

**Before the
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY OF TRANSPORTATION
Washington, D.C. 20590**

In the Matter of)	
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Transparency of Airline Ancillary Fees)	Docket No. DOT-OST-2014-0056
and Other Consumer Protection Issues)	
)	

**COMMENTS OF
THE COMPETITIVE ENTERPRISE INSTITUTE**

September 24, 2014

Marc Scribner
Research Fellow
Competitive Enterprise Institute
1899 L Street N.W., Floor 12
Washington, D.C. 20036
(202) 331-1010
marc.scribner@cei.org

Executive Summary

On behalf of the Competitive Enterprise Institute (“CEI”), I respectfully submit these comments in response to the Department of Transportation’s Office of the Secretary of Transportation’s notice of proposed rulemaking in the matter of Transparency of Airline Ancillary Fees and Other Consumer Protection Issues (“NPRM”).¹ CEI is a nonprofit, nonpartisan public interest organization that focuses on regulatory policy from a market-oriented perspective.²

In our view, this latest action by the Department of Transportation (“Department”) is part of a broader attempt to expand its unfair and deceptive practices (“UDP”) authority under 49 U.S.C. § 41712 in a manner contrary to Congress’ intent in passing the Airline Deregulation Act. Bolstering this contention is the Department’s admission that the projected costs of the revised rules governing airline ancillary fees greatly outweigh its projected benefits.

In addition, we believe the Department’s proposed regulation of ancillary fees reflects a status quo bias that will adversely affect airline competition and consumer welfare.

I. The Department's Ancillary Fees NPRM Would Further Expand UDP Authority in a Manner Inconsistent with Congressional Intent and the Promotion of Consumer Welfare

In recent years, the Department has relied on its UDP authority to impose legally questionable restrictions on airline fare disclosures and advertising (“Total-Price Rule”),³ require airlines to allow passengers to hold or cancel reservations without penalty for 24 hours provided that their ticket was purchased a week or more before the scheduled flight (“24-Hour Hold/Refund Rule”),⁴ and require passenger deplaning if a tarmac delay exceeds three hours (“Tarmac Delay Rule”).⁵ In addition, the Department is currently considering outlawing voice communications onboard aircraft using its same section 41712 UDP authority.

All of these measures appear well intentioned. However, each suffers from defects that likely and perversely harm air traveler welfare. The Total-Price Rule denies carriers their First Amendment right to free speech, limiting their dissemination to consumers of information related to government taxes and fees. The 24-Hour Hold/Refund Rule effectively outlaws true nonrefundable ticketing. Studies conducted by the American Avia-

1. Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, *Notice of Proposed Rulemaking*, DOT-OST-2014-0056, 79 Fed. Reg. 29969 (May 23, 2014) [hereinafter NPRM].

2. See About CEI, <http://cei.org/about-cei> (last visited Sep. 19, 2014).

3. Enhancing Airline Passenger Protections, *Final Rule*, 76 Fed. Reg. 23166 (Apr. 25, 2011) (codified at 14 C.F.R. § 399.84(a)).

4. *Id.* at 23165 (codified at 14 C.F.R. § 259.5(b)(4)).

5. *Id.* at 23164 (codified at 14 C.F.R. § 259.4(b)(1)).

tion Institute,⁶ Government Accountability Office,⁷ and Econometrica, Inc.⁸ (commissioned by the Department) have found the Tarmac Delay Rule has adversely affected flight cancellations. As regards voice communications onboard aircraft, the Department's actions contradict research from the Federal Aviation Administration and reflect a lack of understanding of how in-flight voice communications are actually provided, priced, and used by consumers.⁹

Not only have the Department's latest reinterpretations of its UDP authority generated perverse consequences, they threaten to undermine nearly four decades of economic liberalization in the airline industry. As a number of industry analysts have noted, the recent expansion of the Department's UDP authority contradicts the deregulatory mandate Congress expressed in the Airline Deregulation Act.¹⁰ The courts have so far upheld this upsetting power grab. In a recent ruling, the U.S. Court of Appeals for the D.C. Circuit "ma[de] the adoption of new regulations that much easier," thereby "seriously undermin[ing] the congressional mandate that competition, not regulation, govern airline practices."¹¹

While the Department is pursuing additional anti-competitive and anti-consumer regulations governing ancillary fees under its UDP authority, the U.S. House of Representatives has passed legislation reversing the Department's Total-Price Rule.¹² We agree with Rep. Peter DeFazio (D-Ore.) that the current Total-Price Rule is "a nanny state rule in search of a problem that didn't exist that may have created a problem that does exist."¹³ Similarly, we believe most of the complaints from self-styled "consumer advo-

