

DOT Rulemaking Alert: Enhancing Transparency of Airline Ancillary Service Fees (September 2022)

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On September 25, 2022, the U.S. Department of Transportation (“DOT”) issued a Notice of Proposed Rulemaking (“NPRM”) entitled “Enhancing Transparency of Airline Ancillary Service Fees”. In the NPRM, DOT proposes to require airlines, ticket agents, and metasearch sites to disclose various ancillary fees in response to a consumer query (whether by phone or internet search (whether conducted on a desktop-based browser or a mobile application)). Public comments to the NPRM are due by 60 days after publication in the Federal Register, which is expected soon.¹

Issued at the President’s Direction

The NPRM was issued in direct response to President Biden’s Executive Order “Promoting Competition in the American Economy,” which, among other things, directed the Secretary of DOT to “consider initiating a rulemaking to ensure that consumers have ancillary fee information, including ‘baggage fees,’ ‘change fees,’ and ‘cancellation fees,’ at the time of ticket purchase.”²

Background

In its NPRM, DOT asserts that consumers indicate there is a “market failure” in air transportation pricing due to difficulties in determining the true cost of air travel. While DOT’s “full fare rule” (14 CFR § 399.84) requires carriers and ticket agents to advertise the full fare inclusive of government-imposed taxes and



The firm’s practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines on compliance with DOT’s regulations and policies concerning marketing and advertising. For further information regarding the matters discussed in this article, please contact either of the following attorneys:

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fees, it does not require disclosure of ancillary fees the first time a fare is displayed. In 2011, DOT issued a Final Rule requiring (among other things) carriers and ticket agents to disclose baggage and ancillary fees; for carriers, that meant creating a page listing all ancillary fees (which may be expressed in a range, except for baggage fees). This Final Rule also required carriers and ticket agents to disclose, in response to a customer query, that baggage fees may apply and refer the consumer to the location on the airlines' or ticket agents' website where the consumer can review baggage fee information to determine the amount of applicable baggage fees. The 2011 Final Rule also required carriers to provide specific baggage fee information on e-ticket confirmations.³

As a policy matter, DOT has made several tentative conclusions which underpin its proposals:

- Not displaying bag fees in a passenger-specific manner in response to a query is an unfair practice “because it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.” DOT asserts that the “substantial injury” is the additional time consumers spent searching to determine the true cost of travel.
- Not clearly disclosing passenger-specific change and cancellation fees and policies during the ticket purchase process is an unfair practice, notwithstanding the fact that these fees must be disclosed on or with the ticket.⁴ DOT also contends the practice is deceptive because consumers may be misled during the purchase process and not have adequate notice, which could affect their purchase decision, leading to unfair surprise after the purchase is completed.
- Not clearly disclosing fees for adjacent seating for those traveling with a young child when fare and schedule information is provided is an unfair practice, because passengers may be unexpectedly separated from their children or have to pay unexpected fees to remain next to them. DOT also believes it may be a deceptive practice because consumers could be led to believe passengers will be seated next to their children without charge.

Specific DOT Proposals

The NPRM applies to U.S. and foreign air carriers, ticket agents (e.g., brick-and-mortar, online, corporate) and metasearch sites that display flight options to consumers (“Covered Entities”). Carriers would only need to share their ancillary fee data with ticket agents with whom they choose to distribute their fare products. The ancillary fee data must be “usable, accurate, and accessible in real-time”, which means, among other things, dynamically updating the fee data provided to ticket agents and facilitating their access to such information.

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In light of the above, the NPRM proposes to require that first and second checked bag fee, the carry-on bag fee, the change and cancellation fee and the family seating fee be disclosed at the first point in a search process where a fare is listed in connection with a specific flight itinerary. Such information must be disclosed as “passenger specific”, i.e., a search that takes into account a characteristic of the passenger that may impact ancillary service fees to be charged (e.g., military status, frequent flyer status, method of payment, etc.), if such information is provided (DOT refers to the alternative scenario, in which a customer provides no “characteristic” information, as an “anonymous itinerary search”).

Similarly, for inquiries and purchases made offline (by phone or in person), the same fee disclosure requirements would apply. Sellers would need to make oral disclosures at the same time schedule and fare information is being provided, i.e., as DOT puts it, the “information” and “decision-making” portion of the conversation.

The NPRM would require airlines to distribute fee information on websites and mobile websites for critical ancillary services (e.g., the first and second checked bag fee, the carry-on bag fee, the change and cancellation fee, and the seat fee for a child 13 or under to be seated next to an accompanying adult) at the first point in the search path where a fare is listed in connection with a specific flight itinerary.

DOT would also require carriers and ticket agents to permit customers to purchase the seat assignment disclosed during a search (which DOT refers to as “transactability”) so that adults may be more easily seated next to their children. In contrast to other fees, the amount of a seat assignment fee could permissibly vary with supply and demand until the assignment itself is purchased.

DOT is also requiring two additional disclosures related to cancellation. During the purchase process, DOT is requiring carriers and ticket agents to present, through a pop-up window or link, a summary of the cancellation and change policies for the fare and itinerary listed. Carriers and ticket agents must also present their 24-hour hold or cancellation policy prior to purchase.

Finally, DOT would impose a six-month compliance period following the adoption of a Final Rule. This period would be for implementation and training.

Important Questions

DOT asks several important questions with its proposals, including, but not limited to:

- Should DOT permit an opt-out option for ancillary fee displays?
- Should the proposal apply to airline and ticket agents’ mobile applications or other communication methods such as Chatbots and WhatsApp?

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- Should DOT permit carriers and ticket agents to use alternative means (such as referring them to a website) of informing consumers of ancillary fees during phone and in-person inquiries?
- Is the six-month implementation period too long or too short?

Key Takeaways

DOT's proposal deserves careful consideration from regulated entities such as carriers and ticket agents, both in terms of the practical impact, costs, and effects as well as the numerous questions posed by DOT. Ancillary fees are an important source of revenue and considerable thought should be given to how the NPRM might impact carrier operations and consumer decision making.

Regulated entities are strongly urged to devote the necessary resources to reviewing and commenting on DOT's proposal.

¹ A pre-publication version of the NPRM has been posted in a public docket, available at <https://www.regulations.gov/docket/DOT-OST-2022-0109/document>.

² E.O. 14036 section 5, paragraph(m)(i)(F).

³ Final Rule, "Enhancing Airline Passenger Protections", 76 Fed. Reg. 23110 (Apr. 25, 2022).

⁴ As required by 14 CFR 253.7.