Transparency of Airline Ancillary Fees: Market Incentives for an Industry-Based Solution

Leslie Brockhoeft
TRANSARENCY OF AIRLINE ANCILLARY FEES: MARKET INCENTIVES FOR AN INDUSTRY-BASED SOLUTION

Leslie Brockhoef*
I. INTRODUCTION

IN APPROXIMATELY 2008, MAJOR U.S. airlines began "unbundling" their costs and charging separately for what was previously the full price of an airline ticket.¹ Discount airlines, like Allegiant Air and Spirit, are a growing trend for air travelers, but keeping the low base fee comes at the expense of many ancillary fees, a frequently published concern of travelers.² Indeed, a recent survey by the U.S. Travel Association found that 26% of passengers cited fees imposed by airlines for checked bags, seat assignments, and other ancillary services as their number one concern while traveling.³ In a survey by Open Allies for Airfare Transparency, 81% of travelers surveyed view airline practices on ancillary fees as unfair and deceptive and 71% believe airlines should have to sell ancillary services wherever they sell tickets.⁴

Ancillary fees are add-on fees to the base fare of a plane ticket that are imposed on different optional services, including checked and carry-on bags, meals, blankets, early boarding, and seat selection.⁵ For example, airlines commonly charge around

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⁵ U.S. Gov’t ACCOUNTABILITY OFFICE, GAO-14-515, AIRLINE COMPETITION: THE AVERAGE NUMBER OF COMPETITORS IN MARKETS SERVING THE MAJORITY OF PASSENGERS HAS CHANGED LITTLE IN RECENT YEARS, BUT STAKEHOLDERS VOICE CONCERN ABOUT COMPETITION 34 (2014) [hereinafter AIRLINE COMPETITION].
$25 for checking a bag. Discount airlines especially rely on these ancillary fees as a substantial portion of their operating revenue. Ancillary fees have been a critical component to the recent upturn in the airline industry. Between 2007 and 2013, baggage fee revenues increased from $464 million to $3.35 billion, and reservation change fee revenues increased from $915 million to $2.8 billion.

To address this conspicuous issue of airline ancillary fees, the Department of Transportation (DOT) published a notice of proposed rulemaking (NPRM) entitled Transparency of Airline Ancillary Fees and Other Consumer Protection Issues in May 2014. This paper will discuss the authority of the DOT to enforce the rules in the NPRM as well as other recent rules enacted by the DOT that have paved the way for consumer protection issues and regulation in the airline industry. Then, it will summarize the contents of the NPRM as well as some noteworthy comments filed in response to the NPRM. Finally, it will examine the economic impacts of airline ancillary fees and argue the existence of a market incentive for the airline industry to increase transparency of ancillary fees, rendering the regulatory proposal premature.

II. HISTORICAL BACKGROUND

A. AUTHORITY OF THE DEPARTMENT OF TRANSPORTATION

The Federal Aviation Act of 1958 gave the Civil Aeronautics Board (CAB) authority to regulate interstate affairs and certain deceptive trade practices. During this time, the federal government had the power to regulate the price of airfare, airline routes, and take administrative action against deceptive prac-

7 AIRLINE COMPETITION, supra note 5, at 17.
8 Id.
tices of airlines.\textsuperscript{12} For instance, the CAB had the authority to regulate any air transportation rates to be "just and reasonable."\textsuperscript{13} In 1978, Congress enacted the Airline Deregulation Act (ADA) because "maximum reliance on competitive market forces would best further efficiency, innovation, and low prices as well as variety and quality of air transportation services."\textsuperscript{14} As a result of deregulation of the industry, the CAB was abolished in 1985 and the authority to regulate the airline industry was transferred to the DOT and narrowed.\textsuperscript{15} However, the ADA did retain the CAB's authority over deceptive trade practices.\textsuperscript{16}

The DOT uses its authority under the unfair and deceptive practices provision in 49 U.S.C. § 41712 to regulate aspects of the airline industry, which affirms that the DOT may prohibit "unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation."\textsuperscript{17} A practice is deceptive if it is "likely to mislead" a reasonable consumer.\textsuperscript{18} Further, a CAB rulemaking, determining that bias in airline-owned computer reservation systems constituted an unfair and deceptive practice, clarified that a practice is unlawful under the provision if: "(1) it causes substantial consumer injury, (2) that is not outweighed by any consumer or competitive benefits from the conduct, and (3) the injury cannot reasonably be avoided by consumers."\textsuperscript{19}

The concept of deregulation under the ADA is still a guiding principle that is often at odds with DOT regulations in the airline industry for consumer protection. The Supreme Court ar-

\textsuperscript{12} Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403, 408 (D.C. Cir. 2012).
\textsuperscript{14} Morales, 504 U.S. at 378 (quoting 49 U.S.C. app. §§ 1302(a)(4), 1502(a)(9) (1980)).
\textsuperscript{15} Id.
\textsuperscript{16} Id. at 379.
\textsuperscript{17} 49 U.S.C. § 41712(a) (2006).
ticated the intent of the ADA in *Northwest, Inc. v. Ginsberg*, holding that “[t]he ADA is based on the view that the best interests of airline passengers are most effectively promoted, in the main, by allowing the free market to operate.” The DOT has acknowledged limitations on its authority due to the ADA’s deregulatory intent: “Our rules are designed to produce the minimum intervention necessary to prevent the abuses we detect.” Further, the DOT has stated that the marketplace must govern airfares and issues relating to airfares unless there is “compelling evidence of consumer deception or unfair methods of competition.”

