Public Interest Comment\(^1\) on
The Department of Transportation’s Proposed Rule:
Transparency of Airline Ancillary Fees and Other Consumer Protection Issues
Docket ID No. DOT-OST-2014-0056
RIN: 2105-AE11/2105-AE31
September 16, 2014
Sofie E. Miller, Senior Policy Analyst\(^2\)

The George Washington University Regulatory Studies Center
Retrospective Review Comment Project

The George Washington University Regulatory Studies Center works to improve regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment on the Department of Transportation’s proposed rule addressing the lack of transparency in ancillary service airline fees does not represent the views of any particular affected party or special interest, but is designed to evaluate whether DOT’s proposal incorporates plans for retrospective review, pursuant to President Obama’s Executive Order 13563.

\(^1\) This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center’s policy on research integrity is available at http://regulatorystudies.columbian.gwu.edu/policy-research-integrity.

\(^2\) Sofie Miller is a Senior Policy Analyst at the George Washington University Regulatory Studies Center, 805 21\(^{st}\) St. NW, Suite 609, Washington, DC. She can be reached at sofiemiller@gwu.edu or (202) 994-2974.

The George Washington University Regulatory Studies Center
Introduction

The proposed rule is intended to “enhance protections for air travelers and improve the air travel environment” by establishing certain transparency and disclosure requirements for airlines, global distribution services (GDSs), and ticket agents. The Department for Transportation (DOT or the Department) is proposing to require airlines to disclose and ticket agents to display ancillary fees—such as for checked bags, carry-on bags, and advance seat selection—at all points of sale. While airlines are currently required to display ancillary and optional airline fees, many travelers now rely on meta-search engines (such as Kayak, Google, and Expedia) to compare and purchase airfare, and the Department is concerned that consumers aren’t being provided with code-share disclosure and ancillary fee information.

GDSs, which connect consumers to available travel options using carriers’ real-time databases of flight information, are already defined as ticket agents for the purpose of DOT regulations. This rule would also define meta-search sites that offer flight searches and are compensated for advertisements as “ticket agents.” While some meta-search sites provide flight itinerary information without acting as a final point of sale for airfare, DOT sees a benefit in classifying these entities as ticket agents because these sites may play a “quasi-GDS” role in the future. According to DOT:

Such a broad definition [of “ticket agent”] would ensure that all commercial entities that receive compensation in connection with air transportation advertising/marketing and that are involved in arranging for air transportation would be required to provide consumers with certain essential information early in the process (e.g., information regarding code-share operations, disclosure about baggage fees).

Because GDSs and meta-search sites do not have access to real-time and accurate fee data from carriers for ancillary services, DOT is proposing two alternative fee disclosure structures: Carriers will either be required by this rule to disclose ancillary fee information to ticket agents, including GDSs and meta-search tools, or to ticket agents excluding GDSs and meta-search tools like Kayak and Expedia. The Department believes that this disclosure is necessary so that customers who use meta-search engines to compare or book travel are able to assess the full cost of airline travel before finalizing a booking.

---

3 See the Department of Transportation’s final rule, Enhancing Airline Passenger Protections, April 25, 2011. 76 FR 23109
4 79 FR 29974
5 79 FR 29973
6 79 FR 29974

The George Washington University Regulatory Studies Center

2
The proposal also requires more carriers to report certain flight performance data to the Department, such as on-time performance, mishandled baggage, and oversales data. Large ticket agents will also be required to adopt certain customer service standards, such as providing prompt refunds when necessary, promptly notifying customers of itinerary changes, and holding an airfare reservation at a quoted fare for 24 hours.

Evaluating whether the intended outcomes of “enhancing protections for air travelers and improving the air travel environment” are met ex post can be challenging, so multiple government guidelines instruct agencies to incorporate retrospective review plans into their proposals during the rulemaking process. To support this effort, the GW Regulatory Studies Center examines significant proposed regulations to assess whether they include plans for retrospective review, and submits comments on the public record with suggestions on how best to do so. This comment on DOT’s proposed rule is part of that effort.