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6. JOSHUA MARKS & DARRYL JENKINS, IMPACT OF THREE-HOUR TARMAC DELAY RULES AND FINES ON PASSENGER TRAVEL TIME AND WELFARE (July 20, 2010), *available at* http://www.tarmaclimits.com/Tarmac/Tarmac_Limits_files/Tarmac_Paper.pdf.
 7. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-733, AIRLINE PASSENGER PROTECTIONS: MORE DATA AND ANALYSIS NEEDED TO UNDERSTAND EFFECTS OF FLIGHT DELAYS (2011), *available at* <http://www.gao.gov/assets/330/322962.pdf>.
 8. ECONOMETRICA, INC., INDEPENDENT REVIEW AND ANALYSIS OF THE IMPACT OF THE THREE-HOUR TARMAC DELAY RULE (Jan. 9, 2014), *available at* http://www.dot.gov/sites/dot.gov/files/docs/-Econometrica_Tarmac_Delay_Report_1_9_2014.pdf (prepared for the Department of Transportation).
 9. *See* Comments of the Competitive Enterprise Institute in the matter of Use of Mobile Wireless Devices for Voice Calls on Aircraft, *Advance Notice of Proposed Rulemaking*, Docket No. DOT-OST-2014-0002 (Mar. 26, 2014), *available at* <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2014-0002-1748>.
 10. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. § 40101 *et seq.*).
 11. Joanne W. Young & Lyndsey M. Grunewald, *Supreme Court Review of DOT Actions: An Opportunity to Discipline Government Efforts to Re-regulate the Industry*, 25 AIR & SPACE LAW. 1, 12 (2013) (citing *Spirit Airlines, Inc. v. DOT*, 687 F.3d 403, 411 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1723 (2013)).
 12. Transparent Airfares Act of 2014, H.R.4156, 113th Cong. (2014).
 13. Bruce Alpert, *House-passed bill would allow airlines to advertise fares without taxes and fees*, NEW ORLEANS TIMES-PICAYUNE (Jul. 28, 2014), *available at* http://www.nola.com/politics/index.ssf/2014/07/house-passed_bill_would_allow.html.

cates” reflect a simple preference for bundled services over the consumer choice that comes with *à la carte* pricing, rather than substantive policy critiques.¹⁴

The Department’s latest proposed rulemaking on airline ancillary fees, if it results in a final rule, will only compound the consumer harms already wrought by current airfare advertising regulations.

II. The Consumer Benefits of Unbundling Should Outweigh Complaints Rooted in Status Quo Bias

In its benefit-cost summary, the Department concedes that its ancillary fees disclosure provision (Provision 2) is projected to produce costs (\$46.15 million) that greatly outweigh benefits (\$25.1 million) over a 10-year period. In defense of its decision, the Department states the following:

The quantifiable costs of this rulemaking exceed the quantifiable benefits. However, when unquantified costs and benefits are taken into account, we anticipate that the benefits of this rulemaking would justify the costs. It was not possible to measure the benefits of the proposals in this rulemaking, except for the benefits for provision 2. For example, there are a number of unquantified benefits for the proposals such as improved on time performance for newly reporting carriers and code-share flights of reporting carriers, improved customer goodwill towards ticket agents, and greater competition and lower overall prices for ancillary services and products. There are also some unquantified costs such as increased management costs to improve carrier performance, increased staff time to address consumer complaints, and decreased carrier flexibility to customize services, though we believe these costs would be minimal. If the value of the unquantified benefits, per passenger, is any amount greater than one cent and the unquantified costs are minimal as anticipated, then the entire rule is expected to be net beneficial.¹⁵

To force a finding of positive net benefits, the Department points to unquantifiable benefits such as “increased customer goodwill towards ticket agents” and “greater competition and overall prices for ancillary services and products.”

The inclusion of unquantifiable monetized benefits of “increased customer goodwill towards ticket agents” is absurd on its face, but the Department’s argument that revising ancillary fee rules will result in benefits derived from “greater competition and lower overall prices for ancillary services and products” that exceed costs derived from “decreased carrier flexibility to customize services” deserves greater scrutiny.