**B. RECENT DOT RULES FOR CONSUMER PROTECTION**

The DOT has generally used its authority restrictedly to regulate the airline industry by prohibiting unfair or deceptive practices. However, recently the DOT has adopted rules and proposals in favor of broad consumer protection. In early 2014, the DOT implicated § 41712 by proposing to regulate consumer cell phone use during flights because their use may lead to uncomfortable noise levels for fellow passengers. The NPRM that is the focus of this paper, *Transparency of Airlines Ancillary Fees and Other Consumer Protection Issues*, is the third in a series. In 2009, the first rule, *Enhanced Protections for Airline Passengers I*, increased penalties for long tarmac delays. In this

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20 *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1433 (2014); see also IATA Comment, supra note 19.


24 *Id.*


rule, the DOT found that chronically delayed flights constitute an unfair and deceptive practice.\textsuperscript{28} It also required airlines to post flight delay information on their website and implement customer service plans.\textsuperscript{29} The second rule, \textit{Enhanced Protections for Airline Passengers II}, published in 2011, required airlines to have minimum customer service standards, called for more transparency of ancillary fees on the airline's website, and prohibited price increases after purchase.\textsuperscript{30} Specifically, it required airlines to disclose ancillary fee information on their websites and include information about baggage services and fees on their e-ticket confirmation.\textsuperscript{31} Additionally, in this second rule, the DOT issued regulations on airline marketing and ticket pricing called the airfare advertising rule.\textsuperscript{32} This section will cover two issues contained in the two DOT rules: the tarmac delay rule and the total-price rule.

\section*{1. Tarmac Delay Rule}

The three-hour tarmac delay rule requires airplanes to allow passengers to return to the gate if they have been on the tarmac for over three hours.\textsuperscript{33} The fines for noncompliance could be as high as $27,500 per passenger.\textsuperscript{34} It also requires the airlines to provide water and food and maintain lavatories for passengers within two hours of the delayed flight.\textsuperscript{35} However, some research shows that this rule has had a negative effect on consumer experience.\textsuperscript{36} It may lead airlines to cancel flights due to a fear of

\begin{itemize}
\item \textsuperscript{28} Enhancing Airline Passenger Protections, 74 Fed. Reg. at 68,993.
\item \textsuperscript{29} Id. at 68,983.
\item \textsuperscript{31} RACHEL TANG, CONG. RESEARCH SERV., R43078, AIRLINE PASSENGER RIGHTS: THE FEDERAL ROLE IN AVIATION CONSUMER PROTECTION 14 (2013), http://fas.org/sgp/crs/misc/R43078.pdf.
\item \textsuperscript{32} Enhancing Airline Passenger Protections, 76 Fed. Reg. at 23,166 (amending 14 C.F.R. § 399.84(a)).
\item \textsuperscript{33} 14 C.F.R. § 259.4 (2011).
\item \textsuperscript{36} Alan Levin, Tarmac Delay Rule Making U.S. Flight Cancellations More Likely, GAO Says, BLOOMBERG NEWS (Sept. 14, 2011, 5:10 PM), http://www.bloom
paying the hefty fine. A study by the Government Accountability Office found that airlines experienced a 24% increase in the odds of cancelling a flight after the rule went into effect.

2. Total-Price Rule

Beginning in 1984, the DOT has required that the advertised price for airfare include the entire price. However, airlines could separate the base airfare from the tax, so that customers would have to add them to decipher the total price. But the airfare advertising rule changed this with the inclusion of the total-price rule, which required airline advertisements to minimize reference to government taxes and fees. The airlines can still give an itemized breakdown of the fare, but the price components cannot be displayed prominently or in the same size as the total price. Opponents of the rule believe it works against First Amendment rights and prevents a healthy and competitive airline industry. Spirit Airlines sued unsuccessfully over the rule.

Airlines have reacted to the total-price rule by lobbying for the Transparent Airfares Act of 2014, which recently passed through the House of Representatives. The Act would allow
airlines to list the government taxes and fees separate from the full price of the airfare. The incentive for airlines to want to pass on the blame for high airfare is evident—an estimated 20% of a total airline ticket price goes to federal taxes and fees. Airlines argue that the bill furthers consumer interest by letting them know where their money is going, whereas consumer groups oppose the bill, insisting that it is another opportunity for airlines to deceive consumers by advertising a lower base fare than the actual cost.

III. TRANSPARENCY OF ANCILLARY AIRLINE FEES AND OTHER CONSUMER PROTECTION ISSUES

A. WHAT IS IN THE NPRM?

In May 2014, the DOT published its Transparency of Airline Ancillary Fees and Other Consumer Protection Issues NPRM. In the NPRM, the DOT avers that some people cannot calculate the true cost of travel, because of insufficient information about ancillary services and fees, such as carry-on bags, checked bags, and seat reservations. To combat this, the DOT suggests changing the definition of “ticket agent” to broaden regulation, requiring airlines to provide information on ancillary fees and ticket agents to disclose this information, and promulgating other rules designed to increase consumer protection for purchasers of airline tickets.

1. Definition of “Ticket Agent”

Due to the growing popularity of ticket booking through meta-search engines, the proposal sets forth a new definition of “ticket agent.” This is “to ensure that its consumer protection regulations apply to all entities that hold out airfare, schedule,
and availability information to consumers." The definition would include entities involved in the sale of transportation through the Internet regardless of whether they sell tickets themselves. Specifically, the proposal will cause meta-search engine websites such as Kayak and Google to be considered ticket agents and thus fall under the department’s new consumer protection requirements. Meta-search engines typically provide flight information for consumers to research flight schedules and fare, but then these websites connect them to the airline or travel agent website to purchase their tickets. The proposed definition would ensure that websites with flight search tools are subject to the consumer protection regulations and that they give consumers information about ancillary fees early in the transaction.

