



TRANSPARENCY OF AIRLINE ANCILLARY FEES AND OTHER CONSUMER PROTECTION ISSUES DOCKET ID: DOT-OST-2014-0056

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INTRODUCTION

The Regulatory Studies Program of the Mercatus Center at George Mason University is dedicated to advancing knowledge about the impact of regulation on society. As part of its mission, the program conducts careful and independent analyses that employ contemporary economic scholarship to assess regulations and their effects on the economic opportunities and the social well-being available to all members of American society.

This comment addresses the efficiency and efficacy of this rule from an economic point of view. Specifically, it examines how the rule may be improved by more closely examining the societal goals the rule intends to achieve and whether this proposed regulation will successfully achieve those goals. In many instances, regulations can be substantially improved by choosing more effective regulatory options or more carefully assessing the actual societal problem.

SUMMARY

The Department of Transportation (DOT) proposes, among other things, to expand the definition of ticket agent to include entities that display airline schedules and fares on their websites and apply DOT consumer protection rules to them, to require all such websites to disclose the fees associated with a specific set of services early in the flight search process, and to prohibit certain types of biasing in schedule and fare displays. The proposed rule requires sellers of travel to offer information and disclosures in a uniform manner.

We disagree with this approach for the following reasons:

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First, the DOT is proposing to intervene in a market without presenting credible evidence of a problem that needs government intervention. The DOT has not successfully made the case that airline ticket buyers need the information required by the proposed rule for every trip they consider.

Second, there is ample evidence that airlines, travel agents, and information services companies are already acting to help consumers in their travel choices. A growing number of websites make travel easier by providing relevant information to potential travelers. The trend in the market—exemplified by websites such as kayak.com—suggests that, even without this rule, travelers increasingly receive the information they care about. We provide several examples of this trend in this comment.

Third, several elements of this proposed rule would lead to unintended consequences. By specifying what information travelers must see whenever presented airline schedules, the proposed rule risks stifling innovation that's already underway and has the potential to do far more to improve consumer understanding. The proposal could hinder websites' ability to present a customized set of relevant information to consumers by requiring disclosure of a uniform, specific set of fees to all consumers by all websites. Meanwhile, by requiring consumers to wade through information that's not customized or relevant to their specific situation, the rule carries the risk of reducing rather than improving understanding.

It is primarily because of these unintended consequences that we recommend that the DOT consider the following changes to its proposal:

1. The DOT should limit the websites subject to the proposed rule to only airline-owned and -operated travel sites. This would help avoid the unintended consequence of limiting the ability of third-party information aggregation and organization services—such as Google—to customize the information display based upon user preferences.
2. The proposal should not attempt to limit travel agencies' ability to improve service for consumers by requiring that information or search results be sorted in a predetermined (“unbiased”) manner. Websites have incentives to compete to develop the “best” algorithm for attracting customers to make purchases on their websites, and restricting that competition to only certain predetermined algorithms will likely reduce an important element of competition between travel websites.
3. The DOT should consider leaving the disclosure requirements established in 14 CFR 399.85—the section that requires a simple “baggage fees may apply” statement—unchanged. This approach would impose a minimum amount of disruption on innovation in the airfare distribution market while alerting travelers to be aware of possible baggage fees.

BACKGROUND

Routes, connections, city pairs, and airfares are complicated. Ticketing rules can be even more so. Consumers face schedule changes, denied-boarding rules, and minimum connecting times. This places a substantial burden on the consumer, and the DOT should be commended for its concern.

Fortunately, new businesses are already helping consumers to navigate the thicket of air travel and experimenting with new ways to meet consumers' needs beyond what can currently be imagined. Innovation in the way information is aggregated and transmitted to consumers has helped and will continue to help consumers understand the complexities of air travel. While travel was never simple, help for consumers has changed dramatically with

the shift to booking airline tickets online. No longer guided by a travel agent (of significantly varying expertise), consumers are mostly reliant on computers to search for and recommend flights.

There are two divergent paths for making the process easier to navigate for travelers.

One approach, favored by some of the elements contained in the proposed rule, is to make a uniform set of specific information prominently available when booking tickets. While this approach may be intended to make travelers' decision-making easier, the result may actually be the opposite.

Another approach, currently underway online, is for websites to compete to better understand the needs of individual travelers and customize the information provided to guide them through their travel in order to win their ongoing business.

