

Warlop characterized the Travelport Options Integrator as a workaround to enable agents who use legacy desktops to sell such optional services as the BA seat assignment or United's Economy Plus.

Regarding the BA seat assignment, "Since the majority of our agents are still using the Galileo desktop, we had to find a simple mechanism that would trigger an alert, because it's a very small percentage of bookings that are eligible for this kind of ancillary service offer," Warlop said. "It would be impossible for an agent to have to look for them. That's why we decided that we'd absolutely need listing to make it completely easy. BookingBuilder has this listing technology that we have already in our portfolio. We already licensed for it, so we might as well just use this piece of it."

According to BookingBuilder CEO Seth Perelman, "In this particular case, we created a whole custom plug-in for BookingBuilder Genie that understands when the agent hits certain points in booking British Airways within Apollo, Galileo and Worldspan. That acts as a bridge between the user and a Travelport server, which in turn connects to BA and facilitates the purchasing of the additional content. In this case, it's seat assignments, and, based on frequent flyer status, the agent may purchase those seats or they may be free."

Though Options Integrator works with legacy agency desktops, it requires a download by subscribers--either desktop-by-desktop or site-wide, depending on the TMC's IT configuration, said Travelport GDS senior product manager of merchandizing Steven Ratcliffe.

Right now, ancillary airline content flowing through the Options Integrator is limited to the BA initiative, but Ratcliffe noted, "We do intend to put more content through there. It will become a much more useful

tool with more content as we go forward." Perelman said Options Integrator was designed to "facilitate all types of additional content that they want to offer with minimal to zero additional programming required."

Warlop added that connectivity established with BA to sell seat assignments also would be enabled through the Universal API, which Travelport launched last year to aggregate content from multiple sources, including supplier direct connects. However, most Travelport subscribers likely would not adopt the Universal API until Travelport launches the Universal Desktop in the first half of this year.

"With the view of a longer-term strategy of content coming into our GDS and being able to be consumed by any point of sale--including legacy desktops, universal desktops, the Universal API and then to the Expeditas of the world, et cetera--this is really what we've done with this implementation," Warlop said of Travelport's work with BA. "So, it's not only a front-end widget that we've built. The majority of the work, with a long-term view on a BA relationship, is to pipe BA ancillary services into the GDS."

~ Jay Campbell contributed to this report.













This article originally was published in [*The Beat*](#)













Airline Fees

Fees subject to change and are not guaranteed by KAYAK. [See additional important info](#)

[View full list of carriers](#)

Airline	Checked Baggage (each way)	Meals (each way)	Pets (each way)	Unaccompanied Minor Service (each way)	Seat Assignment / Legroom (each way)
 Air Canada Fees 24 days ago Send feedback	1st Bag: \$25 CAD/USD (for travel between US/Canada) 2nd Bag: \$35 CAD/USD 3rd Bag: \$100 CAD/USD	Snack: \$3- \$5 Meal: \$3 - \$7	Checked: \$105 (North America routes) Cabin: \$50- \$100 (per direction) Cargo: See Aircanada.com	Per Child: \$100 (age 8-11)	For Tango level airfares, seat selection \$10-\$40
 AirTran Fees 24 days ago Send feedback	1st Bag: \$25 2nd Bag: \$35 3rd Bag: \$75	Snack: Free Meal: Not offered	Checked: Not offered Cabin: \$95 (each way) Cargo: Not offered	\$50 one-way per child on nonstop and direct flights or \$100 roundtrip per child. (age 5-11)	Fees starting at \$10 for seat assignment
 Alaska Airlines Fees 24 days ago Send feedback	1st Bag: \$25 Domestic and International 2nd Bag: \$25 3rd Bag: \$75	Snack: \$6 Meal: \$6-\$7	Checked: \$100 Cabin: \$100 Cargo: Contact Alaska Air	Age 5-7 : \$25 USD/CAD each way per child for non-stop/direct flights Age 8-17 : \$25 USD/CAD each way per child for non-stop/direct flight, \$50 USD/CAD each way per child for connecting flight	Seats can be requested by accessing your reservation
 American Airlines Fees 24 days ago Send feedback	1st Bag: \$25 2nd Bag: \$35 3rd Bag: \$150	Snack: \$3-\$8.29 Meal: \$8.29-\$9.99	Checked: \$175 Cabin: \$125 Cargo: See AAcargo.com	Per Family: \$150 each way (age 5-17 available, age 5-11 required, age 12-17 not required)	Preferred Seats are available for purchase when you book your flight, up until the airport check-in cutoff time, beginning at \$4 USD per flight
 Cape Air Fees 24 days ago Send feedback	1st Bag: Free 2nd Bag: \$40 3rd Bag: \$40		Cabin: \$10 (special rules apply)	Free, non-stop only (age 5-12 required, 13-17 available)	
 Delta Fees 24 days ago Send feedback	1st Bag: \$25 2nd Bag: \$35-\$100 3rd Bag: \$125	Snack: \$3-\$6.99	Checked: \$200 Cabin: \$125 Cargo: Varies	Per Family: \$100 (age 5-14)	Aisle, Window, and other Preferred seats offer at cost for non-members, free with Medallion Membership
 Era Aviation Fees 24 days ago Send feedback	1st Bag: Free 2nd Bag: Free 3rd Bag: \$60		See flyera.com	See flyera.com	
 Frontier Fees 24 days ago Send feedback	Carry-on: \$25 during online booking, \$30 online, \$35 at airport counter 1st Bag: \$20 on FlyFrontier.com (\$25 at airport check-in) 2nd Bag: \$30 3rd Bag: \$75	Snack: \$2.99-\$6.99 Meals: \$6.49-\$7.48	Cabin: \$75 - \$125	(age 5-14) \$100 Per Family each way	Leg Room: \$15 per Segment
 Hawaiian Airlines Fees 24 days ago Send feedback	1st Bag: \$25 2nd Bag: \$35 3rd Bag: \$100 (\$50 on interisland flights)	Snack: Free Meal: \$0-\$10	Checked: Contact for Details Cabin: Inter-Island Only - Contact for Rates	Per Child: \$100 (\$35 Interisland) (age 5-11 required, age 12-17 optional)	
 Island Air Fees 24 days ago Send feedback	1st Bag: \$15 2nd Bag: \$25 3rd Bag: \$35	Snacks: Not provided	Cabin: \$35	Age 5-11: \$25 direct, non-stop flights Age 8-11: \$50 to transfer carriers Age 12-17: \$30 for optional escort service to connections	See IslandAir.com
 JetBlue Airways Fees 24 days ago Send feedback	1st Bag: Free 2nd Bag: \$50 3rd Bag: \$100	Snack: \$0-\$6 Meals: \$4-\$12	Checked: Not offered Cabin: \$100 Cargo: Not offered	Per Child: \$100 (age 5-14) Non-stop only	Online seat assignment available, Even More Space seats available for \$10-\$70 (varies by flight)
 Mokulele Airlines Fees 24 days ago Send feedback	1st Bag: \$15 2nd Bag: \$17 3rd Bag: \$25		Cabin: \$25	Ages 5 - 12: \$25	See iflygo.com
	1st Bag: Free		Cabin: \$75		

 Pacific Wings Fees 24 days ago Send feedback	2nd Bag: \$25 3rd Bag: \$25				
 Penair Fees 86 days ago Send feedback	1st Bag: Free 2nd Bag: \$25 3rd Bag: \$50		Checked: See Penair.com Cabin: See Penair.com		
 SeaPort Airlines Fees 24 days ago Send feedback	1st bag: Free 2nd Bag: \$40 3rd Bag: \$40+		Cabin: \$50 Cargo: Contact SeaPort Airlines	Age 7 - 14: \$50	
 Silver Airways Fees 189 days ago Send feedback	1st Bag: \$25 Domestic and International 2nd Bag: \$35 Domestic and \$40 International 3rd Bag: \$125 Domestic and \$150 International		Pet in Cabin (per carrier, one-way): \$125	Unaccompanied Minor age 5-11 (one-way): \$150	
 Southwest Fees 24 days ago Send feedback	1st Bag: Free 2nd Bag: Free 3rd Bag: \$75	Snack: Free Meal: Not offered	Checked: Not offered Cabin: \$95 (each way) Cargo: Not offered	Per Child: \$50 each way (age 5-11)	No assigned seats
 Spirit Airlines Fees 24 days ago Send feedback	Carry-On (if it does not fit under seat): \$35 at booking, \$45 at online check-in, \$50 at kiosk/desk, \$100 at boarding 1st Bag: \$30 at booking, \$40 at online check-in, \$45 at airport 2nd Bag: \$40 at booking, \$50 at online check-in, \$55 at airport 3rd Bag: \$85 at booking, \$95 at online check-in, \$100 at airport	Snack: \$2.50-\$4 Meal: \$3-\$14.50	Checked: Not offered Cabin: \$100 Cargo: Not offered	Per Child: \$100 (age 5-14)	Free Spirit Assigned Seating at Check-In. Customer-Requested Seat Assignments/Deluxe Leather \$1.00-\$50.00 per seat. Big Front Seats \$12-\$199 per seat.
 Sun Country Air Fees 24 days ago Send feedback	1st Bag: \$25 (\$20 online) 2nd Bag: \$35 (\$30 online) 3rd Bag: \$75	Snack and meals available on-board visit suncountry.com	Cabin: \$125-\$199 Checked: Not offered Cargo: Not offered	\$75 per family per flight segment (age: 5-12)	Additional charges may apply based on seat location and destination.
 US Airways Fees 24 days ago Send feedback	1st Bag: \$25 2nd Bag: \$35 3rd Bag: \$150	Snack: \$3-\$6.29 Meal: \$4.99-\$8.59	Checked: Contact US Airways Cabin: \$125 Cargo: Not offered	Per Child: \$150 (age 5-11) non-stop	Seat assignment known as "ChoiceSeat" is available at an additional charge
 United Fees 24 days ago Send feedback	1st Bag: \$25 (may vary) 2nd Bag: \$35 (may vary) 3rd Bag: \$100 (may vary)	Snackbox: \$3.29-\$8.59 Fresh Food Menu: \$7.99-\$9.99	Checked: See United.com Cabin: \$125 Cargo: See United.com	Per Family: \$150 (ages 5-7 Non-stop Only)	Economy Plus: See United.com
 Virgin America Fees 24 days ago Send feedback	1st Bag: \$25 2nd Bag: \$25 3rd Bag: \$25	Snack: \$2-\$3 Meal: \$7-\$9	Checked: Not offered Cabin: \$100 (per segment) Cargo: Not offered	Per Child: (age 5-14) \$75 and up (varies with flight length)	Main Cabin Select: \$39-\$129
 Vision Airlines Fees 24 days ago Send feedback	1st bag: \$25 (\$15 Advance Purchase) 2nd Bag: \$30 (\$20 Advance Purchase) 3rd Bag: \$30 (\$20 Advance Purchase)	Snack: Free	Checked: Not offered Cabin: \$50	Age 5-12: \$100	

You can get more detailed fee information for each carrier by clicking on the name of the airline below.

- | | | | | |
|---------------------------------------|----------------------------------|-------------------------------------|------------------------------------|----------------------------------|
| Adria Airways | Air India | Alitalia | British Airways | Darwin Airlines |
| Aegean Airlines | Air Jamaica | Allegiant Air | Brussels Airlines | Delta |
| Aer Lingus | Air Macau | American Airlines | Bulgaria Air | Donavia |
| Aeroflot | Air Malta | ANA | Calm Air Intl | Dragonair |
| Aerolineas Argentinas | Air Moldova | Arik Air | Canadian North | Eastern Airways |
| Aeromar | Air Namibia | Arkefly | Cape Air | easyJet |
| Aeromexico | Air New Zealand | Arkia Israel | Caribbean Airlines | Egypt Air |
| Afriqiyah Airways | Air Niugini Pty | Aserca Airlines | Carpatair | El Al Israel Air |
| Aigle Azur | Air One | Atlantic Airways | Cathay Pacific | Emirates |
| Air Algerie | Air Tahiti | Atlasjet | Cayman Airways | Estonian Air |
| Air Astana | Air Transat | Aurigny Air | Central Mountain | Ethiopian Air |
| Air Austral | Air Uganda | Austrian Airlines | China Airlines | Etihad Airways |
| Air Berlin | Air Vanuatu | Avianca Aerovias | China Eastern Air | Etihad Regional |
| Air Botswana | AirAsia | Avianca Brazil | China Southern | Eurostar |
| Air Canada | airBaltic | Azerbaijan Airlines | CityJet | EVA Air |
| Air China | Aircalin | Bahamasair | Copa Airlines | Fiji Airways |
| Air Choice One | Airlines PNG | Bangkok Airways | Corsair | Finnair |
| Air Dolomiti | Airmoth Regional | Bearskin Airlines | Croatia Airlines | First Air |
| Air Europa | AirTran | Belavia | Cyprus Airways | Flybe |
| Air France | Airzena Georgian | Berjaya Air | Czech Airlines | Garuda Indonesia |
| Air Greenland | Alaska Airlines | Binter Canarias | Danish Air | Germanwings |

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Airline Fees: The Ultimate Guide

May 1, 2014 1:27 pm by SmarterTravel Staff

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Two dollars for a soda? Ten bucks for an aisle seat? Paying for a carry-on? Airline fees keep increasing, so if you're confused, we can help.

With our *Ultimate Guide to Airline Fees*, you'll find a one-stop reference chart for every major airline fee from every major domestic carrier.

Best of all, you can download the airline fees chart in PDF format at no charge. Because unlike the airlines, we don't make you pay for things that ought to be free.

Click on the image below for the Ultimate Guide to Airline Fees.

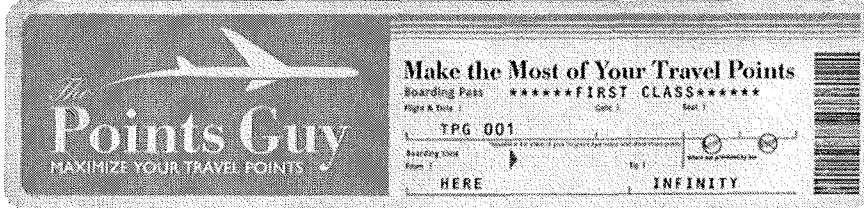
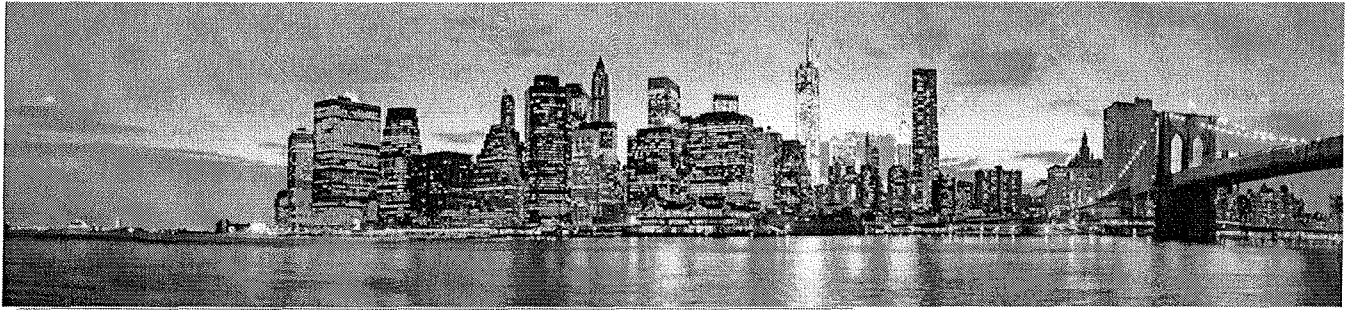
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Editor's Note: The fees chart was updated on May 1, 2014.

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Comparing Airline Checked Bag Fees To Baggage Shipping Services

by [The Points Guy](#) on May 8, 2013 · [9 Comments](#)

in [TPG Contributors](#), [Travel Industry](#)

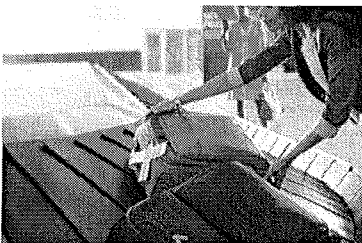
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Like many other airline fees, checked bag fees have become a fact of life, so we asked TPG contributor Adee Braun to take a detailed look at how much you can expect to pay to check your suitcase and compare airline fees to the services that will ship your bags for you.



With a baggage shipping service, there's no need to lug your baggage through the airport.

With checked bag fees climbing each year and the fact that these fees have become one of the best ways airlines can make a profit (domestic airlines took in over \$3 billion in checked baggage fees in 2011), it's no surprise that travelers are looking for alternative ways to get their bags to their destination. The good news is, there are more options than ever to get your bags where they need to go, with airlines getting in on the baggage delivery game in addition to independent companies. Most carriers will allow you one free checked bag on international flights, but charge \$25-50 for the first two bags you check in for domestic flights. With low-level elite status you can usually get at least one bag checked in for free. But, if you have additional bags or especially heavy or oversized ones, a baggage delivery service might be a cheaper option. Also, there's the added bonus of not having to drag your bags to the airport or hotel—a big plus if you have large sports equipment or just a bunch of heavy bags. In general though, if you're traveling with a couple standard-sized suitcases, checking them in and eating the fees is still the way to go. Here's a roundup of what the baggage delivery landscape looks like right now versus the luggage fees for the major US airlines.



Most airlines will charge \$25 for the first checked bag.

AIRLINE FEES Here's a quick reference table of the major domestic airlines and their checked bag fees for non-elite domestic travel, then read on below for the specifics of each airline.

Airline	1st Bag	2nd Bag

Alaska	\$20	\$20
American	\$25	\$35-\$60
Delta	\$25	\$35
JetBlue	Free	\$40
Southwest	Free	Free
United	\$25	\$35
US Airways	\$25	\$35
Virgin America	\$25	\$25

Alaska Airlines Non-elite travelers pay \$20 for each checked bag. Travelers with **MVP** status and their companions get two free checked bags on Alaska Airlines and on American Airlines. They also get the first bag checked in for free on Delta flights. It's \$20 for the third bag and \$50 thereafter. For international flights, Alaska accepts Delta and American elite status luggage benefits. There are also some exceptions for specific destinations. Find the full breakdown [here](#), including overweight and oversized luggage fees.

American Airlines **Non elite economy** travelers will pay \$25 for the first checked bag on domestic flights and \$35-60 for the second on domestic and international flights. Excess, overweight and oversized luggage is charged depending on the destination. **Gold Status** members get two free checked bags at the [current weight and size limits](#).

Delta Non-elite travelers pay \$25 for the first checked bag on domestic flights and \$35 for the second. For international travel, there are no checked bag fees for the first bag and range from \$40-\$100 for the second depending on the destination. [Excess, overweight and oversized bags](#) are charged according to ticket purchase date and destination. **Silver Medallion** members get the first checked bag of up to 70 lbs for free.

JetBlue **Non elite economy** travelers can check in one bag for free and pay \$40 for the second bag. With JetBlue's loyalty program, **TrueBlue Mosaic** (there are no tiers), you get two free checked bags. It's \$75-100 per bag after that depending on the weight.

Southwest Airlines All economy passengers get two free checked bags of up to 50 lbs each. It's \$75 per piece after that. [Overweight and oversized baggage fees](#) vary.

United Airlines United has a handy page for determining exactly how much you'll pay to check in your bags according to destination and cabin category [here](#). Non-elite economy travelers pay \$25 for the first checked bag on domestic flights and \$35 for the second. For international flights the first checked bag is free and second costs \$100, up to 50 lbs. You'll pay \$100 for each additional bag. [Oversized and overweight baggage fees](#) vary. **Premier Silver** members can check in one bag of up to 50 lbs for free.

US Airways Non-elite economy travelers pay \$25 for the first checked bag on domestic flights and \$35 for the second. US Airways differentiates between transatlantic and transpacific flights: no baggage fees for the first bag on transatlantic flights and \$100 for the second; no baggage fees for the first and second bags on all transpacific flights. Overweight and oversized bags are charged according to destination. **Preferred Silver** members get to check in their first bag for free if within the [current weight and size limits](#).

Virgin America Non-elite economy travelers pay \$25 for each checked bag on domestic flights and \$25 for any additional bags. There's no fee for the first bag on international flights booked before April 12, 2013 and \$25 for additional bags. But, if you booked after that date, it's \$25 for the first bag. There are exceptions for refundable and first class tickets. You'll find the full breakdown [here](#). At **Elevate Silver** status you get one free checked bag. **BAGGAGE SHIPPING SERVICES** Here is a roundup of popular baggage services and how much shipping will cost you as well as a look at when these might be more cost-effective than simply paying to check your bag with the airline.



With Bags VIP, you can skip baggage claim and get to your final destination faster.

BagsVIP

BagsVIP has partnered with American Airlines (starting August 6th), United, Delta, US Airways, JetBlue, Southwest, Alaska Airlines, AirTran and Virgin Atlantic. The way it works is, instead of checking in your bags with your flight, you'll check them in with a BagsVIP representative at the airport. You still pay your checked bag fees, but once you arrive at your destination you'll get to skip the baggage claim because your luggage will be delivered directly to your hotel, or wherever you chose. Your bags will arrive within 2 hours if your pickup spot is within 40 miles of the airport. If it's farther than that, it might take as long as 6 hours and will cost you an additional \$1 per mile. Deliveries can't be made to more than 100 miles away.

A major bonus is that there's **no extra charge for overweight or oversized bags**, though I'm sure they'd draw a line if you tried to ship something enormous. Here's the breakdown: 1 bag: \$29.95 2 bag: \$39.95 3-10 bags: \$49.95

Bottom line: This is a pretty good option for domestic destinations if you are shipping large or heavy bags where you'd pay oversize or overweight fees, or if you have more than two bags to ship. But since some carriers don't charge for the first checked bag if you have even basic elite status or a [co-branded credit card](#), and \$25-35 for the second, you're really just paying for the delivery service. And you still have to schlepp your bags to the airport. And, if you are traveling internationally, you're probably out of luck. If you'd rather not have to drag your bags around at all, plenty of other companies offer luggage delivery services and compete with UPS, FedEx and the like. Unlike BagsVIP, these companies will pick up your luggage from wherever you like, so you can go to the airport totally bag-free. As far as comparing these to airline baggage fees, the best deals will really depend on the size, quantity and the destination of your luggage, but here are some comparisons.



Luggage Forward is the biggest baggage shipping game in town.

Luggage Forward

[Luggage Forward](#) is the biggest baggage shipping game in town. It recently gobbled up Baggage Quest, Sports Express and Virtual Bellhop. They are all the same company

now with slightly different websites, but they offer the same prices. Luggage Forward will pick up your bags (or sports equipment) from your home or office and deliver them wherever you like. They ship to over 200 countries. They can also arrange a pick up from your hotel or cruise ship and ship it back home to you. However, if you need your bags picked up at a precise time, there is an additional \$45 fee. Otherwise they'll pick up any time during the scheduled day. Rates vary greatly depending on the weight of your luggage and its destination, especially for international shipping.

Here's the breakdown: To and from the US, per bag Under 25 lbs: \$69 26-50 lbs: \$99 51-75 lbs: \$119 Skis/snowboards start at \$79 depending on size Golf bags start at \$89 depending on size Prices for international destinations vary greatly, but here are sample prices for shipping one bag internationally: US to UK, per bag: Under 25 lbs: \$139 26-50 lbs: \$239 51-75 lbs: \$334 Skis/snowboards start at \$159 depending on size Golf bags start at \$199 depending on size

Bottom line: Luggage Forward is a good option if you are shipping home half a dozen pestle and mortars you bought in Guatemala and you don't want to drag your heavy bag to the airport and then pay the overweight fees, but because scheduling can be erratic and shipping costs vary widely, be sure to price out the airline option as well.

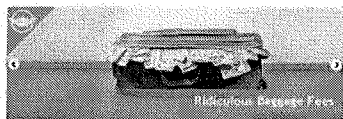


The main benefit of Luggage Free is that they price per pound and offer several delivery speeds.

Luggage Free The main benefit of Luggage Free is that they price per pound and offer several delivery speeds, between 1-5 business days. So, if you don't need your bags in a hurry (perhaps after a shopping spree in LA) you can get your bags shipped home for a decent price. And they will pick up your bags within 6 hours of your order in most US cities and within 48 hours at international locations.

Sports equipment is priced slightly differently, but you'll find the full breakdown [here](#), and below are some pricing samples: Domestic Within 1 business day for a 25 lbs bag: \$137.50 Within 5 business days for a 25 lbs bag: \$53.75 Within 1 business day for a 50 lbs bag: \$275 Within 5 business days for a 50 lbs bag: \$107.50 Within 1 business day for a 75 lbs bag: \$412.50 Within 5 business days for a 75 lbs bag: \$161.25 International shipping is also priced per pound and by destination, but with no shipping speed options. Luggage is delivered in 5-7 days. Also, there are flat rates for sports equipment. Here are sample prices: From US to UK: 25 lbs: \$131.35 50 lbs: \$262.50 75 lbs: \$393.75

Bottom line: Luggage Free's prices are just okay for domestic shipping but still don't beat most airline baggage fees unless you're shipping a light bag. The international shipping fees are steep and shipping times are pretty slow.



Avoid ridiculous baggage fees with Lugless.

Lugless

Like the others, Lugless will pick up and drop off your bags pretty much anywhere. They offer several speed options that are priced accordingly. In theory Lugless ships to over 235 countries and claims to have better prices for international shipping than UPS or FedEx and cheaper second bag and oversized shipping fees than most airlines. But, when I called to find out about their international rates (which were not posted online) I was met with the ambitious greeting: "We're having a great day at Lugless, how may I exceed your expectations?" Turns out they couldn't because their international services are being "revamped" and won't be available for another 6-8 weeks. In the meantime, here are some sample prices for domestic shipping: Domestic Carry on (usually under 25 lbs): \$69 Standard (usually under 50 lbs): \$89 Oversize (usually under 75 lbs): \$109

Bottom line: Domestic rates are higher than most airline baggage fees, even for overweight items. It remains to be seen if their international rates will exceed our expectations.

FedEx

And then, there's FedEx. Most luggage services seem to be competing directly with them. With FedEx you can schedule a pick up from your home, just like the other luggage delivery services. There are also lots of FedEx drop off sites around the world, including in most large hotels and conventions centers. Here are some price quotes for shipping bags from New York to LA. Shipping across the US Carry-on size (25 lbs) Standard overnight: \$198 Ground (4 business days): \$36.50 Standard size (50 lbs) Standard overnight delivery: \$319 Ground (4 business days): \$63 Oversized bag (75 lbs) Standard overnight: \$495 Ground (4 business days): \$83 The prices go considerably higher for international shipping. Here are some price quotes for shipping luggage from New York to London: International Carry on size (25 lbs) FedEx International Priority (4 days): \$320 FedEx International Economy (6 days): \$309 Standard size (50 lbs) FedEx International Priority (4 days): \$550 FedEx International Economy (6 days): \$452 Oversized (75 lbs) FedEx International Priority (4 days): \$786 FedEx International Economy (6 days): \$560

Bottom line: Going with FedEx is a good deal if you are shipping heavy luggage domestically and don't mind waiting the 4 days for Ground shipping. FedEx pretty much flattens the luggage delivery services on this. But, prices are sky high for international shipping. When it comes to checked bags, it turns out that no matter which option you choose, you'll probably have to pay more than you like. That said, although airline baggage fees can seem like a racket – especially if the airline manages to lose your luggage! – these prices still beat out many of the shipping services. However, as more companies get into the luggage-shipping game, hopefully prices will come down for travelers in the long run and we can all travel for less in the future no matter how much we pack.

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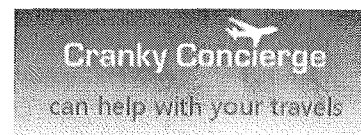
I've Argued for Unbundling, And Now I'll Argue for Re-Bundling

By CF on Sep 23, 2013 | 21 Comments

Last week, I put together a post showing the merits of an unbundled fare structure. In my mind, unbundling was actually just the first step. Now it's time to re-bundle. Oh, and there should be higher taxes to make that happen more quickly.

After reading that first paragraph, you may wonder if I've had a stroke of some sort. Am I really arguing for re-bundling and higher taxes? Yes, but it's not exactly what you think. I am NOT arguing to return to the fully-bundled fare of the old days. Now that fares have been broken down to their base level, it's time to start making sense of all these options. It's time to create new bundles to add value.

In its purest sense, this means offering several types of fares that include different things. Air Canada was one of the pioneers in this effort many years ago. I actually first wrote about that in the very early days of this blog back in November 2006. The airline has five fare categories that bundle a variety of things together. I love it so much that I'll paste the entire product description here:



Learn more at crankyconciierge.com



Care Components	Tango	Flex	Latitude	Executive Class Lowest	Executive Class Flexible
Refundability	Non-refundable	Non-refundable	✓	Non-refundable	✓
Any-time Change	\$200 CAD + fare difference*	\$200 CAD + fare difference*	fare difference*	\$200 CAD + fare difference*	fare difference*
Same-day airport change fee	\$150 CAD	\$75 CAD	✓	\$75 CAD	✓
Same-day airport standby	Available on flights between Toronto, Pearson and JFK, LaGuardia and Newark airports	Available on flights between Toronto, Pearson and JFK, LaGuardia and Newark airports	✓	Available on flights between Toronto, Pearson and JFK, LaGuardia and Newark airports	✓
<small>Please consult Air Canada Reservations to see if a higher fare applies.</small>					
Mileage Accrued and Altitude Bonuses	Tango	Flex	Latitude	Executive Class Lowest	Executive Class Flexible
Aeroplan Miles Accumulated	Up to 50%	100%	125%	150%	150%
Altitude Qualifying Miles accumulated	Up to 50%	100%	125%	150%	150%
Travel Experience	Tango	Flex	Latitude	Executive Class Lowest	Executive Class Flexible
Priority check-in, baggage handling and boarding			✓	✓	✓
Access to Maple Leaf Lounges		+\$50 CAD	+\$25 CAD	✓	✓
Complimentary Checked Baggage Allowance	1 st bag \$25 CAD (per direction)	1 st bag \$25 CAD (per direction)	1 st bag \$25 CAD (per direction)	2	2
Exemption from the sports equipment fee	2 nd bag \$25 CAD (per direction)	2 nd bag \$25 CAD (per direction)	2 nd bag \$25 CAD (per direction)	✓	✓

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Fee for 1 Item					
Advance seat selection	+\$18 CAD	✓	✓		
Complimentary meal			✓	✓	
Prepaid onboard coffee/tea/water (\$2 CAD value)	+\$7 CAD	+\$7 CAD	✓		
On My Way travel assistance service	+\$25 CAD	+\$25 CAD	+\$25 CAD	+\$25 CAD	+\$25 CAD

This model is a great way to do things. You still benefit from the basic idea of unbundling in that people have to want to pay more to get more. But instead of a Cheesecake Factory-like menu with a million confusing options, the airline goes fast food-style and creates value meals.

The Benefits of Re-Bundling

The customer benefit is that it greatly simplifies the process and makes it easier to understand. It also makes rational sense to people who buy tickets. Travelers have complained for ages that airfare makes no sense. Why is someone paying \$200 sitting next to someone who pays \$1000 and both get the same thing? This model creates tangible differences that help explain the difference in fare. And it works. This is an old presentation, but 45 percent of Air Canada customers bought up to a higher fare back then and I know the number remains lofty today.

The beauty of this model is that the airlines benefit as well. The idea is that airlines can get you to pay more for a bundle of things than you would if you just paid for each one individually. Look at the difference between Tango and Flex fares. With Flex, you get a reduced same day change fee, you earn full mileage for the flights, and you can reserve a seat in advance. Of those, the advance seat assignment is probably the most desirable. If that costs \$18, then you can price this whole package at \$25.

What happens is people default to the bundle since it's front and center. But even if they do their homework and compare to buying it a la carte, they'll still often say, "well, it's not that much more to earn full miles and just buy the bundle, so I'll just do it." The airline makes more money, if it's priced correctly.

I should note that I'm not arguing for the cable company-style service which Gary Leff addresses. In that case, you have no choice but to choose a bundle. There is no a la carte offering. That has been a big fight in that industry, and I hope that the airlines don't go in the same direction. I like the idea of offering the bundle up front but still making individual purchases possible after. When you're talking about one-off purchases like air travel, it provides more revenue opportunity than it would in a cable-style situation where there's a long term subscription at stake.

Why Isn't This More Widespread?

So if this can make more money, why aren't we seeing it in the US? Well, we are. Frontier, fresh with former Air Canada execs, adopted fare families awhile ago. And late last year, American introduced a limited set of options as well. But there are a couple of reasons why this isn't more widespread.

Most importantly, tax policy is preventing this from happening. Internationally, it makes no difference. But for domestic travel, fares are taxed at 7.5 percent while fees are not taxed. So why would you create fare families when you'll have to pay a 7.5 percent penalty on everything? (I still can't figure out why American was willing to take that hit.) It makes no sense, so airlines are better off sticking with fees and doing this re-bundling thing half-assed.

Delta for example, has a "Lift" package which combines priority boarding with a 1,000 mile bonus. There's also an "Ascend" package which includes priority boarding and wifi. But those are still add-ons after the fact and not part of the fare. And really, it shouldn't be until ancillaries are taxed. Yes, I think that if the fare is subject to a 7.5 percent tax, then optional items should be as well.

The other issue is that the only place that these bundles can really be implemented properly today is on the airline website. Online travel agents have failed to really provide any of this to people who

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are searching. Traditional travel agents can, but the technology they use makes it difficult to book. (I'm talking about in the US. Go to Canada and there are amazing agent tools, like Travelport's Agencia.) So airlines may look at their scarce development resources and decide that this isn't a priority. But I tend to think the tax issue is probably a bigger one.

Eventually, we'll get to a point where airlines begin to offer bundles across the board, and that will make shopping easier for people. Of course, these bundles won't be standardized across airlines, so naturally, critics will find plenty to complain about, as always. But to get to that point, we need to have fees taxed like fares first.

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21 Responses to *I've Argued for Unbundling, And Now I'll Argue for Re-Bundling*



SEAN says:

Sep 23, 2013 at 6:27 am

This model is a great way to do things. You still benefit from the basic idea of unbundling in that people have to want to pay more to get more. But instead of a Cheesecake Factory-like menu with a million confusing options, the airline goes fast food-style and creates value meals.

I don't know if it was intended, but that was a great line regarding The Cheesecake Factory. The cable-TV muddle has it's own numerous & often confusing array of bundles & deals witch also seem to change by the day. Just as a footnote, cable providers haven't excepted the idea of ala cart pricing as they would lose money since most people watch only a handful of stations to begin with.

Reply



Sally Blue says:

Sep 23, 2013 at 6:46 am

I found the chart interesting, because the change fees are not what I am used to with Air Canada. On U.S. flights it's a \$200 across all non-refundable categories but in Canada it's \$150 at most, and \$100 on Flex and Exec Lowest. On Sun Destinations its \$150 across all segments and on other overseas it varies.

Baggage policy also varies by segment as well, with first bags being complimentary on all segments except the U.S. Air Canada matches down to the U.S. carrier because that's the competitive environment in which it is operating.

While I agree in principle with your earlier comments on bundling, you can't disregard the unintended consequences. The baggage fees have led to a lot more people carrying bags on board, which increases pressure on screening check-points, makes boarding and deplaning less efficient — putting pressure on on-time performance and aggravating many more people — and increases flight crew workload.

Reply



Sean S. says:

Sep 23, 2013 at 8:11 am

I would love to see the impact on boarding and on-time departure that having such a large amount of carry on's has produced. Anecdotally I would argue yes, it has negatively impacted on time departures, but I would love to see actual data examining the impact.

I think a honest large part of people's frustration comes from the boarding process which makes people feel as if they're in a cattle car. Honestly calling by rows, and differentiating prices by row (rows nearer the front, which are already Economy

Posted on: September 29, 2013

Dynamic bundling of ancillaries could be future of airline sales

By Kate Rice

The next big thing for airline ancillary services could be the dynamic bundle, a package of extra features and add-ons that airlines are beginning to create for particular types of clients at particular times.

Delta Air Lines, which leads the airline industry in this trend, has introduced Smart Travel Pack, a bundle of ancillary services that is available through Jan. 5. Though it is currently available only to SkyMiles members and on Delta.com, the airline has been talking to travel agents about how they can help sell bundled offerings.

Farelogix, meanwhile, has incorporated what it calls “dynamic bundle capability” into its merchandising software, FLX Merchandise (FMS2), enabling airlines to create and price bundles of ancillary services for different markets.

A “comfort bundle,” for example, might include noise-cancelling headphones, a pillow and blanket and a premium seat. An “executive bundle” could offer WiFi, priority boarding and business seating that includes a power port.

Travelers could even create their own bundles a la carte, adding one from Column A, one from Column B, for example.

Farelogix said the technology “takes personalization and trip customization to a new level.”

At this new level, the airline seat is no longer shopped for and purchased on the basis of schedule and price. With dynamic bundling, a trip can be searched for and priced based on particular ancillary features that travelers value.

For agents, this presents new challenges as well as new opportunities.

In the case of Delta’s new product, agents who have seen it say they’d like to sell it. The Smart Travel Pack, priced at \$199, includes the first checked bag, priority boarding, access to preferred seats and discounts on economy comfort seats.

Although only SkyMiles members can buy it, they can use the benefits for up to eight of their travel companions traveling on the same reservation.

Once purchased, the benefits of the Smart Travel Pack will be included for any travel during the promotional period when customers include their SkyMiles number in their reservation.

Delta unveiled Smart Travel Pack on Sept. 18, at Delta Insights, its meeting for top-performing agencies. Tim Mapes, Delta’s senior vice president of marketing, did the presentation, and agency response was enthusiastic, according to Jim Osborne, vice president of air, space and specialty products for Virtuoso.

“We all asked if we could sell it and be compensated for it,” he said. He is optimistic that a solution for agencies to sell these and similar dynamic packages will be possible.

Delta spokesman Paul Skrebec said the airline recognizes the appetite in the agency community to sell ancillaries. He said no announcements were imminent but Delta, given its work with Travelport and Amadeus in selling Economy Comfort seats through travel agencies, has clearly started to move down the path of agents selling ancillaries.

Jim Davidson, CEO of Farelogix, said, “The floodgates are opening,” suggesting that airlines might soon be rushing into bundling. He said seven airlines, including United, have the FMS2 platform and the dynamic bundling capability was added in response to their requests. (Delta is a Farelogix customer but is not using FMS2 for its Smart Travel Pack.)

Merchandising is evolving quickly, according to Davidson. At first, the technology enabled static listings of optional services that he compared to a catalog. But FMS2 and similar technologies enable airlines to see what sells and what doesn't.

Davidson said these new technologies enable airlines to perform what he compared to an instant survey.

“You can start doing this stuff and see what customers are willing to pay for and maybe what they're not willing to pay for,” he said. Airlines can run a bundle for three weeks and, if it doesn't produce results, change it, Davidson said.

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The New York Times

October 10, 2013

Airline Extras at a Package Rate

By **STEPHANIE ROSENBLOOM**

Are airlines taking a cue from magazines, Netflix, even Internet and cable packages?