**Incorporating Retrospective Review into NPRMs**

Through a series of Executive Orders, President Obama has encouraged federal regulatory agencies to review existing regulations. On January 18, 2011, President Obama signed Executive Order 13563, Improving Regulation and Regulatory Review, which reaffirmed the regulatory principles and structures outlined in EO 12866. In addition to the regulatory philosophy laid out in EO 12866, EO 13563 instructs agencies to

consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.\(^7\)

This ex-post review makes it possible for the public, as well as regulatory agencies, to measure whether a particular rule has had its intended effect. In his memo implementing this executive order, former Administrator of the Office of Information and Regulatory Affairs, Cass Sunstein, stated that “future regulations should be designed and written in ways that facilitate evaluation of their consequences and thus promote retrospective analyses and measurement of ‘actual results.’”\(^8\) This emphasis is repeated in Sunstein’s June 14, 2011 memo, “Final Plans for Retrospective Analysis of Existing Rules.”

---


In its 2014 Draft Report to Congress on the Benefits and Costs of Federal Regulations, the Office of Management and Budget (OMB) states that such retrospective analysis can serve as an important corrective mechanism to the flaws of ex ante analyses. According to that report, the result of systematic retrospective review of regulations:

should be a greatly improved understanding of the accuracy of prospective analyses, as well as corrections to rules as a result of ex post evaluations. A large priority is the development of methods (perhaps including not merely before-and-after accounts but also randomized trials, to the extent feasible and consistent with law) to obtain a clear sense of the effects of rules. In addition, and importantly, rules should be written and designed, in advance, so as to facilitate retrospective analysis of their effects.

In line with the requirements of EO 13563, OMB’s implementation memo, and OMB’s Draft 2014 Report to Congress, it is clear that DOT should incorporate specific plans for retrospective review and ex post evaluation into the text of its final rule.

Retrospective Review Requirements

To evaluate whether DOT’s proposal was “designed and written in ways that facilitate evaluation of [its] consequences,” we measure it against five criteria:

- Did DOT clearly identify the problem that its proposed rule is intended to solve, and do the policies that DOT proposes address this problem?
- Did DOT provide clear, measurable metrics that reviewers can use to evaluate whether the regulation achieves its policy goals?
- Did DOT write its proposal to allow measurement of both outputs and outcomes to enable review of whether the standards directly result in the outcomes that the Department intends?
- Did DOT commit to collecting information to assess whether its measurable metrics are being reached?
- Did DOT provide a clear timeframe for the accomplishment of its stated metrics and the collection of information to support its findings?

Identifying the Problem and Intended Outcomes

The first of the “Principles of Regulation” outlined by President Clinton in EO 12866 directs agencies, as a first step, to identify the problem that justifies government action through regulation:

The George Washington University Regulatory Studies Center
Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

1. Ancillary Fee Disclosure

While not explicitly defining the problem, multiple times throughout the proposal text DOT refers to an existing lack of transparency as the reason for its proposed requirement for ancillary fee disclosure:

The Department believes that regulation is needed to address the lack of transparency regarding the true cost of air transportation and is proposing to require that fees for certain ancillary services be disclosed to consumers through all sale channels.\(^9\)

This language implies that DOT is attempting to fix an asymmetric information problem by requiring ticket agents to disclose ancillary fee information and making airline costs more transparent. DOT states that this is necessary because the Department “believe[s] that consumers continue to have difficulty finding ancillary fee information,”\(^10\) and this action will “address[] the harm caused to consumers of not knowing the true cost of travel before purchasing air transportation.”\(^11\) The Department identifies some potential areas in which lack of transparency for airline fees could pose problems for consumers, including:

- The lack of complete transparency of fees for unbundled services and products poses a problem for some consumers and corporate travel companies. (79 FR 29974)
- [The] lack of clear disclosure of ancillary fees makes it difficult to determine the true cost of travel and compare different airline flight and fare options. (79 FR 29974)
- Failing to disclose basic ancillary service fees in an accurate and up-to-date manner before a consumer purchases air transportation would be an unfair and deceptive trade practice in violation of 49 U.S.C. 41712. (79 FR 29977)