Making information available can enhance decision-making; requiring that all consumers wade through the same information whether or not that information is relevant to them may have the opposite effect. The DOT proposal risks overwhelming potential travelers with a flood of information irrelevant to their decisions while impeding the ability of websites to compete to provide travel advice that's tailored to individual consumer needs. Like the "Schumer Box"¹ required by Fair Credit and Disclosure Act of 1988² to accompany all credit card applications, standardized disclosures (and even standardized type) present information in a dense format that is often easier to gloss over than to digest. And like the Schumer Box, specific disclosures fail to account for the manner in which products evolve and provide only a part of the picture of what consumers can expect. Credit card application disclosures, of specific items and even in specific font, are disclosed but dense. In contrast, airlines already provide ready access to relevant information on their websites. The mass customization potential of the web is a powerful tool, and as suggested by several examples in the next section of this comment, companies are just beginning to scratch the surface of its potential.

A rule that imposes a defined set of information all consumers must know and applies very broad standards as to the sorts of companies covered by the requirements, therefore, is far from the preferred approach to enhance consumer welfare.

Companies are recognizing and acting upon consumers' needs for simpler and better organized information, creating products that improve consumer understanding in order to win business. Major search companies, such as Bing and Google, that help organize information are now amalgamating travel information. And technology innovators such as Kayak and Hipmunk search other sites, aggregate data, and help consumers find the flights they're looking for in a simple and straightforward manner to comparison shop in a single place.

Moreover, the travel-booking market is highly competitive and contested. In addition to the option of booking directly with an airline or a travel agent, there are large online travel agencies such as Orbitz and Expedia and more specialized sites such as CheapOair. The existence of these options demonstrate that the market is already acting to present consumers with ample information regarding travel, and, furthermore, that competition is forcing these websites to compete by presenting consumers with the organized, relevant information. These developments are inconsistent with the notion that a market failure arising from information asymmetry requires regulatory requirements of information disclosure.

Regulation in this area, then, should be restrained when the market is already competitive and acting to improve areas of concern to the DOT.

1. Kenneth J. Benton, "The Regulation Z Amendments for Open-End Credit Disclosures," *Consumer Compliance Outlook*, 2009, https://www.philadelphiafed.org/bank-resources/publications/consumer-compliance-outlook/2009/first-quarter/q1_03.cfm; and see Todd Zywicki, "Financial Services and E-Commerce: Reflections on Credit Card Practices and Legislative Reform Proposals," *Engage* 9, no. 2 (June 2008), http://mercatus.org/sites/default/files/publication/Zywicki_PDF_Financial_Services_and_E-Commerce.pdf.
2. The Fair Credit and Charge Card Disclosure Act of 1988, Pub. L. No. 100-583 (1988).

LACK OF A MARKET FAILURE MEANS LITTLE TO NO BENEFITS

Fees associated with air travel are disclosed now, mostly voluntarily—down to the specific type of snack a consumer might purchase onboard.³ That’s not to say there’s not room for improvement. But it’s an argument against urgency in a rapidly evolving space that’s already doing a great deal to improve the way consumers buy air travel. There’s a path in place to go from reasonably good to very good, but it’s a path this rule might block. In fact, the market is dynamically evolving to do a better job educating consumers than existing the DOT rules require—evidence that the interventions proposed in this rulemaking are not necessary and in fact could be harmful.

Airlines disclose checked baggage fees prominently on their websites (as required by law).⁴ The DOT’s website advises consumers on how to fully understand the fees they’ll encounter during their travels. And in the six years since a fee for the first checked bag became prevalent on domestic itineraries, there is little evidence of consumer confusion. Indeed, consumer awareness of fees is underscored by their unpopularity⁵ and by the marketing strategy employed by banks to waive baggage fees⁶ as an inducement to sign up for co-branded credit cards (offered by the banking partners of United, Delta, and American). Requiring even greater disclosure than is already available on each airline’s website is unnecessary.

Consumers aren’t surprised by check bag fees, but they may not be aware of how they vary by airlines. However, airlines already are working to inform consumers of this. For example, Alaska Airlines offers the most generous in the industry carry-on policy and a guarantee to have bags delivered within 20 minutes. Airlines spend heavily advertising their competitive advantages—such as Southwest’s “Bags Fly Free” campaign⁷—and electronic advertising can even come at very low cost for carriers that have amassed databases of millions of email addresses. Airlines even aim their advertising at one another highlighting differences in product.⁸

Many of the fees offered alongside an airline ticket aren’t in fact for “services or products previously included in the price of an airline ticket”⁹ but are actual enhancements. Contrary to the DOT’s claim that “priority boarding” is something that used to be part of base airfare, the basic airline ticket did not by definition include priority boarding (or else everyone would have had it and it would not have been “priority”). The DOT should demonstrate how the services for which it requires special disclosure had previously been provided at no extra charge. In fact, airlines may offer consumers who fly frequently (e.g., 25,000 or more miles with an airline and its partners in a year) co-branded credit card holders, or those who pay a per-trip fee the ability to get settled on the aircraft ahead of many other passengers and secure preferred overhead bin space—a new option that had never been included as a standard offering of an airline ticket.