This summer United Airlines introduced yearlong baggage subscriptions (check up to two bags on all your flights within the continental United States, starting at \$349) and Economy Plus subscriptions (more-legroom seats on all your flights, starting at \$499) that you can also give as gifts. In September, Delta rolled out its own subscription program, Smart Travel Pack (\$199), which gives fliers features like priority boarding and preferred seats on each flight they take through Jan. 5. And if you regularly fly American Airlines, you know that last year the airline began bundling amenities, like no change fees and in-flight beverages, into a variety of “choice” fares.

“This really is what the cable companies do,” said [Gary Leff](#), a founder of [Milepoint](#), a frequent-flier forum, and the mileage-award booking service [Bookyouraward.com](#).

Airlines are experimenting with subscriptions and bundles at a time when they are raking in money thanks to fees for à la carte add-ons like early boarding and roomier seats. Their collective ancillary revenue from these amenities is now more than \$27.1 billion, more than doubling since 2009, according to a new report by [IdeaWorksCompany](#), a consulting company.

If you’re frequently checking bags and buying seats with more legroom, a subscription may sound tempting. But does it pay to join? Here’s how to figure it out.

1. ANALYZE YOUR CURRENT FLYING STRATEGY. To determine whether or not you’ll get value out of a subscription, ask yourself how much you plan to fly during the subscription period and where you plan to go. By buying a subscription you are essentially tying yourself to a particular airline, so you need to find out how regularly it flies to and from your desired cities, and whether the seats you are paying for are actually available. If, for instance, most of your flights will be on regional jets that do not have seats with more legroom, there is no point in buying a package where those seats are your main draw.

And check fares on competing airlines. By buying a subscription you might save money on incidentals, but if the fares for the routes you fly are cheaper on other airlines, it simply

doesn't pay to commit to one brand. A good rule of thumb is that subscriptions are best for travelers who fly frequently, but not enough to reach elite status, which, in many instances, would allow you to get those perks at no extra cost. "If you're flying a single airline 10,000 to 20,000 miles a year, then the subscriptions make good sense," Mr. Leff said.

If you're flying only two or three times a year, experts say, take a pass, because you may not fly the same airline each time. And even if you do, chances are you will not be doing so often enough to reap the benefits of a subscription, as opposed to simply buying the amenities you want à la carte.

2. CONSIDER SPENDING MONEY ON AN AIRLINE CREDIT CARD INSTEAD OF A SUBSCRIPTION. In general, the subscriptions "give people access to the kinds of stuff that airlines give at no cost to their bottom-tier frequent fliers," Mr. Leff said.

So instead of buying a subscription, consider paying the annual fee for an airline co-branded credit card, which will duplicate a lot of the same benefits as a subscription. Many airline credit cards, for instance, give users priority boarding along with other perks like a free checked bag.

"You could get one of their credit cards for less than that plus a whole lot of bonus miles," said Brian Kelly, the founder of [the Points Guy](#) Web site, which chronicles the world of frequent-flier miles and travel points. He added one caveat: the points you earn using an airline credit card are banked for a single airline, which is limiting as far as travel points go. But if you know that you'll mainly be flying that airline, it may be worth it.

3. READ THE FINE PRINT. Just because you sign up for a subscription does not mean that you will always be able to reap the benefits.

For example, United's Economy Plus subscription program includes roomier seats — when they are available. Not all flights will have the seats.

Or consider Delta, which includes priority boarding in its Smart Travel Pack. If you primarily take Delta Shuttle flights, note that the airline does not offer priority boarding on those flights.

Another wrinkle is that more-legroom seats can cost more on international flights. On United, a "global" Economy Plus subscription is an additional \$200 on top of the \$499 annual fee. If you're flying to, say, Asia frequently enough to be considering that package, Mr. Kelly suggests just focusing on achieving status in United's frequent-flier program

instead. “One Asia round-trip, depending on how you route it, could get you Silver status,” he said.

4. RECONSIDER YOUR ALLEGIANCES. Whether these subscription programs will prevent elite travelers (without subscriptions) who book last-minute tickets from scoring preferred coach seats will depend on how well the airlines manage that inventory. If they continue to hold back some seats for their best customers, it won’t be an issue. But if the airlines presell all of their most desirable seats to travelers willing to pay extra for a subscription, elites could lose out, particularly in leisure markets where tickets are typically sold far ahead.

If you do have status, but not enough to receive regular upgrades, you might consider switching airlines, rather than buying a subscription. After all, being an elite doesn’t necessarily mean you get a better deal. Every so often, the best deals have nothing do with status or subscriptions.

As Mr. Kelly noted after using his elite status to nab an economy comfort seat on a KLM flight:

“I realized it’s 34 inches of legroom. That’s what JetBlue gives to all of its customers.”



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Travelport Signs New Global Distribution Agreement with United Airlines

- Airline will participate in industry-leading technology solutions including Rich Content and Branding -

ATLANTA
Jun 24, 2014

Travelport, a leading travel commerce marketplace providing distribution, technology, payment and other solutions for the \$7 trillion global travel and tourism industry, today announces a new long-term agreement with United Airlines. This will add to the availability of United's best inventory and prices, and provide access to ancillary products through the state of the art airline merchandising technology offered under the Travelport Merchandising Platform umbrella, including the adoption of Travelport's Rich Content and Branding.

Rich Content and Branding enables airlines to more effectively present the value proposition for their products through detailing their offers, including services and/or ancillary services available for purchase, as well as options to upgrade to alternative products via the Travelport travel commerce platform and travel agencies in a manner more similar to the airline's own consumer-focused website experience. United joins well over 40 other carriers around the globe – ranging from full-service, network carriers, to smaller regional airlines, to low-cost airlines – that have already signed up to use this solution which goes live in the next version of the Travelport Smartpoint agency desktop due this year.

Travelport was the first global distribution system to re-launch the capability for travel agents to sell the additional space and comfort of United's Economy Plus seating. Travelport-connected agents have the ability to access Economy Plus seat availability and prices within the Travelport travel commerce platform with real-time booking and automated integration into the trip built for the travelling leisure or corporate consumer who has elected to use the services of a travel agency. This includes United's complimentary Economy Plus seats for qualified MileagePlus customers and their companions.

"United's array of travel offerings continues to expand and evolve into dynamic products tailored to our customers," said Tom O'Toole, United's senior vice president of marketing and loyalty and president of MileagePlus. "United is pleased this agreement enables us to offer the choices our customers value through additional shopping channels. We look forward to continuing to improve the shopping experience for our customers and their agencies through Travelport's solutions."

"United is one of the world's leading airlines and we are delighted to expand our longstanding partnership with them and see them take advantage of the investments we have made in our pioneering merchandising technology, which has been designed to meet the changing needs of the global travel distribution chain," said Derek Sharp, managing director, Global Distribution Services and Sales, Travelport. "United will be able to leverage Travelport's leading technology to grow their global reach, promote their brand to travelers all over the world and most importantly maximize the revenues they are able to generate per seat sold."

#

Notes to editors:

The Travelport Merchandising Platform was unveiled last year and includes three components:

- **Travelport Aggregated Shopping**, an industry first, consolidates, within the same screen, shopping results from traditional carriers who connect through ATPCO with those from other no-frills carriers who prefer to connect with Travelport via an API connection. The new technology negates the need to shop and compare across several screens and allows travel agents to compare efficiently in the same booking flow.
- **Travelport Ancillary Services** allows travel agents to sell airline ancillaries such as pre-allocated seating, meals and bags, within their existing workflow rather than by booking on an airline website.
- **Travelport Rich Content and Branding** enables airlines to market and retail their products more effectively through customization of product display and content.

For more information on Travelport Merchandising Platform, visit: <http://www.travelportmerchandisingolutions.com/>

About Travelport

Travelport is a travel commerce marketplace providing distribution, technology, payment and other solutions for the \$7 trillion global travel and tourism industry. With a presence in over 170 countries, approximately 3,600 employees and 2013 net revenue of \$2.1 billion, Travelport is a privately owned company comprised of:

- Our travel commerce platform through which we facilitate travel commerce by connecting the world's leading travel providers with online and offline travel buyers in our proprietary business to business ("B2B") travel commerce marketplace. As travel industry demands evolve, we are utilizing our travel commerce platform to redefine the electronic distribution and merchandising of airline core and ancillary products, as well as extending our reach into the growing world of travel commerce beyond air, including to hotel, car rental, rail, cruise-line and tour operators. In addition, we have leveraged our domain expertise in the travel industry to design a pioneering B2B payment solution that addresses the needs of travel intermediaries to efficiently and securely settle travel transactions. We also utilize the extensive data managed by our platform to provide an array of additional services, such as advertising solutions, subscription services, business intelligence data services, and marketing-oriented analytical tools to travel agencies, travel providers and other travel data users.
- Our Technology Services, through which we provide critical IT services to airlines, such as shopping, ticketing, departure control and other solutions, enabling them to focus on their core business competencies and reduce costs.

Travelport Media Contact

Jill Brenner
Senior Director, Corporate Communications
+1 (973) 753 3110
jill.brenner@travelport.com

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Open Allies Survey: Consumers Demand Ability to Search, Compare, and Purchase Ancillary Fees September 4th, 2014

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AIR TRAVEL SURVEY: CONSUMERS DEMAND ABILITY TO SEARCH, COMPARE, AND PURCHASE AIRLINE FEES

71 Percent Say Airlines Should Have to Sell Ancillary Services Wherever They Sell Tickets; 81 Percent Say Current Airline Practices on Fees Are Unfair and Deceptive

Washington, D.C. – September 4, 2014 – A new survey of more than 1,000 air travelers found overwhelming support for a proposed U.S. Department of Transportation (DOT) rule requiring airlines to share their fees for baggage and seat assignments with travel agents and travel websites, with 88 percent saying that requirement was “very” or “extremely” important for travelers. By a broad 71 percent to 13 percent margin, consumers also said the rule should be strengthened to require airlines to sell their basic ancillary fees wherever they sell their tickets.

Conducted by Open Allies for Airfare Transparency in coordination with Travelers United (formerly the Consumer Travel Alliance), the survey found significant traveler frustration and confusion with current airline practices. Two-thirds (63 percent) of air travelers indicated that it is very or extremely inconvenient to have to take the multiple steps required to buy ancillary services today, while 81 percent called current airline practices on fees “unfair and deceptive” for not allowing travelers to see or purchase fees at all points of sale.

“To protect air travel consumers, we need to fix the significant problems they face in searching, comparing, and buying ancillary fees, which have become ubiquitous in the airline industry,” said Andrew Weinstein, Executive Director of Open Allies for Airfare Transparency, a coalition of more than 400 companies and organizations involved in the distribution or purchase of air travel. “The proposed DOT rule gets almost halfway there by requiring airlines to share their fees for baggage and seat assignments, but it fails to address the intertwined issue of how to buy those services at the time of ticket purchase. Playing peek-a-boo with prices will not address the underlying consumer harm, unless travelers can purchase those fees wherever they buy their tickets.”

According to the survey, consumer confusion over this issue is significant, with nearly three-quarters of respondents (72 percent) saying they believed “transparent pricing” would include the ability to purchase the service at that same time as tickets.

Among the survey’s findings:

- More than half of air travelers (55%) said they had been surprised by additional fees after they had purchased their tickets.
- Two-thirds of travelers (63 percent) said that it is “very” or “extremely” inconvenient to have to take multiple steps to buy the ancillary services they need.
- Roughly half (47 percent) said it has become “very difficult” or “nearly impossible” for them to search and find the lowest fare for air travel across airlines, including fees.
- Four out of five (81 percent) said that current airline practices on fees are “unfair and deceptive.”
- The overwhelming majority (88 percent) said the DOT’s proposed rule to require airlines to share baggage and seat assignment fees is “very” or “extremely” important for travelers.
- More than 80 percent said DOT should expand the rule to cover at least one other type of ancillary fee, including cancellation fees (68 percent), change fees (64 percent), and priority boarding fees (49 percent).
- By nearly a 6-1 margin (71 percent to 13 percent), travelers said airlines should be required to sell their fees wherever they sell their tickets.

“This survey dramatically underscores the continuing confusion consumers face when dealing with the universe of fees that airlines have created,” said Charlie Leocha, Chairman, Travelers United, an advocacy group focused on travel issues. “Comparison shopping is the basis for the free market. By hiding the prices of baggage, seat-reservation and others services, airlines are deceiving consumers by only advertising and disclosing partial costs of travel.”

The full results of the survey can be found at www.faretransparency.org.

Survey Methodology

The survey was conducted online among 1,162 US adults who have flown at least once in the last year. The survey was conducted via SurveyMonkey.com through a representative audience sample drawn from the site's 30 million users from August 28 – September 1, 2014. The survey has a margin of error of +/- 3 percent at a 95 percent confidence level.

About Open Allies for Airfare Transparency

Open Allies for Airfare Transparency is a coalition of more than 400 independent distributors and sellers of air travel, corporate travel departments, travel trade associations and consumer organizations. Open Allies and its members are committed to the principles of transparency, choice, competition, privacy, and innovation in the air travel marketplace. More information can be found at faretransparency.org.

[Previous Article: Open Allies Announces Agreement with IATA on Conditions to Res. 787](#)

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Extensible Markup Language (XML)

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Upcoming: [Balisage Conference](#) [[details](#)]

Nearby: [XML Specifications](#) and [Translations](#) of them.

Introduction

Extensible Markup Language (XML) is a simple, very flexible text format derived from SGML (ISO 8879). Originally designed to meet the challenges of large-scale electronic publishing, XML is also playing an increasingly important role in the exchange of a wide variety of data on the Web and elsewhere.

This page describes the work being done at W3C within the XML Activity, and how it is structured. Work at W3C takes place in *Working Groups*. The Working Groups within the XML Activity are listed below, together with links to their individual web pages.

You can find and download formal technical specifications here, because we publish them. This is **not** a place to find tutorials, products, courses, books or other XML-related information. There are some links below that may help you find such resources.

You will find links to W3C Recommendations, Proposed Recommendations, Working Drafts, conformance test suites and other documents on the pages for each Working Group. Each document also contains email addresses you can use to send comments or questions, for example if you have been writing software to implement them and have found problems or errors.

Please do **not** send us email asking us to help you learn a language or specification; there are plenty of resources online, and the people editing and developing the specifications are very busy. We **are** interested in technical comments and errata.

If your organization would like to join the W3C, or if you would like to participate formally in a working group (and have the necessary resources to attend meetings), you can read more [about the Consortium](#).

Working Groups

There is more detail about each of these Working Groups in the [Activity Statement](#) and also on the individual Working Group public web pages.

Most Working Groups have both a public web page and another more private one that is only accessible to W3C Members. The private page has telephone numbers, schedules for meetings and conference calls, links to internal editing drafts, and other administrative information.

XML Coordination Group

The membership of this group is the Chairs of the individual Working Groups. Its role is to provide a forum for coordination between the Working Groups of the XML Activity, and between the XML Activity and other parts of W3C, and between the XML Activity and other organizations.

This group does not produce specifications, so does not have a public page of its own. You can read the [XML CG Charter](#), and there is more information about the XML CG in the [Activity Statement](#). There is also a [member-only page](#).

XML Core Working Group

The mission of the XML Core Working Group is to develop and maintain the specifications for XML itself and closely related specifications such as Namespaces in XML, the XML Information Set, and XInclude.

You can read the [XML Core Working Group Public Page](#) and the [XML Core Working Group Charter](#), and there is also a [member-only page](#).

XSLT Working Group

The XSLT Working Group is responsible for XSL Transformations (XSLT) and a number of supporting specifications.

You can read the [XSLT Working Group Public Page](#) which links to their [Charter](#) and to their [member-only page](#).

XPPL Working Group

The XML Print and Page Layout Working Group is responsible for the XSL-FO formatting language.

You can read the [XML Print and Page Layout Public Page](#) and the [XML Print and Page Layout Charter](#), and there is also a [member-only page](#).

The Efficient XML Interchange Working Group

The Efficient XML Interchange Working Group is responsible for developing ways to exchange XML documents in ways that are as efficient as is practical without compromising the interoperability of XML itself. It also continues the work of the [XML Binary Characterization Working Group](#). This Working Group is *not* about producing a closed, proprietary or obfuscated “binary XML ”—The W3C is all about increasing interoperability!

You can read the [Efficient XML Interchange Working Group Public Page](#) and their [Charter](#); there is also a [member-only page](#) for technical discussion and administration.

XML Processing Model Working Group

The XML Processing Model Working Group is working on defining a scripting language for XML: that is, a way to specify what operations should be performed on an XML document and in what order.

You can read the [XML Processing Model Working Group Public Page](#) and their [Charter](#); there is also a [member-only page](#) for administration purposes.

XML Linking Working Group

The charter of the XML Linking Working Group has expired, and the group is not currently active. When still active, it was working on hypertext links for XML. This includes the XML Linking Language (XLink) and the XML Pointer Language (XPointer).

You can read the deprecated [XML Linking Working Group Public Page](#). There is also a [member-only page](#).

XML Query Working Group

The XML Query Working Group is working on the XML Query Language, a way to provide flexible query facilities to extract data from real and virtual XML documents on the Web. This includes publication of XQuery and also XPath, in conjunction with the [XSLT Working Group](#) (part of the [Style Activity](#)).

You can read the [XML Query Working Group Public Page](#) and the [XML Query Working Group Charter](#), and there is also a [member-only page](#).

XML Schema Working Group

W3C XML Schemas provide mechanisms to define and describe the structure, content, and to some extent semantics of XML documents.

You can read the [XML Schema Group Public Page](#) and the [XML Schema Working Group Charter](#), and there is also a [member-only page](#).

Upcoming events

[XML Prague](#), the leading XML-specific conference in Europe.

[markupforum](#), in Stuttgart is a symposium that has a local emphasis on publishing.

[Balisage](#) in August

is the leading conference relating to the theory and practice of XML and other markup and has moved from Montreal to Washington DC. W3C is a co-sponsor of Balisage 2014, and there may also be a registration discount for W3C Members.

[XML Amsterdam](#) is a sister event to XML Prague in the Spring.

Other Resources

There are so many resources related to XML that we can't possibly list them all here. This is a **good** thing, because it means XML is a success! In addition to a [history of the development of XML at W3C](#), there is an extensive index at the [Cover Pages](#), maintained by Robin Cover. The individual Working Group public web pages may have links to specific resources. There are Usenet newsgroups (e.g. [comp.text.xml](#)) and public mailing lists (e.g. [xml-dev](#)).

You could also try a search engine such as [Google](#) for:

- [XML conferences](#)
- [books](#)
- [training courses](#)
- [online tutorials](#)
- [bibliographies](#)
- [parsers \(both proprietary and open source\)](#)
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- and even [movies](#)

Contact

[Liam Quin](#), [XML Activity Lead](#)



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Note

The XML specification, and other information specific to the XML Core Working Group, has moved to the [XML Core Working Group Public Page](#).

There is also a separate page for [Translations](#).

There is a separate page documenting the [xml-spec DTD](#) used for many of our specifications.

There is also a [Google+](#) page for XML.



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EXPERT: FLIGHT BUNDLES CAN BE WIN-WIN FOR AIRLINES, TRAVELERS



Much like cable companies, cell phone providers and Internet companies, airlines are now bundling extras on individual flights

December 23, 2013 8:25:26 PM PST

By Jeff Ehling

HOUSTON -- When it comes to air travel, if you like your extras a la carte, the fees can add up quickly. From extra legroom, to priority boarding to checked baggage charges, there are all sorts of ways to customize your travel. Now, packaging the perks is a trend that's taking off from bundles to subscription services.

Much like cable companies, cell phone providers and Internet companies, airlines are now bundling extras on individual flights. Different packages offer combinations of services such as free checked bags, priority boarding, no change fees, free Wi-Fi or extra frequent flyer miles.

"You're able to take multiple things, package them together, charge a lower price for each, the airline makes more and you get more things that you want," said Gary Leff with viewfromthewing.com.?

Some airlines are also experimenting with subscription services, allowing you to pay a flat fee for benefits on any flights you take within a set time period.

"A subscription service enables them to guarantee that they're going to have that seat available to them, guarantee that they're going to have that free checked bag," said Airlines for America Senior Vice President Jean Medina.?

Airlines for America, the commercial airline trade association, says these packages and subscriptions allow consumers to get a better prices on the extras they want while airlines make the revenue they need.

AdChoices

Skip the counter and get
FREE rental days

JOIN FREE

Gold Plus Rewards Hertz

"Last year the airlines made 37 cents per enplaned passenger. Had they not offered additional services that customers were willing to pay for, they would have lost \$8 per passenger," Medina said.

But Leff says it's important to examine each package or subscription to make sure it's really going to be worth it for you.

"A subscription really locks you into a single airline, and over time, you may wind up paying more in airfare if you pick the same airline over and over than you would if you were going to go around and shop for the lowest price each time," Leff said.?

In addition, keep in mind the routes you regularly travel. Regional jets may not have extra legroom seats, and smaller airports may not have a priority security line.

"You're not going to get a refund, a pro-rated portion back, because a given flight the benefit isn't available," Leff said.

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FARELOGIX OFFERS CUSTOMIZED FARE BUNDLES

by Michele McDonald September 17, 2013

Airlines can create dynamic service bundles using a new solution embedded in Farelogix' FLX Merchandise, according to company CEO Jim Davidson.

Each airline can determine the types of bundles it offers and the conditions under which they're offered.

"They can be based on who I work for, where I'm going, kids or no kids," Davidson said.

For example, a corporation can negotiate with an airline for its own branded "convenience" bundle that might include a fast-lane screening, priority boarding and inflight wi-fi.

A "comfort" bundle could include noise-cancelling headphones, pillow, blanket and a premium comfort seat.

Tailored pricing

Bundle prices can be adjusted according to the passenger's status with the airline.

The possibilities are not limited to the business travel market, Davidson said.

An airline could offer a "party" bundle for events such as New Year's Eve or the Super Bowl. A family traveling with children might appreciate a bundle that includes free checked bags, advance seat selection that ensures they can sit together and the airline's version of a "happy meal."

The airline can also manage the inventory, Davidson said. For example, if a bundle normally includes extra legroom seats but those seats are sold out, another perk could be substituted.

Build your own

While bundles themselves are not new to travelers, Davidson said a "build your own bundle" option is probably unique in the industry.

"The airline can allow the customer to pick any three out of five services at a bundled price," he said.

The bundles can also be used in customer recovery situations such as missed



We went from change fees to bag fees to seat fees. Now we're getting to services.

Jim Davidson, Farelogix

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Amadeus enabled the sale of United Economy Plus seats via the GDS's Ancillary Service Solution. Amadeus is using the first NDC-XML connection in North America. [Read](#)

Indian IT Company Acquires Rezopia



An India-based IT services company acquired a controlling stake in Rezopia, a cloud-based reservations and distribution management platform for travel agencies and suppliers. ... [Read](#)

connections. An offer of lounge access and an upgrade on the next flight could be pushed to the passenger's mobile device.

Showcasing airline creativity

The flexibility of the solution enables airlines to show off their merchandising creativity and test-market the types of bundles most attractive to various customer segments, from football fans to spa aficionados, Davidson said.

"We went from change fees to bag fees to seat fees. Now we're getting to services," he said.

The new functionality is available to any license holder of the FLX Merchandise product (FMS2). Davidson said it's already being used by one of the largest global airlines on its website.

It can be used underneath any channel, including a GDS, he added.

The airline would expose it as an API to the GDS, which would need a platform on which to display and sell it.

The bundling feature complies with the New Distribution Capability (NDC), the technical standard being developed by IATA.

That's hardly surprising, given that the basic set of XML messages with which IATA is working originated with Farelogix.

Davidson said the feature also is in line with the "vision" for NDC.

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Tech

5 Pillars of Successful Mobile Design

3.4k

Share on Facebook Share Tweet on Twitter [Share Share](#)**BY GRACE SMITH** / [JUN 02, 2013](#)

Designing for mobile has evolved dramatically. Users now expect fast, immersive mobile experiences, and catering to this is increasingly difficult.

When [Luke Wroblewski](#) introduced the concept of Mobile First more than four years ago, it radically changed how we approach design. According to him, the reason was threefold:

It was clear mobile use was going to take over; designing for mobile pushed you to better and simpler designs because of constraints like small screens and slow networks; and last but not least, mobile devices had capabilities like multi-touch and location detection that allowed you to create new kinds of experiences.

SEE ALSO: [85 Top Responsive Web Design Tools](#)

Wroblewski is founder of [Mobile First](#), a former Yahoo VP, co-founder of BagCheck (which was later acquired by Twitter). He recently launched [Polar](#), which lets users quickly set up polls to get feedback on timely issues.

We asked Wroblewski for five powerful app design tips, ranging from speed and signup processes to enforced constraints and the importance of taps.

1. Perception is not reality.

People now expect a lightning-fast user experience each time they use a mobile application. However, Wroblewski concedes the situation is actually "more dire than that, as people expect a faster experience on mobile than on the desktop, but

the networks are slower." So, you're fighting performance on both sides, he says. While you can help speed things up by minimizing assets and improving response times, for example, you can only go so far. "Eventually you'll bump into the realities of mobile networks."

Wroblewski notes techniques that improve perceived performance, giving the "sense that the app is reacting to your input, despite the fact that nothing has actually happened yet."

Instagram co-founder Mike Krieger calls this technique "[performing options optimistically](#)," meaning you can create the illusion that your action has taken effect, when in reality, it hasn't yet.

Wroblewski uses an example: When you like a photo on Instagram, the button instantly informs you that your action is complete. In reality, a network connection is in the process of telling a server what you did. "But Instagram's user interface doesn't wait for the server to verify this actually happened. They optimistically assume it happened," he says. "If something goes wrong later, they deal with it then rather than incurring a delay up front. Commenting works the same way."

The same principle applies to acknowledging touch gestures with subtle UI changes. Immediately when you tap or swipe, your app responds. "Techniques like this increase the perception of performance and, alongside actual performance improvements, they can go a way toward creating fast mobile experiences," says Wroblewski.

2. Postpone signup to improve engagement.

Creating an interface and user experience that will get people to actually engage with your mobile app (and most importantly, keep using it) is a challenge all app developers face. The statistics Wroblewski states are sobering: The average iOS and Android user only downloads [three to five apps per month](#). Of those, [26% are only opened once](#) and never used again, and another [48% are opened 10 times or less](#).

According to Wroblewski, you have two options. Get the most out of every user when he first downloads and opens your app: Ask for his email address, grab his address book, connect him to Facebook, and so on — with the intent of providing a better experience that keeps him coming back. However, this approach tends to frustrate people, enough that they either skip it or, worse yet, abandon the app. Usually, less than half of people who download an app actually complete the signup process.

Your other option is to postpone signup and let people actually jump in and start using your service. In this model, defer all your asks until they're more appropriate. This approach can foster action. Wroblewski is an advocate of this approach: "letting people get going instantly, then bringing things to them." He incorporated it into Polar, which "targets people when they are actually engaged with our product ... The 'everything at once' before you ever use the app can be effective for some, but it can also turn others away."

3. The mobile canvas comes first.

Presenting large amounts of information on the limited real estate of a mobile screen is difficult. Wroblewski admits, "Complex interfaces with lots of information were designed for a specific medium — where you can fit lots of things on a big screen, using the precise input of a mouse cursor or keyboard."

But Wroblewski observes people who often don't actually take the time to try to make their app work for mobile. "Many times that's all it takes." He points to an example, Jason Grigsby at [Cloud Four](#), who designed an expense-report application using responsive web design. After staring at the desktop version of the app for a while, Jason couldn't fashion a workable approach. Instead, he moved on to designing a mobile version. "As he did, everything snapped in place. Not only could he see how the app could become responsive, but he found a number of ways to make the full screen experience better."

"There is power in starting from the mobile canvas, instead of from your existing interface," says Wroblewski. "When you instead start with a different medium, defined by small screens and much coarser inputs like touch, you end up with a different design."

While there are other more-detailed interface design techniques, such as [responsive tables](#) and [off-canvas elements](#), Wroblewski is keen to emphasize, "Those are implementation techniques that will only help you when you've got the big-picture approach in place."

4. Enforce constraints.

One of the biggest challenges in mobile design is "unshackling yourself from 20+ years of desktop computing and the web." Both create a lot of unconscious baggage, says Wroblewski. "That is, you are drawn toward familiar solutions, patterns common to the PC era of software."

While mobile has many similar capabilities to the PC, it has limitations, too. "Many of your instincts will be wrong," says Wroblewski. "I've been designing web apps since 1996, so I have a lot of 'best practices' to unwind, and I often learn the hard way that I'm making things too complex for mobile."

Wroblewski uses creative constraints that force him "to deal with the reality of mobile use." For instance, he makes sure someone can do things [with just one thumb](#), ensuring a certain task can be completed in seconds, not minutes. "When these constraints are grounded in how people actually use their mobiles, you've given yourself a great way to tell if you're going in the right direction with your design."

5. Respect the importance of taps.

Every swipe, tap and action a user takes is important and has a lasting impact on user experience. "When people feel like they are making progress towards something they care about, they'll be more tolerant of an extra tap or swipe," says Wroblewski. "But for the most part, if you increase effort, you tend to decrease participation."

The CEO of Hotel Tonight illustrated that booking a hotel on his app requires only three taps and a swipe, totaling about eight seconds. He compared it to Priceline's mobile process (52 taps, 102 seconds) and Hotels.com's app (40 taps, 109 seconds).

The inverse is also true — moving actions a "tap away" can have negative consequences. Wroblewski cites the [Microsoft mobile Internet Explorer](#) team, which, in an effort to simplify their UI, moved the buttons for browser tabs and favorites under a "more" menu. After all, what's one more tap? Turned out it was a lot. Restoring one-tap access to tabs and favorites was overwhelmingly the No. 1 feature request of mobile IE; it actually made the top 20 list across all of the Windows Phones.

While recent years have seen an explosive growth in the mobile app industry, Wroblewski feels there is still a lot to be learned, which is why mobile remains so exciting. We're still in a period of enormous growth as more of the world comes online, increasingly through a mobile device. It's taken some time to start shedding our PC tendencies, but more uniquely mobile designs emerge every day.

Image via [iStockphoto](#), [luismmolina](#)

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Airline Brands: Putting Passengers in the Captain's Seat

By Stuart Green

Turbulence is a constant for the aviation industry. Airlines remain beset with huge capital requirements, high operating costs, restrictive government policies, differing tax regimes, few manufacturers, a reliance on ground operating systems, strict aviation regulations, strong labor unions, pressure from environmental groups, intense competition, and of course, the weather! It's difficult to think of a more challenging business sector in which to build and maintain success. The good news is more and more people just love, or need, to fly. Within 20 years, it's expected that approximately five billion people will be middle class, due to growth in emerging markets. This new audience is key for airline brands that want to thrive in the coming years. To capture them, airlines need to make these offerings a priority:

Pre-boarding engagement

Fueled by changing consumer behavior, we continue to see more partnerships, co-branding, social media, and digital engagement, as well as more innovative efforts in enhancing the travel experience. KLM, well known for its embrace of digital and social media, has launched a series of mobile apps, such as Passport, which lets users record their journeys and share their experiences via Facebook. Another mobile app lets passengers give real-time feedback on their experiences at the airport. Its recent foray into mobile gaming, Aviation Empire, even puts customers (virtually) in charge of the airline.

A holistic view

Influencing choice on a sustained basis requires a genuine integration between the online and offline experience. Successful airlines must create and maintain a holistic vision for the brand that drives all experiences. For example, Virgin Atlantic's #FITFOO campaign (Flying in the Face of the Ordinary) is not just a digital campaign, but also an expression of the brand, where fun is a key element. Using social media, Virgin looked for those having a dreary, grey day, and set out to make special deliveries to brighten their lives.

A more customized journey

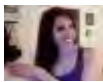
Consumers are increasingly diverse, wise, and demanding, from gourmet menus to in-flight showers. There is a greater connection between the way people live on the ground, and the experiences they desire when they travel. There will always be a place for the premium and budget ends of the spectrum. That said, the future will be more about customization throughout the journey. Put simply, successful airline brands will relate to the lifestyles of their customers, and be a better reflection of their interests. This means more strategic partnerships and co-branding as airline owners build customer journey ecosystems, of which the airline brand is but one important entity.

— Stuart Green (stuart.green@interbrand.com) is Chief Executive Officer, Interbrand Asia Pacific

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BUSINESS INSIDER

Airlines Are Going To Start Profiling You And Deciding How Much You Should Pay For A Ticket



JILL KRASNY

OCT. 24, 2012, 1:00 PM

Airlines are about to start testing a new ticket initiative meant to compete with airfare



Flickr / ND Strupler

websites, [according to USA Today's Bart Jansen](#). If all goes well, it could be adopted by 2016.

Basically the initiative involves asking for personal information, including frequent flier membership, travel history, and use of credit card, to cook up a personalized ticket. This would enable them to offer discounts to frequent fliers or bundle charges such as meals, extra legroom or expedited boarding.

Is this good for consumers? Hard to say yet.

Some consumers will be put off if they feel their information is being used against them to charge higher prices, said Brett Snyder of CrankyFlier.com, which tracks the airline industry: "It won't go over well."

However, "travelers should be excited if the airlines use [the plan] well," he said, like if they offer a bag fee or not based on their status. "If the airlines are concerned about public perception, then there should be a standard widely available published rate as there is today, but as people log in, it should give the opportunity to bring the cost down."

Speaking of status, "having airline elite status or an airline co-branded credit card is even more important than ever," said The Flight Deal, a daily deals site. With the move toward an à la carte pricing model, it's the only way consumers can dodge fees and be the first to nab discounts.

The pricing plan could also make life harder for agents if they can't access the same discounts as airlines. "In theory, the airlines want travel agents to have access to this," said Snyder, who runs a concierge service of his own, "but the third party intermediaries that airlines use to make reservations stand in the way of that becoming a reality." As a result, people might turn to booking experts if airline pricing becomes more complex and they'll jack up their prices.

Comparison sites might try to show the differentiated prices to users, if the airlines allow it. "If the opportunity is out there, it might force these sites to push for a better customer experience," said Snyder. "They could go with an alternate strategy of trying to scold the airlines, and from past experience, that wouldn't be a surprise. But they always end up resolving their issues in the end because both sides need other—for now."

[Now see 23 savvy tips for booking cheap airfare >](#)

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**How to Increase Travel & Tourism Revenue
Through Accelerated Website and Application
Performance**

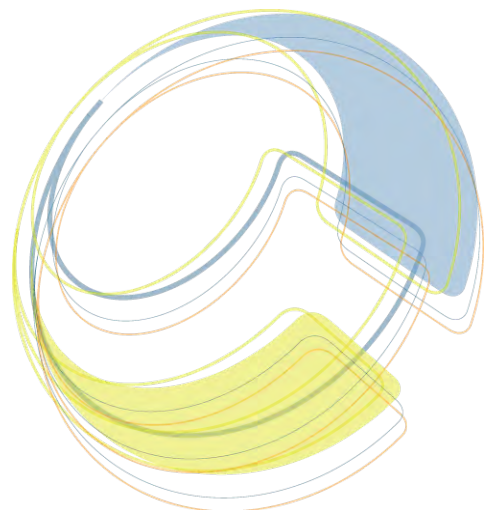


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Introduction: The Battle for Online Travel & Tourism Revenues

Economic war is being waged over the Internet, and today's travel and tourism businesses and agencies have been thrust into the middle of the fight. For this reason, CIOs and IT managers at airlines, booking agents, hotel operators, car rental agencies, and government-sponsored tourism organizations have dramatically stepped up website efforts to draw in the international travel and tourism audience.

A Failure to Deliver

Did you know? The Internet was not designed to support the fast delivery of the many mission-critical, dynamically generated applications found on today's travel and tourism sites. And technologies designed to improve Internet performance – including caching, content delivery, and intelligent routing – do not adequately address the performance requirements of dynamic, web-based applications because much of the content is non-cacheable.

The pressure and competition are enormous for travel and tourism businesses to convert Internet shoppers to actual bookings. As a result, websites and web applications have become mission-critical for these businesses. Where once brochure-like sites satisfied consumers' information requirements, today's consumers demand deeper insights regarding potential destinations through high levels of website interactivity, rich destination previews, and dynamic applications and content. This compels CIOs and IT managers to make their websites as engaging and dynamic as possible. And with consumers showing less and less patience for slow-performing sites, organizations are pressured to deliver all of this functionality without delay.

The Battlefield is Expanding

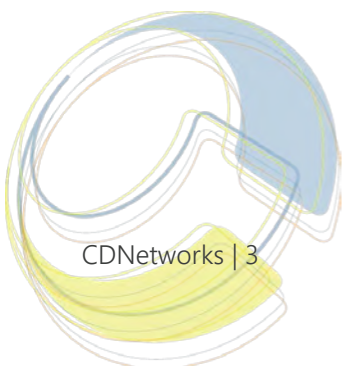
While many travel and tourism businesses consider their online competitors to be those from countries with hundreds of millions of Internet users and technological superiority, a growing threat has emerged from lesser-developed nations. Travel and tourism businesses from less wired nations have become quite savvy at optimizing their sites and adding incredibly engaging functionality to attract and retain the attention of vacation shoppers. In many cases, these businesses either receive funding from companies and governments that benefit from tourism or they join quasi-governmental sites and sell their services there.

The continued increase in travel apps and mobile sites coupled with the global rollout of 4G has also allowed smaller industry players to challenge travel giants with quirky applications and gain mass appeal to today's traveler. With so many apps offering the same service for different parts of the world it is more imperative than ever that travel firms look creatively at their mobile strategies.

The bottom line is that travel and tourism organizations must optimize both the content and performance of their websites to maintain a competitive advantage. This paper examines the challenges of delivering engaging websites that attract visitors from around the globe. It also highlights best practices and solutions for delivering dynamic, rich content fast and reliably around the world to an increasingly international audience.

The Performance Imperative

With competition among travel and tourism websites so fierce, many sites are pushing the envelope beyond engaging, rich content to deliver ever more customized, useful information and



Competitors Cash in on Your Poor Performance

78% of consumers reported switching to a competitive site due to poor web performance at peak times. And 35% of online travel consumers make their bookings during those peak times!

Google Now Uses Site Speed in Search Ranking

Your website will not achieve a high Google search ranking if it performs slowly relative to other websites? Moreover, Google's definition of site speed includes the speed of web applications and dynamic site content. Per Google: "Site speed reflects how quickly a website responds to web requests."⁸

enable social networking between consumers. Following is a list of some of today's most compelling travel and tourism online features:¹

- **Social community features** that enable registered users to share views, pictures, videos, stories and more. Users can even organize groups, communicate with group members, and arrange to meet one another on their trips.
- **Aggregated up-to-the minute travel bargains** from multiple businesses.
- **Interactive maps** that allow users to obtain street-level views from real destination spots within a city or town.
- **Itinerary blocks** that can be cut and pasted from one itinerary or booking to another.
- **Attractions database** enables users to understand which attractions are located in which cities — with attraction lists specific to each city.
- **Feature-specific hotel search** enables users to identify and book stays at hotels that have exactly the features they require (e.g., professional golf course, Asian-styled spa, etc.) rather than being forced into one-size-fits-all bookings.

Websites that incorporate such features can certainly keep the attention of online consumers and increase their bookings. But having the latest and greatest applications on a site won't matter if content and applications keep impatient visitors waiting for pages to load. CIOs and IT managers have known for over a decade that website speed and reliability is important to converting online shoppers into actual booked customers.

