



*Our companies are your gateway to the world ...*

Mr. Sam Podberesky  
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and Proceedings  
U.S. Department of Transportation  
1200 New Jersey Avenue, S.E.  
Washington DC 20590

March 10, 2010

**Re: Distribution of Airline Fee Information**

Dear Mr. Podberesky:

This letter follows up on our recent communications concerning the availability to the travel distribution community (ticket agents, computerized reservations systems (GDSs) and other intermediaries involved in the distribution to consumers of airline travel data) of information about ancillary fees imposed by airlines for transportation services that were previously sold as part of the base airline fare. We offer here (i) a background description of the issue, (ii) our views on the legal basis on which the Department can and we believe should require robust disclosure of fee information to ticket agents and others in the distribution chain for the benefit of consumers, and (iii) a proposed rule for your consideration. As always, we appreciate your office's attention to this important matter and your recognition that the Department has a role to play in this area.

**A. Background -- The Recent Proliferation of Add-on Fees and Charges**

For decades, the "all-in price" of the basic elements of the air travel experience for nearly all travelers was reflected in the fares that airlines published and that the airlines and travel agents<sup>1</sup> – who are the legal agents of airlines for the sale of tickets – communicated to ultimate consumers before they committed to a travel purchase. As a consequence, the full and inclusive price of each of the travel options being considered by a consumer was easy to determine. Consumers benefitted enormously from this pricing transparency.

Over the last two to three years, the airline pricing regime has changed radically. Airlines have "unbundled" their product, and many are now levying significant add-on

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<sup>1</sup> The term "ticket agent" includes, as you know, both traditional "brick and mortar" agencies and online travel companies ("OTCs").

fees and charges for services once widely taken for granted as included in the ticket price. The most notable present example of this trend is perhaps checked baggage. The common, long-standing practice in the airline industry was to allow each passenger to check two bags free of charge, subject to certain size and weight restrictions.

Today, by contrast, a passenger traveling domestically on major U.S. airlines such as American, Continental, Delta, United or US Airways who checks two standard size suitcases would be charged somewhere between \$55 and \$60.<sup>2</sup> Assuming an average ticket price of \$300 for U.S. domestic travel, that extra fee is significant for most consumers – representing a price increase of roughly 20% over the “published” fare. It is beyond debate that in most circumstances an airline charging such a premium on the fare itself would expect notable losses of market share to other airlines with competitive schedules. Moreover, some of the competitors of these large carriers charge lower fees for two items of checked baggage (such as AirTran and JetBlue), or no such fees at all, as is the case with Southwest.

Given the widely reported new policies by U.S. airlines on the size and number of bags that can be carried onboard, with many travelers being compelled to check their luggage, these sizable fees cannot be readily avoided by many consumers. Accordingly, there can be little doubt that the fees an airline imposes for checked baggage should be clearly and effectively communicated to consumers before they are locked into a purchasing decision in order to avoid widespread consumer deception about a matter of the utmost importance – i.e., the price paid for the services to be used.

To its considerable credit, the Department has been leading the way in requiring appropriate disclosure by airlines of their checked baggage charges. However, the critical problem that remains is the practical inability of travel agencies to obtain from each airline on whose behalf they sell tickets the needed baggage and other ancillary fee information in a usable, reliable and efficient manner. This is a matter of great magnitude in terms of potential consumer harm because over half of all air travel sold in the United States is by travel agencies as opposed to the airlines directly. (For convenient reference, we have attached another copy of the paper recently sent to you, authored by PhoCusWright, that underscores the importance of the travel agency network in distributing air transportation, with a specific focus on the role of the GDSs in the distribution chain.) In a nutshell, while airlines have been energetically engaged in various efforts to dissect the air transportation product and assess these new fees, they

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<sup>2</sup> To obtain the information included in this paper on the carriers’ various charges current as of March 5, 2010, we have scoured various web sites. This is a time-consuming, manual process that is overwhelming and simply does not work for traditional travel agents or OTCs – all of whom operate in a very competitive business where efficiency is paramount. Today, they must resort to reviewing carriers’ websites, and waiting for their news releases or reports in the trade or general media. In order to stay abreast of constantly changing ancillary fees at potentially hundreds of airlines, they would have to substantially add to staff, which is unaffordable. This process is highly ineffective, and inefficient in the extreme, especially in contrast to airlines’ sharing the information in a timely, robust manner through the GDSs or otherwise, as discussed *infra*.

have been less quick to develop vehicles for effectively and timely communicating to the agencies who sell their products important elements of the price charged.