Other options now sold alongside tickets may include priority security queuing, priority check-in, extra legroom seating, lounge passes, bonus miles, reduced or waived ticket-change fees, travel insurance, and myriad other services designed to generate incremental revenue by offering a more customized and thus improved travel experience. Again, these costs are not inherent to tickets but to other, optional services.

3. See, for instance, American Airlines. “American Airlines Optional Service Charges.” AA.com. Accessed September 18, 2014. https://www.aa.com/i18n/utility/aacom_services_charges.jsp.

4. *Notice of baggage fees and other fees*. 399.85: Code of Federal Regulations, 2012. <http://www.gpo.gov/fdsys/pkg/CFR-2012-title14-vol4/pdf/CFR-2012-title14-vol4-sec399-85.pdf>.

5. StarNewsOnline.com, “US Airways Chief: Unpopular Fees Here to Stay,” last modified March 26, 2012, <http://business.blogs.starnewsonline.com/19333/us-airways-chief-unpopular-fees-here-to-stay/>.

6. Michelle Erickson, “Fly.com Survey Pits Passengers vs. Airlines in Battle of the Fees,” *Huffington Post*, last modified February 3, 2014, http://www.huffingtonpost.com/flycom/flycom-survey-pits-passen_b_4690390.html.

7. See, for instance, iSpot.tv, “Southwest Airlines TV Commercials,” accessed September 18, 2014, <http://www.ispot.tv/brands/A5a/southwest-airlines>.

8. For example, A. Pawlowski, “Airlines Duke It Out in Funny Commercials,” *CNN.com*, last modified March 29, 2010, <http://www.cnn.com/2010/TRAVEL/03/29/southwest.vs.airtran.ads/>.

9. NPRM, 6; “Need for Rulemaking,” Department of Transportation, *Transparency of Airline Ancillary Fees and Other Consumer Protection Issues*, 79 Fed. Reg. 100 (May 23, 2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-05-23/pdf/2014-11993.pdf>.

Furthermore, since checked bag fees are one of the primary reported annoyances of air travel, it's clear that consumers are aware of the fees. It's the broad awareness that has led to the frustration and to airlines offering products to channel that frustration into mutually beneficial paths—such as signing up for the carrier's co-branded credit card, flying frequently with the airline, or pre-purchasing the service online. And it's precisely by disclosing these fees during the booking process that airlines are able to sell many of these services and generate desired revenue.

If fees *generally* aren't well-enough understood, it isn't as much the issue of such fees as those for checked baggage or reserving specific seats in a cabin, as much as the myriad other fees that airlines have come up with that the proposed rule does nothing to make more widely known. The proposed rule chooses to pick specific fees such as those for checked baggage, advance seat assignment and priority boarding that the DOT believes ought to be understood by everyone, rather than allowing travel booking sites to tailor their displays to offer only the information desired by a given consumer for a specific trip.

For example, Spirit Airlines has become profitable offering a mix of low fares and numerous fees, including fees to print your boarding pass at the airport and for water in-flight. Tellingly, Spirit reports¹⁰ that they receive virtually no complaints from consumers booking tickets through their own website because the fees are spelled out already. Instead, they get complaints from consumers booking Spirit Airlines tickets on third party websites because the fees aren't clearly found there. Notably, many of the fees charged by Spirit don't require disclosure under the proposed rule, yet they generally have not been adopted by other airlines.

Furthermore, many consumers demonstrate a preference for receiving less information about their travel in advance in favor of other things they value, such as lower prices. Both Priceline and Hotwire, for instance, offer "opaque" booking services that do not reveal the airline a consumer will fly or even the specific times of their flights in advance. Some consumers choose this model because it permits them to receive lower prices in exchange for requiring less pre-purchase information. Some airlines use these services to execute the sale of excess inventory at a discount without cannibalizing the higher prices a transportation seller would receive from customers who do care about such rudimentary information. The Hotwire and Priceline business models of not disclosing an airline in advance of a purchase could not be sustained while simultaneously disclosing the specific fees in advance.

