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**Before the Office of Information and Regulatory Affairs, Office of Management and Budget,
Executive Office of the President**

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**Re: Enhancing Transparency of Airline Ancillary Service Fees NPRM
(DOT-OST-2022-0109)**

- Before discussing this specific NPRM, it is important to remind ourselves what DOT must demonstrate in order to regulate this deregulated industry's business practices.
- First, the Department is required to show that the business practice is unfair or deceptive or there is a market failure. Second, as you know, the Department must show that the benefits of the regulation to consumers must exceed the cost of complying with the regulation.
- DOT has failed on both counts here; and as a result, if the NPRM, as drafted, becomes a final rule it would exceed DOT's statutory authority and therefore should be deemed arbitrary and capricious.
- Now let's look at the justification DOT provides for concluding that failing to provide full information on what they consider core ancillaries on the first search page is an unfair and deceptive practice that causes a substantial harm that cannot be reasonably avoided.
- It has been 16 years since airlines unbundled their fares and gave consumers the choice as to which optional services they wish to purchase. DOT offers no evidence that passengers are unaware of this fact, which is not surprising since DOT has required disclosure of ancillary fees since 2011. Nor does the Department argue that passengers are not fully advised of the fees for those services before final purchase. Instead, DOT argues that it is unfair and deceptive not to include full details of what they consider core optional services on the first search page because not having that information makes it more difficult to compare prices between carriers.
- To be clear, DOT does not have the authority under the unfair and deceptive practice standard to require airlines to support comparison shopping. Nor can DOT credibly argue that having ancillary information displayed on the second or third search page

rather than the first meets the substantial harm test. Instead, DOT relies on hearsay evidence from consumer advocates that passengers remain dissatisfied with the level of disclosures on these optional services. Numerous passenger surveys and airline experience demonstrates that after 16 years the vast majority of travelers understand that these optional services come with a fee, despite advocates' claims.

- DOT has also not demonstrated that there is a market failure to justify regulation in this area. First, most airline websites go beyond what is required by DOT to ensure that passengers have complete information on optional services and fees early in the search process. Further, most airlines file ancillary fee information with the Airline Tariff Publishing Company (ATPCO) which in turn makes it available to global distribution systems (GDSs) and travel agents to display on their websites. Finally, airlines have invested millions of dollars to make it possible for travel agents to have full access to their content through New Distribution Capability (NDC).
- This NPRM is the most glaring example to date as to why market competition is preferable to market intervention. Requiring full information on what DOT deems as core ancillary services be displayed at the initial search will make it more difficult, not less, for consumers to book tickets and ancillaries online or over the phone. Passengers will be overwhelmed with clutter, particularly on smartphones where 70 percent of all customers research travel options, and websites will slow, which will result in lower sales. Given the cost of displaying this information, it is likely that airlines will offer fewer itinerary choices to consumers, and we expect some travel agents may decide not to sell airline tickets at all. Committing resources to display this information before initial itinerary selection will divert IT resources away from the ongoing digital transformation of today's distribution network. The only substantial injury to consumers will be if the Department decides to pursue this regulation.
- Let me briefly discuss the concerns we have with displaying the three so-called core ancillaries on the first search page:
- DOT is proposing to require airlines and agents to display what they call dynamic prices for first and second checked bags for each initial search, arguing that static prices already required by the 2011 regulation do not always apply to passengers who, for example, are frequent flyers or who carry an airline credit card. This makes no sense. The static baggage fee information accessible on airline websites meets the needs of the passenger who does not have an existing relationship with the airline through the frequent flyer program or a co-branded airline credit card. In contrast, frequent flyers and credit card holders are acutely aware of the benefits they get for their status – indeed that is often the major reason why they make efforts to get that status. Requiring airlines to do the very complex calculation for each passenger to display dynamic prices on the first page is unnecessary and impractical.

- Turning to change and cancellation fees, most US carriers have discontinued charging for these services. That has not stopped DOT from arguing that these are core ancillaries that need to be regulated. For those carriers that still charge a fee, the cost often depends on the ticket class and the timing of the cancellation. It is unreasonable for airlines to be required to undertake a complex calculation on these fees for each of the countless itineraries that may be presented on a first search page.¹
- Finally, DOT calls for the regulation of family seating plans despite offering no evidence besides baseless allegations by consumer advocacy groups that this is a problem in need of fixing. Parents who are traveling with young children always have the option to purchase seats to ensure that the family all sits together. If they decide not to spend the extra money to secure those seats before boarding, they can take a chance and ask gate agents, flight attendants, or their fellow passengers to accommodate their desire to sit together. It is unreasonable to require airlines and agents to undertake the complex calculation to present seating fees for each seat on the initial search page. Doing so will only create huge amounts of clutter in the form of seat maps on the first page that is only theoretically helpful to a very small percentage of passengers.
- DOT is also proposing to intervene in the business relationships between airlines, travel agents, and GDSs by mandating that airlines share dynamic ancillary service fee information with agents. Again, this is evidence of a lack of understanding by the Department of the airline distribution system. As noted earlier, ATPCO already shares static fare and ancillary information they have in their database with GDSs who in turn enable online travel agencies like Travelocity and Orbitz to today tell their customer how much it will cost to check their bags or whether there are change or cancellation fees. DOT fails to understand that in order to provide this information in a dynamic fashion each agent would need to establish a direct connection with each airline to enable this transmission of real-time data. Today, there are two options for that connection – so-called direct connect, where an agent enters into a contract with a carrier, or via the NDC data exchange format. In the US, 7 percent of transactions are currently via NDC or direct connect. There are approximately 100 airlines serving the US market and 61,000 US-facing travel agents. There are not enough IT providers supporting the industry to get all remaining airlines connected in the six months proposed by the NPRM. We estimate it would take a minimum of three years to get these connections in place.
- Even if DOT could prove there is a substantial injury to consumers or a market failure, they would still have to show that the benefits of the regulatory response outweigh the cost of complying with the regulation. In this case, DOT clearly ignores the requirements of Executive Order 13563. It has clearly underestimated the costs to airlines, travel

¹ A sample search on a major airline website for flights between Washington Dulles International Airport and Paris Charles de Gaulle Airport, departing on January 13, 2023, and returning on January 27, 2023, produced 95 separate potential itineraries.

agents, and GDSs to undertake the fundamental change required to existing airline distribution system to comply with this proposed regulation. This is particularly true for the majority of travel agents who would need to establish the direct connection to each airlines' reservation system to enable them to calculate and display passenger- or itinerary-specific information on the agents' initial search page. On the benefit side, rather than offering any data, DOT simply offers, in essence, that it feels like this is the right thing to do. This "sounds right" approach is a clear path to bad public policy and unforeseen negative consequences for consumers.

- In sum, DOT has not offered any evidence that would lead to a logical conclusion that additional regulation on ancillaries is necessary or appropriate. The solutions offered to this non-existent problem are inconsistent with both airline deregulation principles and operational realities. If DOT continues to insist that regulation is required, we urge the Department to work with industry via an ANPRM to come up with solutions that make sense for the traveling public.