2. Transparency

The proposed rules would require airlines to provide ticket agents, possibly including Global Distribution Systems (GDSs), with information on core ancillary fees and services. GDSs supply the ticket agents with information on the fare, availability, and schedule of the airlines. Sabre, TravelPort, and Amadeus are the three GDSs in the United States that control the distribution of most airline services. Most airlines use GDSs to distribute their products, but some, like Southwest, do not, most likely to avoid the extra service fees. The airlines pay a booking fee to the GDS at a price that currently frustrates the airlines. GDSs have long-term contract agreements with both the airlines and travel agents that act as a barrier to entry for travel technology firms. The NPRM puts forth two different options for the rule requiring disclosure of ancillary fees: option A and option B. Option A would require airlines to disclose ancillary fee information to all ticket agents, including GDSs that the airline

54 Id. at 29,972.
55 Id. at 29,975.
56 Id. at 29,974.
57 Id. at 29,973.
58 Id.
59 Id. at 29,977–78.
60 Id. at 29,975–76.
61 Id.
62 Id. at 29,976.
63 Id.
64 Id. at 29,976.
65 Id. at 30,000–02.
permits to distribute its services information.\textsuperscript{66} Option B would not require airlines to disclose ancillary fee information to GDSs and other intermediaries, but instead only to those ticket agents that sell tickets directly to consumers.\textsuperscript{67} Option B would also not require airlines to disclose ancillary fee information to meta-search engines like Kayak and Google.\textsuperscript{68}

The proposal states that not all ancillary service fee information needs to be disclosed, but disclosures must include those services that are viewed as "intrinsic to air transportation."\textsuperscript{69} These services include first and second checked baggage, one carry-on item, and advance seat selection.\textsuperscript{70} The airlines would have to give this information to ticket agents, and the carriers and ticket agents would be required to disclose this information before the customer purchases the ticket.\textsuperscript{71} However, the NPRM requests comments on whether the list of intrinsic services should be expanded to include in-flight wi-fi, seating section upgrades, food and beverages, and priority boarding.\textsuperscript{72}

In addition to transparency, the proposal solicits comments on whether the ancillary services should be "transactable," which means that the ancillary services could be bought at the same time as the initial purchase of the airfare.\textsuperscript{73} If the rule required ancillary services to be transactable, then they must be made available for purchase through every channel selling their tickets.\textsuperscript{74} Transactability would alleviate concerns for consumers such as whether airlines will increase the price when the ancillary service is actually purchased, and the continued availability of certain services such as advanced seat assignments.\textsuperscript{75} Pricing for advanced seat assignments are of particular interest with respect to transactability because prices are inconsistent, changing with availability, time of purchase, and aircraft size.\textsuperscript{76}

\begin{footnotes}
\item[66] Id. at 29,977.
\item[67] Id.
\item[68] Id.
\item[69] Id.
\item[70] Id.
\item[71] Id. at 29,977-78.
\item[72] Id. at 29,980.
\item[73] Id. at 29,979.
\item[74] Id.
\item[75] Id.
\item[76] Id.
\end{footnotes}
3. **Other Rules in the NPRM**

The proposal sets forth additional rules to increase passenger protection. Under the proposal, small airlines, like Spirit, would be required to report their on-time performance data. This is because the proposal would require any airline accounting for at least .5% of the domestic scheduled passenger revenue to report that data, as opposed to the current 1% requirement. As a reporting carrier, an airline must disclose to consumers the on-time performance per flight either by phone or in person upon reasonable inquiry. Airlines are also required to report on-time performance data and mishandled baggage information to the Bureau of Transportation Statistics. The DOT believes this will incentivize smaller airlines to provide quality customer service. The NPRM also contains a rule that will require airlines to report data for flights operated by code-share partners. The DOT provides quality of service information through the Air Travel Consumer Report, including flight delays, oversales, mishandled baggage, and consumer complaints. The report has a significant impact on consumer perception of the airline, so its accuracy is vital for consumer transparency and airline competition. Code-share flights are those regional short-haul flights operated on a fee-for-flight basis by an operating carrier partner, but the operating carrier does not market or sell the tickets. Mainline carriers often market the flight with their own brands and handle all customer service aspects of their code-share flights. The DOT hopes that this rule will make the report a more complete and accurate representation of airlines’ quality of service.

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77 Id.
81 Id.
82 Id. at 29,981.
83 Id. at 29,982.
84 Id.
85 Id.
86 Id.
87 Id.
88 Id.
The proposal aims to regulate ticket agencies to protect the growing number of consumers who primarily book through ticket agencies. Certain customer service standards that currently apply only to airlines would extend to ticket agents, such as allowing customers to hold reservations without payment or cancel without penalty for twenty-four hours provided that the reservation is made at least a week before the departure date. An agency's website would have to disclose its cancellation policy to consumers and promptly inform passengers of changes in their travel itinerary.

At least one of the rules in the NPRM benefits airlines and is supported by airlines. Under current regulations, air carriers are prohibited from increasing the price of ancillary fees after the purchase of a ticket, including but not limited to the price of a seat and baggage fees. The proposal modifies this rule to only prohibit airlines from increasing the baggage fee after purchase of a ticket but allows increases for other ancillary fees, since baggage fees are "intrinsic to air transportation" and applying the prohibition to other fees may be logistically unfeasible.