Further the new and substantial charges for checked luggage were only the vanguard of added fees imposed on consumers for services once included in the published fare. A number of airlines, for instance, assess charges for the right to reserve a special type of seating, such as an exit row or "extra legroom." For example, AirTran levies an added roundtrip fee of \$40 to reserve an exit row seat, and Frontier assesses a roundtrip fee of \$30-\$50 for the right to reserve a seat with "extra legroom." Recognizing that both United and US Airways already impose additional charges for premium seat selection in economy, the recent announcement by Continental that it too will impose a new charge for extra legroom increases, of course, the chances this method of unbundling will likewise become a new norm. Further, some airlines (e.g., Spirit) impose a fee to purchase any seat on their aircraft in advance of check-in, with higher fees imposed for perceived preferred seats.) A passenger therefore now purchases air transportation through the base fare, but must then separately purchase a seat on the plane unless the passenger waits until 24 hour before check-in, at which time a specific seat can either be purchased or one will be assigned without a fee (from, predictably, inferior seat positions remaining at that time).

Among a litany of others, examples of additional services for which carriers have begun charging consumers fees are:

- Blankets/pillows in flight -- American charges \$8, JetBlue \$7, USAir \$7, and Virgin America \$12, with the rest of the carriers apparently charging nothing at the moment.
- Meals -- while most carriers assess some charge on coach passengers for an in-flight meal, at the moment Continental and JetBlue appear to offer meals on some flights with no added fee.
- WIFI – charges vary widely by carrier, with our research suggesting American Airlines charges a fee of \$10-\$13 and Continental \$4.95 but with a price that varies by usage in the case of Continental.

Surely, there is more unbundling of airline pricing to come. We wish to stress emphatically that we are not opposed to unbundling in principle. However, we do object to unbundling of airline pricing in the absence of the airlines disclosing to travel agencies in an effective, efficient, usable and timely manner their added fees and charges. The obvious reason for that objection is that without such disclosure by the airlines stripping out and re-pricing their products, the travel agencies have no practical, workable way to acquire the information they must have in order to disclose to their clients the full, all-in price of each of the options the traveler is considering.

On that score, it is widely known that air travelers are highly price sensitive, with a fare differential of even a few dollars regarded by airlines as sufficient to drive consumers to choose one alternative over another. Since consumer behavior has demonstrated irrefutably the criticality of even a few dollars in making an air travel

buying decision, any airline pricing regime that fails to ensure that travel agencies are equipped with this key information about charges for add-ons is fraught with the risk of consumer deception on a grand scale. It is no overstatement to say that in the absence of this data being provided to travel agencies in a convenient, usable way, airlines are literally hiding the pricing ball from consumers even if inadvertently.

Put more starkly, concealing a \$60 fee could mislead consumers into picking a flight they would not otherwise choose when there was an alternative flight with zero baggage fees. No airline could credibly argue otherwise. The same point can be made about the other new categories of fees and charges, and the larger the amount assessed the more compelling the need for full and fair disclosure. Moreover, there may well be long-term jockeying for position, and thus frequent changes, with these fees, further underscoring the need for full, accurate and timely disclosure.

In the United States today, nearly all travel agencies continue to use global distribution systems ("GDSs") to obtain information on airline prices and to book the overwhelming proportion of airline tickets they sell. They do so because of the enormous efficiency these systems offer, providing in a neutral, unbiased manner easy-to-use data on scores of airlines with just a few keystrokes. By enabling fare transparency, the GDSs have, indeed, been a major force over time for saving consumers hundreds of millions of dollars annually -- permitting travel agencies to perform in a few seconds an apples-to-apples comparison of the full price of all travel options in a particular market. Nonetheless, GDSs can only provide their travel agency subscribers the pricing data that the airlines in turn supply to them.