While airline websites prominently disclose fees, new market entrants are getting creative about figuring out what information consumers actually value—as opposed to a standardized set of fees all consumers are required to be presented with— in order to win customer views, and in some cases booking transactions.

Hopper.com introduced an interactive tool in August that lets consumers pick the fees and services most relevant to them, including

- Number of checked bags (up to four or more, not just first two as in the DOT rules)
- Carry-on bag fees
- In-flight snack and beverage costs
- Wireless Internet fees
- Seat selection fees
- Extra legroom seating
- Unaccompanied minor fees
- Pet in cabin and checked pet fees

10. See, for instance, The Cranky Flier, "A Vision of How Some Airlines Want to Sell You Tickets," last modified March 12, 2013, <http://crankyflier.com/2013/03/12/a-vision-of-how-some-airlines-want-to-sell-you-tickets/>.

Routehappy integrates various attributes of an airline's product and gives it an overall "happiness" score (which would be considered bias under the proposed rule). They don't just look at wireless Internet, but how fast that Internet is likely to be. They rate seat *width* in addition to legroom, the availability of power and USB outlets, in-flight entertainment, availability of fresh food, and checked bag fees.

SmarterTravel.com focuses on different traveler needs, cataloguing ticket change fees, telephone booking fees, and fees to get a pillow onboard.

Travelers have differing preferences. There is probably not any single set of information that would represent the "most useful" display. However, vigorous competition in the marketplace is more likely than regulation to figure out how to deliver the kinds of customized sets of information that consumers value in the best possible form. In fact, it's relatively new market entrants such as Kayak.com and Google, specifically named in the proposed rule for inclusion, that have been most creative in improving consumers' ability to best compare airline offerings.

Kayak and similar meta-search sites help consumers make sure they're getting the best deals, going further than simply offering different airlines to choose from, as the online travel agency sites do. These meta-search sites pull data from a wider variety of sources, including hundreds of other travel sites, to ensure that the source used to calculate flight availability and airfare by a given site doesn't cause a consumer to inadvertently pay more.

Google even now integrates into its search tools the ability to track your flights, manage boarding passes, and even find alternate travel plans if you're delayed or your flight gets cancelled.¹¹ Once a flight lands, it can direct travelers to their rental cars and to their hotels. It can do all of this without consumer effort if their travel plans were emailed to a Google Gmail account.

UNINTENDED CONSEQUENCES

Disclosure for the sake of disclosure may not only fail to produce benefits but may result in unintended negative consequences. The manner in which the proposed rule would require everyone to see the same information may actually hinder consumers' understanding of that information.

The Internet has done a tremendous amount to provide consumers with information and make it possible for them to direct their own travel decisions. At the same time, the economics of airline ticket distribution has changed and it is no longer viable for most brick-and-mortar travel agencies to offer individual consumer guidance on their booking decisions.

Cost is one part of a consumer's decision. Another is comfort. Still another is productivity.

A business traveler making a day trip isn't likely to be checking bags. A very frequent flyer with elite status in her primary airline's frequent flyer program isn't usually going to pay checked baggage fees. The same goes for an airline's co-branded credit card holder. Nonetheless, under the proposed rule they would still be forced to digest what amounts to irrelevant information on those fees during the booking process.

The things that may be important to a given traveler vary but could include availability of onboard services such as meals for purchase or in-flight Internet, conveniences such as printing a boarding pass for free, or having multiple flights a day between cities in case the customer finishes meetings early, or so they're more likely to have backup options in the event of irregular operations.

Requiring disclosure of a specific set of fees to all consumers, by all websites, is counterproductive to understanding. Faced with already daunting choices of airlines, connecting cities, and aircraft types, we shouldn't demand that everyone displaying travel options must tell every consumer about options that may or may not be important to a given transaction. Baggage fees may not matter on a same-day trip between DC and New York, and change fees may be far more important than priority boarding fees to a business traveler with tentative plans who already

11. See, for example, "Let Google Now Help You with Your End of Summer Travel Plans," Google Travel, last modified August 19, 2014, <http://googletravel.blogspot.com/2014/08/let-google-now-help-you-with-your-end.html>.

boards first because of her frequent traveler status. Requiring consumers to wade through a defined set of data that's not relevant to them in order to find the information that is merely promotes a high signal-to-noise ratio in the booking process and information overload.