14. For an example of a self-styled “consumer advocate” expressing broad dissatisfaction with unbundling, see Christopher Elliott, “*Unbundling*” is a brazen lie and it’s time for the travel industry to come clean, ELLIOTT.ORG (Sep. 28, 2013), available at <http://elliott.org/blog/unbundling-is-a-brazen-lie-and-its-time-for-the-travel-industry-to-come-clean/>.

15. NPRM, *supra* note 1, at 29972.

Since many airlines began unbundling fees for baggage and other services from airfares, several airlines have touted their *bundled* baggage services to differentiate themselves from other carriers.¹⁶ If anything, the rise of *à la carte* pricing in the airline industry has added an additional dimension of competition between air carriers, while allowing passengers the choice to travel light and enjoy lower fares—a practice that increases transparency to consumers with respect to air travel costs.¹⁷

Although consumers may incur some costs associated with adjusting to this new fare and fee model, there is no reason to believe that it will harm consumers in the long-run. The opposite is more likely to be true. Industry analysts have noted that unbundling is a global aviation industry trend, reflecting “an approach that’s forcing airlines to become better retailers . . . in the consumer’s best interest.”¹⁸

To be sure, no one would argue that airlines should be allowed to intentionally mislead and defraud consumers on ancillary fees. But there is no evidence that current industry product and service pricing practices are deceiving consumers. What the opposition to current *à la carte* pricing practices likely reflects is status quo bias.¹⁹ This bias is expected to be strongest in, for instance, heavy packers now facing ancillary baggage fees, who have long had their airfares subsidized by light travelers.

As consumers adjust to these relatively new airline industry practices, this status quo bias—and the resulting entitlement attitude with respect to bundled products and services—should be expected to subside.

We live in a time of broadband Internet service and social media. Information costs faced by travelers seeking airfare and service quality information are likely as low as they have ever been and will likely continue to fall in a competitive marketplace. In addition, the Department has presented no evidence that current ancillary fee disclosure requirements are insufficiently protecting consumers from unfair and deceptive practices.²⁰ Yet, the Department is tacitly admitting its previous efforts have failed in its proposal for dramatic new regulatory requirements that would be imposed upon meta-search engine websites disseminating airfare information.²¹ Such intervention will raise entry barriers and restrict innovation in the online travel information industry, ultimately harming consumers through the resulting reduced competition.

16. Charisse Jones, *JetBlue, Southwest ads jab at rivals’ bag fees*, USA TODAY, Oct. 25, 2010, available at http://usatoday30.usatoday.com/money/industries/travel/2010-10-25-airwarads25_ST_N.htm.

17. See, e.g., Kyle Arnold, *Ultra-low-cost airlines use ‘à la carte’ model with high fees to keep fares low*, TULSA WORLD, Nov. 10, 2013, available at http://www.tulsaworld.com/business/aerospace/ultra-low-cost-airlines-use-a-la-carte-model-with/article_31296657-19a5-5221-8668-e459b78f48f5.html.

18. Kristine Owram, *Airlines go à la carte: Why travellers should get used to baggage fees and more ‘unbundling’*, FINANCIAL POST, Sep. 20, 2014, available at <http://business.financialpost.com/2014/09/20/airlines-go-a-la-carte-why-travellers-should-get-used-to-baggage-fees-and-more-unbundling/>.

19. See William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8–10 (1988), available at <http://www.hks.harvard.edu/fs/rzeckhau/SQBDM.pdf>.

20. Enhancing Airline Passenger Protections, *Final Rule*, 76 Fed. Reg. 23166 (Apr. 25, 2011) (codified at 14 C.F.R. § 399.85).

21. NPRM, *supra* note 1, at 29972–974.

The Department's short-sighted proposals contained in the NPRM are solutions in search of problems. If the final rule results in disincentives to unbundling, air travelers can be expected to face higher base airfares. Such an outcome would harm, rather than help, consumers.

Conclusion

We appreciate the opportunity to comment on the Department's proposals contained in the NPRM.

As our comments indicate, we are troubled by the apparent ongoing effort by the Department to expand its UDP authority in a manner inconsistent with congressional intent that the airline industry practices be disciplined by competitive market forces, rather than economic regulation.

Furthermore, given the lack of evidence supporting the claim that present regulations governing ancillary fee disclosure are insufficiently protecting consumers from unfair and deceptive practices, the regulations proposed by the Department appear likely to unnecessarily restrict airline industry evolution and harm consumers in the long-run. We urge the Department to reconsider its current course of action.

Respectfully Submitted,

Marc Scribner
Research Fellow
Competitive Enterprise Institute