A Slow Site Equals Lost Revenue

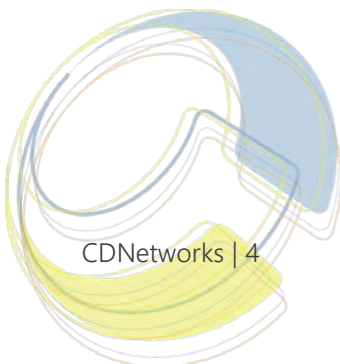
Today, with so many businesses funding high-performing travel and tourism sites and aggressively pursuing wallet share, slow-performing sites don't stand a chance. In fact, as hotelmarketing.com pointed out in its article entitled *Why hotel website performance matters – and why it's so challenging*, 78% of consumers reported switching to a competitive site due to poor web performance at peak times.² And site performance measurement company Gomez reports that 35% of online travel consumers make their bookings during those peak times.³

How does a slow or unavailable website impact travel and tourism businesses? It dramatically reduces revenue. To gauge just how large the revenue impact can be, consider a website that

¹ 10 Travel Web Sites Worth Bookmarking http://frugaltraveler.blogs.nytimes.com/2012/10/09/10-travel-web-sites-worth-bookmarking/?_php=true&_type=blogs&_r=0

² HOTELMARKETING.com, *Why hotel website performance matters – and why it's so challenging*, June 4, 2010

³ Gomez, *When more website visitors hurt your business: Are you ready for peak traffic?*



books \$100,000 per day. Gomez estimates that such a site loses \$800,000 in yearly revenue when it experiences just 2% downtime.⁴

A growing body of evidence demonstrates the importance of attracting and retaining consumers with a high-performing site. Consider some of the most recent published data regarding their threshold for site abandonment:

- **47%** of consumers expect a web page to load in 2 seconds or less.
- **52%** of online shoppers state that quick page loading is important to their site loyalty.
- A 1-second delay decreases page views by **11%** and customer satisfaction by about **16%**.
- Nearly **half** of mobile users abandon a site if it doesn't finish loading within 10 seconds.⁵

Beyond lost revenue, poorly performing websites cause organizations to incur higher customer support costs. Visitors who are dissatisfied with the performance or design of a site often contact the organization's toll-free support number to resolve their issue. This costs businesses anywhere from \$18 to \$34 per call⁶, and the costs can really add up during peak visitor times.

All that said, while performance is critical – especially during peak booking times – many travel and tourism organizations still struggle to ensure optimal site performance.

The Challenges to Travel & Tourism Website Performance

Getting web performance right has proven difficult enough when serving a domestic audience of consumers. But the challenges multiply when competing on the global stage. Following are the five most common barriers to delivering an engaging travel and tourism experience to a worldwide audience:

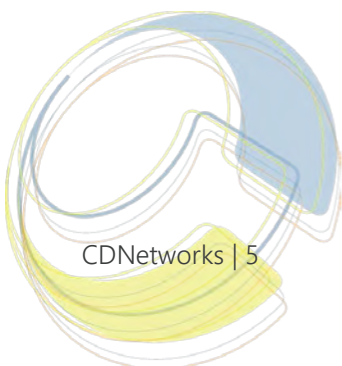
1. Vast distances between consumers and origin servers
2. Internet latency between countries
3. Expectations for fast page downloads anywhere in the world
4. Demand for, and competition from, websites with richer content and applications
5. The high cost of global data center build-outs

⁴ ibid

⁵ Kissmetrics, How Loading Time Affects Your Bottom Line. Referenced online July 30, 2013 from the following source: <http://blog.kissmetrics.com/loading-time/>

⁶ Internet Retailing, E-Tourism: Website performance a critical factor for customer loyalty, March 12, 2010 <http://www.internetretailing.net/2010/03/e-tourism-website-performance-a-critical-factor-for-customer-loyalty/>

⁸ Google, Using site speed in web search ranking, April 9, 2010 <http://googlewebmastercentral.blogspot.com/2010/04/using-site-speed-in-web-search-ranking.html>



The research firm Gartner, Inc. points out that serving a global user audience from just one or two data center locations is difficult because of global Internet latency. Gartner states, for example, that average latency between China and the U.S. and China and Europe ranges from 200 to 350 milliseconds and 400 to 600 milliseconds, respectively.⁷ And as the Google and Microsoft Bing studies above demonstrate, this type of latency reduces website stickiness and, ultimately, online revenues. Latency is becoming a bigger problem for travel and tourism websites each year. As the audience of online consumers becomes more dispersed around the globe, CIOs and IT managers can no longer focus their website performance in just certain geographies.

According to the [World Tourism Organization](#), consumers spending the most on international tourism in 2012 included those from China, Germany, Russia and the United States (see Figure 1 below).⁸ With these countries located so far from one another, travel and tourism websites must develop ways to get closer to these consumers who are located on multiple continents.

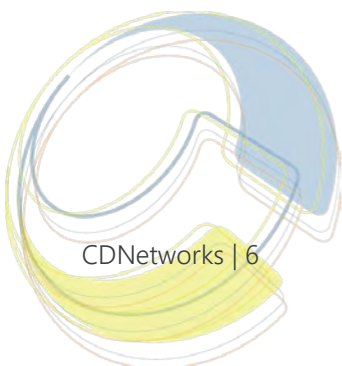
Rank	Country	International Tourism Expenditure (2011) (Billion Dollars)	International Tourism Expenditure (2012) (Billion Dollars)
1.	 China	\$72.6	\$102.0
2.	 Germany	\$85.9	\$83.8
3.	 United States	\$78.7	\$83.7
4.	 United Kingdom	\$51.0	\$52.3
5.	 Russia	\$32.5	\$42.8
6.	 France	\$44.1	\$38.1
7.	 Canada	\$33.3	\$35.2
8.	 Japan	\$27.2	\$28.1
9.	 Australia	\$26.7	\$27.6
10.	 Italy	\$28.7	\$26.2

Table 1: Shows citizens spending the most on international tourism, 2013.

Source: [World Tourism Organization](#)

⁷ Gartner, How to Improve Application Performance on China's Internet, June 25, 2010

⁸ [World Tourism Organization](#)



Delivering a Local Experience Around the Globe

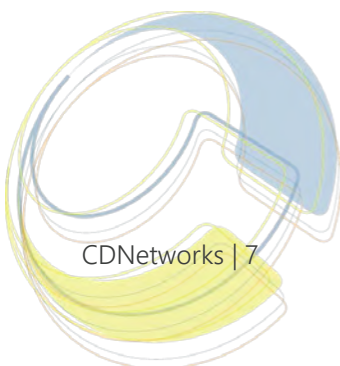
As organizations weigh their options for addressing global site and application delivery, most find themselves comparing the choice of building out their own data centers against outsourcing web and application delivery to a content delivery network (CDN) provider. Typically, after just a brief analysis, most businesses realize that it's cost-prohibitive and resource-intensive to build out, tune, and optimize the global infrastructure required to deliver reliable performance to end users around the globe. Moreover, the time and effort required for such an approach can either stall online initiatives or distract the organization from its core focus for extended periods of time. The following are three critical factors that lead CIOs and IT managers to forgo in-house solutions, turning instead to CDN providers.

1. **Obtaining Expertise:** Getting the core content delivery infrastructure right requires a large IT staff with very specialized skills in a number of performance-enhancing disciplines. These include DNS, storage, caching, acceleration, and wide-area networking.
2. **Provisioning for Scalability:** To prepare for spikes in user demand, travel and tourism businesses must over-provision hardware, software, and bandwidth in order to guarantee end-user uptime and performance. Many CIOs and IT managers go to extremes building up their infrastructure to handle peak traffic volumes. Not only is this type of provisioning expensive, it's wasteful as the infrastructure sits largely idle a majority of the time.
3. **Optimizing Performance:** Delivering the performance that site visitors have come to expect requires redundant, geographically dispersed data centers. This means a lot of headaches and management overhead, particularly during the build-out stage, as teams need to travel frequently, or even relocate. Even then, businesses find themselves unable to match the performance of dedicated CDN service providers.

New Data Center Fixed Costs	Data Center Operation Costs	Data Center Personnel Costs
Legal Fees	Property taxes	Several full-time IT staff per country to monitor and manage the network and applications
Real estate	Heating and cooling (5-10 times Western equivalents in Asia)	One or two business executives to manage ISP and government relations in certain challenging countries, such as China
Site construction	Electricity (5-10 times Western equivalents in Asia)	Expatriate manager to solidify company culture and oversee progress in the most challenging geographies
Hardware	Leased lines (3-5 times Western equivalents in Asia)	1-2 administrative staff per country
Web and applications servers	Migrations for software updates	
Software licenses		
Capital costs incurred if expansion is required		

Figure 1: Bevy of must-have items many travel and tourism businesses fail to consider when investigating the in-house option.

Because of these high and unexpected costs and inhibitors to fast market entry, CDN usage by travel-related businesses has grown dramatically over the past decade. As organizations have expanded to serve global audiences, CDNs have helped extend their reach by delivering site content from servers located across a large number of networks around the world. Recently,



leading CDNs have added application acceleration to their global capabilities. By tapping into these capabilities, travel and tourism websites can quickly serve site content and applications to visitors anywhere in the world in a fast, secure, and reliable manner.

Choosing a CDN Provider

Most CDN service providers' solutions include the infrastructure and content delivery services for static web content, and streaming media. These are considered must-have offerings for a CDN. But for travel and tourism websites focused on serving global audiences, the best CDN providers combine two critical capabilities:

- High in-country performance levels in the fastest-growing markets of the world
- The combination of origin server optimization, dynamic site acceleration, and application delivery

CIOs and IT managers must do their homework to understand which providers can actually deliver the complete CDN solution set. According to Gartner, "Many CDN service providers can provide web content offload, file download and streaming media delivery, but few can provide an application acceleration service, even though many of them claim they can provide some level of application acceleration. Furthermore, their delivery capability and service performance vary."⁹ This is particularly true when combining application acceleration with difficult-to-serve markets, such as Russia and China.

Introducing CDNetworks' Web Performance Suite

The CDNetworks Web Performance Suite (WPS) was designed to address the very issues faced by travel and tourism websites today. WPS enables CIOs and IT managers to deliver dynamic website content and applications — with maximum performance and reliability — anywhere in the world. CDNetworks solves the performance problems associated with dynamically generated content by optimizing the middle mile. Because our proven technology reduces the number of data round-trips necessary to complete a web request — even for dynamic content — it accelerates performance and improves the end-user experience.

Moreover, our global footprint makes it easy for travel and tourism websites to provide end users with the performance they demand. In fact, CDNetworks established operations and infrastructure in the most challenging geographies over the past decade.

Our in-country expertise and services in China and Russia, combined with our six-continent footprint, enable travel and tourism businesses to navigate the most challenging regions of the Internet. Our CDN platform seamlessly combines all the components necessary for high-performance delivery of travel and tourism sites' advanced features and applications. These include acceleration functionality for applications, content, media, and dynamic social features.



⁹ Gartner, How to Improve Application Performance on China's Internet, June 25, 2010



Web Performance Suite

Cloud DNS

Global DNS service that is always available, secure and scalable.

Dynamic Network Acceleration

DNA's wide overlay network of PoPs across the globe ensures high performance and prevents transaction delays and terminations.

Dynamic Web Acceleration

Applications perform without delay and dynamically generated site content appear instantly.

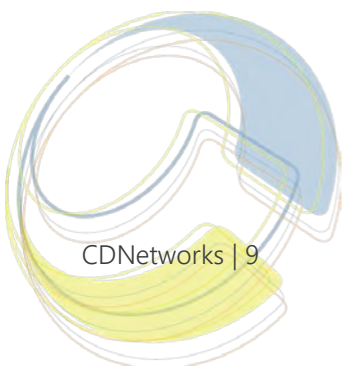
Content Acceleration

Most frequently requested web page content is transmitted through globally distributed cache servers, which means the pages load faster and puts less stress on your server.

Figure 2: CDNetworks Web Performance Suite for Travel & Tourism Websites

Figure 2 above depicts the CDNetworks Web Performance Suite and the elements of travel and tourism websites that it supports.

Not only does CDNetworks enable travel and tourism websites to support engaging site features, CDNetworks is the fastest CDN on the planet. Figure 3 below demonstrates how Virgin Blue dramatically increased the performance of its site using CDNetworks' WPS.



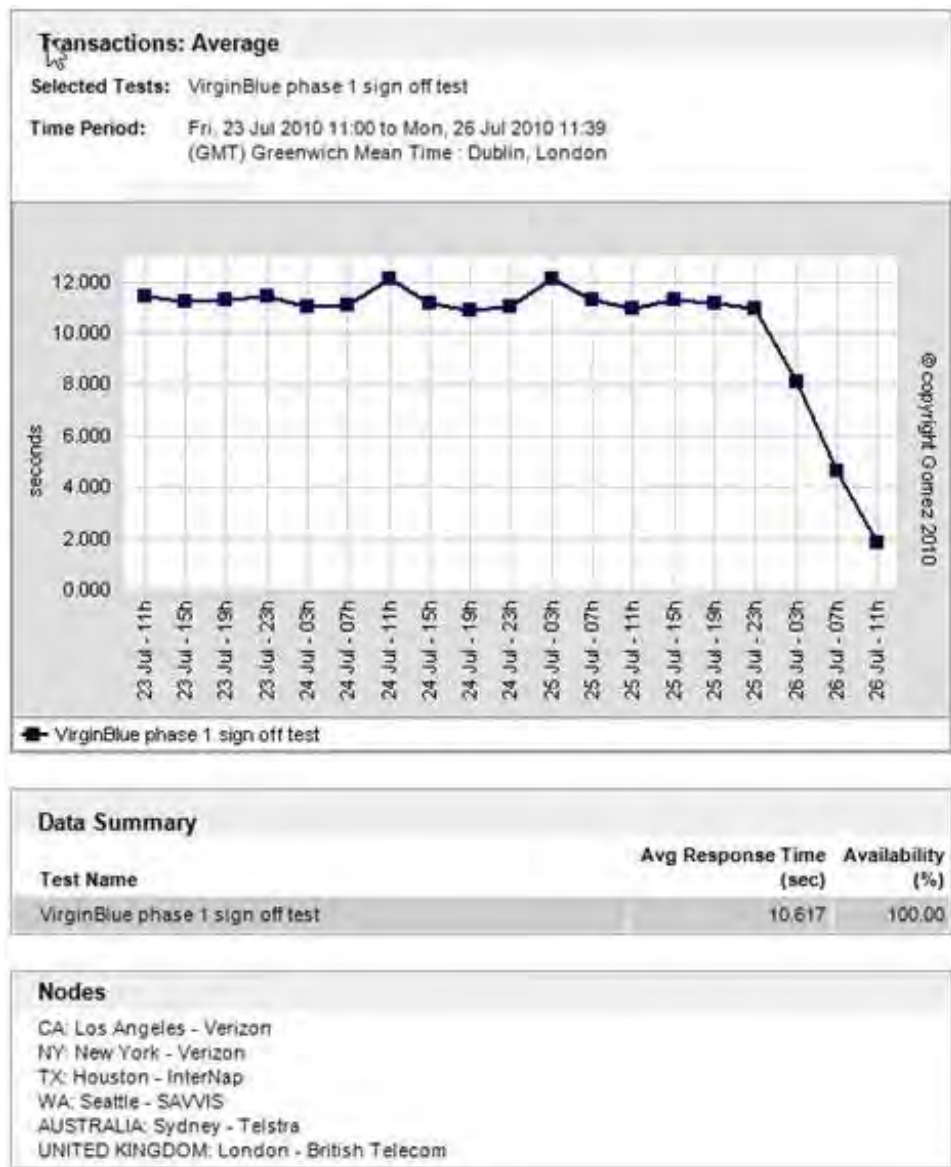
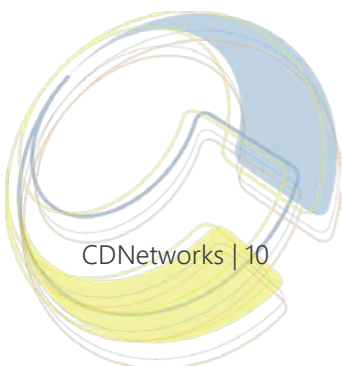


Figure 3: Virgin Blue's site performance improves dramatically with CDNetworks

Leveraging the speed and reliability of CDNetworks, travel and tourism businesses can confidently adopt the most advanced and engaging site features and share them with a global audience.



CDNetworks
Global Offices

US

441 W. Trimble Road
San Jose, CA 95131
+1 408 228 3700

EMEA

Juxon House
100 St Paul's Churchyard
London, EC4M 8BU
+44 203 514 7501

Korea

Handong Bldg. 2F,828-7
Yeoksam-Dong, Gangnam-Gu
135-935 Seoul
+82 2 3441 0400

Japan

Nittochi Nishi-shinjuku Building
8th Floor, 6-10-1, Nishishinjuku,
Shinjuku-ku, Tokyo 160-0023
+81 3 5909 3369

China

Room No.A-1502,
Keijidalou, 900 Yi shan Road, Shanghai
+86 10 8441 7749

info@cdnetworks.com
www.cdnetworks.com

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Conclusion: Our Focus Helps You Focus

Travel and tourism focused businesses must concentrate their efforts on developing compelling and engaging site experiences for their growing global audience. Rather than losing their critical business focus and shifting attention to costly builds-outs of global website infrastructure, these organizations should leverage the on-demand managed services provided by a leading global CDN provider. Not only will this strategy cost less, it will optimize the performance of the ever-more engaging content and applications that sites must adopt to remain competitive. This, in turn, will lead to higher rates of visitor satisfaction and increased revenue from bookings.

Isn't it time that you took the first step toward accelerating your travel and tourism site to provide visitors from around the globe with a faster, more engaging experience? See how easy it can be by calling a CDNetworks Account Executive today at any of our offices around the globe.

About CDNetworks

CDNetworks enables Global Cloud Acceleration. Our mission is to transform the Internet into a secure, reliable, scalable and high performing Application Delivery Network. CDNetworks' unique position as the only *multinational CDN* with expertise and infrastructure in China, Russia and other emerging markets, enables us to be trusted partners in local markets, while serving as foremost experts on extending into global markets. Accelerating more than 40,000 global websites and cloud services over our 140 PoPs, CDNetworks serves its e-business customers across industries like finance, travel, ecommerce, learning management, high tech, manufacturing and media. CDNetworks has been serving its enterprise customers for more than 13 years, and has offices in the U.S., Korea, China, Japan, and the UK. For more information, please visit: <http://www.cdnetworks.com>

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Compuware APM Benchmarks



US Travel - Online Travel Agent - Flight Search Performance Summary

Month Ending: September 01, 2014

[Benchmarks Website](#)

Overall Ranking		Participant	Sub Rankings	
Current	Last		Transaction	Transaction
1	1	Hotel Planner	1	1
2	3	Priceline	2	3
3	3	One Travel	6	1
4	2	Cheapo Air	4	4
5	10	Bookit	3	7
6	8	Travelocity	6	6
7	7	Expedia	4	9
8	5	AA Vacations	9	5
9	9	Apple Vacations	8	11
10	11	Smart Fares	10	8
11	5	Orbitz	11	10



Compuware APM Benchmarks



US Travel Online Flight Search Performance Detail - IE Transaction

Month Ending: September 01, 2014

[Benchmarks Website](#)

0:00 - midnight / (GMT -04:00) Eastern Daylight Savings Time

Participant	Response Time		Availability		Consistency	
	Rank	Seconds	Rank	Percent	Rank	Seconds
Cheapo Air	1	19.792	6	98.810	8	11.695
Hotel Planner	2	22.348	5	98.870	1	6.693
Priceline	3	25.261	3	99.520	3	8.489
Travelocity	4	25.280	10	98.230	2	8.273
Bookit	5	25.545	1	99.720	6	11.137
Expedia	6	26.243	4	99.460	5	10.963
One Travel	7	27.443	2	99.670	7	11.213
AA Vacations	8	28.212	9	98.240	9	13.164
Apple Vacations	9	29.696	7	98.790	4	10.436
Average	--	30.613	--	98.920	--	12.159
Orbitz	10	39.158	11	98.130	10	18.745
Smart Fares	11	67.769	8	98.680	11	22.941



Compuware APM Benchmarks



US Travel Online Flight Search Performance Detail - Firefox Transaction

Month Ending: September 01, 2014

[Benchmarks Website](#)

0:00 - midnight / (GMT -04:00) Eastern Daylight Savings Time

Participant	Response Time		Availability		Consistency	
	Rank	Seconds	Rank	Percent	Rank	Seconds
Cheapo Air	1	15.916	8	99.050	5	7.735
One Travel	2	17.520	1	99.810	6	7.866
Hotel Planner	3	19.441	4	99.650	2	6.391
Travelocity	4	21.016	11	98.480	3	6.849
Bookit	5	22.307	3	99.730	11	9.432
AA Vacations	6	22.516	10	98.640	1	6.003
Priceline	7	22.535	2	99.740	4	7.271
Expedia	8	23.501	7	99.140	9	9.195
Average	--	23.503	--	99.270	--	7.887
Orbitz	9	27.211	6	99.280	10	9.415
Apple Vacations	10	30.605	9	99.020	8	8.693
Smart Fares	11	35.965	5	99.480	7	7.912

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Rejection of transportation sales tax effects cities, counties

Amendment 7: What's next?



This is a 2009 aerial view of the Jefferson City Memorial Airport. Runway expansion at the airport was one of numerous local projects that would have been funded through the transportation sales tax if it had passed.

By [Jeff Haldiman](#), [Madeleine Leroux](#)

Sunday, August 10, 2014

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With the failure of Constitutional Amendment 7, known as the transportation sales tax, comes the loss of \$40 million worth of projects that would have come to Cole County and funds that would have gone to both county and city governments.

Last week, Missouri voters rejected the transportation sales tax, which would have funded hundreds of highway and transportation projects across the state and sought to create a 3/4-cent sales tax to raise \$5.4 billion. Of that, \$540 million would have been directly turned over to cities and counties throughout the state.

Jefferson City Administrator Steve Crowell said the city estimated it would have received \$295,000 per year that could have been spent on a few different uses.

“It is our understanding that this money could have been used for ‘city road, street and bridge expenses,’ which could have been used (subject to determination by mayor and City Council at budget time) for general fund related expenses such as labor, materials, supplies, etc,” Crowell said in an email.

City officials have held off on the annual budget process, which normally begins mid-summer, in order to see how statewide issues, such as the transportation sales tax, turned out. Though the city’s 2015 budget has yet to be set, Crowell said the draft budget at no time included the potential revenue from the tax, so its failure doesn’t have a real impact on the 2015 outlook.

But that doesn't mean city officials would not have liked to see the measure pass. In late July, the City Council unanimously approved a resolution supporting the amendment.

Crowell said his own estimations showed the city could have received roughly \$245,000 in the first year of the tax, which could have provided a bit more flexibility in a tight budget.

"We did not count on the additional revenue, but it would have certainly given the mayor and City Council at least another option to discuss at budget time," Crowell said. "If the measure did pass, then there would have been the additional \$245,000 in revenue which (again subject to approval by the mayor and City Council) would have addressed some of the budget challenges on which staff is working."

Cole County Public Works Director Larry Benz said the county would have received funds that could have assisted with ongoing road costs. Even though he said they weren't counting on the money, Benz said now that the tax has failed, the county will need to look at ways to conserve supplies.

"Over the 10 years of the tax, the county would have received just over \$2 million, or \$200,000 a year, to be used for repairs like additional overlay and chip and seal," Benz said. "Our costs are going up. Salt prices went up from last year. We're going to have to find new ways to conserve and use our salt supplies."

Cole County Presiding Commissioner Marc Ellinger said the failure of the tax means there won't be as many cooperative projects between the county and state as in previous years.

"We'll be able to do cooperative projects with Jefferson City, but other areas in the county which could have seen expansion or improvements probably won't, and that's disappointing," Ellinger said.

Ellinger said voters' rejection of the tax show that MoDOT continues to have issues with being responsive to taxpayer concerns, pointing to the department's 15-Year Plan from 1992.

That plan — approved by the Legislature and not by voters — would have made a number of improvements to roads and bridges statewide, including widening Interstate 70 to three lanes in each direction. To pay for it, lawmakers approved a 6-cent increase in the fuels tax, phased in 2 cents at a time in 1992, '94 and '96.

The Highways and Transportation Commission later made changes in the way fuel tax money was distributed between rural and metropolitan areas, generating complaints from the Farm Bureau and others.

Although many of the projects in the plan eventually were finished, the commission decided in November 1998 that the department couldn't afford the 1992 road and bridge building plan, and replaced it with a series of "rolling" five-year plans that are updated every year.

Ellinger said the method of outlining projects every five years when a county half-cent sales tax is renewed is a good method that allows taxpayers to see that projects are completed before approving the next installment, something that likely would have worked better for MoDOT than the 15-Year Plan.

Canceled projects

The transportation sales tax planned to pay for more than 800 projects throughout the state. In Jefferson City and Cole County, projects included:

- Expanding the Whitton Expressway by an additional lane in each direction from Clark Avenue to Missouri Boulevard — cost of \$17.17 million.
- Expanding runways at the Jefferson City Memorial Airport — cost of \$4.2 million.
- Expanding the city's transit system, JeffTran, by four hours each day — cost of \$8 million.
- Creating a transit service line between Jefferson City and Columbia using OATS shuttle buses — cost of \$1 million.
- Funding improvements to Jefferson City's Amtrak Train Station, from renovations to improving handicap accessibility — cost of \$5 million.

MoDOT officials have said throughout the tax campaign that if the measure failed at the ballot, the 800-plus projects are all off the table.

For Jefferson City, the expansion of transit service would have eased a consistent issue as council members struggle to try and cut the roughly \$1 million general fund subsidy to transit service without cutting the service itself, which currently only runs from 6:40 a.m.-5:45 p.m. Monday through Friday.

Ashley Varner, with Citizens for JeffTran, said the additional money, combined with other potential funding sources, would have helped make substantial improvements to the city's transit service, though she added that the sales tax method also would have hit those who rely on transit hardest.

"Keep in mind that the sales tax that did not pass is a very regressive tax, meaning the poor or those who live in poverty would have been hardest hit; one of the populations that utilizes public transit," Varner said.

For Cole County, several projects in the area would have alleviated ongoing issues that the county is unable to address right now. Benz said one such project was the overlay and widening of Route B, from Jefferson City to Meta.

"There's a lot of accidents on that road, with runoffs of tractor trailers taking place year-round," Benz said.

Another project that would have helped the county was adding lanes to the Whitton Expressway. Benz said that project would have helped alleviate congestion on the highly used road.

"That area will just get worse. In the bigger and broader scheme, increasing the four-lane route of 50 east and west economically would have been a big boom getting traffic in and out of the Jefferson City area," Benz said. "Companies look at access when they search for new places to build."

Reporter Bob Watson contributed information used in this article.

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Attachment D

Survey Conducted by Open Allies for Airfare Transparency in coordination with
Travelers United (formerly the Consumer Travel Alliance):
Evaluation of Survey Methodology and Results

Report of Dr. Larry Chiagouris, September 23, 2014
President, BrandMarketing Services, Ltd.

SCOPE OF RETENTION

I have been retained on behalf of Airlines for America (“A4A”) to review the information (methods and results) as it pertains to a survey conducted by Open Allies for Airfare Transparency in coordination with Travelers United (the “Open Allies Survey”). This survey was discussed in an announcement on September 4, 2014¹ and details related to the survey were provided on the Internet.² My review is based on these materials.

The statements in my report, except as otherwise stated, are based on my personal knowledge, including knowledge I have obtained from reviewing materials pertaining to this engagement, as well as knowledge I have from my decades of experience with regard to marketing and survey research issues in both an academic setting and in a business setting. The opinions expressed are those I have formed based on my consideration of the information I have reviewed in this matter, my expertise, and my experience.

My opinions are based upon my independent analysis and review of relevant information available to date. I reserve the right to review and consider any additional information that may be produced subsequent to the issue of my report and I may supplement my opinions based upon the review of any such materials, if it is appropriate to do so. Details with regard to my background in the area of consumer behavior and survey research are provided in Exhibit A.

STANDARDS FOR SURVEY RESEARCH AND RELATED EVIDENCE

In engaging in this project and preparing this evaluation, I was guided by standards or guidelines typically used and cited in the field with regard to the admissibility of surveys in matters where

¹ <http://www.faretransparency.org/open-allies-survey-consumers-demand-ability-to-search-compare-and-purchase-ancillary-fees>

² <http://www.faretransparency.org/wp-content/uploads/2014/09/Traveler-survey-data-summary.pdf>

there are important public policy decisions to be made or where there exist differences of opinions among two or more parties. These standards relate to matters with regard to survey methods used and the underlying data, analysis, and conclusions. My sources with regard to the appropriate standards and guidelines are found in the *Manual for Complex Litigation*, 4th ed., 2004, the “Reference Guide on Survey Research” by Shari S. Diamond, J.D., Ph.D., in the *Reference Manual on Scientific Evidence*, 3d ed., Federal Judicial Center, 2011, and guidance from the American Association of Public Opinion Research (AAPOR) and also, guidance from the National Council on Public Polls.

Surveys should adhere to the standards in the industry for designing and implementing survey research. These various standards (as seen in the sources identified above) all converge on the following essential set of conditions that define a proper survey:

1. The population was properly chosen and defined.
2. The sample chosen was representative of that population.
3. The data gathered were accurately reported.
4. The data were analyzed in accordance with accepted statistical procedures.
Implicit in this standard is that the study design must be scientifically sound and unbiased with proper control mechanisms to be able to arrive at valid and meaningful conclusions.
5. The questions must be clear, precise, and not leading, and the instrument for data collection be properly designed to be free of design-induced biases.
6. The study must follow proper interview procedures.

In effect, a survey must adhere to all of these factors and none of these factors should be violated.

SUMMARY OF OPINIONS

The Report Does Not Provide Full Disclosure

Professional societies and organizations are almost universally in agreement that full disclosure of survey methods is critical to assure that decisions based on survey research are based on survey research conducted in a professional manner. The American Association of Public Opinion Research notes “Good professional practice imposes the obligation upon all survey and public opinion researchers to disclose certain essential information about how the research was conducted.”³

Included in the disclosure requirements, according to AAPOR, is a description of not only who sponsored the research but also who conducted the research. Knowing who did the poll is said to be the first question that one should ask and get answered according to the National Council on Public Polls.⁴

Who conducted the research is highly relevant. One noted authority has stated, “In some cases, professional experience in teaching or conducting and publishing survey research may provide the requisite background. In all cases, the expert must demonstrate an understanding of foundational, current, and best practices in survey methodology, including sampling, instrument design (questionnaire and interview construction), and statistical analysis.”⁵

One of the problems with the Open Allies Survey is that it does not identify the name or names of the survey research professionals who designed and executed the survey. This lack of

³ http://www.aapor.org/Disclosure_Standards1.htm#.VA-AuWRdVVg

⁴ <http://www.ncpp.org/node/4/#1>

⁵ “Reference Guide on Survey Research,” Shari Seidman Diamond, from *Reference Manual on Scientific Evidence*, 3rd Edition, 2011, page 375.

disclosure results in an inability for others to judge the level of professional expertise that was used to conduct the survey.

The actual questionnaire in the Open Allies Survey, contrary to accepted survey research practice, was not released as a separate document as part of the announcement or as part of the summary of findings. I will therefore, in a subsequent section of this report, draw my conclusions about the questionnaire based on the wording of the questions reported in the summary of findings. However, not providing the images of the actual questionnaire used in the survey is yet another example of a failure to disclose relevant material in connection with the survey. The failure to share the actual questionnaire also makes it impossible to know with certainty the actual order of the questions that were asked, which then masks potential problems in how the order of the questions impacted the survey results.

In addition to the failure to disclose who designed and conducted the survey or the actual questionnaire, there are other equally important omissions in the Open Allies Survey. These omissions concern the nature of the population studied and the sample used to represent the population. These are discussed below in other sections of this report.

The Report Does Not Address in Detail the Relevant Population

As noted above, surveys must address the relevant population to be considered relevant to understanding an issue. If a survey does not address the relevant population, the information provided in the survey is irrelevant and not helpful in assessing any related issues.

The summary of the Open Allies Survey notes that the survey was conducted with people who have “flown at least once in the last year.” However, the universe of people who fly more than one time during the year is substantial. Indeed, people who fly more often may have opinions and attitudes that are different than the people who fly just once. There may also be

differences of opinions among people who fly within the United States versus internationally or who fly on domestic airlines versus international airlines. The Open Allies Survey does not ask the relevant questions to take into account these characteristics of the respondents and the relevance of these characteristics in terms of the definition of the relevant population.

The Open Allies Survey does not provide enough information about the relevant population, as it does not distinguish between those people who may have taken only one trip versus people who may have taken many trips. Certainly, the opinions of all who fly are important but it is important to know if people who fly more often are more or less satisfied with the manner in which services are searched for and priced. The survey, as reported, did not ask the question and identify how many trips the respondents took.

By not identifying the frequency of flying and understanding the different types of consumers and their respective attitudes, we cannot be certain that there is a uniform set of opinions. Indeed, if the survey is not balanced and is comprised disproportionately of one type of consumer versus another, the results may be misleading. Again, given that a question as to the frequency of flying was not included, we will never know if the Open Allies Survey is reflective of the frequency of flying. As a consequence, we cannot know if opinions differ across different types of flyers based on frequency of flying or if the opinions are truly representative of the flying public.

The Sample Chosen was Not Likely Representative of the Relevant Population

Even if the population is well defined, a representative sample needs to be drawn from that population. Open Allies has failed to disclose information about the sample and this lack of information means we cannot be certain the sample is representative.

For example, there is no description as to how the source names and email addresses were obtained and sampled. Were these people drawn from lists and if so, what was the nature of these lists? If lists were used, were the lists representative of the members of the public who fly? There is no description provided with regard to the possible lists source.

Regardless as to whether or not a list was used, we do not know how the respondents to the Open Allies Survey were recruited. Were they offered an incentive and if so, how much of an incentive? Note that the existence of and the level of the incentive are important, and it is the usual and customary practice to describe the incentive in a survey report. There was no disclosure as to incentive levels.

The summary of the Open Allies Survey does not provide any detail as to how people were recruited. It also does not provide any detail as to what the response rate was for the survey. Response rates are very important in survey research. Lower response rates result in less confidence that a sample is representative of a population.

The Open Allies Survey also provides no information about sample validation. It is customary in survey research to incorporate steps in the process or questions that would assure the people included in the sample are who they say they are in terms of information related to their identity or behavior. It is customary to include in a report of the findings what percentage of the sample respondents were removed due to problems related to validation. No disclosure of a sample validation process and related results was provided and as such, the sample may not have been validated.

The announcement accompanying the Open Allies Survey noted that a representative sample had been drawn via SurveyMonkey. It does not disclose any material as to how the sample was made to be representative.

SurveyMonkey is a popular online survey tool and is useful when an organization has a group of people (such as its members or its customers) that it seeks to interview and that it can expect will be cooperative in participating in its surveys. But there are challenges in reaching the general public with this tool. SurveyMonkey uses a general panel drawn from a wide array of sources to construct its panel.

One of the challenges in using its panel is identified by SurveyMonkey itself.⁶ Specifically, many potential respondents protect their online usage against viruses and other problems by not enabling cookies on their computers. While this may appear as a technical detail, it is very important. It results in people being excluded from interviews due to what appear to be connection problems due to their security levels and use of cookie disabling procedures. Thus, any potential respondents that protect their online identity or online experience are likely to be excluded from the SurveyMonkey surveys. This is a problem for any survey, but this is a particular problem for a survey intended to examine how people shop for airline services *online*.

To conclude this section, the above problems of the Open Allies Survey combine to result in a sample that is not likely to be representative of the consumers who shop for airline tickets.

Failure to Conduct or Disclose the Conduct of a Pretest.

The Open Allies Survey research as currently reported is fundamentally flawed in that it did not include material related to a pretest. There are problems described below with regard to the use of ambiguous or misleading language that could have been avoided if a thorough pretest of the questionnaire had been conducted. A pretest of a questionnaire refers to testing of the

⁶ http://help.surveymonkey.com/articles/en_US/kb/Why-are-respondents-reporting-connection-issues-on-my-survey

questionnaire on a sample of respondents to identify and eliminate potential problems in understanding language and in removing language that may be misleading.

Pretests are done carefully to understand if the language contained in a survey and the related stimuli used in a survey are clear and understood by the respondents. As stated by Dr. Naresh Malhotra, the author of a well-established marketing research textbook, "as a general rule, a questionnaire should not be used in the field survey without adequate pretesting."⁷

Stated another way, "when unclear questions are included in a survey, they may threaten the validity of the survey by systematically distorting responses if respondents are misled in a particular direction, or by inflating random error if respondents guess because they do not understand the question."⁸ Indeed, there are indications that the respondents did not understand the questions or that the questions were misleading and this will be discussed in the next section.

Reporting a pretest would require more than the mere assertion that a pretest had been conducted. It would require providing documentation with regard to a) when the pretest was done, b) how the pretest was done, c) who performed the pretest, d) a presentation of the initial set of pretest results and e) a detailed description of the changes made to the questionnaire and/or stimuli based on the conduct of the pretest. None of this material was disclosed and provided in the report of the summary of findings.

Flawed Questionnaire

As noted earlier, the questions must be clear, precise, and not leading, and the instrument for data collection should be properly designed to be free of design-induced biases. In any

⁷ Marketing Research: An Applied Orientation, Naresh K. Malhotra, 2004, Pearson/Prentice-Hall: Upper Saddle River, New Jersey, page 301.

⁸ "Reference Guide on Survey Research," Shari Seidman Diamond, from *Reference Manual on Scientific Evidence*, 3rd Edition, 2011, page 388.

review of a questionnaire, every word needs to be examined in order to determine if the questionnaire is a clear, unambiguous and unbiased instrument for the purpose of measuring public opinion.

In reviewing the questions used in this study, I found several problems related to questions that are either leading or unclear or possibly ambiguous in terms of the answers to the questions. The following are sources of problematic wording:

1. In question #1⁹, the use of the words “in the past” is likely to contribute to data that cannot be accurately interpreted. The expression “in the past” is not clear with regard to the actual time period that the respondents will consider in their response. “The past” is an ambiguous expression and it presents a problem with regard to interpretation because regulations were changed in 2012 with regard to certain ways that the airlines price or communicate the pricing of services. Therefore, more likely than not, some consumers might be thinking about the period of time that took place prior to 2012. Other consumers might be thinking about the period of time after 2012. As a result, any interpretation of the responses will not be able to be linked exclusively to the conditions prior to or following the 2012 changes, thus resulting in an inability to derive clear and explicit conclusions with regard to the responses to this question.
2. In question #2¹⁰, it implies that airlines have been charging for ancillary services only recently. This question is not only misleading. This question reveals a lack of knowledge of the business model of the airlines industry and miscommunicates the business model of airlines in the industry. In terms of a mischaracterization of

⁹ “In which of the following ways have you searched for and purchased plane tickets in the past?”

¹⁰ “In the last few years, airlines have started charging a wide range of fees for things like baggage and seat assignments that used to be part of the base ticket price. Which of the following fees have you paid at least once?”

the industry business model, some airlines do not provide advance seat assignments and even airlines that do provide advance seat assignments charge a fee only for advanced seat assignments in preferred seats (e.g., seats closer to the front of the plane). (Southwest Airlines is an example of an airline that does not provide advance seat assignments). There are airlines that do not charge for the first piece of baggage (JetBlue is an example of an airlines that does not charge for the first piece of baggage). Furthermore, airlines have been charging fees for some ancillary services for at least 10 years and not just “recently” (e.g., snack boxes) and so, this question is misleading.