Many of the proposed rules are designed to increase transparency to consumers online. Indeed, airlines and ticket agents must disclose any code-sharing arrangements on initial itinerary displays on their websites. For example, a United Airlines flight that includes a regional carrier flight would need to identify the regional carrier. The proposal considers requiring ticket agents that give preference to certain carriers over others either to disclose that preference or provide unbiased displays. Websites of large travel agents must disclose in their online displays if they do not market all of the air carriers available to the consumer.

89 Id. at 29,984; see 14 C.F.R. § 259.5; Hetter, supra note 78.


91 14 C.F.R. § 399.88; see id. at 29,990.


93 Id. at 29,986–87; see Hetter, supra note 78.

94 Hetter, supra note 78.

95 Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, 79 Fed. Reg. at 29,989; see Hetter, supra note 78.

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B. ARGUMENTS FOR THE PROPOSAL

Foreseeably, groups representing travel agencies, GDSs, and consumers support most aspects of the NPRM. Many of these groups have submitted comments to the NPRM, arguing that prompt action is needed to address the transparency of ancillary fees to facilitate consumer choice and airline competition, but most of the commenters also maintain that the NPRM as it stands is insufficient to solve the problem. This section will discuss the comments of the American Society of Travel Agents (ASTA), the Travel Technology Association (TTA), Open Allies for Airline Transparency (Open Allies), and Southwest Airlines (Southwest).

1. The American Society of Travel Agents

The ASTA submitted a comment to the NPRM supporting the need for improved transparency of ancillary fees, but it argued that the NPRM does not go far enough. The ASTA is the largest association of travel professionals worldwide and comprises 80% of the travel agency distribution channel in the United States. The ASTA argues in its comment that preventing unfair and deceptive practices is a critical aspect of deregulating the airline industry. In making this point, the ASTA emphasizes that the DOT is the sole enforcement authority for con-


99 ASTA Comment, supra note 98; see McDonald, supra note 97.


101 ASTA Comment, supra note 98, at 6.
sumer protection against airlines.\textsuperscript{102} In opposing option B of the NPRM, the comment pleads for the DOT to require airlines to distribute ancillary information to GDSs, in part because of the heavy reliance by travel agents on GDSs.\textsuperscript{103} It wants the proposal to require airlines to allow ticket agents to sell the airlines’ ancillary services—that they be transactable.\textsuperscript{104} It does not believe that airlines will have any incentive to negotiate transactability of ancillary fees with travel agents.\textsuperscript{105} The ASTA thinks making the ancillary fee transactable is the “best solution” because it will simplify the process for consumers and allow them to effectively comparison shop.\textsuperscript{106} The comment calls on the DOT to act swiftly to adopt rules requiring transparency and transactability of ancillary fees and separate these issues from the other rules in the proposal, which the ASTA opines can be addressed at a later time.\textsuperscript{107}

2. The Travel Technology Association

Similar to ASTA, the TTA’s comment generally supports the proposition of increasing transparency of ancillary fees but advocates for transactability and a broader definition of “basic ancillary services.”\textsuperscript{108} The TTA represents the GDSs, online travel agencies, and the meta-search engine websites that provide air travel information.\textsuperscript{109} In support of option A, it urges the DOT to require airlines to provide the ancillary fee information to GDSs.\textsuperscript{110} Without this requirement, the TTA insists that the disclosure burden for agents would be too difficult a task, since many agents rely on getting their information through a GDS.\textsuperscript{111} In addition, the TTA supports a transactability requirement and wants the DOT to require airlines to give ticket agents enough information to give customer-specific quotes, not just itinerary-specific.\textsuperscript{112} Customer-specific quotes would be specific to any particular passenger type affecting the fee, including military

\textsuperscript{102} Id.
\textsuperscript{103} Id. at 16.
\textsuperscript{104} Id. at 26.
\textsuperscript{105} Id. at 27.
\textsuperscript{106} Id. at 38.
\textsuperscript{107} Id. at 76.
\textsuperscript{108} TTA Comment, supra note 98, at 1.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 7.
\textsuperscript{111} Id. at 2.
\textsuperscript{112} Id. at 20.
personnel, frequent flyer status, method of payment, and cabin (first class or economy).\textsuperscript{118}

In its comment, the TTA suggests that the DOT expand the scope of "basic ancillary services" to include boarding services and cancellation and change fees.\textsuperscript{114} It argues that boarding services should be included because they used to be a component of the total ticket price, and some people, such as those with disabilities and young children, consider them a necessity.\textsuperscript{115} Regarding cancellation and change fees, the TTA cites the general practice that airlines provide this information to ticket agents without a regulatory requirement to show that the fees are an important component of the base fare.\textsuperscript{116} However, the TTA disapproves of the rule included in the NPRM that requires agents to disclose any biases in their website displays and that holds agencies to certain customer service standards.\textsuperscript{117} To this point, the TTA argues that ticket agents have a greater incentive to ensure quality customer service as evidenced by fewer consumer complaints than the airlines.\textsuperscript{118}

3. Open Allies for Airline Transparency

Open Allies for Airline Transparency (Open Allies) made similar comments and stressed that airlines lack any commercial incentive to provide ancillary fee information to the travel agency.\textsuperscript{119} Open Allies represents travel industry and consumer groups who promote increased transparency of airline fares and fees.\textsuperscript{120} It argues that the lack of transparency of ancillary fees afforded to consumers constitutes a market failure.\textsuperscript{121} Open Allies supported the claim that the ancillary fees are deceptive with its own survey showing that out of 1,162 U.S. adult airline travelers, 55% said they were surprised by additional fees paid after their initial ticket purchase.\textsuperscript{122} In its comment, Open Allies claims that no market incentive exists for airlines to disclose anc-

