



December 19, 2022

**SUBMITTED VIA FEDERAL eRULEMAKING PORTAL**

The Honorable Pete Buttigieg  
Secretary  
United States Department of Transportation  
1200 New Jersey Avenue, S.E.  
Washington, DC 20590

**Re: Public Comment on NPRM, Docket No. DOT-OST-2022-0109**

Dear Secretary Buttigieg,

The undersigned State Attorneys General write to express our collective support for the Department of Transportation's October 20, 2022 Notice of Proposed Rulemaking ("NPRM") entitled "Enhancing Transparency of Airline Ancillary Service Fees" (Docket No. DOT-OST-2022-0109). As our States' chief consumer protection enforcers, many of our offices hear every day from consumers who are deceived by "junk fees." These fees raise costs for individuals and families and harm competition. We therefore applaud the Department's efforts to bring transparency to airline pricing.

Our Offices work hard to hold companies accountable when they engage in deceptive and unethical business practices – and our duties to consumers are even more important during these challenging economic times. We have brought state-level civil enforcement actions and launched consumer education campaigns to protect consumers from hidden fees, junk fees, and "drip pricing" in other industry sectors, such as the hotel industry (resort fees), banking industry (overdraft fees and other junk fees), and the restaurant, grocery, and food delivery industries

(service fees). We support increased transparency and upfront pricing for consumers across all sectors, including in the airline and ticketing industry.

The rules proposed in the NPRM would protect the millions of Americans who rely on air travel by correcting a significant market failure, namely the difficulty consumers have in making accurate “apples to apples” comparisons of flight fares, given the airlines’ current lack of disclosure of critical ancillary fees. We are particularly pleased to see that the DOT plans to require transparency as to baggage, change, and cancellation fees, which have been the source of numerous complaints made to our offices by consumers blindsided by airlines’ lack of fee disclosures. The NPRM’s proposed rules as to such fees are both needed and reasonable. Nevertheless, there are certain recommendations, set forth below, that we believe would further enhance price-transparency.

### Family Seating

The NPRM seeks comment on its proposed “family seating” rule, specifically asking whether disclosure of fees associated with family seat selection should be provided “later during the booking process, such as after the stage when a consumer inputs passenger name and age information,” or instead whether the rules should be “more prescriptive about family seat fee disclosure requirements (e.g., requiring that websites be modified to enable consumers to indicate whether a passenger will be 13 or under prior to initiating the search).” (NPRM at 32.) The NPRM also asks “what disclosure should be required, if any, when no adjacent seats are available at the time of the consumer’s ticket purchase.” (*Id.*) We suggest the following mechanism for the disclosure of fees associated with seat selection, and with family seating in particular.

The DOT’s proposed family-seating rule is somewhat complicated by at least two factors. First, airlines generally do not charge family-seating-specific fees. Instead, depending on the fare, airlines may charge for seat selection in general, and the price of a specific seat depends on various characteristics, including legroom, section of the plane, whether the seat is window, middle, or aisle, etc. Second, until a consumer provides information regarding the ages of the members of their party, the airline or ticketing agent cannot know whether there is a need for family seating.

We believe it would be impractical to require consumers traveling with children to disclose this information before conducting a fare search. On the other hand, disclosure of seat-selection charges is necessary for such travelers to be able to conduct a useful comparison of fares that meet their needs. We propose that the DOT require that initial search results include, for each fare, the lowest fee, if any, that would be associated with booking two adjacent seats. If no adjacent seats at a particular fare are available, this lack of availability would have to be disclosed for

that fare. To the extent that more than one pair of adjacent seats is required (that is, if a party is traveling with more than one child), a precise disclosure of associated fees would need to await the consumer's input of each traveler's age information, later in the booking process but prior to finalizing a booking. We believe this solution would empower a consumer traveling with children to conduct, at the outset of their search, a reasonably accurate comparison of relevant fares.<sup>1</sup>

### Booking Fees

Airlines often charge fees in connection with different methods of booking, with some carriers charging for online booking and others charging for telephone or in-person booking. We understand that federal rules already require that such booking fees be included in fare quotes. In particular, such fees should be covered by the 2012 "full fare rule" (14 CFR 399.84(a)), which provides that it is an unfair and deceptive practice for an airline or ticket agent to advertise a fare "unless the price stated is the entire price to be paid by the customer to the carrier, or agent, for such air transportation." If, contrary to this understanding, the "full fare rule" does not cover booking fees, we recommend that their disclosure be required by the DOT's new rules.

### Codesharing

We also recommend that the DOT consider whether its proposed rules adequately address the practice of "codesharing," whereby two airlines cooperate to cover a certain route, such that booking through one airline or a ticketing agent may result in obtaining a seat on a flight operated by a second airline. As you know, different airlines charge different fees for different services, and it is critical that the ancillary fees disclosed to a customer be correct – that is, where there is a codeshare arrangement in place, the consumer must be notified of the fees that will actually be charged, whether they are imposed by the airline through which the consumer booked the flight or the airline operating the flight. We note that the New York Attorney General's office has received at least one complaint stating that a consumer who booked a codeshare flight felt deceived because he understood that the fees assessed would be consistent with the advertised fees of the airline through

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<sup>1</sup> We note that certain carriers with an "open seating" (i.e., unassigned seats) policy may accommodate travelers with children by allowing them to board early. However, the cutoff age for such policies may vary and is not necessarily made clear to consumers at the time of booking. For example, Southwest Airlines allows adults with children age six and under to board early – an age cutoff a family with a seven-year-old might find surprising. We suggest that DOT consider how best to ensure that such information is disclosed clearly and at an appropriate time in the booking process.

which he completed the booking. Instead, the fees actually imposed were those of the separate operating airline.<sup>2</sup>

This scenario would seem to already be covered by the requirement in the proposed rules that the fees disclosed to consumers be accurate. We nevertheless recommend that the DOT consider whether special provision should be made in the rules for codeshare flights. For example, the DOT may wish to explicitly require that, for codeshare flights, the fees that apply to the flight itself be disclosed, regardless of the fees otherwise generally charged by the operating or non-operating carriers.