3. Also in question #2, it notes that airlines are charging a “wide range” of fees. It is not clear how “wide range” would be interpreted by respondents and it is likely that the interpretation of “wide range” would vary quite substantially across respondents.
4. In question #3¹¹, the expression “in recent years” is used. This is in contrast to the expression noted in comment #1 above with regard to “last few years”. There is an inconsistency here that may confuse respondents. Is it “last few years” or is it “in recent years”?
5. Also in question #3, the words include “added dozens of new fees.” It is not clear that there have been “dozens of new fees” and so the choice of words is likely misleading as it suggests that the number of new fees is more than what has actually transpired. The “dozens of new fees” (if such fees exist) should have been enumerated in the question.

¹¹ “In recent years, airlines have added dozens of new fees for everything from window seats to sitting with your family. How difficult is it for you as a consumer to search and find the lowest cost for air travel across all airlines, including those fees?”

6. Also in question #3, it notes that one of the “new fees” is “sitting with your family”. This wording suggests that airlines charge an additional fee to sit with one’s family. However, it is my understanding that sitting with one’s family is not a fee that is charged for every person wishing to sit with his or her family, depending on, among other things, seat availability and where on the plane the family wants to sit, but the use of the expression in the question could be interpreted as a fee that is charged more often than it is.
7. In question #4¹², there is a reference to “extra steps”. The question does not enumerate the “extra steps” but it then follows with the another reference later in the question with regard to “multiple steps” and again does not enumerate what these multiple steps might be, which in turn very likely will result in misleading respondents as to the specific number of steps and perhaps an over-estimate as to the total number of steps. Thus, responses to this question as to “how inconvenient” are likely to be exaggerated.
8. In question #6¹³, it asks the question “do you find unfair and deceptive”. Unfair and deceptive are not the same thing and should not be bundled together in the same question. Furthermore, the words “unfair” and “deceptive” have different meanings in different contexts and thus, it is not clear what context the respondents were considering when responding to the question.

¹² “If you use an online travel site or travel agent, you generally cannot purchase things like baggage or seat assignments, because airlines do not currently allow most travel sites and agents to sell those services. That forces travelers to take extra steps to pay those fees at the airport or through the airlines’ websites. How inconvenient is it for travelers to have to take multiple steps to purchase the things they need for their flights?”

¹³ “Which of the following airline practices, if any, do you find unfair and deceptive to consumers?”

9. Question #7¹⁴ asks about “transparent pricing” and seeks to understand what phrase comes closest to the respondents’ understanding of “transparent pricing”. However, it is unclear how many people understand the word “transparent” or how it was used here. As such, many respondents may have guessed in response to this question. In well-constructed surveys, guessing is something that is undesirable and should be avoided and not encouraged. In particular, the two responses to choose from in the question present a narrow and limiting construct of the term “transparency” and ignores many other legitimate constructs, such as, “transparency means I know what I am buying and what it costs before I buy it,” or “transparency means the seller has a price list I can check so I know what my options are and what they will cost”. Rather than constructing a questionnaire that encourages guessing, wording should be very clear to minimize guessing and as a result, develop a more accurate assessment of respondents’ views with regard to issues related to transparency.

The problems noted here about the questionnaire could have been avoided or at least minimized with the use of a thorough pretest conducted by objective survey research professionals.

Incomplete or Misleading Analyses.

In interpreting surveys, it is important to look at the context of the issues addressed in the poll. The National Center on Public Polls notes, “The key element in reporting polls is context.”

¹⁴ “When you hear the phrase ‘transparent pricing,’ which of the following is closest to your understanding of the phrase?”

It further goes on to note that the entire story or context is important in order to assist readers in interpreting poll results.

This guidance has great relevance to the manner in which the results of the survey in this matter were shared with the public. First of all, the charging for ancillary services is not limited to the airline industry. Other industries, such as banking, telecommunications and cable television also charge for ancillary fees and an important question that should have been addressed in the survey is how consistent is the airlines approach to charging with these other extensively used industries.

In examining the airline industry, the entire issue associated with the disclosure of fee information for ancillary services, as an issue Open Allies believes should be addressed, needs to be put in context with other issues that the airline industry might consider addressing. The question that remains unanswered by the Open Allies Survey is “does the manner in which airlines disclose fee information for ancillary services rank high on the list of problems consumers feel need to be addressed?”

There are other issues related to consumer perceptions of airline practices, such as frequency of on time departures and arrivals, safety, customer service of airlines and ticket agents, and baggage handling. To put the issue of ancillary services in the proper context, a broader list of issues should have been included in the Open Allies Survey. In this manner, we would then be better able to assess the importance consumers give to having up-front disclosure of fees for ancillary services. Because the survey asked about ancillary services in isolation and not in context with other issues, the level of consumer concern was more than likely exaggerated.

Context also demands that questions asked in a survey are fully addressed rather than partially addressed. It is likely that changes to the current manner in which the airlines sell

ancillary services could result in additional costs to the airlines. In most businesses, additional costs are often passed on in part or in total to the consumers who consume the services.

So, for example, when looking at question #10¹⁵ of the Open Allies Survey, instead of asking the question should the DOT require airlines to sell basic extra fees wherever they sell tickets, it would have been more accurate to pose the question by adding the words “even if it means that the prices for these services may increase.” I would expect that the answer obtained would have changed if these additional words had been added and the number of people responding “yes” to the current manner in which the question is asked would have declined.

Beyond issues related to context, the data was not fully analyzed. As already noted, it would have been very helpful to ask people how often they fly so that an analysis could have been made comparing people who fly often with people who only fly occasionally or only once a year.

Additionally, the announcement associated with the release of the Open Allies Survey results does not accurately characterize the data and ignores important data that was gathered and readily available in the study. The announcement includes language that notes that the “survey found significant traveler frustration and confusion with current airlines policies”. However, the survey did not specifically address current airlines practices in detail. Additionally, at no point in the survey were people asked if they were “frustrated” or “confused.” If the survey researchers wanted to measure the degree that the public is “frustrated” or “confused” then the survey should have asked the respondents if they were indeed “frustrated” or “confused”.

¹⁵ “The proposed DOT rule would not require airlines to allow the purchase of fees at the same time as travelers buy their tickets. Should DOT require airlines to sell their basic extra fees wherever they sell their tickets?”

Question #5¹⁶ of the Open Allies Survey did ask people if they were “surprised” by having to pay after “you’ve purchased your ticket”. Surprise is not the same thing as being frustrated or confused. However, even in this instance, much of the data was overlooked and not reported. When examining the 8 ancillary services portrayed in question #5, the vast majority of the respondents were not surprised. In some cases, the level of surprise was as low as 6.26% with all but 1 of the services reporting a level of surprise at below 25%.

The findings reported in connection with the answers to question #5 are also somewhat likely to be overstated for three reasons.

First, by asking respondents in the first instance if they have been surprised by one or more of a list of “extra airline fees,” the question likely suggested to many respondents that they should have been surprised by at least one of those fees. An additional question should have been added immediately before question #5 asking people if they had been surprised by having to pay any extra airline fees, yes or no. In other words, rather than providing the respondents with a laundry list of fees, the survey should have first included a question that directly asked people to think about the fees they had paid and whether any fees had surprised them. Question #5 would then have been asked only among the people claiming they had been surprised. That number of people, more likely than not, would have been fewer.

Second, and similarly, Question #5 should have been asked only of people who stated in response to Question #2 that they had actually paid one of the listed fees. As constructed, the survey asked Question #5 of everyone, which was likely confusing to the 305 respondents who, according to the answers to Question #2, had not paid or did not know if they had paid one of the listed fees.

¹⁶ “Which extra airline fees have you been surprised by having to pay after you’ve purchased your ticket, if any? (Check all that apply.)”


Finally, Question #5 is not time limited. As discussed above with respect to Question #1, fee disclosure practices have changed since 2012. Question #5 should have clarified the targeted time frame. For example, if the question had asked respondents whether they had been surprised by having to pay certain extra airline fees *in the past year*, it is likely that the number of people reporting having been surprised would have been fewer. For these reasons, as it is currently reported, the survey likely overestimates the number of people who it claims are “surprised”.

To summarize this section, results were analyzed out of context, ignored or mischaracterized in the related announcement of the survey findings.

CONCLUSION

My opinion concerning the summary of findings regarding the Open Allies Survey issued by the Open Allies for Airfare Transparency in coordination with Travelers United (formerly the Consumer Travel Alliance) is it should not be relied upon to arrive at conclusions concerning perceptions and attitudes about ancillary services held by the people who fly on commercial airlines in the United States.

Respectfully submitted,



Larry Chiagouris, Ph.D. President, BrandMarketing Services, Ltd.

I reserve the right to supplement my opinions stated herein with any subsequently disclosed documents, data, or other information.

EXHIBIT A

Dr. Chiagouris began his career in survey research while employed at AT&T, overseeing product and feature related development for the consumer products division and the Yellow Pages advertising unit. While employed at AT&T, he completed several survey research related courses at Bell Laboratories and Burke Marketing Research. He conducted survey research interviews during that time with more than 100,000 respondents.

Following his employment at AT&T, he assumed executive positions at major communications and advertising agencies, directing planning and survey research initiatives at Grey Advertising, Bozell Jacobs Kenyon and Eckardt Advertising, Backer Spielvogel Bates Advertising and Creamer Dickson Basford public relations agency. At Creamer Dickson Basford, he directed the survey research work of its subsidiary, CDB Research & Consulting.

During his business career, he held industry leadership positions at leading professional associations and societies. These positions included serving as Chairman of the Advertising Research Foundation and a member of its research quality council. In addition, he served as a member of the Board of Directors of the American Marketing Association (“AMA”) and as the AMA representative to the United States Census Bureau on its plans for conducting the census.

His academic career extends more than 20 years, including academic appointments, teaching courses, and providing lectures concerning research methods at the doctoral, graduate, and undergraduate levels for leading business schools, including the Lubin School of Business at Pace University, the Stern School of Business at New York University, the Baruch Graduate School of Business of the City University of New York, and Nova Southeastern University. He also served as a member of the faculty of the AMA’s Advanced School of Marketing Research and taught the Brand Equity course. In connection with his academic responsibilities, he

currently serves on the Editorial Review Board of the Advertising Research Foundation's publication *The Journal of Advertising Research*. The following is a summary of his professional employment, education and recognition:

WORK EXPERIENCE

Industry Experience

President, BrandMarketing Services, Ltd., 1994 to present, Marketing, branding and advertising consulting firm organized to provide expert witness services to law firms and strategic consultation to Fortune 500 and emerging growth companies. Key litigation support has involved class actions suits representing both plaintiff and defendant. Provision of expert opinion for cases involving Coors Brewing, Avis Rental Car, Sprint and Fruit of the Loom. Key industry consultation has involved Merrill Lynch, McDonald's, Marriott, Prudential, AT&T, JP Morgan Chase, L-3 Communications, Grey Advertising, US Army National Guard, TMP Worldwide and Visa International.

Vice President and Chief Marketing Officer, eCode.com, 2000-2001, responsible for all marketing, business development and marketing communications related initiatives for Silicon Valley startup focused on brand building Internet initiatives.

Vice President and Director of Strategic Planning and Research, Starz Encore Movie Group, 1998-2000, responsible for all strategic development business issues, marketing, and marketing communications related initiatives for international media company.

Executive Vice President of Creamer Dickson Basford Public Relations and President of CDB Research and Consulting, a subsidiary of Creamer Dickson Basford, 1994-1998. Served in the capacity of Executive Vice President and Director of Client Services of top ten public relations firm and also President of its subsidiary, CDB Research & Consulting. In this dual capacity, directed client pr programs in a wide variety of industries and also directed client consulting

engagements with Fortune 500 companies. Co-developed the service WebDiagnostics, an approach to assessing Internet marketing programs.

Executive Vice President, Backer Spielvogel Bates (now organized as Bates Worldwide Advertising), 1991 to 1994
Served in the capacity of head of strategic planning and research services for the agency and its clients.

Senior Vice President, Bozell Jacobs Kenyon and Eckhardt Advertising, 1989 to 1991.
Served in the capacity of head of strategic services and research for the agency and its clients.

Vice President, Grey Advertising, 1983 to 1989
Directed group of account planners and market researchers.

Manager, AT&T, 1975 to 1983

Hired on the fast track high-risk high reward program, progressing through wide variety of functional assignments, including econometrics, finance, technology planning (working with Bell Labs), manufacturing and marketing planning related to product demand and cross elasticity of demand.

Academic Experience

Professor of Marketing, Lubin School of Business, Pace University in New York City, 2002-Present. Full-time tenured Professor. Courses and lectures include: New Product Development, Survey Research, Advertising and Promotion (Including Intellectual Property and Trademark/Copyright Issues), Media Planning and Buying, Advanced Marketing Management, and Marketing Strategy and eCommerce at the graduate level.

Adjunct Professor of Marketing, Nova Southeastern University, H. Wayne Huizenga School of Business Doctoral Program, 1991 - 2007

Adjunct Professor of Marketing, New York University Graduate Stern Graduate School of Business, 1989 - 1991

PROFESSIONAL RECOGNITION

- Award Recipient from the US State Department: Requested to deliver lectures to business leaders of other countries on “Branding in the New Media Environment”
- Selected to attend Harvard University Annual AMA Doctoral Consortium
- Voted by *Agency Magazine* as one of the ten “all stars” in advertising research
- Current or Previous Editorial Review Boards: Marketing Management, Journal of Advertising Research, Journal of Internet Commerce, Journal of Consumer Marketing, Journal of Segmentation in Marketing
- Inducted into Beta Gamma Sigma National Honors Society
- Appointed AMA representative to U.S. Bureau of the Census for Census 2000
- Former Chairman of the Board of the Advertising Research Foundation
- Former Member of the Board of Directors of the American Marketing Association and President, New York Chapter
- Winner of three Effie Awards for advertising effectiveness
- Appointed industry judge at Public Relations Society of America Silver Anvil Awards
- Served as faculty member for American Marketing Association’s Advanced School of Marketing Research
- Presenter at numerous proceedings and conferences to include American Psychological Association Consumer Psychology Division, Consumer Electronics Show, Comdex, American Marketing Association, Direct Marketing Association, Public Relations Society of America, Institute for Broadcasting and Technology, Pharmaceutical Marketing Research Association, Advertising Research Foundation

Attachment E

TRAVEL AGENTS' BELIEFS ABOUT ADDED FEES
FOR ADDITIONAL AIRLINE SERVICES

Prepared for:

Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC

Prepared by:

BrandMarketing Services, Ltd.

and

Princeton Research & Consulting Center, Inc.

March 18, 2013

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EXHIBIT A:	Screener Questionnaire and Main Questionnaire
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A. Background

During the past year or so, there has been a growing interest in the topic of what is commonly referred to as “ancillary fees” in the airline industry. These are fees for services paid by airline passengers that are not included in the standard ticket fare. Additional fees for the checking of baggage and preferred seating arrangements, for example, are often charged by many airlines and added to the cost of the basic ticket.

Although the topic of reporting ancillary fees has been the subject of discussion in the trade press (<http://www.travelweekly.com/Travel-News/Travel-Agent-Issues/Travel-industry-dukes-it-out-over-airline-ancillaries-again/>), research addressing the knowledge and attitudes of air passengers on this topic has been limited. To contribute to a more informed dialogue on the topic of the charging and reporting of ancillary fees, research on key attitudes and beliefs was commissioned by the firm Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC on behalf of its client, Airlines for America. The research was designed to answer the following two questions:

1. Do consumers who engage in traveling on commercial airlines understand and expect to pay ancillary fees for additional services such as the checking of baggage and preferred seating?
2. Are such fees an important consideration when planning a trip by air?

To obtain the answers to the two questions, a study was conducted among travel agents. The study methods and findings appear below for the study conducted among travel agents.

B. Methodology

1. *Methodological Considerations*

This study followed industry guidelines for conducting survey research. These guidelines include the following seven factors:

1. the population was properly chosen and defined;
2. the sample chosen was representative of that population;
3. the data gathered were accurately reported;
4. the data were analyzed in accordance with accepted statistical principles.
5. the questions asked were clear and not leading;
6. the survey was conducted by qualified persons following proper interviewing procedures; and
7. the process was conducted so as to ensure objectivity.

2. *Population*

This is a study of travel agents' knowledge and beliefs about the additional fees that airlines charge for services beyond the basic cost of the ticket. The relevant population for this study was deemed to be travel agents who book commercial air travel.

3. *Sample*

Selecting the method to recruit a sample should always be based on an understanding of the method's potential impact on the study. A representative sample of travel agents was secured by drawing a representative sample of travel agencies. The sample of travel agencies was drawn from the Dunn & Bradstreet list of firms found under SIC Code 47240000. This list contained the telephone number of each of the travel

agencies selected. A total of 4,800 travel agencies were selected. Each travel agency was randomly assigned to one of 16 replicates. Replicates were used as needed. The study was conducted via central-location-telephone interviewing. Since travel agents frequently conduct business by telephone it was felt that this method would not have an adverse impact on the study. Once the interviewer reached a travel agency, the interviewer attempted to speak with the next available travel agent.

Princeton Research & Consulting Center, Inc. (PRCC), the firm selected to implement the study, chose Opinions, Ltd., a telephone interviewing service they have had experience with in the past, to conduct the interviewing.

4. *Questionnaires*

The study required two separate questionnaires, a Screening Questionnaire (Screener) and a Main Questionnaire. The purpose of the Screener was to qualify respondents for inclusion in the study. The Main Questionnaire focused on the issues of this research. Questions were written to be as unambiguous, unbiased, and respondent-friendly as possible. See Exhibit A for a copy of the Screener and Main Questionnaire.

a. Screening Questionnaire

As mentioned previously, the purpose of the Screener was to establish respondents' qualifications for inclusion in the study.

The interviewer began by asking to speak with a travel agent. When connected the interviewer explained the purpose of the call.

I'm ____ calling from the Princeton Research & Consulting Center, an independent national market research company. We are interviewing travel agents today. This is a very brief interview; it will take less than five minutes. I am not selling anything and all your answers will be kept strictly confidential. As a way of thanking you for your cooperation, we will send you a check for \$20.00.

Then, to make sure the correct travel agency had been called, the interviewer confirmed the name of the of the travel agency (Screener Question A). If name was not what was on the sample list, the interviewer confirmed the telephone number (Screener Question B). If the interviewer had dialed the correct number or the respondent refused to confirm the telephone number, the interviewer terminated the call, noted the disposition on the sample list and dialed the next number on the sample list. If the interviewer had not dialed the correct number, the interviewer ended the call and dialed the correct telephone number.

If the interviewer had reached a person at the correct travel agency in Screener Question A, the interviewer asked if the respondent was a travel agent (Screener Question C).

If the respondent was a travel agent, the interviewer continued onto the Main Questionnaire. If not, the interviewer asked to be connected to a travel agent (Screener Question C2). Upon reaching a travel agent, the interviewer repeated the introduction and then began the Main Questionnaire. Note that if this was not a suitable time for the interview the interviewer offered to reschedule the interview or offered the respondent a toll-free phone number to use to call to be interviewed.

b. Main Questionnaire

The purpose of the Man Questionnaire was to assess respondent's knowledge and beliefs about added fees for certain additional services. The interviewer began by cautioning the respondent not to guess.

For each of my remaining questions, if you don't have an opinion or don't know, please don't guess. Just answer "don't know" or "no opinion" and we'll go on to the next question.

Question 1 asked if the respondent belonged to the Association of Retail Travel Agents or ARTA, or American Society of Travel Agents or ASTA.

Question 2 asked if the respondent offered travel services for: air travel, car rentals, hotels, trains or cruises? Only those who said “yes” to air travel were interviewed further.

Question 3 asked if the respondent used: Abacus, Apollo, Amadeus, Fairlogix, Galileo, Sabre or Travelport to find information about flight schedules. Pronunciation guides were provided for Abacus, Amadeus and Sabre.

Question 4 asked if the respondent booked business travel only, non-business travel only or both business and non-business travel.

Question 5 asked the travel agent how important he or she believed some factors were when travelers made travel arrangements.

Then they were asked to rank the importance of several added services (Question 6).

Making air travel arrangements entails several considerations. Among them are the schedule, the selection of the airline, the cost of the basic ticket, the cost for checked baggage, whether the flight is or isn't a non-stop flight and the cost of upgrading to preferred seating.

I'd like you to rank these six considerations in terms of how important you think they are to your clients. Give each a rank of 1 through 6, with 1 being the most important consideration to your clients and 6 being the least important consideration to your clients. Make sure to assign a different rank to each consideration.

I will read the list again and I'd like you to tell me which one is most important to your clients. **MARK THE CONSIDERATION MENTIONED “1”. MARK ONLY ONE CONSIDERATION.**

THEN SAY: And which one is least important to your clients? Please allow me to read the remaining considerations to you. READ ALL FIVE CONSIDERATIONS NOT RANKED. MARK THE CONSIDERATION MENTIONED “6”. MARK ONLY ONE CONSIDERATION.

SAY: Of the remaining four considerations, which one is most important to your clients? Please allow me to read the remaining considerations to you. READ ALL FOUR CONSIDERATIONS NOT RANKED. MARK THE CONSIDERATION MENTIONED “2”. MARK ONLY ONE CONSIDERATION.

THEN SAY: And which one is least important to your clients? Please allow me to read the remaining considerations to you. READ ALL THREE CONSIDERATIONS NOT RANKED. MARK THE CONSIDERATION MENTIONED “5”. MARK ONLY ONE CONSIDERATION.

THEN SAY: Of the remaining two considerations, which one is most important to you're your clients? Please allow me to read the remaining considerations to you. READ BOTH CONSIDERATIONS NOT RANKED. MARK THE CONSIDERATION MENTIONED “3”. MARK ONLY ONE CONSIDERATION.

MARK THE REMAINING CONSIDERATION “4”.

Questions 6 and 6a allowed the respondent to reconsider the order in which he or she ranked the considerations.

Question 7 asked whether the respondent agreed that most people who make air travel arrangements understand that there are fees for checked baggage.

I am now going to ask you whether you agree or disagree with a statement I am going to make. I am going to ask you if you strongly agree, agree, neither agree nor disagree, disagree or strongly disagree with this statement. Here is the statement:

Based on your experience, most of the people you make air travel arrangements for understand that there are fees for checked baggage? Would you say you strongly agree, agree, neither agree nor disagree, disagree or strongly disagree with that statement that most of the people you make air travel arrangements for understand that there are fees for checked baggage, Or you have no opinion about that?

In concluding the interview the interviewer asked for the respondent's name for validation purposes.

The study was pretested on November 18, 2012 through December 3, 2012. The study with the final questionnaire was started on December 20, 2012 and was completed on March 11, 2013.

C. PERSONNEL

The study was designed By Dr. Larry Chiagouris, President of BrandMarketing Services, Ltd., with assistance from Dr. Leon Kaplan, President of Princeton Research & Consulting Center, Inc. (PRCC). Dr. Chiagouris specified how the data were to be analyzed and prepared this report. . Copies of Dr. Chiagouris' resume and Dr. Kaplan's CV are in Exhibit B.

D. OBJECTIVITY

The study was executed under "double blind" procedures, that is, except for Dr. Chiagouris, Dr. Kaplan and the staff at PRCC, no one knew the identity of the client, why the research was being conducted, or its purpose. Care was taken throughout the questionnaire development process to not use wording that was leading or suggestive.

E. DATA GATHERING, QUALITY CONTROL, AND ANALYSES

A representative, random sample of 4,800 telephone numbers of travel agencies found in the D&B listing of travel agencies (SIC Code 47240000) was drawn. It was randomly sorted into 16 replicates of 300 each. PRCC provided Opinions with instructions on how to use the sample. See Exhibit C for a copy of those instructions.

The questionnaire was programmed to ensure that the correct skips were followed automatically and that respondents answered all questions appropriately. The

questionnaire was tested to ensure that the skip patterns were correct and that the questions could be understood and answered.

The initial interviews were monitored by Dr. Chiagouris and Dr. Kaplan to ensure that the questionnaire worked properly and that respondents were answering the questionnaire properly. Additional replicates were opened as needed. All numbers were dialed at least six times or until an interview was completed or refused.

Validation is a procedure that attempts to verify that respondents were qualified to participate in the study and actually had been interviewed. A 100% validation was attempted. Calls were made to all respondents who provided a name and telephone number. Validation began on January 25, 2013 and ended on March 12, 2013. Validation was conducted by The Pat Henry Group, an organization that is not affiliated with PRCC. Out of the 222 respondents, 155 (or 70%) were successfully reached and validated. That is, the respondent was qualified to participate in the study and acknowledged participating in the study. Twenty-five respondents (11%) were invalid, that is, indicated they did not meet the requirements for being interviewed or they did not participate in the study. Forty-two respondents (19%) could not be reached and as is customary, were assumed to be valid in the absence of evidence that they were invalid. See Exhibit D for a copy of the validation letter and validation questionnaire. The results that follow are based on the $(155+42=)$ 197 respondents (89%) who were not found to be invalid.

F. FINDINGS

The results reported below are based on the 197 interviews that passed quality control and validation.

A majority of travel agents interviewed do not belong to either ARTA or ASTA. One in four belongs to ASTA and about one in five belongs to ARTA. Ten percent belong to both organizations.

TABLE 1: Do you, yourself, or does your organization belong to the ... (Q.1)

Base=197	%
American Society of Travel Agents or ASTA	26
Association of Retail Travel Agents or ARTA	21
Both	11
Neither	64

One in three travel agents do use Sabre to find information about flight schedules, followed by Amadeus and Travelport. Other systems are used by fewer than one in five. Some use more than one system. About one in three do not use any system.

TABLE 2: Which, if any, of the following systems do you use to find information about flight schedules? (Q.3)

Base=197	%
Sabre	33
Amadeus	23
Travelport	17
Apollo	13
Galileo	11
Abacus	3
Fairlogix	3
No listed system	35

Over seven in ten book both business and non-business travel. One in four books non-business only.

TABLE 3: Do you book ... (Q.4)

	YES
Base=197	%
Business travel only	3
Non-business travel only	26
Both Business and non-business travel	71

A majority of travel agents believe that “Cost of the basic ticket” is the most important consideration to their clients. Travel agents perceive “Checked baggage fees” and “Upgrading to preferred seating” as least important to their clients.

TABLE 4: Importance of different considerations to clients. (Q.5, 6a, 6b)

	1st	2nd	3rd	4th	5th	6th	Mean
Base= 197	<u>%</u>	<u>%</u>	<u>%</u>	<u>%</u>	<u>%</u>	<u>%</u>	
Cost of the basic ticket	60	17	9	5	5	5	1.92
The schedule	16	41	18	13	9	3	2.64
Nonstop flight or not a nonstop flight	16	15	24	16	19	11	3.37
Selection of airlines	4	12	23	23	20	17	3.95
Checked baggage fee	2	7	15	23	22	32	4.52
Upgrading to preferred seating fee	2	7	12	21	27	32	4.6

Three out of four travel agents either “strongly agree” or “agree” that their clients understand that there are fees for checked baggage.

TABLE 5: Based on your experience, most of the people you make air travel arrangements for understand that there are fees for checked baggage. (Q.7)

Base = 197	%
1 strongly agree,	26
2 agree,	49
3 neither agree nor disagree,	4
4 disagree, or	8
5 strongly disagree	7
No opinion	6
Mean	2.38

G. SUMMARY OF FINDINGS

The findings indicate that, based on the opinions of travel agents, the vast majority of air passengers, in general, expect to pay a fee for additional services (as represented by checked baggage) beyond the cost of the basic ticket. Among the travel agents interviewed, 75% either agree or strongly agree that the passengers for whom they book air travel expect that there will be a fee for checked baggage.

In addition, based on the opinions of travel agents, air travelers judge fees associated with additional services to be relatively unimportant compared to other travel-related considerations. Specifically, fees for checked baggage and upgrading to preferred seating were perceived by travel agents as the least important considerations to their clients in making arrangements for air travel when compared to other related considerations.

In sum, this study shows that most travel agents believe that the vast majority of their clients already know about ancillary fees, and this and other studies suggest that the small minority of relevant consumers who are unaware of ancillary fees would not place much importance on those fees in arranging their air travel.



Dr. Larry Chiagouris
President BrandMarketing Services, Ltd

EXHIBIT A

PRCC2229 (TRAVEL AGENTS SURVEY)

Page One

Hello, may I speak with a travel agent?

WHEN YOU REACH TRAVEL AGENT SAY:

I'm ____ calling from the Princeton Research & Consulting Center, an independent national market research company. We are interviewing travel agents today. This is a very brief interview; it will take less than five minutes. I am not selling anything and all your answers will be kept strictly confidential. As a way of thanking you for your cooperation, we will send you a check for \$20.00.

Just to confirm, is this (BUSINESS NAME FROM SAMPLE)?*

- (1) YES -----→ SKIP TO “Are you a travel agent?”
- (2) NO
- (3) REFUSED -----→ THANK AND TERMINATE.

New Page

Is this phone number (READ NUMBER FROM LIST)?*

(1) YES -----→ THANK AND TERMINATE

(2) NO -----→ REDIAL CORRECT NUMBER, START AT
INTRODUCTION

(3) REFUSED -----→ THANK AND TERMINATE

New Page

Are you a travel agent?*

(1) YES -----→ SKIP TO MAIN QUESTIONNAIRE

(2) NO

(3) REF

Could you please connect me with a travel agent?*

(1) YES ---→ WHEN YOU REACH TRAVEL AGENT, CONTINUE

(2) NO ----→ THANK AND TERMINATE

New Page

I'm ____ calling from the Princeton Research & Consulting Center, an independent national market research company. We are interviewing travel agents today. This is a very brief interview that it will take less than five minutes. I am not selling anything and all your answers will be kept strictly confidential. . As a way of thanking you for your cooperation, we will send you a check for \$20.00.

**IF THIS IS A BAD TIME, OFFER TO RE-SCHEDULE INTERVIEW.
RECORD ON CALL LIST.**

New Page

For each of my remaining questions, if you don't have an opinion or don't know, please don't guess. Just answer "don't know" or "no opinion" and we'll go on to the next question.

Do you, yourself, or does your organization belong to the ...*

	YES	NO	Don't know/ Not sure/REF
Association of Retail Travel Agents or ARTA	(1)	(2)	(3)
American Society of Travel Agents or ASTA	(1)	(2)	(3)

Do you offer travel services for ...*

	YES	NO	REF
Air travel?	(1)	(2)	(3)
Car rentals?	(1)	(2)	(3)
Hotels?	(1)	(2)	(3)
Train?	(1)	(2)	(3)
Cruises?	(1)	(2)	(3)

IF "YES" TO "AIR TRAVEL," CONTINUE. OTHERWISE, THANK AND TERMINATE.

New Page

Which, if any, of the following systems do you use to find information about flight schedules?*

	YES	NO	Don't know /Not sure
Abacus (pronounced "Ah-bah-cuss)	(1)	(2)	(3)
Apollo	(1)	(2)	(3)
Amadeus (pronounced "ah-mah-day-us")	(1)	(2)	(3)
Fairlogix	(1)	(2)	(3)
Galileo	(1)	(2)	(3)
Sabre (pronounced "say-burr)	(1)	(2)	(3)
Travelport	(1)	(2)	(3)

Do you book ...*

- (1) Business travel only
- (2) Non-business travel only
- (3) Both business and non-business travel
- (4) REFUSED

New Page

Making air travel arrangements entails several considerations. Among them are the schedule, the selection of the airline, the cost of the basic ticket, the cost for checked baggage, whether the flight is or isn't a non-stop flight and the cost of upgrading to preferred seating.

I'd like you to rank these six considerations in terms of how important you think they are to your clients. Give each a rank of 1 through 6, with 1 being the most important consideration to your clients and 6 being the least important consideration to your clients. Make sure to assign a different rank to each consideration.

I will read the list again and I'd like you to tell me which one is most important to your clients. MARK THE CONSIDERATION MENTIONED "1". MARK ONLY ONE CONSIDERATION.

THEN SAY: And which one is least important to your clients? Please allow me to read the remaining considerations to you. READ ALL FIVE CONSIDERATIONS NOT RANKED. MARK THE CONSIDERATION MENTIONED "6". MARK ONLY ONE CONSIDERATION.

SAY: Of the remaining four considerations, which one is most important to your clients? Please allow me to read the remaining considerations to you. READ ALL FOUR CONSIDERATIONS NOT RANKED. MARK THE CONSIDERATION MENTIONED "2". MARK ONLY ONE CONSIDERATION.

THEN SAY: And which one is least important to your clients? Please allow me to read the remaining considerations to you. READ ALL THREE CONSIDERATIONS NOT RANKED. MARK THE CONSIDERATION MENTIONED "5". MARK ONLY ONE CONSIDERATION.

THEN SAY: Of the remaining two considerations, which one is most important to you're your clients? Please allow me to read the remaining considerations to you. READ BOTH CONSIDERATIONS NOT RANKED. MARK THE CONSIDERATION MENTIONED "3". MARK ONLY ONE CONSIDERATION.

MARK THE REMAINING CONSIDERATION "4".

	1	2	3	4	5	6
The schedule	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Nonstop flight or not a nonstop flight	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cost of the basic ticket	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Selection of airlines	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Checked baggage fee	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Upgrading to preferred seating fee	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

New Page

You just ranked the six considerations as follows:

Does this accurately reflect how important each is to you or do you want to change anything?*

- (1) Don't want to change anything.
- (2) Want to change order.

New Page

IF PUNCH "2" AT PREVIOUS QUESTION

What would you like to change?*

	1	2	3	4	5	6
The schedule	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Nonstop flight or not a nonstop flight	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cost of the basic ticket	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Selection of airlines	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Checked baggage fee	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Upgrading to preferred seating fee	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

New Page

I am now going to ask you whether you agree or disagree with a statement I am going to make. I am going to ask you if you strongly agree, agree, neither agree nor disagree, disagree or strongly disagree with this statement. Here is the statement:

Based on your experience, most of the people you make air travel arrangements for understand that there are fees for checked baggage? Would you say you ...

*

- (1) Strongly agree
- (2) Agree
- (3) Neither agree nor disagree
- (4) Disagree or
- (5) Strongly disagree with that statement that most of the people you make air travel arrangements for understand that there are fees for checked baggage
- (6) Or you have no opinion about that?

OR (ROTATED QUESTIONS)

I am now going to ask you whether you disagree or agree with a statement I am going to make. I am going to ask you if you strongly disagree, disagree, neither agree nor disagree, agree or strongly agree with this statement.:

Based on your experience, most of the people you make air travel arrangements for understand that there are fees for checked baggage? Would you say you ...

*

- (5) Strongly disagree
- (4) Disagree
- (3) Neither agree nor disagree
- (2) Agree or
- (1) Strongly agree with that statement that most of the people you make air travel arrangements for understand that there are fees for checked baggage
- (6) Or you have no opinion about that?

New Page

Thank you!

Finally, just for validation purposes, may I have your name?*

That's all the questions I have for you! Thank you very much for your time.

INTERVIEWER- END CALL THEN ENTER PHONE NUMBER DIALED BELOW.*

Thank You!

Thank you for taking our survey. Your opinions are very important to us.

EXHIBIT B

LARRY G. CHIAGOURIS, Ph.D.
President, BrandMarketing Services, Ltd.
Professor of Marketing, Lubin School of Business, Pace University

EDUCATION

- Ph.D., – Marketing and Buyer Behavior, The City University of New York
- M.Phil. – Business, The City University of New York
- A.P.C., – Marketing, New York University Stern School of Business
- M.B.A., - Industrial Psychology, Baruch Graduate School of Business, City University of New York
- B.S., - Economics, Magna Cum Laude, New York University Stern School of Business

WORK EXPERIENCE

GENERAL OVERVIEW: DR. CHIAGOURIS HAS SUPERVISED OR DIRECTED OR EXECUTED MORE THAN 300 STUDIES BASED ON SURVEY RESEARCH ACROSS COMMERCIAL, LEGAL AND ACADEMIC SETTINGS AND ENVIRONMENTS.

Industry Experience

President, BrandMarketing Services, Ltd., 1994 to present, Marketing, branding and advertising consulting firm organized to provide expert opinions and market research services to Fortune 500 companies, agencies and law firms.

Vice President and Chief Marketing Officer, eCode.com, 2000-2001, responsible for all marketing, business development and marketing communications related initiatives for Silicon Valley startup focused on brand building Internet initiatives.

Vice President and Director of Strategic Planning and Research, Starz Encore Movie Group, 1998-2000, responsible for all strategic development business issues, marketing, and marketing communications related initiatives for international media company.

Executive Vice President of Creamer Dickson Basford Public Relations and President of CDB Research and

Consulting, a subsidiary of Creamer Dickson Basford, 1994-1998. Served in the capacity of Executive Vice President and Director of Client Services of top ten public relations firm and also President of its subsidiary, CDB Research & Consulting. In this dual capacity, directed client pr programs in a wide variety of industries and also directed client consulting engagements with Fortune 500 companies. Co-developed the service WebDiagnostics, an approach to assessing Internet marketing programs.

Executive Vice President, Backer Spielvogel Bates (now organized as Bates Worldwide Advertising), 1991 to 1994

Served in the capacity of head of strategic planning and research services for the agency and its clients.

Senior Vice President, Bozell Jacobs Kenyon and Eckhardt Advertising, 1989 to 1991.

Served in the capacity of head of strategic services and research for the agency and its clients.

Vice President, Grey Advertising, 1983 to 1989

Directed group of account planners and market researchers.

Manager, AT&T, 1975 to 1983

Hired on the fast track high-risk high reward program, progressing through wide variety of functional assignments, including econometrics, finance, technology planning (working with Bell Labs), manufacturing and marketing planning related to product demand and cross elasticity of demand.

Academic Experience

Professor of Marketing, Lubin School of Business, Pace University in New York City, 2002-Present. Full-time tenured Professor. Courses and lectures include: New Product Development, Survey Research, Advertising and Promotion (Including Intellectual Property and Trademark/Copyright Issues), Media Planning and Buying, Advanced Marketing Management, and Marketing Strategy and eCommerce at the graduate level.

