

Aviation Regulatory Update

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DOT ANNOUNCES NPRM ON ENHANCING TRANSPARENCY OF AIRLINE ANCILLARY SERVICE FEES

On September 26, 2022, the U.S. Department of Transportation (“DOT”) published a new [proposed rule](#) aimed at increasing transparency for airline ancillary service fees.

Specifically, the rule would require U.S. and foreign air carriers, ticket agents, and third-party sellers of air transportation and online “metasearch” websites, to clearly display passenger-specific or itinerary-specific bag fees, change fees, and cancellation fees wherever fare and schedule information is shown to consumers for flights to, from or within the U.S. This includes a clear indication of the fees associated with traveling with a first checked bag, second checked bag, or carry-on bag, whenever fare and schedule information is first provided to consumers for flights to, from, or within the U.S. The rule would also require that airlines disclose any fees charged for seating young children (i.e., children aged 13 or younger) with an accompanying adult on flights and require that airlines and ticket agents allow passengers travelling with young children to purchase adjacent seats with their airline tickets at all points of sale. Airlines that do not charge fees for adjacent seating for passengers travelling with young children would not be required to disclose or make available adjacent seating fees.

A complete list of DOT’s proposals included in the NPRM is below:

Subject	Proposal
Airline Ancillary Service Fees Critical to Consumer Decision	The ancillary services that the Department has identified as being critical to consumers when they choose among air transportation options are as follows: first and second checked bag, one carry-on bag, changing or canceling a reservation, and adjacent seating when traveling with a young child.
Disclosure of Baggage Fees	A proposal to require carriers and ticket agents to disclose fees for a first and second checked bag and a carry-on bag during the booking process when fare and schedule information is provided (typically first page of search results).
Disclosure of Change and Cancellation Fees and Policies	A proposal to require carriers and ticket agents to disclose change and cancellation fees and policies to consumers during the booking process when fare and schedule information is provided (typically first page of search results).
Timing of Online Disclosures	A proposal to require that first and second checked bag fees, carry-on bag fees, change and cancellation fees and the family seating fee be disclosed at the first point in a search process where a fare is listed in connection with a specific flight itinerary.

Passenger-specific information	<p>A proposal that the fee information disclosed to consumers for critical ancillary services be expressed as passenger-specific information if a consumer conducts a passenger-specific itinerary search.</p> <p>Definitions:</p> <ul style="list-style-type: none"> • A passenger-specific itinerary search refers to a search that takes into account a characteristic of the passenger that may impact ancillary service fees to be charged (e.g., military status, frequent flyer status, method of payment, etc.) • An anonymous itinerary search refers to a search that does not take into account passenger characteristics that may have an impact on ancillary service fees to be charged.
Web site and Mobile Displays	A proposal to require that the fees for ancillary services critical to a consumer’s purchasing decision be disclosed using airlines’ or ticket agent’s websites and mobile web sites.
In-Person or Telephone Disclosures of Airline Ancillary Service Fees	A proposal to require that specific fee information for a first and second check bag, one carry-on item, the canceling or changing of a reservation, and a passenger 13 or under to obtain a seat next to an accompanying adult be provided for each itinerary for which a fare is quoted to a consumer during an in-person or telephone inquiry.
Sharing of Airline Ancillary Service Fee Information with Ticket Agents	Airlines would be required to distribute fee information for critical ancillary services to ticket agents that sell or display the airlines’ fare and schedule information.
Prohibition on Fee if Required Disclosure is Not Provided	Collecting a fee from consumers for critical ancillary services without disclosure of this fee during the search process would be deemed an unfair and deceptive practice.
Transactability	A proposal that carriers and ticket agents enable family seating fees to be transactable at all points of sale.
Compliance/Implementation Period	Six-month implementation period to display a first and second checked bag fee, a carry-on bag fee, change and cancellation fee, and family seating fee (if any), to consumers whenever fare and schedule information is provided.

The rulemaking, which was also announced by President Biden at the meeting of the White House Competition Council, comes in response to the Biden Administration’s Executive Order 14036 on “Promoting Competition in the American Economy”, which directed DOT to take various actions related to consumer protection. The Executive Order also specifically called on the U.S. Secretary of Transportation to have DOT consider issuing a rulemaking within 90 days on ancillary fee information related to the display of bag fees, change fees, and cancellation fees at the time of ticket purchase.

DOT has yet to formally publish the NPRM in the Federal Register and therefore there is no set comment period deadline yet, but interested carriers are nevertheless encouraged to review the rulemaking and submit comments.

FAA ANNOUNCES NEW POLICY RELATED TO IASA PROGRAM

On September 28, 2022, the U.S. Federal Aviation Administration (“FAA”) published [new guidance](#) related to changes to the International Aviation Safety Assessment (“IASA”) program. This comes two days after FAA announced that it would change its policy regarding IASA safety categorizations for other countries.

Specifically, FAA has said that it will begin working with countries early on when it sees indications that their civil aviation authorities (“CAA”) are not meeting safety standards. FAA noted that it will exercise discretion by providing a CAA with an informal notification of safety concerns and request to begin discussions with the CAA to try to resolve the issues before initiating the formal IASA process through which a country can be downgraded from Category 1 to Category 2. By doing so, FAA will work to assist a country with addressing developing safety risks rather than simply downgrading its safety category. The new policy does however allow FAA to utilize some safety mitigation strategies. For example, after it notifies a country of a safety concern it can limit direct service to the U.S. by its carriers, limit codesharing operations by foreign operators, and place limits on certain bilateral agreement while it reviews whether the country should be downgraded.