Until quite recently, the airline industry processes and standards for transmitting this vital data on ancillary fees and charges to GDSs -- and through them to travel agencies -- were non-existent. As a consequence, despite the fact that, according to the airlines, the amounts collected by U.S. airlines for these ancillary fees now total billions of dollars, none of these fees and charges has been communicated to the GDSs in an industry-standard, programmable and usable way. And the GDSs as a result have not been able to assure that travel agencies had meaningful access to the information they need to advise clients on the full, all-in price of the trip the consumer plans to take.

Fortunately, the needed industry standards for enabling the communication to GDSs by airlines of all of these separate elements of the all-in price of air travel has just been implemented after many months of work by airlines and GDSs. These standards are now provided by the Airline Tariff Publishing Company ("ATPCO") through a newly-launched product called "ATPCO OC" (also referred to as ATPCO Optional Services and Branded Fares). Importantly, ATPCO OC established over 100 unique fields that can be used by airlines to identify, and file their fees and services for, any particular ancillary fee they choose to assess. The GDSs are now completing the system modifications required to display the data to their subscribers in ways that will effect the needed disclosures, and the GDSs will begin adding that data to their "live" travel agency displays in the next few months.

Of course, ATPCO OC is very welcome news. However, ATPCO OC can be a fix to the problem of inadequate disclosure by airlines of this vital pricing information to their lawful agents only if all the airlines that engage in unbundling actually utilize ATPCO OC to transmit this data to the GDSs. Accordingly, DOT should make it an unfair and deceptive practice for any airline to assess, before or at check-in, ancillary fees that are in addition to the published fare unless that airline timely makes detailed fee information available to its ticket agents in the same way and at the same time that it makes airline fare information available.

**B. The Department Has the Legal Right and Duty to Require Fee Disclosure**

As you are well aware, the Department has broad authority, which it has regularly exercised, under 49 U.S.C. 41712 to require airlines to disclose their fares, including all applicable taxes, surcharges and fees, in any advertised price for transportation, and during the booking process. This “entire price” policy has been applied to fuel surcharges and to a variety of convenience and booking fees imposed by the airlines. *Condor Flugdienst GmbH, Violations of 49 USC 41712 and 14 CFR Part 399* (Apr. 1, 2009) (airline fined for failing to disclose fuel surcharge and service charge). The basis for the policy is to prevent consumer confusion and enhance fair competition by allowing consumers to compare “apples to apples” when choosing airlines.

The full disclosure, entire price policy has also been applied to ticket agents and other intermediaries, which are similarly responsible under 49 USC 41712 for ensuring that passengers receive full information about the price of air transportation. For example, the Department last year imposed penalties on a major travel agency for its failure to disclose in advertisements and on the initial display on its website the 7.5% excise tax that applied to the advertised air travel. *Liberty Travel, Violations of 49 USC 41712 and 14 CFR Part 399* (Feb. 25, 2009). It bears further note that GDSs are also ticket agents and are subject to the requirements of Section 41712. *See Computer Reservations Systems Regulations*, 69 Fed. Reg. 976, 995-98 (Jan. 7, 2004), *aff'd Sabre, Inc. v. Department of Transportation*, 429 F.3d 1113 (2005) (Section 41712 applies to travel agents and other intermediaries in the distribution chain pertaining to the sale of air transportation).

Further, the Department has explicitly extended the Section 41712 disclosure requirements to checked baggage fees, when such fees first became common in 2008. *See Guidance on Disclosure of Policies and Charges Associated with Checked Baggage*, (May 13, 2008). Relying on the proposition that checked baggage fees and policies represent a “significant condition” applicable to air fares, that Guidance requires that airlines *and their ticket agents* provide prominent disclosure, near the fare quotation, of checked baggage fees and policies.

While the Department expressly required ticket agents to conform to its Guidance, it did not go the extra step of requiring airlines to provide information on checked baggage fees and policies to their ticket agents. As discussed above, airlines have generally not done so, and in the past may not have had the means to do so. Thus, ticket

agents, and the airline consumers that they deal with, are today at a disadvantage relative to the disclosure requirements.