Adjunct Professor of Marketing, Nova Southeastern
University, H. Wayne Huizenga School of Business
Doctoral Program, 1991 - 2007

Adjunct Professor of Marketing, New York University
Graduate Stern Graduate School of Business, 1989 -
1991

PROFESSIONAL RECOGNITION

- Award Recipient from the US State Department: Requested to deliver lectures to business leaders of other countries on “Branding in the New Media Environment”
- Selected to attend Harvard University Annual AMA Doctoral Consortium
- Voted by *Agency Magazine* as one of the ten “all stars” in advertising research
- Editorial Review Boards: Marketing Management, Journal of Advertising Research and Journal of Internet Commerce
- Inducted into Beta Gamma Sigma National Honors Society
- Appointed AMA representative to U.S. Bureau of the Census for Census 2000
- Former Chairman of the Board of the Advertising Research Foundation
- Former Member of the Board of Directors of the American Marketing Association and President, New York Chapter
- Winner of three Effie Awards for advertising effectiveness
- Appointed industry judge at Public Relations Society of America Silver Anvil Awards
- Served as faculty member for American Marketing Association’s Advanced School of Marketing Research
- Presenter at numerous proceedings and conferences to include American Psychological Association Consumer Psychology Division, Consumer Electronics Show, Comdex, American Marketing Association, Direct Marketing Association, Public Relations Society of America, Institute for Broadcasting and Technology, Pharmaceutical Marketing Research Association, Advertising Research Foundation

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2. Cole, Michael, Long Mary, Chiagouris, Larry, and Gopalakrishna, Pradeep

- Transitioning from Traditional to Digital Content: An Examination of Opinion Leadership and Word-of-Mouth Communication across Various Media Platforms** *Journal of Internet Commerce*, Vol. 10, No. 1, 2011
3. Chiagouris, Larry, Ray, Ipshita **Customers on the Web are not all Created Equal: The Moderating Role of Internet Shopping Experience** *The International Review of Retail, Distribution and Consumer Research*, Vol. 20, No. 2, 2010
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 5. Lantieri, Tara, Chiagouris Larry **Brand Trust in an Age Without Trust: Expert Opinions** *Journal of Consumer Marketing: Vol. 26, No. 2, 2009*
 6. Ray Ipshita, Chiagouris Larry **Consumer Retention: Examining the Roles of Store Affect and Store Loyalty as Mediators in the Management of Retail Strategies** *Journal of Strategic Marketing: Vol. 17, No. 1, 2009*
 7. Chiagouris Larry, Long Mary, Plank Richard **The Consumption of Online News: The Relationship of Attitudes Toward the Site and Credibility** *Journal of Internet Commerce: Vol. 7, No. 4, 2008*
 8. Moffit Timothy, Chiagouris Larry **What Would Richard Branson Do?** *Marketing Management: May/June 2008*
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 14. Johnson William, Chiagouris Larry **So Happy Together (The Link Between Employee and Customer Satisfaction)** *Marketing Management: March/April 2006*
 15. Gonzalez Jose, Chiagouris Larry **Internet Support Companies: The Impact of Marketing Orientation** *Journal of Internet Banking and Commerce: April 2006, Vol. 11, No. 1*
 16. Topol Martin, Chiagouris Larry **To Dream the Impossible Dream (Customer Loyalty)** *Marketing Management: November/December 2005*
 17. Chiagouris Larry **Non-Profit Brands**

- Marketing Management: September/October 2005*
18. Mohr Iris, Chiagouris Larry **Get the Word Out (SPREADING WORD OF MOUTH)**
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 19. Chiagouris Larry, Mohr Iris **An Evaluation of the Effectiveness of Internet Advertising Tools**
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 21. Chiagouris Larry, Farinelli Jean **Staying Safe in a Dangerous World (GLOBAL MARKETING ISSUES)**
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 22. Chiagouris Larry, Wansley Brant **Branding On The Internet**
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 23. Chiagouris Larry, Middleman Ann **Research For Ink: How To Get Opinion-Driving Publicity From Market Research**
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Trade Publications and Non-Refereed Articles

1. Chiagouris, Larry, **The Secret is in the Data: Delivering What Customers Need & Desire**
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2. West Douglas, Chiagouris Larry, Precourt Geoffrey **Editorial: 50 Years of Advertising Research: What Have We Learned?**
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3. Chiagouris Larry, Verniere Alexis **Marketing Functions on the Internet**
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4. Chiagouris Larry **Comparative Advertising**
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7. Chiagouris Larry **Nonprofits Can Take Cues from Biz World**
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10. Chiagouris Larry **Utility Companies' of Market Research**
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11. Chiagouris Larry **Confessions of a Silver Anvil Judge**
Public Relations Strategist: Winter 1998
12. Chiagouris Larry **Wall Street's Wireless Influence**
Wireless Reviews: Dec 1, 1998; 15, 24
13. Chiagouris Larry **Eight Steps To Improved Investor Relations**
Electrical World: September 1998, Vol.212, Iss. 9
14. Farinelli Jean, Chiagouris Larry **Communicating Your Company's Hidden Value**
IR Update: July 1998
15. Chiagouris Larry, Plank Richard **Raising the Bar**
Electric Perspectives: March/April 1998
16. Chiagouris Larry, Plank Richard **Marketing Research In The Utility Industry: The State of the Art**
American Gas: February 1998
17. Chiagouris Larry **Hidden Value Index**
The Annual Report of the Global Public Network: November 15, 1997
18. Chiagouris Larry **Marketing Encyclopedia**. Illinois: NTC Business Books, 1996

Book: The Secret to Getting a Job After College: Marketing Tactics to Turn Degrees into Dollars, Brand New World Publishing: New York; June 2010 (first edition); March 2011 (second edition)

LEON B. KAPLAN, Ph.D

EDUCATION

- M.B.A. The Wharton School, University of Pennsylvania,
1979 Philadelphia, Pennsylvania (Advanced Management Studies in
Marketing, Strategic Planning, and Business Policy)
- Ph.D. Purdue University, Lafayette, Indiana (Major-
1971 Consumer/Industrial Psychology; Minor-Social Research Methods
And Personnel Selection) Dissertation: Predicting Consumer
Preference Using a Two-Factor Attitudinal Model: An
Experimental Test
- M.S. Purdue University, Lafayette, Indiana (Major-
1970 General Industrial Psychology; Minor-Consumer Behavior,
Psychological Measurement) Thesis: Differential Perceptions as a
Source of Error in Concept Testing
- B.S. *Cum laude*, Brooklyn College, Brooklyn, New York
1966 (Major-Psychology; Minor-Physics)

PROFESSIONAL EXPERIENCE

- 1979 - President, Princeton Research & Consulting Center, Inc.,
Present Princeton, New Jersey.
- 1975 - 1979 Vice President, Custom Research Group, Opinion Research
Corporation, Princeton, New Jersey.
- 1971 - 1975 Senior Research Psychologist, Behavioral Research Group,
Marketing Research Section, Advertising Department, E.I. duPont
de Nemours and Company Inc., Wilmington, Delaware.
- 1971 Post-Doctoral Research Fellow, Consumer Research Institute,
Washington, D.C.
- 1969 - 1970 Consultant to Proctor & Gamble Company, Cincinnati, Ohio, and
the Pillsbury Company, Minneapolis, Minnesota.
- 1969 Research Psychologist, Behavioral Research Group, Marketing
Research Section, Advertising Department, E.I. duPont de
Nemours and Company, Inc., Wilmington, Delaware.
- 1968 Summer Intern Marketing Research Department, General Mills,
Inc., Minneapolis, Minnesota.
- 1966 Interviewer, United States Public Health Services.

ACADEMIC EXPERIENCE

- Oct. 2002 Guest Speaker, School of Business, Montclair State University, Upper Montclair, New Jersey. Lectured about surveys for litigation.
- 1971 - 1976 Adjunct Faculty, Graduate School of Business, University of Delaware, Newark, Delaware. Taught Consumer Behavior, Marketing Research, and Industrial Psychology.
- 1967 - 1970 Teaching Assistant, Department of Psychology, Purdue University, Lafayette, Indiana. Taught Consumer Psychology, Industrial Psychology, and Educational Psychology.

PAPERS AND SYMPOSIA

- Kaplan, L.B. Shopping for a Job: Recruiting College Graduates for the Private Sector. Paper presented at American Psychological Association's 97th Annual Convention, New Orleans, Louisiana, August 1989.
- Boren, M., & Kaplan, L.B. Marketing Research - Strategies and Payoffs. Paper presented at Association of Science - Technology Center's Annual Convention Boston, Massachusetts, October 1988.
- Kaplan, L.B. Symposium Participant. On the Stand: The Role of Consumer Psychologists in Litigation. Presented at American Psychological Association 94th Annual Convention, Washington, D.C. August 1986.
- Kaplan, L.B. Research: Key to Newspaper Change. Presented at Pennsylvania Associated Press Managing Editors Conference, Scranton, Pennsylvania, June 1986.
- Kaplan, L.B. In Search of Profit Excellence. Presented at Adhesive and Sealant Council, Fall 1984 Seminar, Indianapolis, Indiana, October 1984.
- Kaplan, L.B. Symposium Chairman. Theoretical & Empirical Issues in the Measurement of Trademark Infringement. Presented at American Psychological Association 91st Annual Convention, Anaheim, California, August 1983.
- Kaplan, L.B. Symposium Chairman. Perspectives on the Consumer Psychologist in "The Real World". Presented at American Psychological Association 89th Annual Convention, Los Angeles, California, August 1981.
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and Kaplan, L.B

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Kaplan, L.B., Components of Perceived Risk in Product Purchase: A Cross-Validation.

Szybillo, G.J. *Journal of Applied Psychology*, 1974, 59, 298-291.
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Schmidt, F.L., Composite vs. multiple criteria: A review and resolution of the & Kaplan, L.B. controversy. *Personnel Psychology*, Fall 1971, 419-434.

Jacoby, J., & Kaplan, L.B. A profile of the Division 23 member's interests, concerns and affiliations: Responses to a Division 23 survey of its membership. Presented at the Business Meeting, Division 23, American Psychological Association 78th Annual Convention, Miami, Florida, September 1970.

Authored over 1,500 proprietary reports for clients.

AFFILIATIONS

American Psychological Association
Member, Opinion Survey Task Force, 1986

American Psychological Association--Division 23 (Consumer Psychology)
Divisional Representative to Council of Representatives, 1983-1986
President, 1981-1982
Editor, Newsletter, 1978-1979
Chair: Election Committee; Membership Committee; Governmental
Affairs and Public Policy Committee; Program Committee.

Member, American Psychological Society
Member, American Psychology-Law Association
Member, Marketing Research Association
Psi Chi (National Psychology Honorary)
Alpha Kappa Delta (National Sociology Honorary)

AWARDS

Post-Doctoral Research Fellowship, Consumer Research Institute, Inc., 1971
National Science Foundation Fellowship, 1970
New York State Regents Scholarship, 1960-1966

REVIEWER

Division of Consumer Psychology,
Association for Consumer Research,
Journal of Applied Psychology

DIRECTOR/BOARD MEMBER

School Board, Lawrence Township Public Schools, Lawrence, New Jersey
Member, 2004 to Present
Vice President, 2007 to 2012
Chaired: Negotiations Committee; Personnel Committee; Community
Relations & Legislative Affairs Committee; Curriculum, Instruction,
Assessment and Professional Development Committee; Facilities &
Finances Committee.

New Jersey School Boards Association, Trenton, New Jersey
Certificated Board Member, 2008
Master Board Member, 2012
Director, 2005 to 2011
Board of Directors Audit Committee: Member, 2006 to 2011; Chair, 2010
to 2011

New Jersey School Boards Association Insurance Group, Burlington, New Jersey
Trustee, 2009 to Present
Vice Chair, Board of Trustees, 2010 to Present

EXHIBIT C

INTERVIEWER INSTRUCTIONS FOR USING THE SAMPLE

YOU MUST FOLLOW THE SAMPLING INSTRUCTIONS EXACTLY. If you have a problem, ask your supervisor.

Disposition code: Each time a dialing attempt is made, a disposition code must be placed on that sample piece describing the result of that particular phone call. After each dialing attempt, a Disposition Code must be recorded that clearly explains the result of that dialing. Barring a listed outcome, all numbers must be attempted 6 times before replacing.

Certain Disposition Codes that require additional information need to be recorded beyond the Disposition Code letters. These are indicated below by an asterisk (*).

Disposition Code Description

NW - Non-Working #, Disconnected or Out of Service Number.

NB – Non-Business #

NA - No answer after six rings

BZ - Busy signal. (Should re-attempt once, 20 minutes later). Regardless of the call result, this

counts as only one dialing attempt. Record both results in the same call result box.

CB - Call Back. Someone in the travel agency said to Call Back. Record the time and date for the

callback and the name of the respondent.

LH – Language/hearing Barrier. Respondent can't hear or speaks a foreign language,

RF - Refusal. Someone in the travel agency refused.

***TQ** - Terminate. Respondent does not qualify for the survey based on a specific question in the

screeener. This Disposition Code must be accompanied by the Question # at which the

terminate occurred.

***OT** - Other. This Disposition Code must be accompanied by an explanation, and also be reviewed by a supervisor.

AM – Answering machine

FM – Fax machine/modem

BP – Beeper/pager

C -- Complete

Pre-arranged Call-backs: Must always be dialed at their indicated time. Call-backs must always include the name of the qualified respondent.

No Answer/Answering Machine: Additional dialing attempts on sample pieces that have resulted in a "No Answer" or an "Answering machine" should not be called at the same time of day any previous "No Answer" or "Answering machine" occurred.

When working your sample, begin with any prearranged call-backs that have been scheduled for your shift. Then make your next call to any active numbers in replicates that have been started. Then call any previously undialed numbers in started replicates. Finally, open a new replicate. Barring a listed outcome, all numbers must be attempted 6 times before replacing.

EXHIBIT D

VALIDATION QUESTIONNAIRE - TRAVEL AGENT STUDY (2229)

Hello, my name is _____ from Princeton Research and Consulting Center.

I am calling to thank you for participating in our recent study. I would like to verify some information; it will only take a minute.

1. Did you recently participate in a study where you were asked about the flying habits of customers that you booked trips for?
 - 1 YES
 - 2 NO -----> THANK, TERMINATE, RECORD "TERMINATED Q.1"
 - 3 DON'T KNOW > THANK, TERMINATE, RECORD "TERMINATED Q.1"

2. Are you a travel agent?
 - 1 YES
 - 2 NO -----> THANK, TERMINATE, RECORD "TERMINATED Q.2"
 - 3 DON'T KNOW > THANK, TERMINATE, RECORD "TERMINATED Q.2"

3. Do you offer travel services for air travel?
 - 1 YES
 - 2 NO -----> THANK, TERMINATE, RECORD "TERMINATED Q.3"
 - 3 DON'T KNOW > THANK, TERMINATE, RECORD "TERMINATED Q.3"

Thank you very much for helping us with this important research project.



Marketing Research / Merchandising / Demonstrations / Mystery Shopping

March 12 2013

Dr. Leon Kaplan
PRINCETON RESEARCH & CONSULTING CENTER
12 Roszel Rd., Suite C-103
Princeton, NJ 08540

Dear Dr. Kaplan:

The disposition of the 222 respondent names received from Princeton Research & Consulting Center (PRCC) for validation for your Travel Agent Study 2229 are broken down below.

Successfully reached and validated	155
Answering Machine/no answer /busy/ fax on	8
Respondent not available /callback	8
Wrong number or no such person	21
Disconnect	2
Terminated Question 1	20
Terminated Question 2	3
Terminated Question 3	2
Refused	3

All results of the validation study were reported to PRCC. If you should have any further questions, please do not hesitate to contact me.

Sincerely,

PAT HENRY MARKET RESEARCH, INC.

Judith A. Hominy
CEO

Part 2: Rubinfeld Analysis on the Proposed
Rule; Transparency of Airline Ancillary Fees
and Other Consumer Protection Issues

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

In the matter of

**TRANSPARENCY OF AIRLINE
ANCILLARY FEES AND OTHER
CONSUMER PROTECTION ISSUES;
PROPOSED RULE**

Docket DOT-OST-2014-0056

REPORT OF DANIEL L. RUBINFELD¹

I. INTRODUCTION

A. Qualifications

I am Robert L. Bridges Professor of Law and Professor of Economics Emeritus at the University of California, Berkeley and Professor of Law at New York University. I have taught at U.C. Berkeley since 1983 and at NYU since 1999. During 1997-1998, I served as Deputy Assistant Attorney General for Economics at the Antitrust Division of the United States Department of Justice. As the chief economist for the Antitrust Division, I was responsible for supervising approximately 50 Ph.D. economists as well as a smaller group of non-Ph.D. economists and financial analysts. My responsibilities included co-drafting the 1999 efficiency-related amendments to the DOJ-FTC Horizontal Merger Guidelines and the 2000 DOJ-FTC Guidelines for Collaboration among Competitors. I also had ultimate responsibility for all of the economic analyses conducted by the Department of Justice in connection with its antitrust investigations and litigation.

I have previously taught at the University of Michigan, Wellesley College, and Suffolk University. I have served as visiting professor for various periods of time ranging from one

¹ This report has been commissioned by Airlines for America. David Molin of Compass Lexecon provided helpful research assistance.

week to one semester at law or law and economics programs at Stanford Law School, Hamburg University, Catholica University of Lisbon, the University of Bergen (Norway), and the Swiss National Bank's Study Program in Gerzensee Switzerland.

I am the author of a variety of articles relating to antitrust and competition policy, law and economics, law and statistics, and public economics, as well as two textbooks, *Microeconomics* and *Econometric Models and Economic Forecasts*. I have served as co-editor of the *International Review of Law and Economics* and I currently serve as co-editor of the Harvard-based *Journal of Legal Analysis*.

I have been a fellow at the National Bureau of Economic Research (NBER), the Center for Advanced Studies in the Behavioral Sciences, and the John Simon Guggenheim Foundation. I currently teach courses in antitrust and law and statistics. I am a member of the American Academy of Arts and Sciences and a research fellow at the NBER. I have served in the past as President of the American Law and Economics Association.

I have on many occasions consulted for private parties and for a range of public agencies including the Federal Trade Commission, the Antitrust Division of the Department of Justice, and various state Attorneys General. I have also been active in a variety of airline-related matters before the Department of Justice and the Department of Transportation for private parties.

B. Assignment

I have been retained by Airlines for America ("A4A") to analyze the costs and benefits associated with imposing the Proposed Consumer Rulemaking Regarding Enhancing Airline

Passenger Protections 3 (“EAPP-3”)² with special emphasis on Provision 2 and on the cost benefit analysis contained in the Initial Regulatory Impact Analysis³ (“RIA”) prepared by the Department’s contractor, HDR Decision Economics (“HDR”). As it explains in the (“Notice of Proposed Rulemaking”) NPRM, the Department of Transportation (“DOT”) has issued these proposed rules with the intention of improving “the air travel environment of consumers based on its statutory authority to prohibit unfair or deceptive practices in air transportation.”⁴

Provision 2 would require that airlines provide information regarding the fees for certain ancillary services to all ticket agents to which they also provide fare information and that all airlines and ticket agents that provide fare information to consumers to also provide this information. The proposed rules specify that four ancillary services would be covered by Provision 2: first checked bag, second checked bag, one carry-on item, and assigned seat.⁵ Under the proposed rules, airlines would be required to disclose customer-specific fees (e.g. discounts due to frequent flier status, possession of an affinity credit card or similar status) if the customer provides the appropriate identifying information. However, airlines would not be required to provide customer-specific ancillary fee information to travel agents and GDSs and travel agents and GDSs would not be required to disclose customer-specific fees to consumers. Finally, carriers and ticket agents would be required to present ancillary fee information at the

² 14 CFR Parts 234, 244, 250, 255, 256, 257, 259, and 399, Docket No. DOT–OST–2014–0056, May 23, 2014 (“NPRM”).

³ Initial Regulatory Impact Analysis for Proposed Consumer Rulemaking Regarding Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, April 16, 2014 (“RIA”).

⁴ NPRM at 29970.

⁵ RIA at 39.

initial point in a search process where a fare is listed in connection with a specific flight itinerary.⁶

C. Summary

The true economic costs of Provision 2 are substantially higher than the RIA's estimates. The RIA omits a number of quantifiable as well as unquantifiable cost categories, and it underestimates those costs that are included. In particular, whereas the RIA estimates that over ten years each carrier will incur roughly \$367,000 in direct compliance costs, my estimates indicate that ten year, direct compliance cost would be roughly twenty times the size of the RIA estimate (\$7.2 million) if seat assignment fee information is not filed with ATPCO and fifty times larger (\$18.4 million) for an ATPCO-mediated system, assuming ATPCO's systems could be enhanced to accommodate dynamic ancillary fees. The RIA assumes that the GDSs will not incur any costs if Provision 2 were to take effect, but, as I explain, GDSs' compliance costs can reasonably be expected to be of the same magnitude as the carriers' costs. In addition, the RIA does not consider the substantial opportunity cost of using screen space for required disclosures instead of additional search results, or the impact of the rules on technology innovation.

The NPRM and the RIA fail to establish that consumers are unable to obtain information about ancillary fees. To the contrary, most consumers are well-aware of the existence of ancillary services fees. Indeed, the airlines make considerable efforts to make their customers knowledgeable with respect to these fees. In addition to the disclosures required by existing DOT regulations, airlines engage in comparative advertising and emphasize ancillary fee discounts and benefits when they promote their loyalty programs, as do airline-affinity credit cards. Travelers that rely on brick and mortar travel agents also have the benefit of advice and

⁶ NPRM at 30001.

guidance from professionals who are well aware of the airlines' ancillary products and fees. It is easier to comparison shop for air travel than it is for many common and significant consumer purchases.

Contrary to the RIA's assertion, airlines set ancillary fees in a competitive marketplace in which most purchases are made by consumers who have good information regarding ancillary services and fees. As a result, the RIA includes unquantified benefits from a hypothesized increase in competition that is unlikely to materialize. The quantifiable costs in the RIA exceed the quantifiable benefits; therefore, in the absence of significant unquantified benefits, the RIA should have concluded that Provision 2 fails the net benefit test and should not be imposed. In sum, the costs of Provision 2 are likely to be substantially higher than any benefits that will be achieved.

II. BACKGROUND

In every cost-benefit analysis an appropriate baseline must be identified against which the costs and benefits of the proposed action can be evaluated. In my analysis, I assume that if Provision 2 of EAPP-3 is not imposed by the Department, the current trends in the distribution and sale of airline tickets and ancillary services will continue to develop along their current trajectory. I next turn to a brief discussion of the current state, recent, and expected future development of airline ticket and ancillary services sales and distribution.

A. Airline Ticket Distribution

Figure 1 illustrates the various entities involved in the distribution of airline fare information and their relationships with one another. Airlines sell tickets to consumers directly, through their websites and call centers, and indirectly, through online and traditional (so-called brick and mortar) travel agencies. For tickets sold by ticket agents, the distribution of fare

information begins when the airlines submit fare information to ATPCO.⁷ ATPCO compiles airfare (and certain ancillary service fee) information from hundreds of airlines around the world and packages and distributes this information to the GDSs (i.e., Sabre, Amadeus, and Travelport). Unlike fare information, fare availability information is not submitted to ATPCO; instead, the GDSs obtain this information directly from the airlines' inventory management systems. The GDSs charge the airlines approximately \$4-5 per ticket segment for their services.⁸

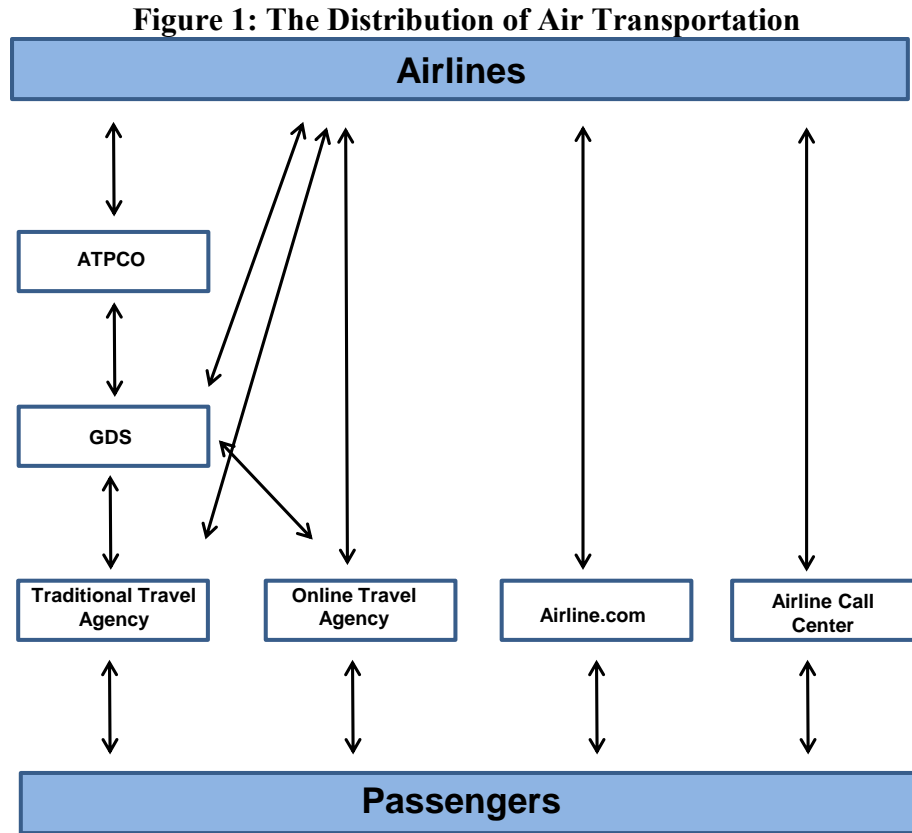
Meta-search engines provide consumers with search functionality that is similar (and in some cases more advanced than)⁹ online travel agencies. However, unlike online travel agencies they do not sell air transportation to the consumer. Meta-search engines refer consumers to another firm that sells the product the consumer was searching for by providing links next to (or embedded in) the search results. Because each airline owns its fare and seat availability information, firms such as meta-search engines that make commercial use of this information must obtain the airlines' permission to do so. In return for allowing meta-search engines to use their fare information, some airlines require meta-search engines to refer consumers wishing to purchase tickets on that airline to the airline's web site so that the airline avoids paying GDS and online travel agency commissions. Consequently, the combination of meta-search engines and airline websites provides the airlines with a lower cost distribution channel, while providing

⁷ ATPCO began as the Tariff Department of the Air Transport Association of America, before reorganizing as the independent Airline Tariff Publishing Company in 1974. See <http://www.atpco.net/atpco/aboutthis.shtml>.

⁸ Travelport's revenue per segment for its global operations grew from \$5.13 in 2011, to \$5.28 in 2012 and \$5.49 in 2013. Travelport SEC Form 10-K for the fiscal year ended December 31, 2013 at 36; Cost-Benefit Analysis of Proposed Consumer Rule 3, prepared by Mike Tretheway, InterVISTAS-ga2 Consulting, Inc.; Mid-term Evaluation of Regulation 80.2009 on a Code of Conduct for Computerised Reservation Systems and Repealing Council Regulation 2299/89, Final Report September 2012, Prepared for European Commission, Prepared by Steer Davies Gleave.

⁹ For example, Kayak provides consumers with the option to take estimated bag fees into account when searching for flights.

consumers with many of the same benefits (e.g., the ability to comparison shop) that online travel agencies provide.



Travel agencies rely on the GDSs to provide information and execute transactions. When a travel agency submits a search to its GDS, the GDS searches its database to determine which flights (or itineraries composed of multiple flights) best meet the search criteria. The GDS queries each airline that sells tickets on one or more of the flights that best meet the search criteria (i.e., the “marketing” carrier) as to which fare basis codes¹⁰ have tickets available on the flights of interest. The GDS then reports to the travel agent the fares and restrictions of the available tickets. Finally, the ticket agent informs the customers of the available itineraries and

¹⁰ Each fare basis code is associated with a unique combination of restrictions such as minimum stay, advance booking and change/cancellation fees.

associated fares. When a customer reserves a ticket, a Passenger Name Record (“PNR”) is created by the GDS and sent to the airline which temporarily reserves the tickets in its inventory management system. When a customer confirms a booking, he or she pays the travel agency, which sends payment information to the GDS PNR. The GDS then confirms the booking with the airline and sends payment information to the airline.

The distribution of baggage fee information follows a similar path, due in large measure to DOT requirements. Airlines provide ancillary service fee information on their websites¹¹, including baggage fee information in both static and lookup form, and make this fee information available during and after the ticket purchase process, as well. Airlines also submit checked baggage fee information to ATPCO, which distributes this information to the GDSs, which then pass it on to the travel agencies.¹² None of A4A’s members charges an ancillary service fee for (one) carry-on bag.

Historically, carriers did not begin to assign passengers to specific seats until roughly 30 days before the departure date. Passengers who purchased their tickets more than 30 days in advance were not assigned a seat at the time of purchase; most were assigned seats when boarding passes were issued. Carriers and travel agents accommodated passengers’ requests (e.g. to seat a group together or to sit in a window or aisle seat) as best they could from the remaining unassigned seats so that the last passengers to be assigned seats had the fewest options. Over time, airlines began to reserve certain “preferred” seats for frequent fliers. Some airlines have gone on to sell preferred seat assignments to passengers who do not have frequent

¹¹ Subject to the requirements of EAPP-II. See 14 CFR Parts 244, 250, 253 et al. Enhancing Airline Passenger Protections; Final Rule, (“EAPP-II”) at 23148.

¹² Subject to the requirements of EAPP-II. See EAPP-II at 23145.

flier status. One notable exception is Southwest Airlines, the largest domestic carrier by passenger count, which has never assigned seats.¹³

In the years since EAPP-II was issued,¹⁴ airlines have worked to make preferred seat assignment fee information available and transactable for travel agencies and their customers. This is not unexpected, as carriers have an incentive to make their ancillary services available for purchase through every cost-effective distribution channel. Airlines have developed XML-based or “direct connect” Internet distribution technologies that are newer and more flexible than the technologies historically relied upon by GDS. Some airlines have sought to use these technologies to provide both basic ticketing and ancillary service information directly to travel agencies (e.g., American Airlines). More recently, GDSs have begun to work with the carriers to obtain seat availability information using this XML technology. As shown in Figure 2, the three major carriers, American, Delta, and United have each entered into agreements to make their seat assignment fee information available and transactable through one or more GDSs.

Figure 2: GDS-Airline Seat Assignment Agreements and Availability

	Sabre	Amadeus	Travelport
<u>Paid Preferred</u>	<u>United (active)</u>	<u>United (active)</u>	<u>United (active)</u>
Seat Assignment	Agreements announced December 2008 and May 2013 Product live June 2014	Agreement announced October 2011 and April 2014 Product live September 2014 <u>Delta (pending)</u> Agreement signed August 2012 <u>American (pending)</u> Agreement signed May 2013	Agreement announced August 2010 and June 2014 Product live February 2014 <u>Delta (active)</u> Agreement signed June 2012 Product live April 2013 <u>American (pending)</u> Agreement signed March 2013

Sources: "United Sabre to Enable Point-Of-Sale Upselling", *Business Travel News*, Jay Boehmer, December 8, 2008; Sabre Press Release, May 22, 2013 and June 13, 2014; "Amadeus and United Sign Content Agreement," *Travel Agent Central*, George Dooley, October 24, 2011; "Amadeus Adds United's Economy Plus Seats," *Travel Weekly*, Kate Rice, September 3, 2014; United Amadeus Agent Cheat Sheet, <http://origin.library.constantcontact.com/download/get/file/1110305070619-1147/UnitedAmadeusAgentcheatsheet.pdf>; Amadeus Press Release, August 6, 2012 and April 15, 2014; "With Amadeus Deal, AA Has XML Connectivity with Two GDSs," *Travel Weekly*, Kate Rice, May 12, 2013; United Economy Plus® and Travelport factsheet <http://www.united.com/CMS/Documents/pdfs/agency/United-Economy-Plus-Travelport-Factsheet.pdf>; "Travelport Agencies to Sell United Ancillary Services, Economy Plus Seating", *Tnooz*, Dennis Schaal; "Travelport Announced a 'Long-Term' Distribution Agreement with United Airlines", *Business Travel News*, June 26, 2014; United Press Release, February 7, 2014; "Delta to Distribute Economy Comfort Seats Through Travelport GDSs," *Travel Market Report*, Michèle McDonak, June 7, 2012; Delta Press Release, April 9, 2013; American Airlines Press Release, March 13, 2013.

¹³ Department of Transportation DB1B Database.

¹⁴ EAPP-II was issued April 25, 2011.

When an airline makes seat assignments transactable via a GDS, the airline is making an upfront investment that it hopes to recoup over time with increased seat assignment fees. It is not surprising that the largest carriers would be the first ones to invest in making their seat availability transactable through the GDSs, because the largest carriers have the most to gain.

Airlines differ with respect to which ancillary services they charge for and the fee structures they employ. In particular, many airlines set preferred seat availability fees dynamically. To illustrate, some airlines raise or lower the fee they charge for the remaining aisle seats on a given flight depending on whether they are selling faster or slower than expected. In general, price flexibility increases social welfare by ensuring that goods and services are allocated to the consumers who place the highest value on them. For example, if airlines were unable to adjust the seat assignment fee, they would occasionally run out of aisle seats and be unable to accommodate a passenger who books at the last minute even if that passenger places the highest value on that seat location. Similarly, on flights with lower load factors airlines would be unable to offer aisle seats at a discount and some aisle seats would go unsold.

Static pricing can lead to inefficiency, as is currently the case with baggage fees. In order to comply with EAPP-II's baggage fee disclosure requirements within the time provided, airlines have no alternative to filing their baggage fees with ATPCO. However, ATPCO's technology does not allow for dynamic ancillary fees. As a result, airlines cannot offer discounts on checked baggage for flights with low load factors or more unused cargo capacity, and cannot raise checked baggage fees offered at the time of booking on flights where the demand for checked baggage is expected to exceed supply. Instead, they must occasionally impose "baggage embargoes" as a hard cap on the number of checked bags. If carriers are forced to file seat

assignment fees with ATPCO using ATPCO's current ancillary services filing system seat assignment will also be static.

B. Assumptions Regarding the Final Rules

As I discuss below, the NPRM contains a number of alternative proposals, and solicits, seeks or invites comment on a wide variety of alternatives and questions that must be answered before the rules can be implemented. In addition, the RIA appears to contradict the NPRM as to whether or not the airlines will be required to file ancillary fee information through ATPCO. Consequently one must make certain assumptions regarding the details of the final rules before any cost-benefit analysis can be conducted.

First, the NPRM does not include, and indeed does not discuss the effective date of the rule. In the EAPP-II NPRM, the Department proposed that the final rule take effect 180 days after its publication in the Federal Register, but in the final rule, the Department gave carriers only 120 days to comply with EAPP-II.¹⁵ It is my understanding that the EAPP-II baggage fee rules were delayed due to the industry's inability to successfully implement the requisite systems.¹⁶ Consequently, I assume that, if adopted, Provision 2 would have a relatively extended compliance timeline to allow the airlines, GDSs, travel agents, and (most likely) ATPCO to adapt their systems to be in compliance with the new requirements.

Crucially, the RIA and NPRM differ on the role that ATPCO (and the systems that rely upon it) would play. The NPRM states that “[c]arriers could use existing channels, such as filing the fee information through the ATPCO, or they could develop their own systems to disseminate

¹⁵ EAPP-II at 23156-7.

¹⁶ Department of Transportation 14 CFR PARTS 244, 250, 253, 259 and 399 Docket No. DOT-OST-2010-0140 RIN No. 2105-AD92, Enhancing Airline Passenger Protections: Limited Extension of Effective Date For Certain Provisions.

the information,”¹⁷ whereas the RIA recognizes that “If carriers have to provide ancillary service fee information to OTAs and GDS, the GDSs will likely demand that carriers transmit the data through ATPCO.”¹⁸ As discussed in greater detail below, some but not all carriers *have already* developed their own “direct connect” systems to disseminate (and in some cases transact) ancillary service fee information to GDSs and to travel agencies (both via GDS and directly). Whether they would be able to use those systems as a means of complying with the proposed regulations and whether other airlines would be able to implement similar technologies would depend on how much time they are allowed to come into compliance with the new requirements.

ATPCO’s systems do not currently accommodate dynamic fees for baggage, seat assignment, and other ancillary services and I understand that it would take substantially more than 18 months for ATPCO to enhance its systems to accommodate dynamic ancillary fees. Those carriers who have not developed their own “direct connect” systems will have no alternative to filing their seat assignment fee information with ATPCO and abandon the use of dynamic seat assignment fees. Obviously, compliance costs will be dramatically higher if the final rule requires the airlines to change their business practices (e.g., abandon the use of dynamic seat assignment fees), because the implementation schedule does not allow sufficient time to develop and debug the requisite technology and/or allow for alternatives to ATPCO to be developed (if needed).

My understanding is that the application programming interface (“API”) currently employed by carriers and GDSs only supports the provision of seat assignment availability and

¹⁷ NPRM at 29978.

¹⁸ RIA at 48. The cost analysis in the RIA is also explicitly based on ancillary fees filed and distributed through ATPCO.

fee information in response to a query regarding a particular reservation and flight.¹⁹ These systems would need to be modified to comply with the requirement to present ancillary fee information at the first point in a search process where a fare is listed in connection with a specific flight itinerary. Absent a relatively extended compliance timeline, as a practical matter, airlines would likely have no option but to rely on ATPCO as they currently do for baggage disclosure. Nevertheless, modifying the existing direct connect systems would be less costly than requiring these carriers to file all ancillary service fees through ATPCO. Importantly, if the RIA is correct all carriers would be required to file seat assignment fees through ATPCO. This limitation in filing through ATPCO would effectively end dynamic pricing through all channels, for a variety of practical and contractual reasons.

The NPRM and RIA consider the issue of “transactability,” but do not propose requiring the ancillary services covered by Provision 2 to “be available for purchase through all channels that carriers decide should sell their fares.”²⁰ Although the Department has not included any transactability requirement in the proposed rules, it “has not closed the door on the possibility of also requiring those ancillary services be available for purchase through all channels that carriers decide should sell their fares.”²¹ To be specific, the RIA includes an analysis of the benefits of transactability, but inappropriately does not include any analysis of the incremental costs of transactability.²² Consequently, the RIA overstates the net benefit of the “transactability alternative.” I assume that the final rule will not include a transactability requirement.

¹⁹ See, e.g., https://support.travelport.com/webhelp/uapi/Content/Standalone_Merchandising/SeatMaps/API_Air_Merchandising_Seat_Map.htm

²⁰ NPRM at 29979.

²¹ NPRM at 29979.

²² RIA at 49.

Obviously, the imposition of a transactability requirement would entail additional compliance costs, with the extent of those costs depending on the specific requirements.

The NPRM does not specifically address whether carriers will be required to provide seat availability information to ticket agents in addition to seat assignment fee information.

However, the NPRM does require that consumers receive accurate and real-time information that can be used to determine the total cost of travel, including ancillary service fees. I therefore assume that under the final rules airlines will be required to provide both seat assignment fee information and seat availability information.

III. COSTS

A. Overview

As previously discussed, depending on how long they are given to come into compliance with the proposed rules, the airlines may have no option but to rely on ATPCO to distribute ancillary fee information. I will therefore analyze the regulatory costs under two alternatives: (1) that carriers will be required to provide ancillary fee information via ATPCO; and (2) that carriers will be free to disseminate ancillary fee information to GDSs and travel agents using their own systems so long as the information is provided “in an up-to-date and useful fashion.”²³

B. The RIA Dramatically Underestimates Carrier Compliance Costs

I have noted that some carriers already developed systems for the distribution of ancillary fee information directly to travel agencies or indirectly via the GDSs, but these systems were designed to work with the airlines current systems for selling ancillaries, with a sequencing of flight and fare section followed by seat selection. Many smaller carriers do not currently have this technology. In order to estimate the cost of developing and maintaining the systems needed

²³ NPRM at 29974.

to disseminate seat assignment fee information and availability to GDSs, I have surveyed A4A²⁴ members. Each airline was asked “For which ancillary services does your airline allow transactions through one or more GDSs, what did it cost to implement and what does it cost per year to maintain, process and verify transactions?”