The previously discussed Schumer Box, which includes required disclosures for credit card applications, includes useless or trivial information—such as minimum finance charges (that average 50 cents)—and the technical methodology for computing balances, which may be impenetrable for the average consumer. By requiring *unhelpful information* to be disclosed, it is far more difficult than necessary for consumers to locate the terms that are important to their individual situations. What's more, once the specific items that required disclosure were mandated, they have shown resistance to change even when they clearly added little value to decision-making.¹²

There's no evidence of market failure here. On the contrary, there's innovation (which regulation could stifle) headed in the right direction. Consumers need services that figure out how to deliver the information most relevant to each individual.

RECOMMENDATIONS

There are several changes that the DOT could make to improve the proposal and limit some the unintended consequences specified above. First, and at the very least, the DOT should limit the targeted websites to only airline-owned and -operated travel sites. This would help avoid the unintended consequence of limiting the ability of information aggregation and organization services—such as Google—to customize and optimize information displays based upon user preferences.

Second, the proposal should not attempt to limit travel agencies' abilities to improve service for consumers by requiring that information or search results be sorted in a predetermined (“unbiased”) manner. Travel agencies compete by offering their best judgment to consumers. This is a valuable service, but the proposed rule may limit the degree to which travel agencies could continue to provide it. Sites that bias their displays to favor one airline or another or avoid showing a particular airline in its results can be harming consumers if those consumers believe that's all the travel options that are available. However, most consumers shop several sites for airfare rather than just going to a single site (outside of airline websites themselves, where it's natural to expect to buy only that airline's products). Analysis by Google suggests consumers visit an average of 22 websites over 9.5 shopping sessions before making purchases.¹³

On the other hand, this so-called bias can be beneficial to travelers.¹⁴ Sorting results based not just on schedule or price can begin to deliver real value to the consumer. There may be best-value algorithms that could guide consumers to the best total trip cost (an airline's fare might be \$5 higher but include two free checked bags or offer more legroom). The system could also guide consumers away from historically less-reliable flights, or legal but inadvisable connections. “Bias” is another form of judgment—something travel agents used to offer but has been largely eliminated from online bookings. Allowing agencies to compete to improve service is better for consumers than outlawing judgment in the display of schedules and fares or requiring onerous disclosures that can also harm the innovative site's competitive position.

Third, the DOT should consider leaving the disclosure requirements established in 14 CFR 399.85 unchanged. We've suggested that consumers are well informed now regarding fees for which the DOT contemplates requiring greater disclosure. Fee information is already easy to find. And the airfare distribution space is moving toward more customized information in order to help consumers navigate a confusing landscape with information most relevant to them. Requiring consumers to wade through information not relevant to their needs for a given trip

12. See Todd Zywicki, “Financial Services and E-Commerce: Reflections on Credit Card Practices and Legislative Reform Proposals” *Engage* 9, no. 2 (2008).

13. *Ibid.*

14. Boudreaux, Donald J., and Jerome Ellig. “Beneficent bias: The case against regulating airline computerized reservation systems,” *Journal of Air Law & Commerce* 57 (1991): 567.

both clutters their screens, making it more difficult to gain understanding, and imposes unnecessary costs on companies working to custom-tailor information. Since there's little evidence of an urgent problem, companies should be allowed to compete over how best to serve travel consumers rather than having display and sales strategies dictated to them at the risk of stifling innovation.

If the DOT moves forward with these portions of its proposed rule, then the alternative to leave the disclosure requirements established in 14 CFR 399.85 unchanged (requiring a simple “baggage fees may apply” statement) becomes the least harmful alternative to the extent that the definition of ticket agent is broadened as contemplated in the proposed rule. There is little *need* for the disclosure of well-known information, but keeping the current rule intact would be the approach that imposes a minimal amount of disruption of innovation in airfare distribution while allowing consumers to reap the benefits of competition and new technologies.

CONCLUSION

The proposed rule requires sellers of travel to offer information and disclosures in a uniform set of ways, despite a lack of evidence suggesting the specific information contemplated by the proposed rule represents the particular set of facts that each consumer needs to understand for every trip.

The DOT should avoid mandating the specific manner in which information must be displayed because of the unintended consequences of such an intervention. It's precisely the understanding, context, advice, and nuance that market innovators ought to be pursuing in order to help travelers make the best decisions possible. Sellers of travel are already competing to provide information that is customized for travelers, and the one-size-fits-all approach of the proposed rule threatens to short-circuit advances that are already occurring.

As each portion of the proposed rule is considered, it's important to ask what future improvements could be made by enterprising sellers of travel sellers—and whether the decision to require disclosure of a specific set of information by all sellers will allow that process to succeed.