DOT ISSUES GUIDANCE ON THE INTERPRETATION OF UNFAIR AND DECEPTIVE PRACTICES

On August 29, 2022, DOT published [guidance](#) meant to inform the public and regulated entities like airlines of its interpretation of the terms “unfair”, “deceptive”, and “practices” as they relate to DOT’s authority to prohibit unfair and deceptive trade practices in air transportation and the sale of air transportation.

This is an “interpretive rule”. As a result, DOT believed it could issue it without issuing a notice-and-comment rulemaking. Because it was issued without notice-and-comment, and as DOT confirms, this “guidance” lacks the force and effect of law.

As background, DOT has authority under 49 U.S.C. 41712 to investigate alleged instances of unfair and deceptive practices, and to decide whether a U.S. or foreign air carrier has engaged in unfair or deceptive practices in air transportation or the sale of air transportation. If DOT finds that such conduct has occurred, it has the statutory authority to penalize a carrier up to \$3,738 per violation, per day. The following is a summary of DOT’s interpretations of some of these key terms:

DOT’s definition of “unfair” and related guidance on its elements:

DOT defines a practice as being “unfair” if it “causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.” DOT also notes that it can choose to act against an unfair practice even before a substantial injury takes place, or when it deems that an unfair practice is likely to cause a substantial injury to take place.

DOT’s definition of “deceptive” and related guidance on its elements:

DOT defines a practice as being “deceptive” to consumers if the practice is “likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter.” DOT views deception from the perspective of an ordinary consumer acting reasonably in the circumstances, which includes consideration of an airline’s statements or representations from the viewpoint of a consumer, and consideration of how clear, conspicuous, and significant the airline’s statement or representation is, how familiar the public with the product, and the availability of alternate sources of information to the public.

DOT's view of the term "practices" and final points included in the guidance document:

DOT indicated that it did not find it necessary to define the term "practice" as it maintains that its aviation consumer protection regulations can always be deemed as directed at the practices of airlines or ticket agents, which includes actions or policies carried out by the airline that affect consumers. Lastly, DOT did not consider it necessary to find proof of intent to establish either unfairness or deceptiveness, meaning that a final determination on unfairness or deceptiveness rests solely on the Department's definitions and interpretations on whether something is unfair or deceptive.

IATA HOLDS CONFERENCE CALL ON DOT'S AIRLINE TICKET REFUNDS NPRM

On September 22, 2022, the International Air Transport Association ("IATA") held a conference call to discuss the components of DOT's Notice of Proposed Rulemaking on Airline Ticket Refunds and Consumer Protection.

It is strongly encouraged that covered carriers carefully study DOT's proposal as it is unusually impactful and if there are issues of concern to your operation, to file comments. The more specific operational issues that carriers can identify, and bring to DOT's attention through public comments, the greater the likelihood that certain problematic requirements proposed in the rule can be revised before the regulations are finalized. Another option would be to prepare and submit a short filing in support of IATA's more detailed comments (which are still being prepared). **Comments are due November 21, 2022**, and we are happy to assist you in preparing and submitting a comment if you are interested.

The proposed rule asks for comments on a number of key topics and issues and proposes to regulate the industry in troublesome ways. We think the following topics are particularly important for comments:

- The rule proposes to put into law the Department's longstanding interpretation that passengers must receive full refunds (not vouchers) for cancelled or significantly delayed flights. This was not an issue of concern pre-pandemic, and it appears DOT is using a once in a lifetime occurrence to push through unnecessary regulations that would require cash refunds not vouchers for flights that are cancelled or significantly delayed for any reason.
- The rule also proposes to require carriers to provide non-expiring vouchers to passengers holding non-refundable tickets if such passengers are unable to fly due to certain pandemic related reasons including government-mandated travel bans, closed borders, or if passengers are advised not to travel due to personal health risks or concerns, or the health risks or concerns of other passengers. Carriers would have to provide refunds in the original form of payment if they receive significant government assistance. This requirement is troublesome because it places few "guardrails" on situations where passengers can voluntarily cancel their reservation and receive a voucher and essentially makes non-refundable tickets refundable in many circumstances.
- The rule asks for comment on whether DOT's proposed refund rules should be applied to flights operating between two foreign points. DOT does not have jurisdiction to regulate flights between foreign points operated by foreign air carriers and any attempt by DOT to do so would be extraterritorial.
- The proposed rules may also generate operational conflicts in terms of carriers' compliance with existing passenger rights regimes in the EU and Canada, as definitions and obligations across these existing regimes are not aligned with DOT's proposal.

FAA ISSUES NEW POLICY TO PROTECT AIRCRAFT MANUFACTURING EMPLOYEES

On September 7, 2022, FAA issued a [final notice](#) on a new policy aimed at protecting aircraft manufacturing employees from undue corporate influence. Specifically, the policy focuses on employees working on the agency's behalf through the Organization Designation Authorization ("ODA") program, and their unit members.

As background, the ODA program is the means through which FAA grants designee authority to organizations or companies based on 14 CFR Part 183 to conduct the types of FAA functions that they would normally seek from FAA, such as approving design changes for their products. Under FAA's new policy, ODA holders are now required to monitor, report, and investigate all allegations of interference and to report the results to FAA. In addition, the policy also requires annual training of employees, audits and reviews, increased communication with FAA, and includes a provision for the issuance of civil penalties if interference occurs between superiors and their unit members. FAA also announced that it has begun taking nominations for an expert panel to review ODA holders' safety culture and to inform future recommendations for agency action and safety procedures. FAA noted that the new policy is intended to establish a means through which aircraft manufacturing employees can speak freely with FAA certification officials at any time.

FAA's new policy comes in response to accusations of improper influence reported during the manufacturing and production of Boeing's 737 MAX, and several whistleblowers' accusations that Boeing's actions allegedly posed safety risks during the assembly process for the Boeing 737 MAX and 787 Dreamliner.