\textsuperscript{119} TTA Comment, supra note 98, at 17.
\textsuperscript{120} Id.
\textsuperscript{115} Id.
\textsuperscript{121} Id.
\textsuperscript{116} Id.
\textsuperscript{122} Id. at 2.
\textsuperscript{117} Id. at 2.
\textsuperscript{118} Id. at 3.
\textsuperscript{119} See Open Allies Comment, supra note 25.
\textsuperscript{120} Id. at 1.
\textsuperscript{121} Id. at 2.
ancillary fee information to ticket agents: "Showing incomplete prices undoubtedly does make air travel seem cheaper, thereby increasing the likelihood that air travelers will purchase a ticket. Hiding fees also degrades comparison shopping, lessening competition and reducing downward pressure on prices." Like TTA and ASTA, Open Allies supports option A and the transactability requirement and argues that ticket agents should be provided with customer-specific fee information. Also, Open Allies takes the position that priority boarding and cancellation and change fees should be included in the definition of "basic ancillary services," contending that these fees are pivotal information to consumers when comparing ticket purchase options.

4. Southwest Airlines

Southwest distinguished itself from other airlines by generally supporting the proposal. In its comment, Southwest argues that the rule requiring disclosure of basic ancillary fee information to ticket agents "would allow consumers to make more of an apples-to-apples comparison among carriers when shopping for air transportation, and would foster more vigorous competition among air carriers." This requirement would "ultimately put downward pressure on fees." Southwest notes its uniqueness among its competitors because it does not charge ancillary fees for services intrinsic to air travel. It also recognizes option A as the better option in the NPRM for two reasons: (1) ancillary fee information through GDSs is critical for travel agents, and (2) ancillary fee information through meta-search engine tools is of growing importance to consumers. However, Southwest does not support expanding the list of basic ancillary fees to include in-flight wi-fi, seating section upgrades, priority boarding, or food and beverages.

123 Id. at 6.
124 Id. at 12, 48.
125 Id. at 46.
126 Southwest Airlines Comment, supra note 98.
127 Id. at 6.
128 Id.
129 Id. at 3.
130 Id. at 9.
131 Id. at 11.
C. ARGUMENTS AGAINST THE PROPOSAL

Most airlines oppose the rule, arguing that it would be an overreach of the DOT’s authority after deregulation and that the DOT should let the marketplace rule.132 This section will discuss the comments of Airlines for America (A4A), the International Air Transport Association (IATA), and AAA.

1. Airlines for America

A4A argued in its comment that the ancillary fee disclosure rule is unnecessary and beyond the DOT’s regulatory authority.133 A4A is the largest trade association for airlines in the United States.134 A4A claims this proposal, if enacted, would be a “dramatic change in position” from the DOT’s decision to deregulate in 2004.135 It argues that the Enhanced Airline Passenger Protection II provisions that went into effect in 2012 will improve transparency, and more time is needed to see if consumer protection on the issue is still warranted.136 A4A argues that GDSs have market power over airlines and cites examples where the DOT has recognized this in the past.137 A4A explains that airlines use ancillary fee information as a negotiating tool for lowering the fee that airlines pay to the GDSs and technological advancements of GDSs, both benefitting consumers.138 A4A also insists that market pressures for airlines to disclose ancillary fees exist.139 The incentive to disclose ancillary fee information derives from airlines’ interest in long-term customer loyalty and to

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133 Rice, supra note 132.


135 A4A Comment, supra note 18, at 5.

136 Id. at 13–14.

137 Id. at 2–3 (quoting Computer Reservations System (CRS) Regulations, 69 Fed. Reg. 976, 989 (Jan. 7, 2004) (codified at 14 C.F.R pt. 255) (“Each CRS therefore continues to have significant market power based on the travel agents to which it has exclusive access.”)).

138 Id. at 3–4.

139 Id. at 9.
facilitate the sale of ancillary fees. The comment demonstrates how some third-party websites have gathered airlines' ancillary fee information, like smartertravel.com, and made such information publicly available for comparison.

Additionally, A4A argues that basic ancillary fees are incidental and not intrinsic to air transportation. It claims that many customers choose to forgo these services to save money and that such services are not a major factor in making ticket purchases. In support of this argument, A4A cites the Internal Revenue Code, which requires passengers to pay taxes on airfares "for taxable transportation of any person." But it does not tax passengers on airfares for "transportation of baggage" or any other "optional" service.

A4A insists that the DOT has miscalculated the cost-benefit analysis. It notes that costs would include airlines' investments in technological advancements for setting and displaying ancillary fees and for developing and marketing ancillary bundles and products. A4A also claims that requiring ticket agents and carriers to provide ancillary fee information on the first website display screen would overwhelm, rather than assist, the customer due to its irrelevancy and complexity.

As noted in A4A's comment, GDSs have indeed reduced their fees to airlines during negotiations in exchange for full content. In an article opposing the regulation, David Berg, the Senior VP and General Counsel for A4A, argues that the rule would "stifle innovation and competition in the distribution market" by further strengthening the GDSs' market power.