The Department has not yet issued a similar disclosure guidance or rules regarding other types of unbundled fees and related travel conditions (e.g., seating fees and fees for various services offered in-flight, but sold in advance). We submit that it is a short, and fully-warranted, step for the Department to do so under its well-established Section 41712 powers. Requiring disclosure to consumers by airlines and ticket agents of all unbundled fees for services sold in advance of or at the time of check-in and used or consumed during the course of travel is no less appropriate than was requiring the disclosure of the checked baggage fees, the precursor to the other unbundled fees now beginning to proliferate. Whether viewed as a significant condition of air fares, or as an inherent part of the air transportation being sold, such unbundled fees, as well as the policies/conditions related to those fees, warrant disclosure so that consumers can make fully informed choices.

So too is it but a short and equally necessary step for the Department to require that airlines inform ticket agents (travel agencies, GDSs and OTCs) of these fees and related conditions of travel through the same distribution mechanisms that those airlines use to disseminate information on their fares. Disclosure through the industry-established fare distribution system used by the airline is the only way of ensuring that ticket agents - which are subject to Section 41712 to no different degree than the airlines that formulate these fees -- have the information that they and their consumer clients need to make informed air transportation decisions.

Simply posting the fees and conditions on airline websites for ticket agents - forcing them to hunt for this crucial data -- is insufficient. The volume of data on airline fees and fares at any one point in time is huge, and airline policies vary by carrier in many cases and change frequently. Further, given the time-consuming nature of the task, it is neither efficient nor practical for travel agencies to exit the GDS environment in order to scour the web sites of one or more carriers for these fees and charges each time they make a sale. In short, the challenge of keeping track of that ever-changing body of data cannot be met by ticket agents unless the data flows into and through the computerized network provided by the GDSs in which virtually all airlines participate. All ticket agents rely on one or more of these GDSs in real time to obtain the information they need to sell air transportation.

On the other side of the ledger, with ATPCO having developed and implemented an efficient industry solution enabling airlines to quickly and automatically pass this ancillary fee information to GDSs along with their other pricing data, the failure by any that participated in a GDS to use these existing processes would simply not be justifiable.

Airlines therefore should be required to provide ancillary fee data to the GDSs in which they choose to participate, using ATPCO OC (or perhaps an alternative vehicle that the airline and the GDS had mutually agreed upon). While airlines might normally be expected to do so, and most airlines probably will do so, one can readily imagine an

airline deciding to post the data only on its own website as a means of driving traffic to that website, effectively cutting off ticket agent access. Ticket agents would therefore be unable to meet their fee disclosure obligations to consumers under the law, and consumers would be deprived of the best and most current data available.

The Department has the authority to require airlines to provide important data concerning their services to their ticket agents (including GDSs) and to provide the data to standard industry data suppliers, and has done so in the past in connection with code share and change-of-gauge flight disclosure rules. Thus, in its rules requiring disclosure by airlines and ticket agents of these types of flights, at 49 CFR Parts 257 and 258, the Department requires that data be shared with computerized reservations systems as follows:

**§ 257.5 Notice requirement. (a) Notice in schedules. In written or electronic schedule information provided by carriers in the United States to the public, the Official Airline Guides and comparable publications, and, where applicable, computer reservations systems, carriers involved in code-sharing arrangements or long term wet leases shall ensure** that each flight in scheduled passenger air transportation on which the designator code is not that of the transporting carrier is identified by an asterisk or other easily identifiable mark and that the corporate name of the transporting carrier and any other name under which that service is held out to the public is also disclosed. (emphasis added).

**§ 258.5 Notice requirement. (a) Notice in schedules. Carriers holding out or operating change-of-gauge services to, from, or within the United States shall ensure that in the written and electronic schedule information they provide to the public, to the Official Airline Guide and comparable publications, and to computer reservations systems,** these services are shown as requiring a change of aircraft. (emphasis added).