However, DOT acknowledges more than once that it has no evidence that this problem currently exists in the market for airfare. As DOT states in its proposed rule:

---

\(^9\) 79 FR 29975
\(^10\) 79 FR 29977
\(^11\) 79 FR 29978
We are not aware of whether there is a widespread problem of consumers being confused by Web sites that do not sell tickets but do provide fare, schedule, and availability information that consumers are relying on in planning their travel.\textsuperscript{12} 

…The Department remains of the view that as carriers continue to unbundle services that used to be included in the price of air transportation, passengers need to be protected from hidden and deceptive fees and allowed to price shop for air transportation in an effective manner. However, we lack sufficient data to be able to quantify the extent of this problem for consumers.\textsuperscript{13} 

While DOT believes that this regulation is “warranted to ensure fair advertising and communication of critical information to air travel consumers as well as minimum customer service standards such that consumers are protected from unfair treatment,”\textsuperscript{14} it has not established that any unfair or predatory treatment is occurring. In the proposed rule, the Department is seeking comment from consumers on whether they have difficulty finding this information, and whether their ability to comparison shop for air travel is affected as a result.\textsuperscript{15} 

As noted above, longstanding regulatory guidance directs agencies to identify a compelling public need before they commence regulation, not to commence regulation and then seek input on whether a problem exists.

Problem identification is crucial to the formulation of any policy. Without knowledge of the actual problem that the DOT is trying to address—or whether it even exists—neither DOT nor the public can assess whether the policy or regulation has had the intended effect, which is key in retrospectively evaluating regulation. In this case, the Department’s inability to identify an existing problem necessitating its rule may leave DOT unclear on whether its rule has been successful and make retrospective review difficult.

\textbf{2. Performance Reporting Requirements}

In defining the problem, DOT primarily focuses on its proposal to require carriers to report ancillary fee information to ticket agents and GDSs. Also of importance is the Department’s proposal to lower the threshold for which carriers are required to report performance data to DOT. Currently, carriers accounting for less than 1% of domestic scheduled passenger revenue are not required to report, and the proposal would change that to 0.5%. The information reported by carriers is incorporated into the Department’s Air Travel Consumer Report (ATCR). The goal

\textsuperscript{12} 79 FR 29973
\textsuperscript{13} 79 FR 29975
\textsuperscript{14} Department of Transportation “Initial Regulatory Flexibility Analysis for Proposed Consumer Rulemaking Regarding Transparency of Airline Ancillary Fees and other Consumer Protection Issues.” April 16, 2014. Page 3
\textsuperscript{15} See “Request for Public Input on Airline Fees,” 79 FR 29977.
of this requirement is to improve transparency for consumers evaluating airline performance to enable effective comparisons across airlines. According to the proposal, DOT is concerned that:

the current scope of reportable flights under Part 234 is inadequate to truly capture many carriers’ quality of service, so as to be accurately reflected in the ATCR. The limited scope of the current reporting requirements may result in consumer confusion or misperception.\textsuperscript{16}

Further, the Department states that “the inadequacy of the scope of service quality reports may hinder competition” between airlines.\textsuperscript{17}

**Behavioral Economics**

While DOT seemingly cannot identify or substantiate a problem that its rule is intended to solve, its intent seems to be to reduce information asymmetries by providing purchasers with complete information about fares, travel expenses, and performance. This explanation follows traditional regulatory practice, as information asymmetry is widely regarded as a market failure that can be addressed by regulation. However, not once in its proposal does DOT mention information asymmetry as the reasoning for its rule. Instead, in its Initial Regulatory Flexibility Analysis (IRFA), DOT states that the lack of information available to consumers is due to either imperfect competition between airlines, or to imperfect rationality – i.e. that businesses (the air carriers, GDSs and travel agents) are making “bad” decisions that ultimately do not serve profit-maximizing ends.