140 Id.
141 Id. at 11.
142 Id. at 18.
143 Id. at 18-19.
144 Id. (quoting 26 U.S.C. § 4261(a)).
145 Id. (quoting I.R.S. Priv. Ltr. Rul. at 7, 8, PLR-118216-09, No. 201002004, 2010 WL 147820 (Jan. 15, 2010)).
146 Id. at 21.
147 Id. at 22–23.
148 Id. at 24–25.
disincentivized innovation, thus leaving them with out-of-date and inefficient technology.\textsuperscript{151}

2. The International Air Transport Association

The IATA is a global trade association for air carriers, representing approximately 240 international airlines.\textsuperscript{152} In its comment, the IATA explains that the DOT’s authority to regulate unfair and deceptive practices should be narrowly construed, in order to adhere to Congress’s deregulatory intent in the ADA.\textsuperscript{158} It argues that the DOT is exceeding its authority and that the DOT has not evidenced any substantial injury to consumers from current practices.\textsuperscript{154}

The IATA uses several examples to illustrate how the airline industry is already working towards higher transparency of airline fees;\textsuperscript{155} it cites the New Distribution Capability (NDC).\textsuperscript{156} Indeed, the DOT has approved the NDC, a program to develop and market a new XML data transmission standard that would be available for use by any party.\textsuperscript{157} The new standard is designed to customize ticket offers for consumers with different combinations of ancillary services that would include a total price.\textsuperscript{158} About the program, the DOT said “the use of common technical standards could facilitate the marketplace development of distribution practices and channels that 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

\begin{itemize}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} IATA Comment, \textit{supra} note 19, at 1; \textit{About Us}, IATA, http://www.iata.org/about/Pages/index.aspx (last visited Nov. 18, 2015).
\item \textsuperscript{153} IATA Comment, \textit{supra} note 19, at 6–8.
\item \textsuperscript{154} \textit{Id.} at 11–12 (“Considering the fact that charges for bags and premium seating are a common industry practice—and that most consumers are aware that fees are associated with these ancillary services—it is difficult to see how requiring ticket agents to retrieve ancillary fee information on their own from readily available public sources results in any concrete harm to consumers.”).
\item \textsuperscript{155} \textit{Id.} at 19.
\item \textsuperscript{156} \textit{Id.} at 25.
\item \textsuperscript{158} Transparency of Airline Ancillary Fees and Other Consumer Protection Issues, 79 Fed. Reg. at 29,976.
\end{itemize}
and amenity offers and increase transparency, efficiency and competition."\footnote{IATA Welcomes US Dept. of Transportation Final Approval of Resolution 787, \textit{supra} note 157.}

3. AAA

Not every travel agency offers complete support to the rule requiring airlines to disclose ancillary fee information to ticket agents; AAA remains somewhat skeptical.\footnote{See McDonald, \textit{supra} note 97.} AAA is a not-for-profit entity, one of North America’s largest travel agencies, and the largest travel and membership organization in North America.\footnote{AAA Comment, \textit{supra} note 132, at 1.} In a letter to the DOT in response to the NPRM, AAA referenced Congress’s intent to regulate the airline industry when the ADA was passed in 1978.\footnote{\textit{Id.}} AAA emphasizes the importance of keeping regulation consistent with the ADA’s concept of the superiority of competition to promote innovation and low prices in the airline industry.\footnote{\textit{Id.}} For this reason, AAA “urges the Department to proceed with great care” in considering the proposal.\footnote{\textit{Id.}}

IV. ECONOMICS OF AIRLINE FARES

The U.S. airline industry struggled first in the aftermath of September 11, 2001, and then during the recession in 2008 due to high fuel prices and the financial crisis, but it has since returned to profitability.\footnote{\textit{Id.}} Revenue growth has been essential to the U.S. airline industry’s improved financial health.\footnote{\textit{Id.}} According to a 2014 Government Accountability Office report, this growth has been aided by three main factors: (1) more passengers; (2) limiting the supply of available seats in relation to demand; and (3) revenue from ancillary fees.\footnote{\textit{Id.}} Following the recession, total operating revenue decreased by $22 billion from 2008 to 2009 but is now exceeding pre-recession levels and increased 29% from 2009 to 2012.\footnote{\textit{Id.}}
A. Economic Impacts of Ancillary Fees

1. Ancillary Fees Increasing Revenue

Prior to unbundling, airlines spread the cost of ancillary services equally across all travelers as a part of their base airfare. Unbundling the ancillary fees has been an effective strategy for airlines, as they are able to keep the base fare low while allocating the additional costs on the specific customers who use the optional services. For instance, baggage checking is a costly service for airlines, but not every customer uses that service, so charging it as an ancillary fee imposes a cost proportional to the actual cost of services that a customer wants. But in some cases the cost may be negligible, such as reserving a particular seat on an aircraft. Some passengers place higher value on this service, and so they are willing to pay a higher price while others are not. This enables airlines to increase revenue and differentiate their brand by offering enhanced products for minimal cost. For example, a recent study found that when airlines introduced bag fees in 2008, base fares fell by about 3%, but the total cost of travel was higher for those who used the service. However, consumers paid on average about 4% more for airfares in 2012 than in 2007, without considering additional fees, most likely due to an improved economy and increased demand.

Although revenue from ancillary fees is still small in proportion to total airline operating revenue, it is growing: according to a Government Accountability Office report in 2010, the revenues from baggage fees, reservation change fees, and cancellation fees have grown from less than 1% of operating revenues in 2007 to over 4% in 2009. From 2009 to 2010, airline revenue from baggage, reservation changes, and cancellation fees in-

169 Id. at 17.
170 Id.
171 Id. at 34.
172 Id.
173 Id. 34–35.
174 Id. at 34.
175 Id. at 35.
177 Id. at 11.
creased 13%.\textsuperscript{178} 2014 was a record setting year for add-on fee revenues, with U.S. airlines collecting $6 billion in baggage and reservation fees.\textsuperscript{179} In fact, some data suggests that without revenue from ancillary fees, some airlines would not be profitable.\textsuperscript{180} When Air Canada and WestJet Airlines announced their plans to charge checked baggage fees, both companies' stock rose on the day of these announcements.\textsuperscript{181}