These broad notice requirements, and specifically the requirements that carriers provide information on their flights to GDSs and to the Official Airline Guide, were adopted in recognition of the fact that (1) ticket agents are obligated by Section 41712 to provide information on code share/change-of-gauge flights, (2) such agents account for a large percentage of airline sales and (3) ticket agents depend on airline information provided to GDSs to obtain the data that they need to make the disclosures. Thus, in the NPRM issued with respect to the code share rule, DOT stated as follows:

Ticket agents should also be able to identify code-shared flights easily, since computer reservations systems already identify them and airlines can update those systems to reflect changes very quickly.

59 Fed. Reg. 40838 (Aug. 10, 1994).

The situation is no different today and no different with respect to disclosure of airline fees than it was with respect to disclosure of code share and change-of-gauge flights. As in 1994, ticket agents remain obligated to provide fee information (as underscored by the current checked baggage fee guidance), account for a significant percentage of airline sales, and depend on GDSs for data provided by airlines. Any DOT fee disclosure rules therefore should include provisions similar to those found in Sections 257.5 and 258.5 of the DOT rules.

Further, requiring airlines to provide information that their agents need to meet statutory disclosure requirements that fall on both the airline and the ticket agent is fully consistent with applicable principles of agency law.<sup>3</sup> The responsibility of a principal (the airline) to provide information to its agents (the ticket agents and GDSs) comports with the duty of the parties to such a relationship to act fairly and in good faith. *See Restatement of the Law, Third, Agency*, section 8.15(b). It also comports with the duty of the principal to share relevant information with the agent, including information needed to prevent pecuniary loss by third parties with whom the agent deals on behalf of the principal. *Id.*, at section 8.15(c).

### C. The Proposed Rule

In view of the above, ITSA offers the following proposed rule for the Department's consideration:

#### § \_\_\_\_\_. Disclosure of Fees<sup>4</sup>

(a) The failure of a carrier to disclose its fees and charges for services offered by the carrier in connection with air transportation in a manner consistent with this regulation is an unfair or deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. § 41712.

(b) A carrier shall transmit to its ticket agents, computer reservations systems in which it participates and airline tariff publishing agencies used by the

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<sup>3</sup> That travel agents are the agents of airlines is well-settled. Not only do agency appointment documents, including those utilized by the ARC appointment process, make this point explicit, but the agency relationship has been confirmed by case law. *See Illinois Corporate Travel, Inc. v. America Airlines, Inc.*, 806 F.2d 722, 725 (7<sup>th</sup> Cir. 1986) (confirming that a travel agency relationship to an airline is that of "a genuine agency.")

<sup>4</sup> ASTA and ITSA assume that the Department would also provide explicitly in this rule for the disclosure by airlines and ticket agents of fees and charges in advertisements and on Internet sites, as well as during the booking process, as it does today through its 2008 Guidance on checked baggage fees. However, we have focused in our proposed rule on the distribution of these fees to ticket agents and do not here offer specific terms on such disclosure.

carrier to transmit fare information, complete information on its fees and charges for passenger services provided by the carrier at the same time and in the same manner as the carrier transmits information on its fares made available for distribution through its ticket agents;

- (c) For purposes of this rule, the following definitions apply:
- (i) "carrier" shall mean an air carrier or a foreign air carrier.
  - (ii) "fees and charges for services offered by the carrier in connection with air transportation" shall mean complete information about any fee or charge for a service, including any related conditions or policies, offered by the carrier in connection with its air transportation service and available for sale prior to or at the time of passenger check-in for a flight. Examples of the types of fees and charges to which this rule applies include fees for checked baggage; the purchase of specific seats on a flight; meals and beverages offered for sale in advance of or at the time of check-in; and service upgrade opportunities available for sale to any passenger.

Please note that the above terms would not require that any airline participate in distribution processes, or participate in a GDS, if it does not otherwise use such a process or GDS for the dissemination of its fare information. Rather, whatever mechanism the airline uses to distribute its fares would have to be used to distribute fee data, which is no different than the rules already in place regarding code-share and change-of-gauge information.

We appreciate your consideration of our views and look forward to answering any questions that you might have.

Respectfully,



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