DOT cites general passenger complaints regarding airlines to indicate that “that the market is not, at present, delivering welfare-maximizing outcomes.”\textsuperscript{18} As DOT’s IRFA goes on to state:

The poor market outcomes being witnessed today in terms of product transparency and transactability are at the partially the result of what Behavioral Economists call rationality-limiting heuristics – essentially decision-making short cuts that are based on previous experience, not on a rational examination of all possibilities – though they could also be the product of more anti-competitive behavior. Research conducted for this analysis was inconclusive regarding the degree to which observed industry behavior is only a result of myopia; or delayed contesting actions by some carriers; or of a fundamental problem with current industry structure. Therefore, it is recommended that the Department adopt an

\textsuperscript{16} 79 FR 29982
\textsuperscript{17} 79 FR 29983
incremental approach, one that will hopefully ‘nudge’ carriers, GDSs and travel agents into developing a private industry-based solution.\footnote{Department of Transportation “Initial Regulatory Flexibility Analysis for Proposed Consumer Rulemaking Regarding Transparency of Airline Ancillary Fees and other Consumer Protection Issues.” April 16, 2014. Pages 3 – 4.}

Behavioral economics research has been applied to the regulation of consumer behavior in a variety of policy areas, and researchers have debated whether this is justified.\footnote{See, for example, Gayer, Ted, and W. Kip Viscusi. “Overriding Consumer Preferences with Energy Regulations.” \textit{Journal of Regulatory Economics} 43.3 (2013): 248-64.} However, its application to commercial actors is relatively new, and is less justifiable because commercial actors are profit-seeking entities. The argument that businesses are making irrational decisions regarding fee disclosure and are losing consumers as a result is tenuous, at best.

DOT’s own analysis shows that the anticipated costs of the rule will outweigh the quantified benefits by $55.41 million over ten years. This analysis, combined with DOT’s dependence on assumptions regarding irrational behavior on the part of competitive, profit-motivated entities and its inability to identify what “failures of private markets or public institutions … warrant new agency action,” cast doubt on whether implementation of the proposal would enhance public welfare.

\subsection*{Measurement Criteria}

In order to measure the success of this rule following implementation, it is necessary for DOT to define what constitutes a “success.” Any stated metrics of success should be linked to the problems identified, and demonstrate that the standards that the agency is proposing actually improve consumer information about airline fees and performance (output) and improve the customer flight experience (outcome).

While DOT does not commit to measuring outcomes to ensure that its rule is working, it does identify some intended consequences of its rule that can act as metrics for use in retrospective review. Below are some potential metrics that DOT identifies in its proposed rule which may enable measurement both of the rule’s success, and the accuracy of the Department’s ex ante analysis.

\textit{Expanding the definition of “ticket agents” to require listing ancillary fees}

- Greater competition and lower overall prices for ancillary services and products. (79 FR 29972)
- The Department is striving to avoid any adverse impact on innovations in the air transportation marketplace, contract negotiations between carriers and their distribution

\begin{thebibliography}{9}
\end{thebibliography}
partners, and a carrier’s ability to set its own fees and fares in response to its own commercial strategy and market forces. (79 FR 29977)

**Requiring smaller carriers to file performance data**

- Improved on time performance for newly reporting carriers and code-share flights of reporting carriers.
- Increased public scrutiny of reporting carriers’ performance, which in turn will function as an incentive for these carriers to improve the quality of their service. (79 FR 29981)
- Enhanced service quality will increase these carriers’ competitiveness and benefit the regional markets that they primarily serve. (79 FR 29981)
- Requiring all reporting carriers to report data for all flights marketed under that carrier's name and code would put carriers on an equal footing in this important competitive arena. (79 FR 29983)
- These data will provide consumers with more meaningful information on which to base their airfare purchasing decisions. (79 FR 29981)
- Expanding the reporting carrier pool would enhance the Department's ability to analyze the cause of flight disruptions such as delays and cancellations, particularly with respect to airports in smaller communities and smaller airlines. (79 FR 29981)