Discount airlines such as Allegiant Air and Spirit that offer cheap base airfares receive a more considerable portion of their operating revenues from ancillary fees.\textsuperscript{182} For example, Spirit's revenue from checked baggage and change fees grew from 3% to 15% of total operating revenues between 2008 and 2012.\textsuperscript{183} However, the total revenue from ancillary fees is unclear, because airlines are only required to report to the DOT their checked baggage and reservation change fees; other fees are included in a variety of other revenue accounts.\textsuperscript{184}

2. Ancillary Fees Decreasing Customer Satisfaction

On the other hand, customers have become increasingly frustrated by airlines "nickel and diming" them with the use of sometimes-hidden fees, and this could affect their willingness to purchase tickets from those airlines in the future. Research suggests that consumers' attitudes toward brands that use add-on pricing are more negative than those that disclose full price, making consumers less likely to purchase from those brands in the future.\textsuperscript{185} Whether consumers view the add-on fees as reasonable is an important factor in determining whether the fees will affect their brand attitude.\textsuperscript{186} Presentation of the fees is also an important factor.\textsuperscript{187} Presenting the total price after the addi-
tional fees can mitigate the effects of consumers feeling cheated by the brand.\textsuperscript{188} However, when extra fees are less visibly salient, in particular those shown in a smaller font size, customers underestimate the total cost, leading to short-term benefits.\textsuperscript{189} But there is a higher likelihood they will eventually be surprised by the total cost, thus creating a negative impact on future purchases.\textsuperscript{190}

An example of the brand attitude effect of add-on fees is apparent with Southwest Airlines, the outlier of the airline industry with its "bags fly free" mantra. Southwest was the top stock of 2014, with increases that topped 110%, beating out all of its competitors.\textsuperscript{191} It ranked second in airline customer satisfaction only to JetBlue, according to the American Customer Satisfaction Index.\textsuperscript{192}

\section*{B. Other Important Costs Affecting Price of Airfare}

It is impossible to look at costs affecting airfare without considering the price of fuel. Rising fuel prices have presented major challenges in the airline industry because fuel accounts for nearly half of an airline's total costs.\textsuperscript{193} Airlines took numerous steps to deal with the rising fuel prices between 2002 and 2013.\textsuperscript{194} During that period, jet fuel prices quadrupled from $0.72 to $2.98 per gallon and gasoline prices for aviation tripled from $1.29 to $3.93 per gallon.\textsuperscript{195} However, very recently there has been a fall in fuel prices.\textsuperscript{196} Although this has been a relief for airlines, economic experts predict that this savings will not be reflected in ticket fares.\textsuperscript{197} This may be because airlines have

\begin{flushright}
\textsuperscript{188} Id. at 26.
\textsuperscript{189} Id. at 18.
\textsuperscript{190} Id.
\textsuperscript{192} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Mouawad \& Clark, \textit{supra} note 193.
\textsuperscript{197} Id.
\end{flushright}
little incentive to reduce their fares, partially because of the lucrative ancillary fees.\textsuperscript{198}

In addition to fuel price issues, government-imposed fees and taxes have increased. As mentioned earlier, government-imposed taxes and fees now make up about 20% of the total price of airfare.\textsuperscript{199} For instance, ticket fees pay for construction projects at airports, called passenger facility charges.\textsuperscript{200} There is a federal cap on these fees currently set at $4.50 for each takeoff and landing.\textsuperscript{201} These fees generate $2.8 billion a year, but airports argue the fees have not kept pace with inflation.\textsuperscript{202} There is a contentious proposal to raise the cap to $8.\textsuperscript{203} Raising the cap is troubling to airlines, because a Government Accountability Office study in 2012 found that a $3 increase in security fees on airline tickets could result in a 1% decline in customers.\textsuperscript{204}

V. ANALYSIS

A. THE QUANDARY OF REREGULATION OF THE AIRLINE INDUSTRY

Although the DOT undoubtedly has the authority to prevent airlines from unfair and deceptive practices, the extent to which it can intervene into the airline industry’s marketing and distribution practices remains unresolved.\textsuperscript{205} The spirit of the ADA, that “maximum reliance on competitive market forces would best further efficiency, innovation and low prices as well as variety and quality of air transportation services,” is certainly called into question by the current NPRM and other recent consumer protection rules regulating the airline industry.\textsuperscript{206} As shown by other rules, the consequences of such regulations can often be unexpected and inadvertently impose more harm on consum-

\textsuperscript{198} Id.
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id.
\textsuperscript{204} Id.
\textsuperscript{205} See Young & Grunewald, supra note 23, at 1, 14.
The requirement that there be "compelling evidence" of consumer harm to issue such regulations seems to have been relaxed by recent rules. The Supreme Court, under the guidance of the ADA, looked at frequent flyer miles programs in *Northwest* and found that the market provided sufficient protection: "If an airline acquires a reputation for mistreating the participants in its frequent flyer program... customers can avoid that program and may be able to enroll in a more favorable program." Likewise, here the customers can protect themselves by finding the ancillary information on the airline's website or simply purchasing from airlines that they find to be more straightforward in their marketing and services.

The ASTA's argument that the DOT must zealously prevent unfair and deceptive practices in the airline industry, because the ADA made the DOT the sole enforcement authority through federal preemption, is misguided. The purpose of ADA preemption of state law is to "prevent states from hampering competition by reimposing similar regulation," not to create extensive federal regulation. Additionally, the "saving" clause of the ADA leaves remedies at common law and statute in place, and section 1305 of the ADA only preempts state law "related to rates, routes, and services." In this instance, the NPRM, if enacted, would stifle innovation and produce less variety of air transportation services, falling short of the stated goal of the ADA.