#### “Catchall” Ancillary Fee Provision

The NPRM requests comment on “how to address future adoption by airlines of additional ancillary service fees and how to ensure their disclosure to the extent that they are of critical importance to consumers.” (NPRM at 26.) This is certainly a realistic concern.<sup>3</sup> Accordingly, we recommend that the DOT’s rules include a “catchall” provision requiring disclosure of generic “critical” ancillary fees, to cover any future innovations in this area.

Such a provision should require disclosure of fees associated with any products or services that a reasonable traveler might foreseeably consider necessary. While such open-endedness could be problematic if there were a private right of action to enforce the DOT’s regulations, courts appear to be unanimous in holding that no such private right of action exists.<sup>4</sup> Therefore, it would be up to the

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<sup>2</sup> This concern is shared by one of the commenters on the NPRM, who wrote: “Perhaps you have this covered but please also require the disclosure of fees when a code-share partner is operating the flight. I tried to book flights on American Airlines recently but the flights were operated by British Airways. I could not determine how much BA was going to charge me for assigned seats in advance. Even when I contact AA help they could not answer. The full price of the ticket should be clear to the buyer. Thanks.” (Comment ID DOT-OST-2022-0109-0015.)

<sup>3</sup> See A. Pawlowski, “Airline considers fee for lavatory use,” CNN (Apr. 7, 2010), *available at* <https://www.cnn.com/2010/TRAVEL/04/07/ryanair.lavatory.fee/index.html>.

<sup>4</sup> See *Bailey v. Rocky Mountain Holdings, LLC*, 889 F.3d 1259, 1268 n. 21 (11th Cir. 2018) (“The prohibition on unfair or deceptive practices in 49 U.S.C. § 41712 has been held not to create a private right of action.”) (citing *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 519-20 (5th Cir. 2002); *Polansky v. TWA*, 523 F.2d 332, 340 (3d Cir. 1975)). See also *Pasternack v. Laboratory Corp. of Am. Holdings*, 807 F.3d 14, 21 (2d Cir. 2015); *Kalick v. Northwest Airlines Corp.*, 372 F. App’x 317, 320 (3d Cir. 2010); *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 34 (1st Cir. 2007); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 541 (7th Cir. 1993) (“DOT, not private parties, will enforce consumer protection rules against the airlines.”)

DOT to determine whether a novel ancillary fee is “critical” such that notice of such a fee must be provided to consumers at the outset of their fare inquiry.

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We believe the proposed rules will help protect consumers and strengthen our nation’s transportation sector through increased transparency and accountability for the airline industry. We are committed to working collaboratively with the DOT to protect consumers and to ensure that America’s transportation sector is able to grow and thrive in a truly competitive environment that benefits our citizens and our economy. In that regard, our offices are available to provide more information concerning the complaints we have received from consumers and to assist the DOT in any way we can in its formulation of rules regarding ancillary fees.

We note that the DOT’s proposed rules are especially important to our consumer constituents, as the States are preempted from bringing civil enforcement actions against the airline industry. Under current law, we rely on the DOT to protect consumers from hidden fees and drip pricing in the airline and ticketing industry.

Relatedly, we strongly urge the DOT to provide its support for Congressional legislation that would authorize state attorneys general to enforce state and federal consumer protection laws governing the airline industry. Attorneys general, as the States’ chief consumer protection enforcers, are at the front lines of protecting American consumers from deceptive and unfair practices and, as such, receive thousands of consumer complaints each year regarding conduct by the airlines. Alongside the DOT, we have a critical role to play in holding airlines accountable should they treat consumers deceptively or unfairly. Congressional action authorizing the States to enforce consumer protections against airlines would broaden such enforcement beyond a single federal agency, to the benefit of U.S. consumers. This is why a bipartisan coalition of state attorneys general have twice urged Congress to pass legislation authorizing such enforcement.<sup>5</sup>

Thank you for your consideration of these proposals and for taking much-needed action in this area.

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<sup>5</sup> See Letter from Attorneys General to U.S. Congressional Leaders (Aug. 31, 2022), *available at* [https://naagweb.wpenginepowered.com/wp-content/uploads/2022/08/NAAG-Policy-Letter-Airline-Accountability-and-Increased-Consumer-Protection-Final\\_38-AGs.pdf](https://naagweb.wpenginepowered.com/wp-content/uploads/2022/08/NAAG-Policy-Letter-Airline-Accountability-and-Increased-Consumer-Protection-Final_38-AGs.pdf); Letter from Attorneys General to U.S. Congressional Leaders (Oct. 1, 2020), *available at* <https://naagweb.wpenginepowered.com/wp-content/uploads/2020/10/Final-Airline-Consumer-Protection-NAAG-Letter.pdf>.

Respectfully submitted,



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