The survey responses of those A4A members who have developed such systems indicate that the direct compliance cost per carrier is roughly an order of magnitude larger than the RIA’s cost estimate. Figure 3 provides some of the details. The average cost per carrier surveyed was \$3.6 million for the first year and \$7.2 million for the ten-year period.

Figure 3: Provision 2 Compliance Costs per Carrier²⁵

	Cost for First Year	Cost for Ten Years		
		Undiscounted	Discounted at 3%	Discounted at 7%
No. of Carriers Surveyed	3	3		
Estimated Cost per Carrier Surveyed (millions)	\$3.61	\$7.21	\$6.72	\$6.21
Number of Impacted Carriers (per RIA)	167	167		
Cost for each Airline to Transmit Ancillary Service Fees to GDSs via ATPCO (millions) (per RIA)	\$0.037	\$0.361	\$0.323	\$0.276

Sources: RIA Table ; Survey results of Airlines for America members.

The disparity in estimated costs between the carriers’ actual experience and the RIA’s prediction reflects the fact that that the RIA analysis excludes certain substantial costs and significantly underestimates others. In particular, the RIA only includes two costs for Provision 2, (1) annual labor costs to provide ancillary fee information to ticket agents and (2) ATPCO

²⁴ The survey instrument is included as an appendix to this report. The survey respondents were American, Delta, United, and Alaska. Southwest also responded, but their results were not included because their business model made the results non-comparable.

²⁵ I report the total cost for a ten year period on an undiscounted basis as well as at 3% and 7% real discount rate as is standard practice in a Regulatory Impact Analyses. See Office of Information and Regulatory Affairs, “Regulatory Impact Analysis: A Primer,” page 11.

annual fees.²⁶ Most of the disparity in the first year results can be attributed to the RIA's failure to include any costs related to the development and debugging of the programs and procedures that the carriers will have to create to report ancillary fee information. Annual costs for the subsequent years were also much higher than the RIA indicates because the RIA assumes that only 8 hours of labor will be needed for each carrier to provide information to ticket agents. Discussions with A4A members indicate that they each (except Southwest, which was not included in the analysis) devote the equivalent of at least one full-time employee to monitoring, debugging and updating their baggage fee information reporting through ATPCO. As seat assignment is an inherently more-complicated ancillary service, it can reasonably be expected to be more costly to distribute and maintain seat assignment fee information than baggage fee information.

Importantly, as discussed below, the costs associated with implementing an ATPCO mediated solution for the distribution of ancillary service information would be even higher. The ATPCO system currently cannot support flexible or dynamic ancillary services pricing. As a consequence, to the extent the only practical way carriers will have distribute ancillary fee information to travel agents is via ATPCO, they will be forced to change their current pricing practices and prevented from implementing new more customized pricing models.

C. The DOT Dramatically Underestimated the Costs of EAPP-II

I use the cost of implementing the baggage fee disclosure requirements of EAPP-II, which also required that airlines file new information with ATPCO as an estimate of the cost the airlines would incur if they were required to file seat assignment fee information with ATPCO.

²⁶ Note that the RIA incorrectly characterizes these fees as the "annual cost carriers need to pay ATPCO to publish ancillary fee information" when they actually pay ATPCO subscription fees to obtain data from ATPCO (including data on their own fares and fees which is used to verify ATPCO's accuracy). RIA at 49.

A comparison of actual compliance costs and the compliance costs estimated by the Department illustrate that the Department has a history of underestimating the cost associated with consumer protection rules requiring disclosures during automated fare search and reservation/ticketing processes. In particular, the baggage fee requirements of EAPP-II were approved on the basis of estimated costs that were a small fraction of the actual costs of implementation. EAPP-II Area 8 requires that each covered carrier disclose applicable baggage fees on e-ticket confirmations; post notice of any increases in baggage fees on its home page; and provide a link from its home page to a page that contains a full disclosure of all baggage and other ancillary service fees.²⁷ It also requires that carriers apply the same baggage rules throughout an itinerary when the origin or destination is within the U.S.²⁸ In the cost benefit analysis of these requirements, the Department's contractor estimated that "costs incurred by affected carriers, travel agents, and tour operators to comply with Rule provisions in Area 8 are expected to be \$4.8 million in 2012 and \$9.1 million for the entire 10-year period from 2012 through 2021."²⁹ Notably, the EAPP-II RIA did not mention or attribute any costs to the requirement that carriers apply the same baggage rules throughout an itinerary that includes a U.S. point of origin or destination; this effectively requires carriers to synchronize their baggage rules with their codeshare partners.

In striking contrast, the airlines alone have incurred tens of millions of dollars in costs to comply with the baggage fee disclosure and operational baggage fee requirements of EAPP-II, whereas the EAPP-II RIA was based on the assumption that large marketing carriers would incur less than \$5,000 in compliance costs. In the survey of A4A's member airlines, I asked: "How

²⁷ "Final Regulatory Analysis Consumer Rulemaking: Enhancing Airline Passenger Protections II," Ecometrica Inc., 1029-000/DTOS59-09-F-10089, ("EAPP-II RIA").

²⁸ EAPP-II at 23151.

²⁹ EAPP-II RIA at 64.

much did it cost your airline to meet the ‘Baggage and Other Fees and Related Code-Share Issues’ requirements of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2)?”

Figure 4 summarizes the responses.

Figure 4: EAPP-II Baggage Fee Requirements Compliance Cost per Large Marketing Carrier³⁰

	Unit Cost of Complying with EAPP 2 Baggage Rules			
	For the First Year	For Ten Years		
		Undiscounted	Discounted at 3%	Discounted at 7%
Estimated Programming/ Updating E-Tickets and Websites to Display Baggage Fees/Optional Fee/ Links ¹	\$ 4,944	\$ 9,394	\$ 8,794	\$ 8,165
Actual Programming/Updating E-Tickets and Websites to Display Baggage Fees/ Optional Fees/ Links ²	\$ 6,981,250	\$ 18,400,000	\$ 16,859,876	\$ 15,247,451

Sources: (1) EAPP 2 Final Regulatory Analysis, Table 34; (2) Survey results of Airlines for America members (except Southwest).

Much of the difference between the actual costs of implementation and the cost estimates in the EAPP-II RIA is explained by the fact that the Department’s contractor assumed that the only costs carriers would incur would be the “incremental cost of updating and posting notices when these fees change.”³¹ There, the Department’s contractor should have known that the carriers would incur other significant costs, but effectively assumed they would be zero because the contractor did not have “extensive information about the likely magnitude of these costs.”³² The Department effectively recognized that it underestimated the extent of the efforts required to comply with the EAPP-II baggage fee regulations when it extended the implementation period by five months and then adopted a six month non-enforcement period.³³

³⁰ Four A4A members provided compliance cost data. Other large marketing carriers may have incurred lesser costs.

³¹ EAPP-RIA at 63.

³² EAPP-RIA at 63.

³³ Department of Transportation, Order 2012-1-2, January 24, 2012 at pages 3-4.

The survey analysis supports my conclusions that, even if it were feasible, an ATPCO mediated solution for the distribution of ancillary service information would be very costly, because the airlines would have to alter their seat assignment systems to be compatible with the ATPCO seat assignment fee filing regime.

D. The RIA Ignores Certain Costs

There are several omissions in the RIA's analysis of costs. First, the cost of screen space on the first page of search results will be used for ancillary fee disclosures rather than the display of additional search results (which benefit consumers) or advertising (which benefits airlines, online travel agencies and meta-search engines). This is particularly notable given that the DOT has long recognized that consumers and travel agents often select flights from the first page of search results without looking at subsequent pages. The value of screen space will only increase as consumers use mobile devices for more of their web surfing and shopping. I estimate the cost of reduced screen space by assuming that displaying the required ancillary services fee information will impact consumers shopping for air transportation on mobile devices.

It is my understanding that the Department does not propose to regulate display on mobile devices. If it were to do so the costs for transactions using just those devices would be as described below. In particular, I assume that as a result of Provision 2's adoption, on average it will take one minute longer to shop for and purchase a ticket using a mobile device. I assume that the percentage of passengers who buy tickets online who use a mobile device will increase from 7% in 2012 (the year before the study) to 50% in 2017, based on a recent study funded by the International Air Transport Association.³⁴ This leads me to the conclusions highlighted in

³⁴ Henry H. Harteveltdt, "The Future of Airline Distribution, A Look Ahead," December 5, 2012, Atmosphere Research Group.

Figure 5: if Provision 2 had been in effect in 2013, it would have caused consumers to waste over 415 thousand hours, with a monetized value of \$14.6 million. Furthermore, the time wasted grows over time, as the number of passengers who used mobile devices to make their purchases increases, so that, over ten years, consumers will waste several hundred millions of dollars' worth of time.

Figure 5: Value of Time Lost by Consumers Using Mobile Devices

	2013	2013-2022
Number of tickets sold (reporting carriers and non-reporting carriers) ¹	319,381,689	3,545,490,286
Average travel trip party size ¹	1.4	1.4
Percent purchased online ¹	70.0%	70.0%
Percent of online booking using mobile ²	15.6%	41.4%
Hours lost per booking	0.017	0.017
Value of time per passenger hour(personal non-travelling) ¹	\$ 35.21	\$ 35.21
Total hours lost	415,196	12,231,941
Undiscounted cost (Millions)	\$ 14.6	\$ 430.7
Discounted cost at 3% (Millions)		\$ 372.4
Discounted cost at 7% (Millions)		\$ 308.7

Sources: (1) RIA, Table 12 and page 44. (2) The Future of Airline Distribution, A Look Ahead by Henry H. Hartevelt, Atmosphere Research Group, December 5, 2012, page 6.

Note: The Future of Airline Distribution projects the percent of online booking using mobile to be 7% in 2012 and 50% in 2017. The numbers in the intervening years have been interpolated. For years 2017 onwards, the percentage is kept at a constant 50%.

The costs reported in the RIA “do not include the costs to the GDSs to reprogram their software. This is because at least one of the three large GDSs has already revised its software so that it would be capable of meeting the requirements Also, the industry trade association has indicated that other GDSs are preparing similar upgrades, if not already undertaking them for market competition reasons.”³⁵ Presumably, the RIA is referring to software revisions that allow the GDSs to use ancillary fee information provided by the airlines directly, as it is not clear how

³⁵ RIA at 49.

the GDSs could revise their software so that it would be capable of using seat assignment fee information filed with ATPCO, given that the vast majority of airlines do not file seat assignment fees with ATPCO.

For the GDSs to make effective use of seat assignment information filed with ATPCO, the GDSs would need to make significant investments in their systems in order to properly price, and display seats. The GDSs can reasonably be expected to incur higher costs than the airlines (i.e. more than \$7 million) to adapt their systems, because ensuring system compatibility across GDS and airline systems will be more costly for GDSs than airlines simply because there are many more airlines.

Neither the DOT nor the RIA account for the cost of the time consumers will spend waiting for their search results given the additional processing time required to search for the ancillary fee information associated with each itinerary. Based on the input of its members, A4A estimates that including ancillary pricing and availability in the initial search results would add approximately 20-40 seconds to each itinerary search at an online travel agency or meta-search engine.³⁶ Consumers perform many searches for each purchase they make (e.g., one recent study found that online travel agencies make only 22 sales per thousand searches). Consequently, as shown in Figure 6, consumers made roughly one hundred million airline ticket purchases at online travel agencies in 2013, but conducted over four billion searches. Ignoring any increase in search time at meta-search engines and other channels, a twenty second increase in search response time would result in over twenty-two million hours of consumer time spent waiting for search results with a monetized cost of \$805 million.

³⁶ Comments of Airlines for America, Part III at p. 26.

Figure 6: Cost of Waiting for Search Results

	2013	2013-2022
Number of tickets sold (reporting carriers and non-reporting carriers) ¹	319,381,689	3,545,490,286
Average travel trip party size ¹	1.4	1.4
Percent purchased from Online Travel Agencies ¹	47.0%	47.0%
Tickets purchased from Online Travel Agencies	107,220,996	1,190,271,739
Percent purchased not using Mobile Devices ²	84.4%	41.4%
Book-to-Search Rate for Online Travel Agencies ³	2.2%	2.2%
Searches at Online Travel Agencies not using Mobile Devices	4,113,387,285	22,398,749,995
Increase in search time (seconds per search) ⁴	20.0	20.0
Increase in search time (hours)	22,852,152	174,113,954
Value of time per passenger hour(personal non-travelling) ¹	\$ 35.21	\$ 35.21
Undiscounted cost (Millions)	\$ 805	\$ 6,131
Discounted cost at 3% (Millions)		\$ 5,438
Discounted cost at 7% (Millions)		\$ 4,711

Sources: (1) RIA, Table 12 and page 44. (2) Cathy Schetzina Walsh, "Parsing Shop and Book: How Airlines , Hotels and OTAs Compete on the Desktop and Mobile Web," PhocusWright, July 2014 at 3. (3) A4A Comments at 25-26. (4) The Future of Airline Distribution, A Look Ahead by Henry H. Harteveldt, Atmosphere Research Group, December 5, 2012, page 6.

Note: The report commissioned by IATA projects the percent of online booking using mobile to be 7% in 2012 and 50% in 2017. The numbers in the intervening years have been interpolated. For years 2017 onwards, the percentage is kept at a constant 50%.

Finally, the RIA ignores the costs that the airlines, online travel agencies, meta-search engines, and GDSs will incur in modifying their websites and software so that they present ancillary fee information at the first point in a search process where a fare is listed in connection with a specific flight itinerary. Even after investments have been made in airline and GDS systems to meet this requirement, there is no guarantee that the systems will work seamlessly together. Getting the two systems to work together is a non-trivial task that entails substantial costs. For example, in June 2012 Delta and Travelport announced that they had reached an agreement to make Delta "Economy Comfort" seats available to Travelport's subscribers by the end of 2012.³⁷ However, as shown in Figure 2, Economy Comfort seats did not become

³⁷ Delta Press Release, "Delta to Sell Economy Comfort Through Travelport Systems," July 4, 2012.

available through Travelport until April 2013. Figure 2 also shows that no other agreement to provide seat assignment information and transactability has been implemented in less time than it took Travelport and Delta.

The fact that the GDSs are still in the process of upgrading their software so that it is capable of meeting the technical requirements suggests that it has been the GDSs' inability or unwillingness to develop the necessary technology that has prevented them from distributing seat assignment fee information and not because the "airlines are exhibiting a form of behavior known as myopia, in which they focus on the short-run benefits (greater control of access to customers, or decreased fees to GDSs) to their long-term detriment (greater overall consumer dissatisfaction and limited demand)."³⁸ The RIA's assertion falls flat, given that there is no reason to believe the airlines are exhibiting myopia as all four of the factors the RIA identifies impact the airline's long-run financial well-being. Instead, the negotiations between the GDSs and the airlines over the terms and conditions under which the airlines provide seat assignment fee information and transactability are better characterized as a war of attrition: both the GDSs and the airlines incurred costs from their inability to reach an agreement sooner, but each side initially refused to compromise because they hoped the other side would concede. The airlines want the GDSs to use newer, more flexible XML-based technologies to obtain ancillary fee information and execute ancillary fee transactions, while the GDSs have preferred that the airlines adapt their ancillary services offerings and pricing so that they are compatible with the GDSs' current technology. War of attrition scenarios in business situations are not typically indicative of myopia: both sides in a war of attrition properly understand that the potential long-term benefits from winning a conflict outweigh the short-term costs of the conflict. In this case,

³⁸ RIA at 7.

adopting the current GDS technology for ancillary services would reinforce the GDS's market power and reduce the potential for new entrants (which rely on XML-based technologies) to compete with the GDSs.

GDS-mediated distribution channels are both more expensive and less capable of offering bundled products than the airlines' websites. In particular, "airline.com" websites have dramatically lower per segment distribution costs. Whereas GDS fees average \$4-5 per segment, it costs airlines \$2-3 per ticket to issue tickets (\$1.20 per segment, assuming a \$3 per ticket costs and an average of 2.5 segments per ticket) using their own websites.³⁹ Figure 7 shows the financial consequences of having just one percent of customers shift their ticket purchases from GDS-mediated channels to airline websites. According to the RIA, there were just under 320 million tickets sold in 2013. As shown in Figure 7, roughly two-thirds of tickets were sold via GDS-mediated channels and, at an average cost of \$4.50 per segment (based on the farelogix estimate of \$4-\$5), airlines spent roughly \$2.4 billion per year in GDS booking fees. For each 1% of passengers who shift their purchases from GDS-mediated to airline websites, the airlines realize annual savings over \$17 million.

³⁹ "Comments of Farelogix, Inc." *In* Enhancing Airline Passenger Protections, Notice of Proposed Rulemaking, 14 CFR Parts 234, 244, 250, 253, 259 and 399; Docket No. DOT-OST-2010-0140 (September 23, 2010).

Figure 7: Airlines’ Savings from a 1% Shift in Bookings to an Airline.com

	2013	2013-2022
Number of tickets sold (reporting carriers and non-reporting carriers) ¹	319,381,689	3,545,490,286
Segments per ticket ²	2.5	2.5
Share of tickets booked through GDS ^{1,3}	67.0%	67.0%
GDS fee per segment ²	\$ 4.5	\$ 4.5
Airline.com cost per segment ⁴	\$ 1.2	\$ 1.2
Percentage of passengers who shift to non-GDS channel	1.0%	1.0%
Undiscounted cost (Millions)	\$ 17.65	\$ 195.98
Discounted cost at 3% (Millions)		\$ 171.24
Discounted cost at 7% (Millions)		\$ 145.43

Sources: (1) RIA, Table 12. (2) NPRM, page 6. (3) The Future of Airline Distribution, A Look Ahead by Henry H. Harteveltdt., Atmosphere Research Group Table 12-1. (4) “Comments of Farelogix, Inc.” *In* Enhancing Airline Passenger Protections, Notice of Proposed Rulemaking, 14 CFR Parts 234, 244, 250, 253, 259 and 399; Docket No. DOT-OST-2010-0140 (September 23, 2010), at 6; "Cheapest Airfare Might Be on Airlines' Own Website," *The Big Story*, Scott Mayerowitz, September 12, 2012.

Notes: The share of tickets booked through GDS is calculated to be 67%. 10% of tickets are booked through airline call center/airport, city offices (The Future of Airline Distribution, Table 12-1) and 23% of tickets are purchased directly from carrier websites (RIA, Table 12).

The RIA ignores another cost, which, even if not quantified, must still be considered.

One potentially significant cost flows from a likely reduction in the pace of innovation.

Requiring airlines to make ancillary fee information widely available increases the cost of experimenting with new pricing mechanisms (such as dynamic pricing) and makes the development of new methods of information distribution (especially those that avoid the payment of GDS fees) more costly.

IV. BENEFITS

A. Potential for Double Counting of Benefits.

Any unquantified benefits of ancillary fee disclosure should be attributed to EAPP-2, and not to EAPP-3, as is done in the RIA. The DOT already requires that fee information for all four ancillary services covered by Provision 2 (as well as other ancillary services not covered by Provision 2) be made available on carrier websites. Thus, ancillary fee information is already

provided one click away from the carrier’s main webpage,⁴⁰ and EAPP-2 also requires that baggage fee information be presented after ticket purchase and in e-ticket confirmation email to passenger.⁴¹ Furthermore, baggage fee information is filed with ATPCO and made available to travel agencies through the GDSs.

B. Clicking Through Multiple Web Pages is Not Inefficient and May be Efficient

If the Department requires ancillary service fee information to be displayed on the first page that is displayed in response to a flight itinerary search request, consumers will be subject to the problem of choice overload—having more options (presented all at the same time) can reduce consumers’ satisfaction with their ultimate decision as well as the quality and optimality of the decision-making process. Basic economic theory suggests that rational, fully informed consumers always benefit when presented with additional options. However, numerous behavioral economic studies have found that having a large number of options can reduce the quality and optimality of the decision and make consumers feel that the decision is difficult and dissatisfying.⁴² This is known as the problem of “choice overload.” When presented with a few options consumers can fully consider each option before making their decision; when choosing from a large number of potentially relevant options, a close investigation of each option is typically infeasible and consumers make a decision without fully considering each option.

⁴⁰ EAPP-2 requires all ancillary fees on one page, one webpage away from the main airline webpage. EAPP-II at 23111.

⁴¹ EAPP-II at 23111.

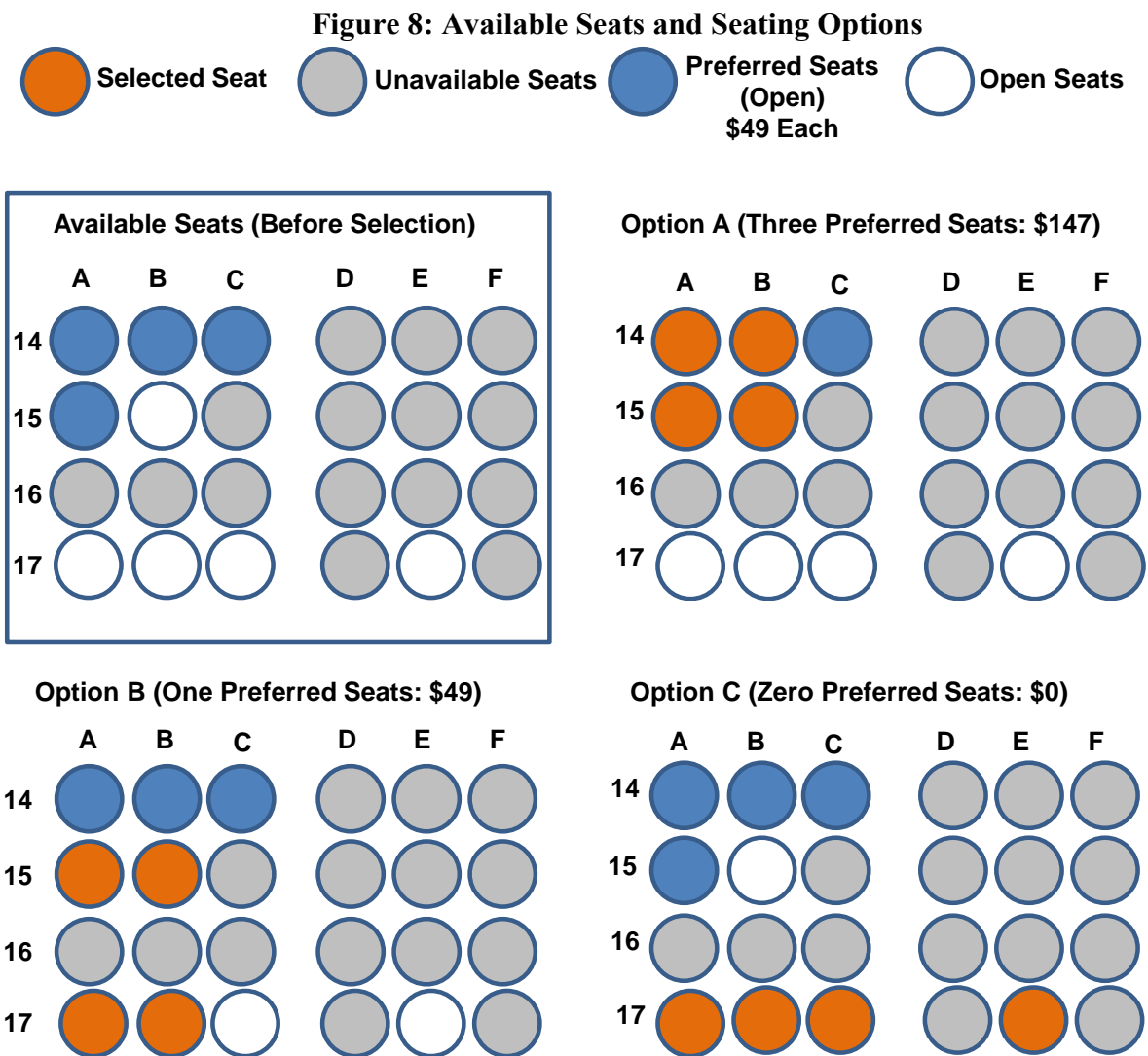
⁴² Betty E. Tanius, Stacey Wood, Yaniv Hanoach and Thomas Rice, “Aging and Choice: Applications to Medicare Part D,” *Judgment and Decision Making*, Vol. 4, No.1, February 2009, pp 92-101; Arthur Schram and Joep Sonnemans, “How Individuals Choose Health Insurance: An Experimental Analysis,” *European Economic Review*, 2011, Vol. 55, 799-819; Yaniv Hanoach, Stacey Wood, Andrew Barnes, Pi-Ju Liu and Thomas Rice, “Choosing the Right Medicare Prescription Drug Plan: The Effect of Age, Strategy Selection, and Choice Set Size,” *Health Psychology* 2011, Vol. 30, No. 6, 719-727; Tibor Besedeš, Cary Deck, Sudipta Sarangi, and Mikhael Shor, “Age Effects and Heuristics in Decision Making,” *Review of Economics and Statistics* (2012), 94(2):580-595.

The problem of choice overload can be addressed by designing a “choice architecture” that improves both the quality of consumers’ decision making and satisfaction with their decisions. Because the choice architecture (and consumers’ ability to make good decisions when purchasing goods and services) helps to determine consumers’ satisfaction with their choice (and ultimately with their purchase), firms compete with one another to provide consumers with a choice architecture that helps consumers make good decisions.

Airline, online travel agency, and meta-search websites are designed so that passengers engage in sequential choice: first they search for itineraries based on schedule and ticket price, then they choose certain itineraries to research further (i.e. by clicking on the itinerary); then, for each flight under consideration, they select further ancillary services. They make their final selection from the bundles of flights and ancillary services under consideration. There is economic research to support the view that this kind of sequential choice architecture helps to improve the quality of consumer decision making.⁴³ Providing consumers with sequential decisions (i.e. first choose a flight, then a seat, then the number of checked bags) may lead to better decision quality. For example, many travelers do not know how many bags they will want to check at the time they purchase their ticket; paying baggage check fees just prior to departure ensures that passengers only pay for the bags they check. Waiting to pay for checked baggage also gives customers additional time to qualify for complimentary checked baggage by signing up for an affinity credit card or gaining frequent flier status.

⁴³ See, e.g., Tibor Besedes and Cary Deck and Sudipta Sarangi and Mikhael Shor, “Designing a sequential choice architecture to reduce choice overload,” MPRA Working Paper No. 38173, at 17. “Our sequential tournament process does succeed in improving the quality of decision making. This choice architecture first places options into subgroups and then the options selected from each subgroup are combined into a final set from which the ultimate decision is made.”

Seat assignment is a multi-dimensional choice (particularly for groups that wish to travel together). Both seat assignment fees and consumers' willingness to pay may vary depending on whether the seat is a window, aisle, or middle, has extra legroom, or is towards the front of the cabin. Consider, for example, a family of four traveling with two small children booking seats on a flight in which some seats can be selected at no additional cost and some "Preferred" seats can only be selected for a \$49 per seat fee and who encounters the following seating chart:



Option A includes two window seats (which small children often prefer) and allows the entire family to sit in adjoining rows, but costs \$147 in ancillary fees. Option B includes two

window seats, and allows the family to sit close together, but not in adjoining rows and costs \$49. Option C includes only one window seat, but allows the children and one adult to sit together with the other adult seated separately, but nearby. In this case, there is no simple answer to the question: “How much would this family have to pay in ancillary fees to sit together?” because the answer depends on how close together they want to sit and whether or not they also want two window seats.

C. The Proposed Rules Will Not Lead to Greater Competition and Lower Overall Prices for Ancillary Service Fees

The NPRM and RIA assert that increased ancillary fee transparency will lead to some consumers making more informed and better purchasing choices causing increased (price-based) competition and lower ancillary fees.⁴⁴ In particular, both the NPRM and RIA⁴⁵ contend that consumers who are unaware of or have limited information about ancillary fees pay higher fees.

This line of reasoning is faulty. In the first place, the use of ancillary fees has been prevalent for a number of years, they receive substantial attention in the media, and the airlines have made considerable efforts to inform their customers about them. In addition to the disclosures required by existing DOT regulations, airlines engage in aggressive comparative advertising and emphasize ancillary fee discounts and benefits when they promote their loyalty programs, as do airline-affinity credit cards; at this point the number of consumers unaware of ancillary fees is insignificant. Moreover, this analysis runs contrary to “a notion that has always been implicit in competitive theory: *Every consumer need not have perfect information. If there are enough perfectly informed consumers ... the weight of their potential search keeps the*

⁴⁴ RIA at 33.

⁴⁵ E.g., “travelers (perhaps those who rarely travel) who are not aware of the fact that many carriers no longer allow for pre-flight seat assignments without paying an additional fee.” RIA at 33.

market competitive. [ital. in the original]”⁴⁶ Repeat customers are inherently better informed than first-time buyers; this is why models of imperfectly informed consumers (e.g. Salop and Stiglitz which the RIA cites in explaining its “Analytical Framework”⁴⁷ and the seminal lemons paper by George Akerlof⁴⁸) typically describe the purchase of durable goods.

Air transportation is a repeat business in which “frequent fliers” are the most coveted customers, and most airline tickets are bought by frequent fliers or consumers who are well-informed about ancillary service fees.⁴⁹ Consequently, even in the absence of consumer protection laws, airlines would have no incentive to design fees that are hidden and deceptive. While such fees might generate additional revenue from a relatively small number of uninformed consumers, they would do so at the cost of foregoing the business of a much larger number of informed consumers.

Airlines set fares and ancillary service fees in competitive markets in which most purchases are made by informed consumers who take into account the total price of air transportation (including both ticket prices and ancillary fees). Consequently, if a less-experienced, poorly informed consumer purchases a ticket on an airline without taking into account ancillary fees charged by that airline, those ancillary fees will still be set at a competitive level. In the language of economics, the presence of informed consumers in the marketplace creates an incentive for airlines to set ancillary fees at competitive levels. In essence, the behavior of informed consumers creates a positive externality for less-informed consumers.

⁴⁶ S. C. Salop, and J. E. Stiglitz. “Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion,” *Review of Economic Studies*, 44, (1977), at 501.

⁴⁷ RIA at 32.

⁴⁸ George A. Akerlof. “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism.” *The Quarterly Journal of Economics*, Vol. 84, No. 3. (Aug., 1970), pp. 488-500.

⁴⁹ According to the RIA, only 47% of passengers purchase tickets through online travel agencies, and 20% search for ancillary service fees on multiple webpages (RIA at 46).

The development of branded fares is further evidence of airlines' efforts to provide consumers with product information in a manner that is both transparent and intuitive. As explained by two Sabre vice presidents, in developing "branded fares" the airlines have

... been focused on defining the bundle of ancillary services that distinctly identify a specific branded product and one that would resonate with the customer. For the first time, consumers have the requisite transparency to really understand what their 'fare' offers them. With this new framework, a customer can much more closely relate to a brand called 'Premium' with its associated attributes such as refundable fare, advanced seat selection, day lounge access and perhaps specific customer service numbers. Similarly, a brand called 'Super Saver' connotes a different and 'stripped down' product and service level. A clear bundle of services offered within a branded product enables the customer to make the choices that better reflect their travel needs.⁵⁰

Most of A4A's members currently offer at least one branded fare.⁵¹ Many carriers also have branded fares that bundle other ancillary services together with seats with additional legroom.

V. REGULATION OF INTERMEDIARIES

A. Regulation that Enhances Intermediaries' Bargaining Power vis-à-vis Producers Can Cause Consumers' Prices to Increase due to Double Marginalization.

Double marginalization occurs when both producers and intermediaries possess market power. Firms with market power are able to set prices above marginal cost (i.e., they set a markup of price over marginal cost). If the output of one firm is an input for a second firm, and both firms are exercising market power, then the first firm will charge a markup over its cost and the second firm will charge a markup over its cost which includes the first firm's markup.

In the airline industry, the GDSs have substantial market power in the market for the distribution of airline tickets to travel agents.⁵² If GDS market power were enhanced by

⁵⁰ Ben Vinod and Kyle Moore, "Promoting branded fare families and ancillary services: Merchandising and its impacts on the travel value chain," *Journal of Revenue and Pricing Management* (2009) Vol. 8, at 178.

⁵¹ See Table 1 (attached).

⁵² See, e.g., 14 CFR Part 255 [Dockets Nos. OST-97-2881, OST-97-3014, OST-98-4775, and OST-99-5888] RIN 2105-AC65, Computer Reservation Systems (CRS) Regulations; Mark Smith and Brian Pearce, Value Chain Profitability, IATA Economics No. 04, IATA, June 06 ; Benjamin Edelman "Distribution at American

regulation, such as the Department’s proposed rule, they would be able to charge higher fees to airlines (or alternatively, thwart airlines’ attempts to extract lower fees or other considerations) and airlines would pass the cost of the GDS fees on to consumers in the form of higher airfares, harming consumer welfare and making the ticketing distribution system less efficient than it is now. The ability to determine when, to whom, and under what circumstances to distribute ancillary services fee information (and transactability) provides the airlines with leverage in their negotiations with the GDS. A4A members that have been able to negotiate the distribution of ancillary fees with a GDS report that they have received certain financial considerations in return.⁵³

One recent study, (Bilotkatch, Rupp and Pai, 2014, (“BRP”))⁵⁴ provides empirical evidence on the impact of GDS intermediation on pricing in the airline industry. In the first quarter of 2011, Expedia and Orbitz stopped displaying American Airlines’ fares as a result of a dispute. American’s access to other online and brick and mortar travel agents was further limited by Sabre’s decision to bias the display of American’s fares so that American’s fares appeared less prominently when travel agents and consumers searched for fares using Sabre’s system. BRP find that during the first quarter of 2011, on one-stop itineraries “American has significantly lower fares. The size of this effect is 2.7% to 4.7%. ... American saved on GDS

Airlines” Harvard Business School Case 909-035, January 2009. (Revised June 2009.); Stefano Vannini, “Bargaining and Two-Sided Markets: The Case of Global Distribution Systems (GDS) in Travelport’s Acquisition of Worldspan,” European Commission Competition Policy Newsletter, No. 2, 2008.

⁵³ The terms of these agreements remain confidential.

⁵⁴ Bilotkatch, Rupp and Pai, “Value of a Platform to a Seller: Case of American Airlines and Online Travel Agencies,” (August 6, 2013). Available at SSRN: <http://ssrn.com/abstract=2321767>.

and travel agency commissions (which range from 2% to 3% of the ticket price), if passengers booked tickets directly through American Airlines at AA.com.”⁵⁵

B. Transactability

If the Department were to impose a transactability requirement, two sets of costs would be imposed on airlines. Airlines that allow passengers to prepay checked baggage fees, carry-on baggage fees and purchase (all categories of) seat-assignment at the time of purchase would incur the costs of making their systems compatible with the GDSs and/or travel agencies. Other airlines, which do not currently allow customers to pay for these ancillary services at the time of ticketing, would also bear the cost of altering their business practices in order to allow for ancillary service transactability at the time of purchase.

For example, some airlines allow baggage fees to be paid in advance at the time of purchase, but many do not allow (“a la carte”) baggage fees to be paid at the time of ticketing. American Airlines does not allow passengers to pay for checked bags until check-in, and Delta allows passengers to pre-pay baggage fees, but only during the last 24 hours before the scheduled departure. These policies are driven by operational considerations. Allowing passengers to pay baggage fees well in advance of departure would require substantial investments in revenue recognition software and systems. Furthermore, many passengers do not know exactly how many bags they will check until after they pack. When passengers pay baggage fees in advance, it is inevitable that some passengers will arrive at the airport with fewer bags than they paid for, requiring time-consuming refunds. As noted, Southwest Airlines does not assign any seats,

⁵⁵ BRP at 15-6. Reduced access to travel agencies and one GDS has (at least) three effects on the fares an airline is able to charge: (1) it reduces demand from customers who use online travel agencies, decreasing fares; (2) the savings on travel agency and GDS commissions reduces costs, decreasing fares and (3) the impact of the reduced information of American Airlines fare information.

which gets passengers on board and seated more quickly and enable Southwest's quick turnaround times.⁵⁶

If the Department were to require that all ancillary services be made available for purchase through all channels at the time of ticketing, American, Delta and other airlines with similar baggage check strategies would be forced to change their business practices and incur significant associated costs.

VI. CONCLUSIONS

As the Department makes clear in its NPRM, it has proposed these regulations because it is of the "view that as carriers continue to unbundle services that used to be included in the price of air transportation, passengers need to be protected from hidden and deceptive fees and allowed to price shop for air transportation in an effective manner."⁵⁷ Most airline tickets are purchased by consumers who are well-aware of ancillary service fees. Provision 2 of EAPP-3 would create significant costs for carriers, and degrade the quality of the shopping experience for frequent fliers, and other well-informed consumers, who purchase the vast majority of airline tickets.

Shopping for air transportation is complicated and, all else equal, consumers would prefer that it be less so. However, including ancillary service fee information in the first screen of search results will not reduce the inherent complexity of the air transportation purchase process. Online travel agencies, airline websites and meta-search engines compete with one another to attract customers. The current market outcome in which online travel agencies, meta-search engines and airlines do not typically include baggage fee information in the first screen of search

⁵⁶ Paul Finney, "Loading an Airliner Is Rocket Science," *The New York Times*, November 14, 2006.

⁵⁷ NPRM at 29975.

results suggests that there is little demand in the marketplace for ancillary fee information to be included in the first screen of search results, Imposition of the new requirement would likely decrease the incentives to innovate with respect to new forms of ticket distribution, which could substantially increase costs in the long run.

A handwritten signature in black ink, reading "Daniel L. Rubinfeld". The signature is written in a cursive style with a large, prominent 'D' and 'R'.

Daniel L. Rubinfeld

Executed on September 29, 2014

Table 1: A4A Member Airline Main Cabin Standard Seat Branded Fares

Airline	Package	What You Get
Delta	Lift Package	(1) Priority boarding (2) Mileage booster: can add 1,000 more miles on your flight
	Ascend Package	(1) Priority boarding (2) Delta 24-hour Wi-Fi pass
American Airlines	Choice Essential	(1) One checked bag (2) Group 1 boarding (3) Earn AAdvantage miles
	Choice Plus	(1) One checked bag (2) Group 1 boarding (3) No change fee (any difference in fares will still apply; valid for American Airlines operated flights) (4) Same-day flight change (5) Same-day standby (6) Premium beverage on board (7) Earn 50% more AAdvantage miles
	Fully Flexible	(1) Priority access boarding (2) Same-day flight change (3) Same-day standby (4) Priority baggage delivery (5) Earn Aadvantage miles
Southwest	EarlyBird Check-In	(1) Automatic check-in before the traditional 24-hour check-in (2) Early assigned boarding position (3) Early access to overhead bin storage
	Business Select	(1) Priority boarding (2) Fly By: breeze through ticket counter and security checkpoint lines faster with Fly By lane access (in participating locations) (3) Premium drink: enjoy a premium drink onboard your flight with a coupon valid for use on day of travel (4) Extra rapid rewards points: double points per dollar
Jet Blue	Even More Speed	(1) Expedited security
United Airlines	Premier Access	(1) Designated airport check-in lines (2) Exclusive security lanes (3) Priority boarding (4) Among the first bags to be delivered

Sources: Airline websites for Delta, American Airlines, Southwest, Jet Blue, and United Airlines.