B. AN INDUSTRY-BASED SOLUTION

The claim that airlines have no market incentive to display ancillary fees is false. With the growing disgruntlement of consumers who feel duped by the "hidden fees," airlines can in-

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207 See Levin, *supra* note 36.
210 See IATA Comment, *supra* note 19, at 12.
213 49 U.S.C. app. §§ 1305(a)(1), 1506; see Rombom v. United Air Lines, Inc., 867 F. Supp. 214, 221 (S.D.N.Y. 1994) ("Given that Congress did not repeal § 1506, I do not accept United's argument that § 1305 preempts all state tort actions. Adopting the result urged by United would leave injured plaintiffs without a remedy in situations where outrageous and unnecessary conduct occurred during the performance of a service.").
crease customer satisfaction and brand loyalty with more transparent display of their extra fees.\textsuperscript{214} The airlines' interest in building customer loyalty is evidenced by their development of frequent flyer programs.\textsuperscript{215} The success of Southwest's "bags fly free" policy and positive brand attributions by consumers exemplifies the manifest market incentives of such policies.\textsuperscript{216} For instance, after one airline adopted a frequent flyer-like program, it quickly became an industry standard in order to compete.\textsuperscript{217} The airline industry is certainly ripe for incentives to increase brand loyalty, as it has been rapidly declining for the past eight years.\textsuperscript{218} Additionally, the success of Southwest suggests that the airline industry's improvement in revenue can be attributed to an improved economy and consolidation of the industry over the rise in ancillary fees.

Even if airlines do not adopt a policy partially eliminating ancillary fees like Southwest, there is still a market incentive to provide this information to GDSs.\textsuperscript{219} Aside from improving customer satisfaction and brand attitude, the highly-desired information is an important negotiating tool for airlines that has proven effective in lowering fees and thus total cost to the consumer.\textsuperscript{220} Indeed, Open Allies concedes in its comment that "a number of bi-lateral agreements to distribute ancillary services have been announced between individual airlines and individual GDSs in recent years."\textsuperscript{221} Illustrating that airlines do not have an abusive level of market power, profit margins for industry are low when compared to most other industries.\textsuperscript{222} Although proponents for the rule argue that ancillary fees reduce downward pressure on airfare prices, the airline industry has increased the variety of air transportation available in recent years.\textsuperscript{223} Despite the recent major airline mergers, the number

\textsuperscript{214} See A4A Comment, \textit{supra} note 18, at 9.
\textsuperscript{216} See Solomon, \textit{supra} note 191.
\textsuperscript{217} See Trejos, \textit{supra} note 215.
\textsuperscript{219} See A4A Comment, \textit{supra} note 18, at 3–4.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} Open Allies Comment, \textit{supra} note 25, at 6.
\textsuperscript{222} \textit{Airline Competition}, \textit{supra} note 5.
\textsuperscript{223} See Open Allies Comment, \textit{supra} note 25, at 6.
of competitors has not considerably changed and the growing
market of discount airlines has increased.224 With incentives for
this information to be released by both GDSs and airlines, an
industry-based solution, such as the NDC, would allow for a mar-
ket efficient compromise by the two players.

Airlines' reliance on ancillary fees for revenues and the public
condemnation on hidden fees is a recent phenomenon, and
given time the industry will react. In its comment, Open Allies
adequately showed that ancillary fees surprised a majority of air-
line travelers.225 However, with any implementation of a new in-
dustry standard affecting cost upwardly, consumers will likely
feel surprised and aggrieved. Additionally, a deceptive practice
is "likely to mislead," not merely has a "tendency and capacity
to mislead."226 Without allowing time for the airline industry to
adapt and react to the new economic realities, the proposal is
premature. For instance, with airlines like Spirit getting in-
creased media scrutiny for their baggage fee policies, the re-
ported instances of customers feeling surprised or deceived by
the post-purchase fee will inevitably fall.227 Thus, the argument
that ancillary fees constitute unfair and deceptive practices will
fall accordingly.228

VI. CONCLUSION

After struggling in the recession, the airline industry has cre-
atively innovated its business model and invested substantially in
doing so.229 These innovative tactics have enabled the industry
to survive the recession and emerge financially strong.230 Be-
cause the current NPRM is a broad interpretation of DOT's au-
thority under the "unfair and deceptive" practices provision,
and likewise antagonistic to Congress's intent to deregulate the
airline industry with the ADA, such a rule requires "compelling
evidence" and clear harm to consumers. Until the after-effects
of hidden fees (increasing negative brand attitude and increas-
ing public scrutiny) are actualized by the airline industry, we

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224 Id. at 10.
225 Id. at 2.
226 Sw. Sunsites, Inc. v. F.T.C., 785 F.2d 1431, 1436 (9th Cir. 1986).
227 See Jack Nicas, Thriftiest Fliers Outwit Fee Hungry Airlines, WALL ST. J. (Nov. 23,
2013, 5:28 PM), http://www.wsj.com/articles/SB100014240527023046071045792
14260795108536.
228 See Open Allies Survey, supra note 4.
229 See AIRLINE COMPETITION, supra note 5.
230 Id.
cannot exhaustively examine the market incentives for airlines to make them more transparent. When these market incentives can be implemented in negotiations and the ramifications of industry-based solutions are realized, and there still consists a market failure, the time for a regulatory solution may be ripe. Until then, the proposed rules are premature.