**Customer service standards for ticket agents**

- Airline passengers will all be put on an equal footing when it comes to customer service standards, regardless of how they purchased their tickets. (79 FR 29985)
- Airline passengers will have improved customer goodwill towards ticket agents. (79 FR 29972)

Throughout the course of the proposed rule, the Department did not do a very thorough job of communicating to the public what kinds of results it expects from its rule. This is likely due to the fact that the agency could not verify the extent or even existence of the problem that its rule is intended to address, as these metrics should be used to measure progress toward elimination of the problem identified. As the Department formulates its final rule, it should make a special effort to clearly identify and substantiate the problem that its rule is intended to solve, so that the agency and the public have the tools to evaluate the rule’s success after implementation. Identification of a problem or market failure will enable the Department to pinpoint clear and specific metrics for reviewers to use when evaluating the effects of the rule.

**Measure Linkages**

As DOT commits to measuring the effects of its rule, it should also be aware of mediating factors that may have accomplished or undermined the stated metrics absent the rule. Determining
linkages between the rule and the measured outcomes is necessary to ensure that the policy itself resulted in the desired outcomes, rather than other factors beyond the agency’s control. For example, some stakeholders have raised the question of whether, under the propose standards, carriers “may no longer have sufficient financial incentive to invest in new distribution technologies that could ultimately provide more useful and responsive information to consumers by allowing carriers to differentiate their services from competitors.”

This possibility may result in foregone advances in technology that ultimately leave consumers without a desired range of optionality. In this case, it would be important to review the effects of its rule to ensure that public welfare increases as a result, and whether the outputs that DOT expects will actually result in the intended outcomes.

**Information Collection**

In the text of the NPRM, DOT did not state how it will collect the relevant information to measure the efficacy of its rule. Currently, DOT collects information on the quality of airline services provides to customers through its ATCR, which includes information on flight delays, mishandled baggage, oversales, and other consumer complaints. Given that DOT expects its rule to result in improved on-time performance for smaller carriers not previously required to record performance metrics and improved flying experiences for travelers, it would make sense for DOT to use its own database to measure whether any improvements in these areas are perceptible after implementation of its rule.

DOT’s proposed rule includes two new collections of information: 1) a requirement that some smaller carriers report on-time performance, mishandled baggage, and oversales to DOT and 2) a requirement that larger carriers provide “enhanced reporting” for code-share partner operations.

OMB’s Paperwork Reduction Act regulations require agencies to “ensure that each collection of information … informs and provides reasonable notice to the potential persons to whom the collection of information is addressed of … an estimate, to the extent practicable, of the average burden of the collection (together with a request that the public direct to the agency any comments concerning the accuracy of this burden estimate and any suggestions for reducing this burden).” Feedback from respondents on these information collection requests (now and when they are renewed every three years) should provide DOT useful information on one aspect of the costs associated with the requirements.

---

21 79 FR 29977
22 5 CFR Part 1320.8(b)(3)(iii)

The George Washington University Regulatory Studies Center
Timeframe

In the text of its rule, DOT does not commit to a timeframe in which to measure the outcomes of its rule. In the final rule, DOT should identify a timeframe for review, indicating how soon after implementation the Department will begin to measure the progress of its stated metrics, and how the timing of airline performance reporting may affect this timeframe.

Recommendations

First and foremost, the Department must make an effort to clearly identify the problem that its rule is intended to solve, and verify that the problem exists. While the proposed rule appears potentially to have been intended to address information asymmetries, DOT does not mention information asymmetry once in the entire rule, and does not provide any information about the extent and scope of the problem its rule is intended to address. This lack of information is concerning, as it may indicate that there is no current problem that needs to be addressed through regulation, in which case any resulting policy may result in efficiency losses for carriers and consumers.

After identifying whether a problem actually exists, DOT should clearly show how the standards it proposes will have the intended effect. The Department should make use of existing databases, such as the ATCR, to measure outputs and outcomes that may change as a result of its policy (e.g. improved on-time performance, fewer mishandled bags, etc.), and should clearly state the timeframe within which it is evaluating its policy.