Appendix

Survey of Airlines for America Members' Ancillary Services Practices and Costs

Instructions

For all questions pertaining to costs please include the cost of any internal resources (in particular, the cost of employees' time). Note that cost data need not be precise; range estimates (e.g. \$1-\$2 million) will also provide useful data. All questions exclude business and first class.

Questions

1. For which ancillary services does your airline file data with ATPCO's Optional Services?
2. How much did it cost your airline to create and debug the programs and procedures necessary to file Optional Services data with ATPCO?
3. How much does it cost your airline each year to file ancillary services data with ATPCO's Optional Services?
4. How often do you update ancillary services data with ATPCO?
5. Do your airline's base fares include (at least) one carry on item? If not, what do you charge for the first carry on item?
6. Do your airline's base fares include seat assignment?
7. Please explain how and when a seat is assigned to a passenger who pays the base fare and does not make any additional payment for seat assignment (and does not receive seat assignment privileges due to frequent flier or affinity status)?
8. How are your airline's seat assignment fees set? Do they vary with: middle, window and aisle; row; legroom; length of flight; fare; number of available seats of that type on a given flight; or other factors?
9. How much did it cost your airline to meet the "Baggage and Other Fees and Related Code-Share Issues" requirements of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2)?
10. How much does it cost your airline each year to continue to meet the "Baggage and Other Fees and Related Code-Share Issues" requirements of the EAPP #2?

11. For which ancillary services does your airline:

- a. Provide data through one or more GDSs, what did it cost to implement and what does it cost per year to maintain the system, process and verify the ancillary services data?
- b. Allow transactions through one or more GDSs, what did it cost to implement and what does it cost per year to maintain, process and verify transactions?
- c. Provide data through direct connect with travel agencies, what did it cost to implement and what does it cost per year to maintain the system, process and verify data?
- d. Allow transactions through direct connect with travel agencies, what did it cost to implement and what does it cost per year to maintain system, process and verify transactions?

Part 3: A4A Non-GDS Comments on the
Proposed Rule; Transparency of Airline
Ancillary Fees and Other Consumer
Protection Issues

**BEFORE THE DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC**

-----X
In the matter of :
 :
TRANSPARENCY OF AIRLINE ANCILLARY : **Docket DOT-OST-2014-0056**
FEEES AND OTHER CONSUMER :
PROTECTION ISSUES; :
PROPOSED RULE :
-----X

COMMENTS OF AIRLINES FOR AMERICA

Communications with respect to this document should be sent to:

DAVID A. BERG
Senior Vice President & General Counsel
DOUGLAS K. MULLEN
Assistant General Counsel
Airlines for America
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-4000
dberg@airlines.org
dmullen@airlines.org

**BEFORE THE DEPARTMENT OF TRANSPORTATION
WASHINGTON, DC**

-----X
In the matter of :
 :
TRANSPARENCY OF AIRLINE ANCILLARY FEES AND OTHER CONSUMER PROTECTION ISSUES; : **Docket DOT-OST-2014-0056**
PROPOSED RULE :
 :
-----X

COMMENTS OF AIRLINES FOR AMERICA

Airlines for America (A4A) submits these comments in response to the Department of Transportation’s notice of proposed rulemaking (NPRM) on Transparency of Airline Ancillary Fees and Other Consumer Protection Issues.¹ 79 Fed. Reg. 29970 (May 23, 2014). This document (Part 3 of A4A’s comments) includes comments to the Department’s NPRM on all issues except for the proposal concerning Display of Ancillary Service Fees Through All Sales Channels (Ancillary Service Fees) and comments on the Initial Regulatory Impact Analysis (IRIA). We file separate comments on the Ancillary Service Fees issue (Part 1) supplemented by a report on the IRIA prepared by Professor Daniel Rubinfeld of Compass Lexecon (Part 2). Together, these three filings comprise A4A’s comments on the NPRM.

Introduction & Summary

The NPRM addresses nine listed topics but also asks over 70 questions that seek input on at least another six potential proposals. As noted, this document provides the Department with comments on all issues except for the Ancillary Service Fee proposal. In general, A4A supports proposals and alternatives that promote market solutions and promote innovation to achieve the Department’s goals, which we share, of transparency for consumers, enhanced competition (particularly between distribution channels) and, in general, enhance the customer experience. To this end we suggest flexible performance-based measures that identify desired outcomes but which allow carriers to develop and implement efficient solutions instead of highly prescriptive measures that seek to manage, in a manner harkening back to regulation by the Civil Aeronautics Board, how airlines serve their customers. We note that carriers have invested heavily to enhance the customer experience, particularly since returning to profitability, and to continuously making improvements in response to customer demands and a rapidly changing and competitive marketplace. Customers respond to these efforts by rewarding carriers that adopt practices and procedures that meet their expectations. In other words, customer service is driven by a robust marketplace, where carriers are free to compete by experimenting with

¹ A4A members are: Alaska Airlines, Inc.; American Airlines, Inc.; Atlas Air, Inc.; Delta Air Lines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Continental Holdings, Inc.; United Parcel Service Co., Inc. and US Airways; Air Canada is an associate member.

innovative enhancements. Imposing regulatory structures meant to benefit passengers, while well intentioned, may in fact undo and prevent the very innovation that will provide the service customers seek. In this document we describe where the NPRM interferes with carrier customer service efforts and ask the Department to drop or modify proposals that will produce more harm than good, or in terms of the Executive Orders, result in more cost to society than benefit. This will avoid the kinds of costly solutions carriers and others were forced to implement to meet the Department's Passenger Protection 2 Final Rule.²

More specifically, in this document we support proposals to (1) expand the definition of ticket agents to include meta-search engines, (2) expand the scope of carriers that must report information to the Bureau of Transportation Statistics, (3) impose customer service standards on ticket agents (4) enhance website disclosure of code-share services (5) require ticket agents to disclose the carriers whose tickets they market and sell and (6) clarify the Department's policy regarding post-purchase price increases. We suggest important alternatives and improvements to (1) reporting data for codeshare partners, (2) prohibiting undisclosed airfare display bias, and (3) addressing abuse of "mistake" airfares. We disagree with other proposals and preamble discussions where the Department articulates an expansive view of its statutory authority without additional congressional action, in some cases proposing regulations to govern private commercial arrangements. We disagree that the Department is authorized to impose tarmac delay penalties on a per-passenger basis and oppose that provision.

This is the third consumer initiative in six years, and we urge the Department to take note of the impact of prior regulations and ongoing market changes before imposing extraordinary new measures that more directly insert the Department into a vibrant, competitive and evolving marketplace. The Department should step back and understand that it is proposing to impose a regulatory regime that is far more intrusive than that imposed on any other sector of the economy. Instead of heavy-handed regulation, the Department should exercise restraint to avoid unraveling market-driven progress.

Comments on NPRM Proposals

- I. Clarifying the Definition of "Ticket Agent" [NPRM 29972 – 29974, proposed regulation 399.80(s)]**
 - a. The Department proposes to expand the definition of ticket agent to include entities that are compensated to provide fare, schedule and availability information to consumers. This expansion would require more entities, such as metasearch engines (and clarify application GDSs), to comply with the Department's codeshare disclosure, change of gauge disclosure requirements, as well as various existing and newly proposed ticket agent customer service commitments.

² See 76 Fed. Reg. 23110, 23148 ("Enhancing Airline Passenger Protections")(April 25, 2011).and the discussion of the bag fee disclosure rule (14 CFR 399.85) in the Rubinfeld Report p 16.

A4A Comment: Expanding the definition of ticket agent to entities that do not sell tickets to consumers but do receive compensation from a ticket seller for providing information to consumers is consistent with existing regulatory requirements and puts all intermediaries holding out information to the public on equal footing. Likewise, applying codeshare disclosure, change of gauge disclosure and ticket agent customer service commitments to such entities enhances transparency regardless of the method of distribution of fare and schedule information booking path. However, we do not agree that the Department's authority to regulate meta-search engines can be based solely on whether an entity receives compensation in connection with the arrangement of air transportation.³ The Department's authority is limited to preventing unfair and deceptive practices and should remain focused on that charge. The Department should not seek to expand its authority to cover a host of commercial entities that are affiliated with arranging air transportation and receive compensation but have no impact on the consumer experience.

- b. The Department also asks a series of questions in the preamble about whether it should regulate the commercial/contractual relationships between carriers and ticket agents. The Department asks if it should prohibit carriers from imposing restrictions on ticket agents that prevent ticket agents from including a carrier's schedules, fares, rules, or availability information in an integrated display. The Department also asks if it should require carriers to allow ticket agents to provide links to the Web sites of the entities listed in an integrated display, including non-carrier Web sites.⁴

A4A Comment: At the outset, we agree with and support the Department's proposal that permits carriers to prohibit screen scraping in section 256.5(b) because allowing screen scraping without carrier permission would unfairly constitute use of information from another party's website for financial gain without the carrier's permission.

Expanding the definition of ticket agents will help to fulfill the Department's goal of ensuring that all parties giving consumers flight/price information provide the same transparency as carriers and existing ticket agents. However, the Department should not adopt any regulations that interfere with commercial relationships and negotiated contractual terms between carriers and ticket agents, such as what entities are listed in an integrated display. That is a commercial matter between businesses that will be decided by the parties based on numerous factors. There is no factual support or policy rationale articulated in this docket for why the Department believes it needs to or should regulate commercial relationships between carriers and ticket agents. The only information provided is a vague statement that the Department has been informed about some of the commercial contractual terms between carriers and ticket agents. Such a general statement does not provide the necessary substantial evidence to support a regulation that would intrude on the commercial relationship between private parties. Further,

³ 79 Fed. Reg. 29973.

⁴ 79 Fed. Reg. 29974.

the Department provides no explanation as to what authority it would rely on to interfere with these contractual/commercial relationships. In addition, the IRIA assesses no related costs or benefits.

Regulating commercial terms and conditions between parties is beyond the scope of the Department's unfair and deceptive practice authority and interferes with the Congressional goal of deregulation to place "maximum reliance on competitive market forces and on actual and potential competition."⁵ There are many reasons why carriers and ticket agents negotiate commercial terms, not the least of which is that carriers compete with ticket agents to market to consumers. Consumers benefit from healthy competition among industry participants and the Department should not mandate who can gain access to commercial information and products. There is no unfair or deceptive practice, and placing restrictions on the marketplace will impair commercial negotiations and result in less competition and less choice for consumers.

Finally, the Department provides no specifics on how it might regulate in this area. Without a specific proposal to respond to, the public cannot effectively comment. If the Department insists on moving forward, it must do so in a supplemental notice to provide effective notice and receive informed comment from the public as required by the Administrative Procedure Act (APA).

II. Expanding the Definition of "Reporting Carrier" Under 14 CFR Part 234 [NPRM 29980 -29982; proposed regulations 234.2. 234.3]

- a. The Department proposes to expand the pool of reporting carriers from any carrier that accounts for at least 1% of domestic scheduled passenger revenue to any carrier that accounts for at least 0.5% of domestic scheduled passenger revenue.

A4A Comment: We support this proposal because it would increase the total amount of information available to the public.

- b. The Department asks whether the 0.5% standard of proposed regulation 234.2 is the appropriate standard for determining which carriers will be deemed 'reporting carriers', whether a different percentage threshold is appropriate, or whether the Department should simply require reporting by all carriers that provide domestic scheduled passenger service.

A4A Comment: It is our position that the Department should require reporting by all carriers providing domestic scheduled passenger service. Any airline that has the resources to obtain an operating certificate and to offer scheduled service (and which already submits Form 41 and Form T-100), should not find it overly burdensome to report to DOT basic information about its own operations. Reporting by all scheduled service airlines furthers the Department's objective

⁵ 49 U.S.C. 40101(a)(6).

of increased availability of information to consumers without a countervailing unacceptable regulatory burden on small carriers.

- c. The Department also seeks comment on whether the concept of “reportable flights” should be eliminated and the Department should rather simply mandate reports for all scheduled flights operating by reporting carriers to and from all U.S. airports.

A4A Comment: Currently, major carriers do not distinguish between “reportable” and “non-reportable flights” when submitting data to the Bureau of Transportation Statistics (BTS), so eliminating the concept of “reportable” flights would, in essence, revise the regulatory scheme to catch up to the reporting that is already taking place. Eliminating the concept of “reportable” flights and simply mandating that reporting carriers report on all of their flights furthers the Department’s general objective of increased consumer information.

III. Carriers to Report Data for Certain Flights Operated by Their Code-Share Partners [NPRM 29982-29984; proposed regulations 234.4, 234.6, and 250.10]

A4A Comments:⁶ The Department has articulated a general objective of providing consumers more service quality data regarding codeshare flights operated by the regional carrier partners of mainline U.S. airlines in the areas of on-time performance, baggage handling statistics, and denied boarding. More precisely, the NPRM states that the Department’s “primary regulatory interest is collecting and publishing data on code-share service operated by the regional-carrier partners of the larger U.S. airlines.”⁷ As a means of achieving this objective, the Department has proposed increased Airline Service Quality Performance Reporting (used in the Air Travel Consumer Report) for carriers in those three areas, namely proposed regulations 234.2-234.4, 234.6, and 250.10.

While we support the Department’s objective of providing consumers data about regional carrier code share operations, we think there are equally effective but less burdensome ways of achieving it than the proposed regulations.

Precisely because we support providing accurate information to consumers, we oppose the Department’s discrete proposal to amend 14 CFR 234.6 for reporting of baggage handling statistics to change from the way mishandled baggage is reported (that is, from the current basis of mishandled baggage reports per passenger enplanement to a new standard of mishandled bags per unit of checked bag). There is no discussion of this proposal in the preamble. There is also no mention in the IRIA of either the underlying proposal or of the Department’s consideration

⁶ Southwest Airlines does not join in the A4A comments on Section III. Southwest’s positions on proposed Sections 234.4 (Reporting of On-Time Performance) and 234.6 (Baggage-handling statistics) are set out in its own comments filed in this docket.

⁷ 79 Fed. Reg. 29983.

that it might extend this proposal to additional carriers and additional reporting. We previously explained our position in comments filed in 2011 in the Ancillary Airline Passenger Revenues Reporting NPRM (Revenue Reporting NPRM), Docket No. RITA 2011-0001. We opposed the new standard in the RITA docket, and still do because the existing standard provides accurate and more useful information for passengers.

Mandating a new reporting standard for baggage handling statistics is not necessary in order to accomplish the Department's information/transparency objectives. Indeed, the Department implicitly recognizes this by stating that including the proposed rule text from the revenue reporting NPRM in this NPRM is not indicative of whether the Department is going to adopt the new standard. If the Department has not decided this question, why raise it in this NPRM and raise the possibility of extending it to additional carriers? It only appears that the Department is attempting to short-circuit the notice and comment requirements of the APA. If any future change in bag reporting standards is made, the Department might then consider extending that standard to additional reporting carriers and possibly new reports, but it would have to justify such a proposal. It is inappropriate for the Department to introduce the possible extension of a still-pending rule into this rulemaking, and it is likewise improper for the IRIA to ignore the costs associated with that potentiality. For procedural as well as substantive reasons, the bag reporting proposal must be eliminated from the final rule.

We offer the following comments and alternative suggestions to the specific proposed reporting regulations 234.4, 234.6, and 250.10, and the Departments' related requests for comments.

a. Proposed Regulation 234.4

Proposed regulation 234.4, regarding reporting of on-time performance, raises concerns related to:

- Submission of duplicate data by different carriers;
- Difficulty for a reporting carrier to certify data provided to it by its codeshare partners;
- Difficulty by a reporting carrier in submitting data provided to it by its codeshare partner; and
- Difficulty, by both carriers and BTS, in processing the newly required data.

For these reasons, A4A proposes an alternative solution, discussed below.

Today, all major domestic carriers report detailed on-time flight information (by date/flight) to BTS for the flights they operate. Reporting carriers today are in a position to, and do, certify information in the report because the reports are only for flights they operate. The reporting/operating carriers today can and do work directly with BTS to make sure the data elements are quality checked and, if necessary, they provide additional or revised submissions to resolve any discrepancies. The reporting/operating carriers provide the information to BTS by the 15th of each month, and the process of quality checking with BTS and making revised or additional submissions may take a up to a week or ten days after the initial submission.

Mainline airlines codeshare with (1) regional partners that already report to BTS, (2) regional partners that do not currently report to BTS, and (3) and other major non-regional airlines that already report to BTS. Thus, for example, American Airlines codeshares with Skywest (a regional partner that already reports), Piedmont (a regional partner that does not currently report) and Alaska Airlines (a major airline that already reports).

Potential problems with proposed 234.4

Proposed regulation 234.4 (like proposed regulations 234.6 and 251.10) would require a reporting carrier to continue submitting reports under 234.4(a), but would also require that each reporting carrier submit a separate, second report that includes not only the information on its own operated flights, but also information on flights operated by other carriers under the reporting carrier's code. In essence, the second report would cover all the carrier's listed flights, whether operated by the reporting carrier or a codeshare partner. The first report (required today) would thus be a subset of the information in the second report.

The Department seeks comments on whether the second set of reports should only contain information related to codeshare operated flights but not flights operated by the reporting carrier, thus eliminating the overlap between the first and second set of reports – we address that question affirmatively below. Regardless of whether the second report overlaps with the first report, however, the complexities of the proposed reporting requirements raise a number of potential problems.

1. Duplicate data.

Today, detailed information on daily operations of individual flights is submitted to BTS by the operating carrier. BTS in turn summarizes the information in various tables (airport, time window, etc.) that appear in the ATCR.

Under the proposed regulation where both the operating carrier and marketing carrier (whose code appears on the flight) submit information on the same flight, BTS will receive duplicate data for some operations. Five codeshare flights, for example, would result in ten reports to BTS. BTS would have to carefully scrutinize the data to ensure there is no double counting of code-share flights and ensure on-time flight statistics are accurately reported in the ATCR, particularly when, as is common, carriers change codeshare partners. Such double reporting also could confuse the general public and anyone who subscribes to this data; it could easily mislead the press who report on these matters if not fully understood.

2. Burden and Complexity for both Carriers and BTS

If the proposal is adopted, reporting carriers will need to submit the data on the flights they operate (in Part 234 format) to BTS and to their codeshare partners. Each mainline carrier will then need to consolidate information on its own flights with the information provided by its

codeshare partners in order to submit the “second” report to BTS. The mainline carrier cannot certify the accuracy and quality of data it receives from its codeshare partner because codeshare partners do not have access to each other’s reporting systems. To the extent BTS may have questions regarding information on flights operated by a regional codeshare partner, the mainline carrier would not be able to respond, but instead would have to forward the question to its codeshare partner and wait for a response.

Assuming that operating carriers share their quality service information with their codeshare partners at the same time they report to BTS (i.e., both BTS and the mainline carrier receive the codeshare carrier data on the 15th of each month), the mainline carrier would need additional time to create the “second” report for BTS. Mainline carriers would need at least 15 days to verify, create, and submit a second report, resulting in a second report transmission to BTS on the 30th of each month at the earliest. The end result would be two monthly reports to BTS two weeks apart rather than one report on the 15th of each month. BTS would have less time to process more reports and data before publishing the ACTR the following month.

In the event an airline has a data submission error and must resubmit data to BTS, multiple carriers would need to recheck and resubmit data. For example, suppose Airline A is a regional carrier that codeshares with Airline B. Airline A submits data on the flights operated under Airline B’s code data to both DOT and Airline B on July 15th. Airline B incorporates that information in its “second” report to BTS on July 30.

If BTS requires Airline A to resubmit data on July 31st due to data quality issues, then Airline B must be notified, send the corrected data, and resubmit its “second report”. One error will result in both airlines submitting corrected second reports and BTS will then need to handle and process two rather than one resubmitted report. Thus, carriers may have to submit their operating data multiple times in a month, and resubmitting by one carrier will likely necessitate resubmitting by its codeshare partner. This multiple, duplicate resubmission process would be cumbersome for BTS and carriers, complex, increase opportunities for errors, and take many extra days or extra weeks. Errors, omissions and footnotes about changes in business relationships (mergers etc.) are already a regular feature of existing reports. These situations would, predictably, increase dramatically under the current proposal, increasing the complexity of the data and decreasing utility for many data users.

3. A4A’s Proposed Alternate Approach

A4A’s alternative provides a simpler and more efficient solution to DOT’s disclosure objective. Depending on what approach DOT takes to expanding the universe of reporting carriers, there will be fewer, or perhaps no, non-reporting regional codeshare carriers, and thus information on virtually all flights operated by regional carriers will be reported to BTS. Our alternative calls for mainline carriers to provide a monthly list that would contain just the operating carrier and flight numbers (not the full part 234 data) of codeshare flights operated by other carriers (in

addition to the existing regularly filed information submitted to BTS for the mainline carriers' flights). Alternatively, we believe that BTS has access to Official Airline Guide (OAG) reports and should be able to research this information independently. BTS would then couple the mainline carrier's monthly list of codeshare flights with the information submitted directly by the regional carrier to generate and publish the desired quality service information regarding the codeshare flights of the mainline carrier.

BTS also would need to receive separate files from each carrier that identifies the marketing carrier and marketing carrier flight numbers for the flights a reporting carrier operates for its codeshare partners. For example, a customer may buy a ticket for AA2750 (operated by Envoy/American Eagle). This flight is reported by MQ as MQ2750. If, when MQ reports the flight, it includes the information that it is marketed as AA2750, BTS can publish a report denoting the flight as an AA flight, operated by a codeshare partner rather than AA itself.

Even when a carrier partners with multiple code-share partners, the information can easily be managed. For example, Skywest (OO) operates regional flights for AA and separate regional flights for AS with distinct flight numbers. The table below is an example of how an operating carrier could provide the codeshare partner information to BTS.

Date	Operating Airline	Operating Flight Number	Marketing Carrier/Code Share Partner	Marketing Flight Number
8/15/2014	OO	2575	AA	2575
8/16/2014	MQ	2750	AA	2750
8/17/2014	AS	454	AA	7454

This approach would eliminate two carriers submitting duplicate information. Additionally, it would eliminate any resubmission/certification/question issues, because only one carrier would resubmit information to BTS. The result would be that BTS has the complete data set earlier in the month and would not have to scrub the data to account for duplicate reports. This alternative approach would provide more robust, timely, efficient and accurate information to the public relative to the proposed 234.4.

4. The Department also asks how it should regulate mainline codeshare partner reporting.

The Department should not require mainline-to-mainline codeshare reporting to BTS. It represents very little of overall traffic (roughly 2%). In mainline-to-mainline situations, the consumer typically is very aware that the operating carrier is different from the marketing carrier (and the brand of the operating carrier); if a consumer really is interested in the other mainline operating carrier's statistics he/she can review reports for that carrier.

This situation also holds true for the very small number of passengers denied boarding from this already-small passenger population. Consequently, reporting among mainline carriers is unlikely to change data and rankings in the ATRC; the data simply will be statistically insignificant. For

these reasons, the burden of collecting, sharing among partners, verifying and reporting data on both the operating and the marketing carrier would be disproportionately burdensome relative to any public benefit.

Additionally, the marketing carrier in the denied boarding context has no control over the inventory of the operating carrier if it does not have a purchase agreement with that carrier. These flights should be excluded from any additional or new reporting of on-time, denied boarding or mishandled bag data as they make up a very trivial share of the market and reporting would be exceptionally difficult due to lack of systems and data exchange. Moreover the data is unlikely to impact passenger behavior or decision-making since these flights in many cases operate in very small markets where there is no alternative air service.

b. Proposed Regulation 234.6

A portion of the Department's proposed amendments to section 234.6 are "tentatively based" on the proposed rule text from the revenue reporting NPRM. Additionally, the Department has proposed additional revisions to section 234.6 not offered in the revenue reporting NPRM.

Thus, the regulation as proposed in this NPRM is a combination of language from the original rule, language proposed in 2011 as part of the revenue reporting NPRM (underlined below) and language proposed for the first time in this NPRM (italics below):

§234.6 Baggage-handling statistics.

(a) Each reporting carrier shall report monthly to the Department on a domestic system basis, excluding charter flights, the total number of checked bags, including gate checked baggage, the total number of wheelchairs and scooters transported in the aircraft cargo compartment, the total number of mishandled checked bags, including gate checked baggage, and the number of mishandled wheelchairs and scooters that were carried in the cargo compartment. *Each reporting carrier shall submit a separate monthly report on the mishandled baggage, wheelchairs and scooters as described above for all domestic scheduled passenger flight segments that are held out with the reporting carrier's code on the reporting carrier's website, on the websites of major online travel agencies, or in other generally recognized sources of schedule information, including flights operated by code-share partners that are certificated air carriers or commuter air carriers. For flights operated by a code-share partner that also carry passengers ticketed under another carrier's code, the reporting carrier shall only report baggage information applicable to passengers ticketed under its own code.*

(b) This information shall be submitted to the Department within 15 days after the end of the month to which the information applies and must be submitted with the

transmittal letter accompanying the data for on-time performance in the form and manner set forth in accounting and reporting directives issued by the Director, Office of Airline Information.

We first offer our comments on those aspects of proposed regulation that were originally proposed in the revenue reporting NPRM, followed by comments on the new proposed “second report” requirements.

Proposed changes to 234.6 from the Revenue Reporting NPRM

The revenue reporting NPRM proposed two significant changes. First, changing the method of computing and reporting mishandled bags from mishandled bag reports per passenger enplanement to mishandled bag per checked bag; second, new requirements related to gate checked baggage, wheelchairs and scooters.

1. Proposed change to the mishandled baggage metric originally proposed in the revenue reporting NPRM

The Department should not adopt its proposed changes to the mishandled bag formula because doing so will provide less accurate information to passengers and cause airlines to incur unjustified costs to make system changes without a corresponding public benefit.

Most importantly, the proposed metric (mishandled bags/total bags) would not measure customer impact accurately - it would measure process completion and, in doing so, would drive incorrect and misleading conclusions about customer satisfaction. As an example, consider a passenger flying nonstop between New York and San Francisco who checks 3 bags. The airline mishandles one of the three bags and the passenger files a mishandled baggage report. Under the current metric, this situation is reported as one mishandled baggage report/one enplanement, a 100% "mishap rate" for that customer. Under the Department's proposal, this situation would be reported as one mishandled bag out of three total checked bags, a much lower mishap rate of 33.3% that in effect understates the impact on the customer. A customer who has experienced a mishandled bag is dissatisfied with the experience irrespective if one bag is mishandled or two bags are mishandled. The impact and experience of being an unsatisfied customer due to a baggage handling mishap is fully captured by the enplanement-based existing metric but not captured by the proposed bag based metric.

The Department's 2011 baggage metric proposal incorrectly assumed that it would be simple and relatively inexpensive (\$10,000 per carrier) for carriers to report origin and destination ("O&D") checked bag counts. This is not the case. Unlike the current metric, which is comprised of two easily obtainable, objective data inputs (the number of mishandled baggage reports and the number of domestic enplanements both of which carriers collect and report today and which leave minimal room for ambiguity), the proposed denominator (the total number of O&D checked bags) would be much more difficult (and costly) for airlines to produce. The proposed denominator would also be subject to more interpretation, error, and data gaps than the existing data elements, raising questions about the comparability of the data across carriers.

Some examples of the difficulties airlines would face in producing the proposed denominator include reporting of interline bags, bags accepted from another airline during irregular operations, and gate checked bags (especially for regional carriers that do not have a process in place to accurately and consistently record gate check bag count in a format that would enable it to be reported to BTS). Enplaned passengers are the denominator for current ATCR bag reporting as well as other elements of the ATCR for good reason, the “T” and the “C” are centered on consumers. It does not make sense to have other elements of the ATCR based on enplanements and bag reporting uniquely disassociated from enplanements. The current U.S. standard is also the international standard and carriers and alliances depend on this data to gauge their own performance and to hold business partners accountable for performance. Creating a new standard for U.S. airlines would have a substantial ripple effect across alliances and international airlines. Disrupting bag reporting data series by inventing a new denominator would generate less-usable data than today.

2. Gate checked baggage, wheelchair, and scooter reporting requirements originally proposed in the revenue reporting NPRM

In the original revenue reporting NPRM, the Department stated that it assumed the information necessary for carriers to report the total number of gate-checked bags and the number of wheelchairs and scooters carried in the cargo compartment, as well as the number of mishandlings for those three categories, was already gathered and maintained by the carriers. 41 Fed Reg. 41729. In our comments filed in the revenue report NPRM, in 2011, we noted that assumption was, in fact, incorrect. It still is. It is not an industry standard or common practice for carriers to track the number of gate-checked bags they carry or the number of wheelchairs and scooters they carry in the cargo compartment, much less track the number of mishandlings in those categories. Carriers would have to create new systems to track and then report the information. Against those costs is the Department’s view, stated in 2011, that there is a “crucial” need for carrier specific information related to wheelchairs and scooters. And the passage of three years has not borne out the Department’s view that such information is “crucial” for the traveling public.

Further, we question the Department’s bias toward requiring carriers to submit and disclose data of ever increasing granularity, all based on the assumptions (not empirical evidence) that there is a need for such information, that consumers will in fact access (and rely on) such information in making purchasing decisions, and that each incremental level of additional detail provided to consumers is, in fact, more valuable than the cost of producing this data.⁸

The Department itself has acknowledged that consumers generally don’t directly consult or rely on BTS data. Instead, to the extent consumers become aware of such information they do so by reading news stories about BTS reports or the ATCR, which necessarily are high level – not

⁸ See the discussion of information overload at p 26 in the Rubinfeld Report.

detailed.⁹ Consequently, the Department cannot reasonably conclude that the costs of ever increasing disclosure, granular, and detailed information is useful to consumers, and that the benefits of such expanded reporting outweigh the costs.

3. Comments on New Proposal - Data Timing and Quality Will be Degraded, Harming Consumers

The Department rightly places high importance on data accuracy and completeness. Ensuring that each operating carrier reports its own data is the best way for the Department, and ultimately the public, to receive quality, timely data. Requiring a mainline carrier to report on behalf of its codeshare partner's means that carriers will not be able to produce additional reports (on-time, baggage and denied boarding) that aggregate data from different codeshare partners as quickly as they produce current reporting.

Adding new reporting carriers and aggregating reporting of codeshare partners would require significant additional internal work for all carriers every month, including carriers that currently report. One major carrier assesses that the additional data collection and verification (to the extent feasible) needed to produce the proposed additional report including codeshare partners, (whether or not that pool includes smaller carriers that do not currently report) would require an additional 15 to 30 calendar days beyond current reporting times. The current schedule of reporting 15 days after the close of the month is already very challenging for many reporting carriers, even with more employee time and IT systems for carriers to receive and verify (if feasible) and perform the needed quality control on data received from other airlines to produce aggregated reports within 15 days of the close of the reporting period. In addition if a mainline carrier were required to report data for its partner(s) the mainline carrier would ordinarily not be able to certify that data.

4. The Department Also Asks a Series of Questions About the Costs and Benefits of Expanding the Pool of Reporting Carriers and Increased Codeshare Reporting

The IRIA is deficient in many respects, including its analysis of provisions expanding the pool of reporting carriers (proposal three) and increasing codeshare reporting (proposal four). Among other things, the IRIA relies largely on data from 2010 or 2011. In a rapidly evolving industry it is not representative or acceptable to base analysis for ten years starting in 2015, or likely later given the time carriers would need in order to comply, when baseline data is already half a decade old, or more.

One set of costs to the public is data discontinuity. Data becomes meaningless as carriers enter and end partnerships and operating carrier partners enter and exit markets. It is frequently the market rather than the operating partner that drives on-time performance data. Oversales data on

⁹ See Summary of August 7, 2014 DOT Meeting with A4A, response to Question 13, page 5, found at DOT-OST-2014-0056-0624.

a per-partner basis provide neither the Department nor the public with meaningful information; oversale quantities are very small to begin with.

Among other errors and omissions in the IRIA, under Proposal Four carriers that currently report and have codeshare partners would incur significant new costs to receive and verify (to the extent possible) data from codeshare partners and perhaps also from newly-reporting carriers as proposed in 234.2. The IRIA's cost estimates for this proposal would roughly double based on the costs of 234.2 to reporting carriers alone (costs the IRIA explicitly ignores, see IRIA at 58-59). For a carrier that currently reports, Proposals Three and Four would require the mainline carrier to report on behalf of its domestic partners. Proposals three and four would cause mainline carriers to incur costs both to produce new data and to feed that data into internal systems and to quality check information. The skilled-labor intense, unavoidably manual process of reviewing data quality guarantees high ongoing costs for Proposal Four far above the IRIA's estimates. In addition, development and IT costs associated with each change of codeshare partner would add additional costs the IRIA overlooks. There are very significant costs to IT systems and data verification for carriers that would accept quality service data from codeshare partners. The majority of these costs would arise from any expansion in mishandled bag reporting. DOT's IRIA shows a *negative* \$30 million "benefit" from this proposal already. This figure attributes only \$2.7 million in costs to codeshare partners. We estimate the true costs for all carriers would roughly double to \$60 million the IRIA's \$30 million cost estimate.

Against these higher costs, DOT claims benefits that, at best, are ephemeral: improved handling of baggage for newly reporting carriers and code-share flights for all reporting carriers, "decrease in oversales," "improved customer good will towards carriers," "insurance value" (explained as the benefits to consumers to know more for the future) and "improved public oversight of the industry" (IRIA at 69). At bottom, these factors are highly speculative and cannot reasonably be considered as regulatory benefits.

As a starting point, mishandled bags are at or near a historic low, and knowledgeable passengers do not consider oversale statistics in making purchasing decisions given the infrequency with which passengers are bumped involuntarily. Moreover, none of these claimed benefits suggests an existing unfair and deceptive practice. Each appears well outside the scope of the Department's authority as a basis for regulation. Each carrier will have responsibility for reporting its own data and for verifying that data and data sets should be cleaner.

As noted above, the NPRM acknowledges that "the Department is mindful that on-time performance data in the ATCR may have a limited influence on a consumer's purchase decision regarding a particular flight, because that consumer is more likely to refer to that specific flight's on-time performance record, which under 14 CFR 234.11 must be provided on a marketing carrier's Web site, regardless of whether it is operated by a code-share partner."¹⁰ Having

¹⁰ 79 Fed. Reg. 29983.

admitted the minimal to zero value in affecting (much less improving) consumer purchase decisions, the NPRM defends proposed costly additional reporting burdens on carriers by citing benefits of brand loyalty, employee recruiting and element of negotiations with airports. No data supports any of these claimed uses of this costly data expansion, and in any case the speculative improvements in these areas are far afield of the Department's authority.

5. Implementation Period

The six months the NPRM envisions to implement the proposed changes in Proposal Four is a fraction of the time needed. We remind the Department that it took carriers and vendors over 15 months to implement the baggage rules in the last passenger protection rulemaking. Some of that time was spent estimating work flows, costs, and progress to support extension requests while at the same time attempting to comply with the regulation including waiting for ATPCO to develop a solution that carriers could use. We urge the Department to provide enough time to implement this change up front, without the need to repeatedly submit requests for extension.

If each carrier reports for itself, six months may be adequate for on-time and denied boarding reporting. Bag reporting, even using existing metrics, will take 24-36 months given the new systems, processes and training that would be required for any expansion in bag reporting.

IV. Minimum Customer Service Standards for (Large) Ticket Agents. [NPRM 29984 – 29986, proposed regulation 399.80]

- a. The Department seeks to impose five new customer service commitments on large ticket agents, these include: (1) a 24 hour reservation hold or refund without penalty if booked at least one week in advance of departure (24 hour hold); (2) disclose on ticket agent websites ticket cancellation policy, aircraft seating configuration, and lavatory availability on the aircraft and make these disclosures by telephone if the passenger requests; (3) timely passenger notification for changes to the their travel itinerary; (4) acknowledging receipt of a consumer complaint within 30 days and providing a substantive response to consumer complaints within 60 days, complaints to airlines must be forwarded to the airline, and (5) prompt refunds (i.e., 7 days for credit and 20 days for cash).

A4A Comment: We generally support the Department imposing these customer service requirements on ticket agents because passengers already receive these services from airlines and adopting these requirements will provide a consistent passenger experience. However, the Department should modify the 24 hour hold/refund requirement because a new refund requirement on agents threatens competitive harm and carrier direct costs of (a) business loss and (b) IT and systems development if made final as drafted. A few simple text changes would

preserve consumer benefits and avoid this unintended consequence of interference in the market and in the carrier-agent relationship. Carriers have already invested in specific paths to meet current risk-free refund or hold requirements for passengers who purchase directly from carrier. We recommend that ticket agents follow the same 24-hour refund or hold requirements of the airline for which it is selling tickets. Any different outcome would cause considerable confusion for the public. To ensure that passengers benefit from the most direct, timely information on the day of travel, we suggest that agents not be responsible for obligation three (timely notifications) on the day of departure. On the day of departure the airline commonly has traveler contact information and the most up-to-date travel information and the passenger has multiple means of accessing status information. Furthermore, this regulation must not require carriers to offer to or through agents a 24 hour refund path that would offer different or more favorable terms for agency sales, even if indirectly, as that would distort the distribution market. In particular, any regulation that would require carriers to hold space without payment for 24-hours for sales through agencies could have a substantial effect on inventory availability with very negative consequences for consumers (loss of availability, higher prices) and direct costs to carriers and to passengers.

In addition, the Department should clarify that the 24 hour hold/refund provision does not apply to travel packages that include air transportation reservations because unlike airlines, other providers of package arrangements are not required to hold reservations without penalty. Carriers and ticket agents will incur unreimbursed penalties from third parties if a passenger cancels a package that includes air transportation.

- b. In the preamble, the Department asks a series of questions regarding how ticket agent and carrier customer service requirements should be communicated to customers over the phone, during an online ticket booking process, or on ticket agent websites in general.

A4A Comment: Carriers currently provide ample notice of 24 hour hold/refund options (and ticket agents likely will do the same), so there is no need or justification in the docket for requiring additional disclosures such as orally by a reservation agent or during the booking process when the customer does not seek such information. DOT's regulations should be outcome-based, focusing on what needs to be accomplished, rather than on how parties should accomplish the objective. In particular, time with a reservation agent and space on a website during the booking process are extremely limited and costly resources. Carriers provide efficient booking services to passengers who do not want and do not care to be distracted by information not relevant to them. Presenting this information in a specific place, time or way required by regulation will only serve to crowd out other information the passenger is seeking or inquiring about, degrading customer service efficiency and experience. It will also inhibit the marketplace from developing efficient solutions and evolving. Requiring information next to each flight in a

flight search result list (as the Department asks in preamble questions)¹¹ is especially troubling because this information is already available elsewhere and in essence would regulate online shopping functions without justification. These requirements would diminish carrier use of the latest technology for mobile websites or apps, which are extremely popular with passengers. If ticket cancellation is of interest to passengers, they have every incentive to find out the carrier policy and carrier websites already provide this information. Likewise, ticket agent links to carrier policies for cancellation, seating, etc. exist today and provide passengers the most up to date information they need; direct information to the carrier website avoids another link in the chain of information to passengers that could degrade information, by either not updating or presenting in a way that confuses the passenger.

V. Codifying 49 U.S.C. 41712(c) Regarding Website Disclosure of Code-Share Service and Other Amendments to 14 CFR Part 257. [NPRM 29986 – 29988, proposed regulation part 257]

- a. The Department proposes changes to carrier code-share disclosure regulations to implement statutory changes in the Airline Safety and Federal Aviation Administration Extension Act of 2010. This proposal would require codeshare disclosure on the first display presented in response to a flight search request, the disclosure to be easily visible to the viewer and it would apply to mobile applications.

A4A Comment: We do not object to these codeshare disclosure proposals; A4A members already comply with them. However, we note that the Department seeks to apply this proposal to mobile website applications, which is not expressly addressed in the statute. We urge the Department to take a flexible approach regarding application of this proposal and all others to new technologies like mobile applications. Before mandating prescriptive requirements, we ask the Department instead to adopt performance standards that allow industry to meet new requirements efficiently in response to market demand, while preserving the ability of customers to use the latest technology, providing the information that customers seek. We recommend the Department prioritize all of the new disclosure requirements before adopting a final rule and consider how these disclosures will fit with one another and in different ticketing platforms, particularly in view of overlapping regulatory requirements regarding website and kiosk accessibility. Mandating minimum text size and requiring codeshare disclosures immediately adjacent to the entire itinerary on the first flight search result page will degrade passenger search options unnecessarily with no corresponding benefit.¹²

VI. Disclosure of the Carriers Marketed (Applies to Large Travel Agents Only – NPRM 29988 – 29989, no regulation text).

¹¹ 79 Fed. Reg. 29985.

¹² See Rubinfeld report p 19.

- a. The Department asks whether it should require large ticket agents to maintain and display lists of carriers whose tickets they market and sell; and if required how to disclose the carriers that are marketed and sold by the ticket agent.

A4A Comment: We do not object to the Department requiring ticket agents to maintain and display a list of carriers whose tickets they market and sell, nor do we object to a general disclosure that the ticket agent does not sell tickets for all carriers. We do object, however, to requiring a ticket agent to specifically list all the carriers whose tickets the ticket agent does not sell because that would inappropriately highlight (advertise) nonparticipating carriers who have chosen not to distribute through an outlet or channel. The Department should not intervene in carrier advertising and marketing decisions and only require disclosure of participating carriers.

VII. Prohibition on Undisclosed Airfare Display Bias by Ticket Agents and Carriers [NPRM 29989 – 29990, proposed regulation Part 256]

- a. The Department proposes to prohibit “biased” ticket agent and carrier web displays that include the schedules, fares, rules, or availability of more than one carrier and is marketed to U.S. consumers or a proprietary display available to travel agents, business entities, or a limited segment of U.S. consumers. The regulation would apply to direct connections between ticket agent and internal carrier systems if the direct connection provides schedules, fares, rules, or availability of more than one carrier. “Electronic Airline Information Systems” (EAIS) that use any factors relating to carrier identity to order information must disclose that carrier identity is used to order information in the display. An EAIS must disclose any system-imposed preference used to list carrier flights. An EAIS may organize information on the basis of any service criteria as long as the criteria are applied consistently to all carriers, and to all markets. The EAIS must display the lowest fare available that best satisfies the flight search request (date and time of travel, nonstop, number of passengers, etc) unless some other display bias used to order the information is specifically and prominently disclosed.

A4A Comments: We support the Department’s effort to provide transparency for the public and prevent display bias. We agree with and support the Department’s proposal that permits carriers to prohibit screen scraping in section 256.5(b) because it constitutes use of information from another party's website for financial gain without the carrier’s permission.

However, we question why this regulation applies to carriers as well as ticket agents if, as the Department states, the identified problem in the past was computer reservation systems and the problem today concerns certain ticket agents and GDSs. We note that the Department stated in the Computer Reservations System (CRS) final rule that “[c]onsumers assume that an airline website will favor the airline’s own services and not present an impartial display of all airline services. Any airline offering a website will seek to promote its own services and those of any

allied airlines.” Computer Reservations System (CRS) Regulations, Final Rule, 69 Fed. Reg. 976, 1020 (Jan. 7, 2004). Given the Department’s past recognition of carrier preferences on its own website, what has changed to apply this section to carrier websites? Has the Department received any complaints regarding bias of carrier websites? If not, what benefits would this regulation drive by covering carriers? How can the Department justify the application of this proposal to carriers on a cost/benefit basis if no benefit will result? As a consumer protection matter, no reasonable consumer would believe that a carrier would not give preference to its own flights in its own website displays.

Therefore, there is no benefit in covering carrier websites.. The NPRM and IRIA do not identify any harms or justification for regulation in these areas and the Final Rule should make this exclusions clear.

VIII. Prohibition on Post-Purchase Price Increases for Baggage Fees [NPRM 29990 – 29991, proposed regulation 399.88]

- a. The Department confirmed its existing policy that carriers can only charge the bag fees in existence at the time the passenger purchases air transportation. It also clarified that all other optional services not purchased with a ticket can be raised until the time of travel.

A4A Comment: We generally support the notion that optional service pricing should be driven by market forces and not government policy. We support the clarification that, for all optional service fees other than bag fees, carriers are permitted to modify the price of those services and products not purchased with a reservation. It would be extremely burdensome and costly for carriers to be required to charge passengers for these services and products based on when they purchased their ticket and it is economically important for carriers to retain control of pricing services.

In addition, the Department should clarify that if a passenger is eligible for reduced or free bag allowance at the time of purchasing a ticket (and does not choose to check a bag at ticketing) and the eligibility is lost (e.g. terminates a credit card, no longer meets frequent flyer status, etc.) before departure, the carrier is free to charge the passenger for checking a bag since the status is no longer valid.

IX. Revising the post-purchase price provision to better address the issue of the possible abuse of mistaken fares [NPRM 29991, no proposed regulation text]

The Department is considering revising guidance on post purchase price increases (14 C.F.R. 399.88) it previously issued in regards to the Passenger Protection 2 final rule concerning “mistaken fares.”¹³ The Department has rightly become concerned that some consumers are

¹³ 79 Fed. Reg. 29991.

increasingly and intentionally purchasing mistaken fares posted on frequent-flyer community blogs and travel-deal sites and seeks comment on how best to address this problem.

We urge the Department to adopt a policy similar to what the Canadian Transport Agency established in two opinions issued this year; that is, there is no meeting of the minds and no contract when a passenger purchases a mistaken or erroneous fare.¹⁴ We recommend a flexible approach that allows carriers to refund the amount paid for a mistaken fare, permit passengers to pay the difference between the mistaken fare and intended fare, or other options that a passenger may agree to.

Following the CTA decisions is in the best interest of passengers for several reasons. First, mistaken fares result in some consumers grabbing available seats on flights thereby reducing seat availability and resulting in fewer travel options for passengers acting in good faith. Second, our experience is that honoring mistaken fares will encourage bad actors to broadly promote mistaken fares, further reducing available seats. Third, honoring mistaken fares will force carriers to raise prices to account for the massive lost revenues that result from inventory mistakenly sold at a fraction of the intended fare. In addition, mistaken fares can be distinguished from post purchase price increases because the mistaken fare price was not intentional, post purchase increase prohibitions should apply when there is a valid contract and meeting of the minds between the passenger and carrier.

If the Department decides that purchasing mistaken fares somehow forms a valid contract, which they do not, the Department should not object to carriers protecting themselves in contracts of carriage. Other modes of transportation and other industries deal with mistaken prices/fares in contracts and airlines should be treated no differently. For instance, Thrifty car rental mistakenly offered a free one-day rental car to certain members of the public and ultimately did not honor the deal for those mistakenly receiving it.¹⁵ Expedia posted incorrect hotel prices in Japan that were not honored.¹⁶ Holland America offered cruise prices that were substantially lower than intended and the cruise line required passengers to pay the intended price or get a refund.¹⁷

We note that existing contracts for online products and services expressly limit the service provider liability for faulty online pricing. For example, Amazon's "Condition of Use" states:

With respect to items sold by Amazon, we cannot confirm the price of an item until you order. Despite our best efforts, a small number of the items in our

¹⁴ See CTA Decision No. 177-C-A-2014, May 9, 2014, page 7, paragraph 48, found at <https://www.otc-cta.gc.ca/eng/ruling/177-c-a-2014>; see also CTA Decision No. 202-C-A-2014, May 27, 2014, page 7, paragraph 50, found at <https://www.otc-cta.gc.ca/eng/ruling/202-c-a-2014>.

¹⁵ <http://bigstory.ap.org/article/thrifty-says-offer-free-rental-car-was-mistake>

¹⁶ http://usatoday30.usatoday.com/travel/news/2005-11-14-expedia-error_x.htm

¹⁷ http://usatoday30.usatoday.com/travel/destinations/2006-11-16-cruise-pricing_x.htm?csp=28

catalog may be mispriced. If the correct price of an item sold by Amazon is higher than our stated price, we will, at our discretion, either contact you for instructions before shipping or cancel your order and notify you of such cancellation. Other merchants may follow different policies in the event of a mispriced item.¹⁸

Amtrak's Terms of Transportation takes a similar stance:

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, the purchaser's option, to reissue the ticket for the correct fare.¹⁹

The Federal Trade Commission has also publicly stated that no federal statute requires merchants to honor mistaken pricing, unless it is misleading or deceptive.²⁰ In sum, the nature of online pricing for any industry requires that merchants protect themselves from rare but costly mistakes. The CTA has recognized and smartly responded to such challenges, as should the Department.

X. Ancillary Fee Disclosure Requirements Under Sections 399.85(a) and (b) [NPRM 29991, proposed regulation 399.85]

- a. The Department proposes to amend notice requirements for ancillary fees clarifying the scope of this regulation (websites marketing to U.S. consumers) as well as changing notice requirements to be consistent with the proposal on sharing ancillary fees (399.90). The current rule requires disclosure that bag fees may apply and where passengers can find bag fees on the first screen in which the agent or carrier offers a fare quote for a specific itinerary selected by a consumer. The proposal would require carriers and ticket agents to provide 1st and 2nd checked bag, carry-on bag, and advance seat assignment (so-called "basic" ancillary services) fee information if the passenger requests it.²¹ A carrier or ticket agent must provide information at the first point in a search process where a fare is listed in response to a specific flight itinerary request from a passenger. Data must be disclosed at that first point in a search

¹⁸ <http://www.amazon.com/gp/help/customer/display.html/181-1155137-6349653?ie=UTF8&nodeId=508088>

¹⁹ <http://www.amtrak.com/servlet/ContentServer?c=Page&pagename=am%2FLayout&cid=1241337896134>

²⁰ <http://online.wsj.com/articles/SB10001424052748704266504575141644282587882>

²¹ See proposed section 399.85(b).

process and may be displayed through a link or rollover to the fees for “basic” ancillary services. The same information is required on the summary page provided to the consumer at the completion of any purchase.

A4A Comment:²² We note there are actual and potential conflicts between section 399.85(b) and section 399.90(e) if both are adopted as proposed. Section 399.85(b) requires disclosure of the four covered ancillary fees if a passenger requests it (presumably by telephone), section 399.90(e) requires automatic disclosure of the four fees unless the customer opts out of this information. Section 399.85(b) allows website disclosure by a roll over or link to fees (which may imply disclosure to carrier webpages that statically display all ancillary fees), section 399.90 does not mention a method of disclosure. As noted in our separately filed comments on section 399.90, we object to DOT adopting section 399.90 option A or option B; however, if the Department decides to adopt one of the options, we urge the Department adopt disclosure requirements in section 399.85(b) with some modifications. We recommend the Department make the following changes:

Carriers should not be required to provide customer specific fees on or via the first search screen because if customer specific fee notice is required, it should be required later in the booking process, when the carrier has all necessary passenger information to provide accurate fees for ancillary services.

To provide passengers specific baggage and seat fee information earlier, significant personal information would have to be obtained at the beginning of the flight search process. The NPRM does not propose and no rule should require or encourage collection of this passenger data at the beginning of a search process. At a minimum this would include frequent flier and credit card numbers. The associated privacy and related disclosure issues would be serious, and the days of anonymous shopping by consumers, something of great importance to consumer advocates and DOT, would come to an end. Even ignoring the value of anonymous shopping, any rule that explicitly or implicitly would require more information about the traveler’s identity early in the search process would require the customer to spend far more time searching for flights, which is the opposite of the intention of this proposal, as well as requiring a total reworking of flight booking paths, destroying the enormous investment carriers have made to create the current efficient booking paths.

Proposed 399.85 would require carriers and agents to display ancillary pricing information at a very precise point and in a specific way. Such prescriptive language will harm consumers by forcing carriers and agents to push incorrect (generic, not customized) or unwanted information to consumers at a point too early in the booking process and it will substantially slow search results. We estimate a delayed search of twenty to forty seconds for all searches, impacting over an estimated billion annual searches, requiring shoppers to spend more time shopping and

²² Southwest Airlines does not join in the A4A comments on Section X. Southwest’s position on the disclosure of basic ancillary fees is set out in its own comments filed in this docket.

booking as they review redundant or conflicting information about pricing of ancillaries. It will also reduce the number of potential flight options available on a screen, thus causing longer search times overall. Please see the potential costs of increased search time more fully discussed in Dan Rubinfeld's review of the IRIA.²³ These concerns are additive to and apart from our and others objections to proposed 399.90 and center on the where and how proposed 399.85 would have carriers and agents display ancillary pricing information. As noted above, the Department's rules should focus on outcomes, not procedures, particularly where, as here, the agency seeks to alter market-driven solutions.

In short, if the Department believes that it must further regulate the display of pricing for optional services, it will elect on behalf of hundreds of millions of annual airfare shoppers to either: require airlines and possibly agents to display potentially incorrect or unwanted pricing information about ancillaries early in the booking process, creating screen clutter and slowing search results and shopping (as would be the case under 399.85 as proposed); or preserve the benefits of full disclosure prior to purchase by allowing display of ancillary pricing at a point useful to the passenger and at which point the carrier can provide accurate information, and in every case before purchase.

By declining to require ancillary services pricing "at the first point in a search process where the fare is listed," DOT would ensure that the airline or agent makes available, and that customers can consider before purchasing, all needed information about bag and seat assignment fees efficiently and logically.²⁴

In no case should regulation such as that proposed in 399.85 require carriers to provide customer-specific fees during the search process before the traveler's biographic data is entered in the ordinary course of the transaction. Requiring carriers to provide more specific data on ancillaries before a shopper tentatively selects a flight to consider and enters his/her identity and/or the identity of other travelers will force airlines to return information that likely is incorrect in a majority of instances, including overstating prices.

For these reasons, it is simply not possible to return correct information about ancillary pricing at the first point in a search process where the fare is listed for the reasons above. This is particularly the case for pricing information for searches involving multiple parties (who may each have different loyalty, credit card, fare class or other status with the carrier that warrants waivers or discounts on ancillary service fees); for searches involving multiple carriers; for complex itineraries etc.

As a practical matter, the first search screen has limited space. Including the large amount of information proposed in 399.85(b) on the first display would mean that the first search screen

²³ See Rubinfeld report at p 21.

²⁴ See Rubinfeld report at p 26.

would return fewer results to the consumer due to space constraints. Even information displayed as a roll-over or pop-up takes up space. Forcing additional information to that first search screen will harm the consumer by causing information overload and extending the time needed to search for flights that meet the customer's criteria. The NPRM and IRIA do not consider these costs in reduced functionality and fewer search results for the information the public really wants; fare and schedule information. Nor do they quantify the consumer time lost in reviewing information that most consumers do not seek or want and the longer time shoppers will have to wait for fare and schedules to be returned due to burdens on systems to return more data.

Technical and commercial developments in customer-friendly display of information about the availability, quality and price of ancillary products are rapid. Carriers continue to make investments in informing their customers and shoppers about everything they might want to know about their services – and that the information is available when customers tell us they want to receive it. Any regulation to create a single requirement about what, where, when and how to display this information will waste investment in these innovations and foreclose options that respond to consumer demand and preferences and are thus better for consumers.

Passengers need only be given the option to opt in to displaying ancillary fee information, which avoids presenting information that passengers may not care about. To the extent that the Department believes that it is important for shoppers to access ancillary data from the first page, carriers and ticket agents should be allowed to provide a rollover or link option on the first fare/itinerary page to static carrier ancillary fee webpages, which provides adequate notice to consumers and is consistent with notice requirements and standards applicable to other industries and sectors of the economy. As discussed above, the Department's focus should be on what notice should be provided, not how and where it is provided – that is the function of the market.

Specifically with regards to proposed requirements about the display of fees “on the summary page provided to the consumer at the completion of any purchase,” the Department should only include seat assignment fees in this section if the seat assignment was purchased with the ticket. Otherwise, seat assignment fees should be excluded from these notice requirements because (1) seat assignment fees can change after the date of ticket purchase so including them on the summary page will be providing potentially misleading and clearly unreliable information, (2) the carrier needs to know what precise seat assignment a passenger is interested in to provide a price (3) seat assignments are generally offered on a per segment basis, further complicating application here, and (4) there are many options for seat assignments (in some cases a dozen different options) and choices/cost will depend on seat availability, which constantly changes.

It is imperative that any regulation regarding seat assignment fees be narrowly tailored to the purported problem the NPRM identifies and should therefore be limited to the fee for a generic advanced seat assignment. The Final Rule must not inadvertently make subject to regulation premium seats and sections like first and business classes, or a carrier's differentiated premium economy sections – which are set apart by seat pitch, loyalty program accrual and other

characteristics. Moreover, DOT has presented no evidence, anecdotal or otherwise, that premium class/section seating charges should be covered by the rule.

Finally, we agree with the Department's decision to only apply these notice requirements to "websites" and not apply these notice requirements to mobile applications because doing so will reduce the amount of information a passenger receives in response to a request, because certain functionality is not available on mobile Apps, and requiring more data will degrade efficacy of such applications. Applying the proposed rule to personal devices such as smart phones and related applications would create an impossible compliance hurdle.

While we provide an overall cost/benefit assessment of this proposal elsewhere, we note the following impacts: costs accrue to consumers in loss of a wider range of flight options reported on the first search screen; the additional time of 20 to 40 seconds for systems to return search results due to the substantially larger and potentially more complex amount of data that would be required to be displayed or available with those results; and the time for the person shopping to review cost information they did not seek and may not want. The problem of greatly increased wait time for search results would not be cured by relying on links or rollovers; systems need time to create and populate those means of accessing information and shoppers of course would need additional time in the booking path. Losses to carriers are in terms of squandered investment in current booking paths and displays, investment in seat quality and characteristics that are impossible to convey in the manner DOT envisions, loss of consumer welfare through elimination of variable pricing for seats, and loss of ability to accurately quote seat prices.²⁵

²⁵ The NPRM and RIA fail to meet Executive Order 12866 and Executive Order 13563 requirements in several respects; First, the NPRM and RIA fail to capture accurate costs and benefits of all proposals and therefore prevent the Department from adopting a final rule "upon a reasoned determination that the benefits of the intended regulation justify its costs." E.O. 12866 at § 1(b)(6), E.O. 13563 at § 1(b)(1). Second, the NPRM and RIA fail to identify a "compelling need" for regulating E.O. 12866 at § 1(a). Third, the NPRM and RIA fail to design the regulations "in the most cost-effective manner" E.O. 12866 at § 1(b)(5). Fourth, the NPRM and RIA fail to take into account the cost of cumulative regulations. E.O. 13563 at § 1(b)(2).

XI. Civil Penalty for Tarmac Delay Violations [NPRM 29992, proposed regulation 259.4]

- a. The Department proposes to amend the tarmac delay rule to clarify that the Department may impose penalties for tarmac delay violations up to \$27,500 on a per passenger basis.²⁶

A4A Comments: Congress did not grant the Department the power to impose a civil penalty of \$27,500 per passenger for each flight that violates the tarmac delay rule. The Department's claim to this power is not based on the text of the statute and defies logic. If Congress had intended to confer such extensive power on the Department it would have said so explicitly, but that explicit authority does not exist.

The Department asserts that if a flight is delayed one minute over the three-hour domestic tarmac delay limit, it can impose a \$27,500 civil penalty against carriers for each passenger. If a flight, for example, is a Boeing-747 aircraft which holds 416 passengers, then the imposition of an approximate \$11.5 million dollar fine should be, according to DOT, within its prosecutorial discretion for even that one minute delay over the three-hour mark. The risk of such drastic enforcement creates misplaced pressure on air carriers and pilots that could disrupt the appropriate balance between safety and operational efficiency. If the Final Rule adopts a \$27,500 fine on a per-passenger basis for tarmac delays, the costs to the public (increased flight cancellations, premature return to gate and lost passenger time among other things) as well as to the industry, will be overwhelming, as carriers will take increasingly conservative steps to avoid that fine potential.

²⁶ The Department supports this proposal by stating "Indeed, a number of carriers have recognized this fact and complained in public filings and press reports of the prospect of incurring \$27,500 per passenger in fines for tarmac delay violations." NPRM at 29992. Public statements challenging the DOT's misreading of the statute certainly do not add further justification to the Department's position. In fact, many carriers to face DOT enforcement actions in this area have expressly disagreed with the Department's opinion that it has the authority to assess tarmac delay civil penalties on a per person basis, see DOT Orders 2011-11-13, 2013-7-18, 2013-10-13, and 2014-4-8.

Maximum Civil Penalty – Per Flight vs. Per Passenger

Aircraft	Current Maximum Per Flight – Under Statute	Proposed Maximum Civil Penalty – Under the NPRM	Average Aircraft Seating Configurations
737-800 ²⁷	\$27,500	\$ 4,812,500	175
747-400 ²⁸	\$27,500	\$11,440,000	416
767-300 ²⁹	\$27,500	\$ 6,820,000	248
777-300 ³⁰	\$27,500	\$12,540,000	456
787-8 Dreamliner ³¹	\$27,500	\$ 6,655,000	242
A318 ³²	\$27,500	\$ 2,942,500	107
A319	\$27,500	\$ 3,850,000	140
A320	\$27,500	\$ 4,537,500	165
A321	\$27,500	\$ 5,582,500	203
A330-300 ³³	\$27,500	\$ 8,250,000	300
A340-300 ³⁴	\$27,500	\$ 8,250,000	300
A350-900 ³⁵	\$27,500	\$ 8,662,500	315
A380 ³⁶	\$27,500	\$14,437,500	525
ERJ 135 ³⁷	\$27,500	\$ 1,017,500	37
ERJ 140	\$27,500	\$ 1,210,000	44
ERJ 145	\$27,500	\$ 1,237,500	45
ERJ 145XR	\$27,500	\$ 1,375,000	50
E170 ³⁸	\$27,500	\$ 1,980,000	72
E175	\$27,500	\$ 2,475,000	90
E190	\$27,500	\$ 2,750,000	100
E195	\$27,500	\$ 3,300,000	120

The NPRM does not acknowledge the impact that this change could have on operations. Much of the recent advance in aviation safety have been to remove external pressures from pilots’ decision-making and air carriers’ operational planning. Calculating civil penalties on a per-passenger basis runs counter to this trend. Through enforcement actions since the

²⁷ http://www.boeing.com/boeing/commercial/737family/pf/pf_800tech.page

²⁸ http://www.boeing.com/boeing/commercial/747family/pf/pf_seating_charts.page

²⁹ <http://www.boeing.com/assets/pdf/commercial/airports/acaps/767sec2.pdf>

³⁰ http://www.boeing.com/boeing/commercial/777family/pf/pf_300product.page

³¹ <http://www.boeing.com/boeing/commercial/787family/787-8prod.page>

³² <http://www.airbus.com/aircraftfamilies/passengeraircraft/a320family/>

³³ <http://www.airbus.com/aircraftfamilies/passengeraircraft/a330family/a330-300/cabin-layout/>

³⁴ <http://www.airbus.com/aircraftfamilies/passengeraircraft/a340family/>

³⁵ <http://www.airbus.com/aircraftfamilies/passengeraircraft/a350xwbfamily/>

³⁶ <http://www.airbus.com/aircraftfamilies/passengeraircraft/a380family/>

³⁷ <http://www.embraercommercialaviation.com/Pages/Default.aspx>

³⁸ http://www.embraercommercialaviation.com/AircraftPDF/E170_Cabin.pdf

implementation of the tarmac delay rule, the Aviation Consumer Protection Office of DOT has altered the balance air carriers have struck during adverse weather events between safety and operational efficiency, despite the Office's lack of expertise in these areas. In the few years since the enactment of the lengthy tarmac delay rules, this Office has inserted its opinion on the following issues to name a few:

- How quickly an air carrier should gate aircraft after landing at an airport during a snowstorm;
- The extent to which an air carrier should consider the tarmac delay rule when determining how many aircraft to divert to airports during a thunderstorm; and
- Whether and to what extent an air carrier should initiate an emergency tarmac deplaning procedure, where passengers are deplaned on the active tarmac, during thunderstorms and snowstorms.

Although there is a safety exception within the lengthy tarmac delay rule, it is grudgingly and inconsistently applied only under limited circumstances. The Aviation Consumer Protection Office, consisting of attorneys and consumer protection analysts, simply does not have the expertise to make these difficult safety exception determinations. Each lengthy tarmac delay event raises unique operational and safety issues that may need to be analyzed by experts in flight operations, ground safety, human factors, and other areas.

In the NPRM, the Department compares its enforcement of its regulation of air carrier refunds and denied boarding compensation to its enforcement of lengthy tarmac delays and concludes that civil penalties for each violation should be calculated in the same manner. NPRM, at 29992. This disregards the fact that tarmac delays occur on a per-plane basis, unlike violations of the refund and denied boarding compensation rules, which occur on an individual basis.

Under 49 U.S.C. § 46301(a), DOT has authority to impose a civil penalty “of not more than \$27,500” upon air carriers and others for “violating” specifically listed aviation-related laws and regulations issued under any of those laws, including DOT’s tarmac delay rule. Congress clearly and unequivocally defined the amount of the maximum penalty as well as the unit of penalty. Subsection (a)(2) of § 46301 states that a “separate violation” occurs “for each day” or “if applicable, for each flight involving the violation. . .” (emphasis added). The delay of any one aircraft on the tarmac over three hours is a single act; a delay does not become multiple acts simply because multiple passengers are onboard the aircraft. The Second Circuit in *FAA v. Landy* stated, “The test of whether charges are multiplicitous is, in important part, one of legislative intent. Congress should indicate clearly that it contemplated separate violations, because a determination that separate violations are involved makes it possible to fine cumulatively.” *FAA v. Landy*, 705 F.2d 624, 636 (2d Cir. 1983), cert. denied, 464 U.S. 895 (emphasis added) (citing 1 C. Wright, Fed. Pract. & Proc. § 142, at 476-78; and *United States v. Reed*, 639 F.2d 896, 904 (2d Cir. 1981)). “Because a determination that separate offenses are involved makes possible multiple punishment for the same conduct, unless Congress has indicated clearly that it contemplates separate crimes, doubts should be resolved against turning a single transaction into multiple crimes.” 1C Wright, Fed. Pract. & Proc., § 142 (emphasis added). As discussed below, there is no statutory authority to assess a civil penalty on a per passenger basis.

There is nothing in the language of the statute that would allow DOT to calculate the penalty on a per passenger basis. It is a well-established rule of statutory construction that, if Congress has directly spoken to an issue in a statute and the plain meaning is clear and unambiguous on its face, the statute must be applied as written by both the administrative agency charged with its enforcement and a reviewing court. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (lead case). See also *Carciere v. Salazar*, 555 U.S. 379, 383 (2009) (“This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. If it is, we must apply the statute according to its terms.”); *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) (“It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it”). DOT has itself applied this rule of statutory construction in its proceedings to avoid strained interpretations not called for by the plain statutory language. *DHL Airways, n/k/a ASTAR Air Cargo*, DOT Order 2004-5-10, p. 11 (May 13, 2004).

Nor does the history of the statute support DOT’s “per passenger” interpretation, even assuming for the sake of argument that the statute is deemed to be ambiguous and open to alternative interpretations, which it is not. Prior to the enactment of the Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. Law 100-223 (Dec. 30, 1987), the civil penalty provision at 49 U.S.C. app. § 1471, the predecessor to § 46301, provided for penalties for continuing violations on a per day basis. Under the 1987 law, Congress increased the maximum civil penalty applicable to certain violations committed by those that operate aircraft for compensation or hire from \$1,000 to \$10,000, and added the language “or each flight with respect to which such violation is committed, if applicable.” Pub. Law 100-223, § 204.

As stated in Conference Report No. 100-484, at 81 (Dec. 15, 1987) the Senate offered this amendment to “clarify that in appropriate cases each flight operated in violation of the Act or FAA regulations is a separate violation; . . .” (emphasis added). Further expanding the original per day penalty authority to define separate violations based on the number of passengers on a flight is not discussed in the Report. The deliberate addition of one term to the statute (each flight) implies the exclusion of others (each passenger). See *National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (“When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode”); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061-62 (D.C. Cir. 1995) (applying the familiar maxim of statutory construction *expressio unius est exclusio alterius*, meaning “mention of one thing implies exclusion of another thing.”) There is nothing in the legislative history of § 46301 to indicate that DOT has been granted authority to assess civil penalties on a per passenger basis.

Congress has, in several statutes, expressly established the number of passengers as the unit of penalty. For example, the shipping laws are replete with penalties for “each passenger” transported in violation of the statute, notwithstanding the fact that the involved wrongs are committed on a single voyage. See, e.g., 46 U.S.C. § 3501(b); 46 U.S.C. § 12118(f); 46 U.S.C. § 55103(b). Gambling-related provisions pertaining to transportation between shore and gambling ships similarly impose penalties for “each passenger” carried or transported in violation of the

statute. See 18 U.S.C. § 1083. Immigration-related statutes requiring advance arrival and departure manifests for commercial vessels, including aircraft, similarly impose penalties for “each person,” including “passengers,” for whom accurate information is not provided. See 8 U.S.C. § 1221. Thus, Congress knows how to say “per passenger” and would have used such language here had it intended to authorize DOT to impose per passenger penalties. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994). The fact that Congress did not expressly set the penalty unit at a per passenger level in aviation, while doing so in other transportation settings, is further evidence of Congress’s clear intention to limit DOT’s penalty authority to “per day” or “per flight” violations.

Finally, in determining whether the potential assessment of fines could reasonably have been contemplated by Congress for tarmac delays, a court construing the statute “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Texas v. United States*, 497 F.3d 491, 501 (5th Cir. 2007). The application of “common sense” to a statute that nowhere contains a per passenger penalty references suggests that adoption of “per passenger” as a penalty unit, which can result in fines 400 times greater than Congress authorized, cannot be read into a statute as DOT seeks to do here.

b. The Tarmac Delay Rule, Consistent with the Statute, Requires Computation of Violations on a Per Flight Basis

Consistent with the per flight language in the penalty statute, DOT adopted a tarmac delay rule that, among other things, requires a carrier to provide an assurance that it “will not permit an aircraft to remain on the tarmac for more than three hours. . .” 14 C.F.R. § 259.4(b)(1) (emphasis added). Identical language is used for international flights, with the exception that the allowable delay is four hours. *Id.* at § 259.4(b)(2). Further, the rule repeatedly refers to actions that must be taken “for all flights.” See, e.g., §§ 259.4(b)(3) & (4) (emphasis added). Since regulations, like statutes, must be construed to give effect to the plain meaning of the words used, 14 C.F.R. § 259.4 should be construed as providing that violations will be measured on a per flight basis. *City of Anaheim v. FERC*, 558 F.3d 521, 525 (D.C. Cir. 2009) (“in the end, as in the beginning, the plain language [of the statute] controls. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”).

An administrative agency is a creation of Congress, with only the authority prescribed by statute. DOT cannot interpret § 46301 in a manner that goes beyond and effectively amends the statute. *FDA v. Brown & Williamson Tobacco Corp.*, *supra*, 529 U.S. at 125; *Guardians Ass’n v. Civil Service Comm’n of City of New York*, 463 U.S. 582, 614 (1983); *North Carolina v. EPA*, 531 F.3d 896, 910 (D.C. Cir. 2008) (“All of the policy reasons in the world cannot justify reading a substantive provision out of a statute.”); *State of New Jersey v. Hufstedler*, 662 F.2d 208, 218 (3d Cir. 1981) (“To allow an agency to assume powers that it considers appropriate in carrying out its duties but which have not been allotted to it by Congress would attribute legislative powers to the executive branch and disturb the balance in our tripartite system of government”); see also

CAB v. Delta Air Lines, Inc., 367 U.S. 316, 322 (1961) (“the determinative question is what Congress has said it [the agency] can do”).

Thus, while DOT has some discretion in determining the amount of the civil penalties to apply in particular cases, and can provide guidance on that matter through administrative regulations or statements of policy, that discretion must be exercised within the confines of the Department’s Congressionally-delegated authority. When it goes beyond that point, such as its per passenger interpretation, an agency is acting in an ultra vires manner and not in accordance with law. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213 (1976) (“The power granted to an administrative agency is not the power to make law. Rather it is the power to adopt regulations to carry into effect the will of Congress as expressed in the statute”); see *American Bus Ass’n v. Slater*, 231 F.3d 1, 6 (D.C. Cir. 2000) (citing the Administrative Procedure Act, 5 USC 558(b), which states that “[a] sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.” Therefore, any attempt to calculate the penalty based on the number of passengers onboard the delayed aircraft is beyond the Department’s Congressionally-delegated authority.

c. Past Attempts by DOT and Others to Obtain Per Passenger Authority Would be Unnecessary if Such Authority Already Existed

DOT’s lack of authority to impose per passenger penalties is further suggested by several unsuccessful attempts by DOT and others to obtain such authority, efforts that would have been unnecessary if the authority to assess penalties in that manner were already in place. In 1999, for example, both the House and Senate responded to an increasing number of airline passenger complaints on flight cancellations, lost luggage and delays, with hearings to address what some viewed as unfair treatment of airline passengers. Six bills were introduced in the 106th Congress that were aimed at airline passenger protections. See Airline Passenger Bill of Rights Act of 1999, H.R. 700; Airline Passenger Fairness Act, H.R. 752; Passenger Entitlement and Competition Enhancement Act of 1999; Omnibus Airline Passenger Fair Treatment Act of 1999, H.R. 2200; Airline Customer Service Commitment Act, S. 383; Air Travelers Fair Treatment Act of 2000, S. 2891. As summarized in a 2001 Congressional Research Service report, “About half of the bills provided for fines for violation of the acts’ provisions or set airline financial liability *for each passenger* subject to a nonsafety delay or cancellation” (emphasis added). None of these bills was enacted.

One of the bills introduced, H.R.700, specifically sought civil penalties determined on a per passenger basis by amending the statute to state that “a separate violation occurs for each passenger affected by the violation.” And in a draft bill titled the Airline Passenger Fair Treatment Act that never attracted a Congressional sponsor and accordingly was never assigned a bill number, the Administration also sought per passenger penalty authority for DOT. As described by DOT’s then General Counsel, Nancy McFadden, when testifying before the Senate Committee on Commerce, Science, and Transportation on March 11, 1999 and before the House Committee on Transportation and Infrastructure a week later, the Administration bill “would also clarify that violations affecting passengers can result in a maximum penalty of \$10,000 *per passenger* per violation. Failure to comply with an assurance in a carrier plan would constitute a violation of the statute subject to civil penalties.” See

ost.dot.gov/test/pasttest/99test/McFadden1.htm (March 11, 1999); ost.dot.gov/test/pasttest/99test/McFadden2.htm (March 18, 1999) (Emphasis added). Although all of the airline passenger protection bills described above, including the Administration bill, were referred to appropriate committees, none of them ever became law.

An equal number of bills addressing the same subject were introduced in the next Congress. See Airline Passenger Fair Treatment Act of 2001, H.R. 384; Airline Passenger Fair Treatment Bill, H.R. 1407; Airline Passenger Bill of Rights, H.R. 1734; Air Travelers Fair Treatment Act of 2001, S. 200; Airline Customer Service Improvement Act, S. 319; Fair Treatment of Airline Passengers Act, S. 483. Although the name given by the Administration to its draft bill from the prior Congress was used in H.R. 384, neither that bill nor any others introduced sought per passenger authority.

However, notwithstanding the Department's desire for per passenger authority, such authority has never been enacted. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language").

Any attempt to interpret the statute and regulation to support a per-passenger calculation would be contrary to the plain language of the statute and not entitled to deference by the courts. There have been a number of attempts to amend the statute to grant the DOT the authority to impose penalties on a per passenger basis but no such amendment has been adopted into law.

Any attempt to impose this penalty on a per-passenger basis administratively by pointing to carrier tarmac delay assurances and seeking to fine a carrier on the basis that each violation of the customer assurances constitutes a separate violation for civil penalty purposes would suffer from the same underlying weakness.

Whether or not the Final Rule adopts this definition, but particularly if it does, the Department must immediately begin a new rulemaking to review the tarmac delay rule in light of costs to carriers and the traveling public from that existing regulation. The costs of the tarmac delay rule continue to far outweigh its benefits as illustrated vividly in the recent analysis of that rule the Department commissioned and has made public.³⁹ That report admitted that the tarmac-delay rule's (TDR's) impacts failed to show clear benefits, acknowledging "It is difficult to characterize the overall impact of TDR-attributable changes in cancellations and lengthy taxi-out delays on passenger welfare." That same report cites that Department contractor HDR's regulatory evaluation of the tarmac delay rule during the rulemaking phase estimated 41 excess cancellations as a result of the rule. The recent retrospective analysis of the effects of the rule by DOT's own contractor Econometrica calculates that in 2010 the TDR rule alone drove 491 flight cancellations and in 2011 the rule alone drove 4,139 excess cancellations. That same reports cites academic and GAO studies that calculate as many as 13,000 flights (versus the DOT's estimate of 41) have been canceled in a single year as a result of the rule strongly suggesting that a review is in the public interest, especially as the Department's contractor calculated that the cost of a single excess cancellation exceeds \$10,000.

³⁹ See http://www.dot.gov/sites/dot.gov/files/docs/Econometrica_Tarmac_Delay_Report_1_9_2014.pdf

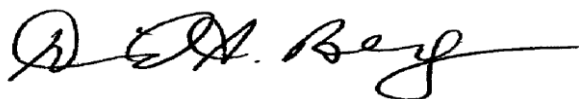
XII. Proposals that Benefit Passengers

We generally support the Department's proposed clarification for tarmac delay reporting that carriers need only report tarmac delays of more than three hours, the Department's proposal to require oral descriptions of limitations to oral offers of free/reduced rate ticket to denied boarding volunteers (section 250 amendments), and the proposal to limit flight status change (cancellation, diversion, or delay of 30 minutes or more) to those that take place within seven calendar days of the scheduled departure (section 259.8 amendments). However, we do take issue with the Department *requiring* carriers to make flight status notifications to "other interested persons" (i.e. not passengers) that subscribe to flight status notification services. We do not agree that DOT has the authority to require or enforce this obligation towards parties who are not air travelers. This requirement is outside of the Department's regulatory authority. The final rule should strike the term "...and other interested persons" from proposed 259.8(a)(1).

Conclusion

Carriers are committed to providing excellent customer service and compete fiercely on the basis of service in a deregulated industry. Market forces, enhancements in carrier websites, recent Department passenger protection regulations and a modernized Air Traffic Control system will provide the framework to accomplish continued service improvements. While carriers will continue to implement policies and practices to improve passenger services in response to market forces, it is important the Department fully account for the true total costs of its proposals and reject or defer action on areas that are outside of the scope of its authority; that are being addressed by market forces; that could be pursued using existing authority; and those that fail the benefit-cost test. In addition, the Department should adopt industry recommended alternatives and provide enough time to implement each of these proposals.

Respectfully Submitted,



David A. Berg
Senior Vice President & General Counsel
Airlines for America
1301 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 626-4000
dberg@airlines.org

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